SUPREME COURT COPY

SUPREME COURT
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No. S081700

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

WILLIE LEO HARRIS,

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Kern County
Case No. SC071427a
Honorable Roger D. Randall, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 7

I. GUILT PHASE 7

A. THE PROSECUTION'S CASE 7

1. BUCHOLZ, MANNING, AND HARRIS 10

2. MANNING AND HILL 14

3. HILL'S ALIBI 18

4. CRIME SCENE – APARTMENT 19

5. DNA EVIDENCE 22

6. MEDICAL EXAMINER'S TESTIMONY 24

7. CRIME SCENE - CAR 26

8. THE POLICE INVESTIGATION 27

9. HARRIS'S STATEMENTS TO THE POLICE 28

10. THE TORIGIANI BURGLARY 32

11. OTHER PROSECUTION EVIDENCE 33

B. THE DEFENSE CASE 35

1. POLICE INVESTIGATORY FAILURES 37

2. DEFENSE MEDICAL EXPERTS 38

TABLE OF CONTENTS
(Continued)

3. THE TWO PERCIPIENT WITNESSES 40

(a) Lori Hiler 40

(b) Loli Ruiz 45

4. THE MAN AT THE SCENE OF THE CAR ARSON 47

C. TIMELINE EVIDENCE 49

D. DELIBERATIONS AND VERDICT 52

II. PENALTY PHASE 53

A. PROSECUTION'S CASE 53

B. DEFENSE CASE 54

1. APPELLANT'S BACKGROUND AND FAMILY LIFE 54

2. THE ABSENCE OF VIOLENCE 56

3. THE DEFENSE PSYCHOLOGIST 58

4. THE PRISON EXPERT 62

ARGUMENT 63

PART ONE: PRE-TRIAL ERRORS 63

I. INTRODUCTION: THE COURT'S ERRORS BEFORE THE SECOND TRIAL CREATED WHAT AMOUNTED TO A DESIGNER JURY FAVORING THE PROSECUTION 63

TABLE OF CONTENTS
(Continued)

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S CHANGE OF VENUE MOTION WAS CONTRARY TO THE EVIDENCE, ERROR, AND PREJUDICIAL 65

A. FACTUAL BACKGROUND TO THE CHANGE OF VENUE MOTION 65

1. DEFENSE EXPERT DR. EDWARD BRONSON 65

2. FIRST MAINE FACTOR – NATURE AND GRAVITY OF THE OFFENSE 68

(a) Nature of the Crime and Terminology

(b) Nature of the Crime and "Salience" 70

3. SECOND MAINE FACTOR – NATURE AND EXTENT OF NEWS COVERAGE 72

(a) Dr. Bronson's "Hierarchy of Prejudice" with Respect to News Coverage 74

(1) Inflammatory Publicity 74

(2) Inadmissible Material 75

(3) Inaccurate Coverage in the Headlines 76

(4) Presumption of Guilt 76

(b) Television Coverage 80

TABLE OF CONTENTS
(Continued)

4. THE THIRD *MAINE* FACTOR – SIZE OF THE COMMUNITY 81

5. THE FOURTH AND FIFTH MAINE FACTORS – RELATIVE COMMUNITY STATUS OF DEFENDANT AND VICTIM 83

6. THE PUBLIC OPINION SURVEY 85

7. DR. BRONSON'S CONCLUSIONS 92

8. THE TRIAL COURT'S RULING 94

9. DENIAL OF APPELLANT'S RENEWED MOTION 96

B. THE COURT'S DENIAL OF THE VENUE MOTIONS WAS ERROR AND PREJUDICIAL, GIVEN THE SUBSTANTIAL LIKELIHOOD THAT APPELLANT COULD NOT GET A FAIR TRIAL DUE TO THE PRE-SECOND-TRIAL PUBLICITY 97

1. THE TRIAL COURT ERRONEOUSLY EXCLUDED THE EXPERT'S OPINION THAT APPELLANT COULD NOT BEGIN HIS TRIAL WITH THE PRESUMPTION OF INNOCENCE INTACT 100

2. ON BALANCE, THE MAINE FACTORS COMPELLED A CHANGE OF VENUE, BECAUSE NOT ONE OF THEM WEIGHED AGAINST IT 101

TABLE OF CONTENTS
(Continued)

(a) The Actual Media Coverage Fatally Tainted the Jury's Ability to Presume Appellant Innocent 101

(b) The Newspaper Coverage Expressed and Created Public Opinion Sympathetic to Manning and Hostile to Appellant From Which the Jurors Could Not Have Been Immune 104

(c) The Early Coverage and the Primacy Effect Created a Public Presumption of Guilt From Which the Potential Jurors Could Not Be Immune 116

(d) The Television and Radio Coverage, Especially the Coverage of the First Trial, Exacerbated the Primacy Effect of the Early Print Coverage, Maintaining and Enhancing the Presumption of Guilt Among the Second-Trial Potential Jurors 122

(e) Though Covering A Large Geographic Area, The Relative Size and Demographics of Kern County Ensured That the Media Coverage Would Taint the Jury Pool 125

(f) The Relative Status of Manning and Appellant as Represented to the Community from Which the Venire was Drawn Ensured a Bias Against Appellant 128

TABLE OF CONTENTS
(Continued)

(g) The Nature and Gravity of these Offenses Could not Have Been More Prejudicial 133

3. THIS CASE IS DISTINGUISHABLE FROM BOTH OF THIS COURT'S RECENT CASES AFFIRMING DENIALS OF CHANGE-OF-VENUE MOTIONS 134

C. THE ERRONEOUS DENIAL OF APPELLANT'S MOTION REQUIRES REVERSAL 139

1. VOIR DIRE IS INEFFECTIVE AS AN INDICATOR OF PREJUDICE 139

2. THE ERROR ALSO INFECTED THE JURY'S PENALTY DETERMINATION WITH BIAS IN FAVOR OF THE DEATH PENALTY 157

3. CONCLUSION 157

III. THE COURT ERRED IN LIMITING QUESTIONS RELATING TO RACE IN THE PROSPECTIVE-JUROR QUESTIONNAIRE AND IN INDIVIDUALIZED VOIR DIRE 159

A. FIRST TRIAL QUESTIONNAIRE 160

B. THE SECOND-TRIAL QUESTIONNAIRE AND MOTION FOR INCREASED INDIVIDUAL, SEQUESTERED VOIR DIRE 161

TABLE OF CONTENTS
(Continued)

C. THE COURT DISALLOWED INDIVIDUAL, SEQUESTERED VOIR DIRE ON QUESTIONS OF RACIAL BIAS 165

IV. THE COURT ERRONEOUSLY FOUND NO PRIMA FACIE CASE WHEN THE DEFENSE MADE A *WHEELER-BATSON* CHALLENGE TO THE PROSECUTOR'S PEREMPTORY STRIKES OF TWO OF THE THREE AFRICAN-AMERICANS IN THE VENIRE 173

A. THE DEFENSE CHALLENGE TO THE VENIRE PUT THE COURT ON NOTICE THAT THERE WERE FEW AFRICAN-AMERICANS AVAILABLE TO SIT ON THE JURY 173

B. THE PROSECUTION EXERCISED PEREMPTORY CHALLENGES AGAINST TWO OF THE THREE AFRICAN-AMERICAN JURORS LEFT ON THE PANEL, OVER THE OBJECTION OF THE DEFENSE 175

C. THE TRIAL COURT ERRED IN FAILING TO FIND A PRIMA-FACIE CASE OF RACE-BASED EXCLUSION, IN APPARENT RELIANCE ON AN ERRONEOUS STANDARD 177

1. THE AVAILABLE EVIDENCE POINTS TO AT LEAST AN INFERENCE OF RACE-BASED EXCLUSION, AND SPECIFICALLY TO AN ENTIRELY UNSUPPORTABLE EXCLUSION OF ONE OF THE AFRICAN-AMERICAN JURORS 178

TABLE OF CONTENTS
(Continued)

2. THE ANSWERS GIVEN BY THE TWO STRUCK AFRICAN-AMERICAN JURORS DIFFER FROM THOSE OF WHITE JURORS LEFT ON THE JURY, IF AT ALL, BY BEING MORE IN FAVOR OF THE DEATH PENALTY 181

(a) Other Than the Fact that He Was African-American, There Is Nothing in the Record to Indicate That Juror H.C. Would Have Been Anything But an Ideal Juror for the Prosecution 181

(b) Neither Did the Answers of K.P. Indicate Any Particular Antipathy to the Death Penalty, and Some of the Non-Struck White Jurors' Answers Were More Ambivalent Than Those of Both H.C. and K.P. 183

3. WHILE THIS COURT HAS DIS-FAVORED COMPARISONS AT THE FIRST BATSON STAGE, THERE IS LITTLE ELSE UPON WHICH A DEFENDANT CAN RELY WHEN THERE ARE SO FEW MINORITY JURORS IN THE VENIRE 187

V. THE COURT ENGAGED IN SEVERAL OTHER PRACTICES WHICH CONTRIBUTED TO CREATING A "DESIGNER JURY" FOR THE BENEFIT OF THE PROSECUTION 192

TABLE OF CONTENTS
(Continued)

A. THE COURT FAILED TO SUSTAIN THE CHALLENGE FOR CAUSE OF A JUROR WHO WAS EMBEDDED IN THE CRIMINAL JUSTICE SYSTEM, THEREBY INCREASING THE PRO-PROSECUTION BIAS OF THE JURY 193

B. THE DEFENSE FEAR OF USING ITS LAST PEREMPTORY WAS ENTIRELY JUSTIFIED, GIVEN THAT THE COURT PERSISTENTLY REHABILITATED JURORS WHOSE INITIAL ANSWERS WOULD HAVE LED TO THEIR BEING EXCUSED FOR CAUSE 197

C. EVEN IF THE COURT'S REHABILITATING MARGINALLY ACCEPTABLE JURORS WAS NOT ERROR, IT JUSTIFIES APPELLANT'S DECISION NOT TO USE HIS LAST PEREMPTORY, AND CONTRIBUTED TO THE PATTERN OF SELECTING A JURY DESIGNED FOR THE BENEFIT OF THE PROSECUTION 205

VI. CUMULATIVE ERROR: THE COURT'S SERIAL PRE-TRIAL ERRORS INSURED THE SELECTION OF A JURY THAT WAS TAINTED BY PUBLICITY AND TILTED TOWARD CONVICTION AND DEATH, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS AND FAIR TRIAL 208

PART TWO: GUILT-PHASE ERRORS 211

VII. THE COURT PREJUDICIALLY ERRED IN ADMITTING THE FACTS OF THE ALREADY-ADJUDICATED TORIGIANI BURGLARY FOR PURPOSES OF IDENTITY AND INTENT 211

TABLE OF CONTENTS
(Continued)

A. THE COURT ABUSED ITS DISCRETION IN FINDING SUFFICIENT SIMILARITIES TO SHOW INTENT AND IDENTITY 213

1. THERE WERE INSUFFICIENT SIMILARITIES, AND TOO MANY DISSIMILARITIES, TO MAKE THE LATER BURGLARY RELEVANT TO THE INTENT TO COMMIT A BURGLARY AGAINST MANNING 214

2. IF THERE WERE INSUFFICIENT SIMILARITIES AND RELEVANCE WITH REGARD TO INTENT, THEN, A FORTIORI, THERE WERE INSUFFICIENT SIMILARITIES AND RELEVANCE WITH RESPECT TO IDENTITY 219

B. THE ADMISSION OF THE OTHER CRIMES EVIDENCE WAS PREJUDICIAL 220

VIII. A LACK OF EVIDENCE, A PROSECUTORIAL OMISSION, AND INSTRUCTIONAL ERRORS REQUIRE REVERSAL OF THE ROBBERY COUNT AND THE ROBBERY SPECIAL CIRCUMSTANCE 227

A. THERE WAS NO EVIDENCE TO SUPPORT A FINDING THAT THE INTENT TO ROB WAS FORMED BEFORE THE MURDER 227

TABLE OF CONTENTS
(Continued)

B. A CRUCIAL OMISSION IN THE PROSECUTOR'S CLOSING-ARGUMENT EXPLANATION OF THE ELEMENTS OF THE CRIMES, COUPLED WITH ERRONEOUS INSTRUCTIONS AND A FAILURE TO EXPLAIN THE IMPORTANCE OF WHEN THE INTENT TO ROB WAS FORMED, UNDERMINES ROBBERY-SPECIAL-CIRCUMSTANCE VERDICT 231

1. THE PROSECUTOR'S OMISSIONS LURED THE JURY INTO THE ROBBERY SPECIAL CIRCUMSTANCE FINDING 231

2. THE COURT COMPOUNDED THE PROSECUTOR'S ERRORS BY BOTH BY AN ERROR IN THE SPECIAL CIRCUMSTANCE INSTRUCTION AND BY ITS FAILURE *SUA SPONTE* TO INSTRUCT ON WHEN THE INTENT TO ROB AROSE 233

3. THE ROBBERY SPECIAL CIRCUMSTANCE CANNOT SURVIVE ANALYSIS UNDER THE HARMLESS-BEYOND-A-REASONABLE DOUBT STANDARD 237

C. THE ROBBERY CONVICTION SUFFERS FROM THE SAME INSUFFICIENCY OF EVIDENCE, PROSECUTORIAL ERRORS, AND THE COURT'S FAILURE TO INSTRUCT ON WHEN THE INTENT TO ROB AROSE 238

TABLE OF CONTENTS
(Continued)

IX. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF LACK OF CONSENT NECESSARY FOR RAPE 242

A. THERE WAS INSUFFICIENT EVIDENCE OF LACK OF CONSENT 242

B. WITHOUT MORE, THE MANNING-HILL RELATIONSHIP DOES NOT SUPPORT A FINDING OF LACK OF CONSENT 246

1. THE TRIAL COURT'S EVIDENTIARY RULINGS GAVE THE JURY A FALSE PICTURE OF THE MANNING-HILL RELATIONSHIP, THEREBY BOLSTERING THE PROSECUTION'S ASSUMPTIONS REGARDING CONSENT 247

(a) The Court's Admittance of Two Letters Written by Manning Further Tilted the Playing Field Toward the Prosecution 248

(b) The Court Erred in Sustaining Relevance Objections to Evidence Showing Problems in the Manning-Hill Relationship 254

2. THE ERRORS WERE PREJUDICIAL 260

X. THE COURT MADE A SERIES OF ADDITIONAL ERRONEOUS AND PREJUDICIAL EVIDENTIARY RULINGS THAT HAD THE EFFECT OF UNFAIRLY FAVORING THE PROSECUTION AND DISABLING THE DEFENSE 261

TABLE OF CONTENTS
(Continued)

A. THE COURT ERRED IN RULING THAT THE PROSECUTION COULD INTRODUCE IRRELEVANT BLOOD EVIDENCE, DISCOURAGING THE DEFENSE FROM INTRODUCING THE LACK OF BLOOD ON APPELLANT'S CLOTHING THE NIGHT OF THE KILLING 261

1. THE BLOOD SPOT ON THE SHOES. BECAUSE IT COULD NOT BE LINKED TO THE VICTIM, WAS IRRELEVANT AND PREJUDICIAL 262

(a) The DNA Evidence Excluded Both Manning and Harris as Sources of the Blood Stains on Harris's Shoes 262

(b) The Prosecution Conceded the Inadmissibility of the Shoe-Blood Evidence for the Second Trial, but the Court Ruled Mid-Trial that Mention of the Blood-Less T-Shirt Would Open the Door for It 264

2. THE COURT'S RULING WAS ERROR, FORCING THE DEFENSE TO FOREGO INTRODUCING RELEVANT AND USEFUL EVIDENCE TO AVOID INTRODUCTION OF IRRELEVANT PROSECUTION EVIDENCE 266

3. THE TRIAL COURT'S ERROR WAS PREJUDICIAL 268

TABLE OF CONTENTS
(Continued)

B. THE COURT ALSO ERRED IN LIMITING THE TESTIMONY OF A DEFENSE EXPERT WITNESS 270

C. THE COURT ERRED IN NOT GRANTING A MISTRIAL FOLLOWING THE DETECTIVE'S MENTION THAT HARRIS REFERRED TO MANNING AS "THE BITCH" 273

D. THE COURT ERRONEOUSLY AND PREJUDICIALLY RULED IN FAVOR OF A PROSECUTION OBJECTION, DESPITE THE FACT THAT THE PROSECUTOR HAD WITHDRAWN IT 275

E. THE COURT'S INSTRUCTIONAL ERRORS FURTHER HAMPERED THE DEFENSE 279

XI. THE PRE-TRIAL AND GUILT-PHASE ERRORS, TAKEN TOGETHER, CONSTITUTE A FAILURE OF DUE PROCESS AND THE OPPOSITE OF A FAIR TRIAL 283

PART III: PENALTY PHASE ERRORS

XII. THE COURT ERRED IN NOT DECLARING A MISTRIAL, OR AT MINIMUM DISMISSING A JUROR WHO REPORTED TO HER FELLOW JURORS DURING DELIBERATIONS ON SOMETHING SHE THOUGHT THE DEFENDANT HAD COMMUNICATED TO HER 286

A. FACTUAL BACKGROUND 286

TABLE OF CONTENTS
(Continued)

B. WHILE THE COURT CONSIDERED THE DEFENDANT'S ALLEGED CONDUCT AS A MATTER OF HIS COURTROOM DEMEANOR, IT WAS MORE ANALOGOUS TO OUT-OF-COURT INFORMATION BROUGHT INTO THE DELIBERATION ROOM 291

XIII. THE TRIAL COURT FAILED TO ADMONISH THE JURY FOLLOWING THE PROSECUTOR'S SUBSTITUTION OF "WILLIE HORTON" FOR DEFENDANT'S NAME 298

XIV. THE COURT ERRED IN REFUSING DEFENSE-PROFFERED PENALTY PHASE INSTRUCTION FAVORING LIFE IN CASE OF DOUBT 300

XV. CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL 303

A. CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE A MEANINGFUL DISTINCTION BETWEEN CAPITAL AND NON-CAPITAL MURDERS 303

B. CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL IN FAILING TO REQUIRE A FINDING THAT DEATH IS APPROPRIATE BEYOND A REASONABLE DOUBT 305

C. THE FEDERAL CONSTITUTION REQUIRES JURY UNANIMITY AS TO AGGRAVATING FACTORS 307

TABLE OF CONTENTS
(Continued)

D. THE LACK OF INTERCASE PROPORTIONALITY REVIEW RENDERS THE CALIFORNIA DEATH PENALTY LAW UNCONSTITUTIONAL 309

CONCLUSION 310

TABLE OF AUTHORITIES

CASES

Aerojet-General Corp. v. Transport Indemnity Co.
(1997) 17 Cal.4th 38 — 171

Apprendi v. New Jersey
(2000) 530 U.S. 466 — 305

Beck v. Alabama
(1980) 447 U.S. 625 — 305

Brecht v. Abrahamson
(1993) 507 U.S. 619 — 241

Brown v. Louisiana
(1980) 447 U.S. 323, 334 — 307

Cassim v. Allstate Insurance Company
(2004) 33 Cal.4th 780 — 171

Chambers v. Mississippi
(1973) 410 U.S. 284 — 252, 254

Chapman v. California
(1967) 386 U.S. 18 — 224, 269

College Hospital, Inc. v. Superior Court
(1994) 8 Cal.4th 704 — 170, 171, 225, 241, 269

Consorti v. Armstrong World Industries, Inc. (2nd Cir. 1995)
72 Fed.3d 1003, *vacated sub. nom. Consorti v. Owens-Corning Fiberglas Corp.* (1996) 518 U.S. 1031. — 309

Copeland v. State
(Fla. 1984) 457 So.2d 1012 — 150

Corona v. Superior Court
(1972) 24 Cal.App.3d 872 — 77, 93

TABLE OF AUTHORITIES
(Continued)

Crane v. Kentucky
(1986) 476 U.S. 683 254

Cunningham v. California
(2007) 549 U.S. 270 306-308

Dowling v. United States
(1990) 493 U.S. 342 223

Duncan v. Louisiana
(1968) 391 U.S. 145 97, 210

Estelle v. McGuire
(1991) 502 U.S. 62 223

Fain v. Superior Court
(1970) 2 Cal.3d 46 102

Frazier v. Superior Court
(1971) 5 Cal.3d 287 104, 128

Furman v. Georgia
(1972) 408 U.S. 238 303

Ghilotti v. Superior Court
(2002) 27 Cal.4th 888 171

Godfiey v. Georgia
(1980) 446 U.S. 420 303

Gregg v. Georgia
(1976) 428 U.S. 153 306, 309

Groppi v. Wisconsin
(1971) 400 U.S. 505 98

TABLE OF AUTHORITIES
(Continued)

Ham v. South Carolina
(1973) 409 U.S. 524 169

Hedgepath v. Pulido
(2008) ___ U.S. ___, 129 S.Ct. 530, 172 L.Ed.2d 388 241

Holt v. United States
(1910) 218 U.S. 245 141

In re Carpenter
(1995) 9 Cal.4th 634 294, 296

In re Fields
(1990) 51 Cal.3d 1063 272

In re Miller
(1973) 33 Cal.App.3d 1005 87

In re Murchison
(1955) 349 U.S. 133 285

In re Sassounian
(1995) 9 Cal.4th 535 243

In re Stankewitz
(1985) 40 Cal.3d 391 190, 296, 297

In re Willon
(1996) 47 Cal.App.4th 1080 226

In re Winship
(1970) 397 U.S. 358 285, 305

Irvin v. Dowd
(1961) 366 U.S. 717 140, 141

TABLE OF AUTHORITIES
(Continued)

Jammal v. Van de Kamp
(9th Cir. 1991) 926 F.2d 918 — 224

Johnson v. California
(2005) 545 U.S. 162 — 189, 191

Johnson v. Mississippi
(1988) 486 U.S. 578 — 307

Larson v. Solbakken
221 Cal.App.2d 410 — 258

Maine v. Superior Court
(1968) 68 Cal.2d 375 — 67, 97, 99, 100 115, 126, 129, 133, 158

Martinez v. Superior Court
(1981) 29 Cal.3d 574 — 68, 87, 94, 102, 114 115, 126, 133, 134

Mathews v. United States
(1988) 485 U.S. 58 — 282

McKinney v. Rees
(9th Cir. 1993) 993 F.2d 1378 — 224

Michelson v. United States
(1948) 335 U.S. 469 — 221, 226

Miller-El v. Dretke
(2005) 545 U.S. 231 — 187, 189

Monge v. California
(1998) 524 U.S. 721 — 307

Morgan v. Illinois
(1992) 504 U.S. 719 196

Mu'Min v. Virginia
(1991) 500 U.S. 415 139, 166

Murphy v. Florida
(1975) 421 U.S. 794 139, 151

Neder v. United States
(1999) 527 U.S. 1 238, 241

People v. Adcox
(1988) 47 Cal.3d 207 133, 292

People v. Alcala
(1984) 36 Cal.3d 604 214, 221, 223

People v. Alvarez
(1996) 14 Cal.4th 155 213

People v. Avila
(2006) 38 Cal.4th 491 191, 196

People v. Ayala
(2000) 23 Cal.4th 225 252

People v. Bacigalupo
(1993) 6 Cal.4th 457 296, 303, 305

People v. Balcom
(1994) 7 Cal.4th 414 214, 215

People v. Bell
(1989) 49 Cal.3d 502 232

TABLE OF AUTHORITIES
(Continued)

People v. Bell
(2007) 40 Cal.4th 582 — 178, 180, 187, 188, 189

People v. Birks
(1998) 19 Cal.4th 108 — 236

People v. Bittaker
(1989) 48 Cal.3d 1046 — 196

People v. Blakeley
(2000) 23 Cal.4th 82; — 225

People v. Bolden
(2002) 29 Cal.4th 515 — 228

People v. Bolie
(1998) 18 Cal.4th 29 — 307

People v. Bolin
(1998) 18 Cal.4th 297 — 244

People v. Bolton
(1979) 23 Cal.3d 208 — 298

People v. Branch
(2001) 91 Cal.App.4th 274 — 225

People v. Brown
(2988) 46 Cal.3d 432 — 302

People v. Buffam
(1953) 40 Cal.2d 709 — 283

People v. Burgener
(1986) 41 Cal.3d 505 — 267

People v. Clark
(1993) 5 Cal.4th 950 309

People v. Cancino
(1937) 10 Cal.3d 230 300

People v. Cardenas
(1982) 31 Cal. 3d 897 283

People v. Coddington
(2000) 23 Cal.4th 529 226

People v. Coffman and Marlow
(2004) 34 Cal.4th 1 132, 140

People v. Collins
(1978) 17 Cal.3d 687 308

People v. Cornwell
(2005) 37 Cal.4th 50 178, 190

People v. Crittenden
(1994) 9 Cal.4th 83 196, 234

People v. Cuccia
(2002) 97 Cal.App.4th 785 283, 284

People v. Cunningham
(2001) 25 Cal.4th 926 196, 291

People v. Czahara
(1988) 203 Cal.App.3d 1468 306

People v. Degnen
(1925) 70 Cal.App. 567 242

TABLE OF AUTHORITIES
(Continued)

People v. Demond
(1976) 59 Cal.App.3d 574 — 258

People v. Dennis
(1998) 17 Cal.4th 468, 523 — 132

People v. Dillon
(1984) 34 Cal.31d — 304

People v. Durham
(1969) 70 Cal.2d 171 — 258

People v. Edlbacher
(1989) 47 Cal.31d — 303

People v. Elize
(1999) 17 Cal.App.4th 605 — 226

People v. Eubanks
(1996) 14 Cal.4th 580 — 225

People v. Ewoldt
(1994) 7 Cal.4th 380 — 211, 213, 214, 219, 223, 226

People v. Falsetta
(1999) 21 Cal.4th 903 — 223

People v. Farmer
(1989) 47 Cal.3d 888 — 278

People v. Felix
(1993) 14 Cal.App.4th 997 — 219

People v. Flood
(1998) 18 Cal.4th 470 — 241

TABLE OF AUTHORITIES
(Continued)

People v. Frye
(1998) 18 Cal.4th 894 229, 306

People v. Garceau
(1993) 6 Cal.4th 140 195, 255

People v. Gardeley
(1996) 14 Cal.4th 605 271

People v. Granados
(1957) 49 Cal.2d 490 281

People v. Green
(1980) 27 Cal.3d 1 228, 233, 266

People v. Guerra
(2006) 37 Cal.4th 1067 178

People v. Guiton
(1993) 4 C.4th 1116 228

People v. Hall
(1986) 41 Cal.3d 826 228, 281

People v. Harris
(1981) 28 Cal.3d 935 151, 152

People v. Harris
(2005) 37 Cal.4th 310 255

People v. Heishman
(1988) 45 Cal.3d 147 292

People v. Hess
(1951) 104 Cal.App.2d 642 258

TABLE OF AUTHORITIES
(Continued)

People v. Hill
(1998) 17 Cal.4th 800 — 233, 283

People v. Hillhouse
(2002) 27 Cal.4th 469 — 304

People v. Hogan
(1982) 31 Cal.3d 815 — 297

People v. Holt
(1997) 15 Cal.4th 619 — 167

People v. Honeycutt
(1977) 20 Cal.3d 150 — 297

People v. Hood
(1969) 1 Cal.3d 444 — 236

People v. Horton
(1995) 11 Cal.4th 1068 — 173

People v. Hughes
(2002) 27 Cal.4th 287 — 237

People v. Jenkins
(2000) 22 Cal.4th 900 — 125

People v. Jenkins
(2000) 2 Cal.4th 900 — 298, 299

People v. Jones
(2003) 30 Cal.4th 1084 — 205

People v. Kelly
(1992) 1 Cal.4th 495, 528 — 228

TABLE OF AUTHORITIES
(Continued)

People v. Key
(1984) 153 Cal.App.3d 888 242

People v. Kronemyer
(1987) 189 Cal.App.3d 314 283

People v. Kunkin
(1973) 9 Cal.3d 245 243

People v. Lanphear
(1984) 36 Cal.3d 163 293

People v. Manson
(1976) 61 Cal.App.3d 102 151

People v. Marshall
(1990) 50 Cal.3d 907 295

People v. Marshall
(1999) 15 Cal.4th 1 243

People v. Martinez
(1991) 20 Cal.4th 225 228

People v. Mason
(1991) 52 Cal.3d 909 196

People v. Mattson
(1990) 50 Cal.3d 826 205

People v. Maury
(2003) 30 Cal.4th 342 196

People v. Mincey
(1992) 2 Cal.4th 408 293

TABLE OF AUTHORITIES
(Continued)

People v. Morales
(1989) 48 Cal.31d — 304

People v. Morris
(1988) 46 Cal.3d 1 — 244

People v. Morris
(1991) 53 Cal.3d 152 — 196

People v. Nesler
(1997) 16 Cal.4th 561 — 293-296

People v. Osband
(1996) 13 Cal.4th 622 — 234

People v. Pierce
(1979) 24 Cal.3d 199 — 297

People v. Polite
(1965) 236 Cal.App.2d 85 — 279

People v. Prieto
(2003) 30 Cal.4th 226 — 234, 237, 241

People v. Prince
(2007) 40 Cal.4th 1179 — 65, 67, 68, 125, 128, 132, 134, 135, 140, 151, 156

People v. Racy
(2007) 184 Cal.App.4th 1327 — 226

People v. Ramirez
(2006) 39 Cal.4th 398 — 68, 121, 125, 132, 140

People v. Redmond
(1969) 71 Cal.2d 745 243

People v. Reyes
(1998) 19 Cal.4th 743 267

People v. Robbins
(1988) 45 Cal.3d 867 214

People v. Rodriguez
(1986) 42 Cal.3d 730 306

People v. Saille
(1991) 54 Cal.3d 1103 281

People v. Sanchez
(1995) 12 Cal.4th 1 306

People v. Sanders
(1990) 51 Cal.3d 471 174

People v. Scheid
(1997) 16 Cal.4th 1 225, 267

People v. Schmeck
(2005) 37 Cal.4th 240 303

People v. Sears
(1970) 2 Cal.3d 180 281

People v. Sherrod
(1997) 59 Cal.App.4th 1168 171

People v. Simon
(1995) 9 Cal.4th 493 281

TABLE OF AUTHORITIES
(Continued)

People v. Slocum
(1975) 52 Cal.App.3d 867 258

People v. Stanley
(2006) 39 Cal.4th 913 233, 235

People v. Szymanski
(2003) 109 Cal.App.4th 1126 207

People v. Talle
(1952) 111 Cal.App.2d 650 298

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(1956) 46 Cal.2d 818 170

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(1972) 8 Cal.3d 106 98

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People v. Wende
(1979) 25 Cal.3d 436 — 5

People v. Wheeler
(1978) 22 Cal.3d 258 — 98, 175

People v. Wilborn
(1999) 70 Cal.App.4th 339 — 167, 168

People v. Williams
(1981) 29 Cal.3d 392 — 152

People v. Williams
(1988) 44 Cal.3d 883 — 293, 293

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(1989) 48 Cal.3d 1112 — 77, 85, 87, 92, 93, 129, 130, 152, 293

People v. Williams
(1998) 17 Cal.4th 148 — 225

People v. Wright
(1988) 45 Cal.3d 1126 — 281

Powell v. Superior Court
(1991) 232 Cal.App.3d 785 — 86, 127

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(1991) 499 U.S. 400; — 166

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(1981) 451 U.S. 182 166

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(1977) 19 Cal.3d 899 178

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Sheppard v. Maxwell
(1966) 384 U.S. 333 98, 121, 133, 158

Smith v. Phillips,
(1982) 455 U.S. 209 140

Snyder v. Louisiana
(2008) ___U.S.___, 128 S.Ct. 1203, 170 L.Ed.2d 175 187

Spencer v. Texas
(1967) 385 U.S. 554 223

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(1887) 123 U.S. 131 141

State v. Brown
(1999) 297 Mont. 427 207

State v. DeVore
(1998) 292 Mont. 325 206

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(2002) 309 Mont. 113 206

State v. Williams
(1993) 262 Mont. 530 206

TABLE OF AUTHORITIES
(Continued)

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(1978) 80 Cal.App.3d 623 — 115, 126

Sullivan v. Louisiana
(1993) 508 U.S. 275 — 282, 307, 308

Thomas v. Hubbard
(9th Cir. 2001) 273 F.3d 1164 — 283

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(1986) 476 U.S. 28 — 161, 169, 189

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(7th Cir. 1972) 472 F.2d 340 — 140

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(9th Cir. 1994) 22 F.3d 900, 902 — 187

Williams v. Superior Court
(1983) 34 Cal.3d 584 — 69, 76, 77, 85, 87, 92, 99, 100

CONSTITUTIONS

California Constitution, article I, section 16 — 308

article VI, section 13 — 268

United States Constitution, Amendment V — 79, 210, 261, 282 292

Amendment VI — 97, 164, 210, 261, 269, 282, 292, 307 308, 309

Amendment VIII 303-309

Amendment XIV 166, 292, 307, 309

STATUTES

Code of Civil Procedure § 223 170

Evidence Code:

§ 210 254, 257, 258

§ 352 212, 213, 225, 265-267, 273

§ 502 281

§ 801 271

§ 1101 224

§ 1250 250, 253

Health & Safety Code § 11350 3

Penal Code:

§ 187 3

§ 189 304

§ 190.2 304

§ 451 4

TABLE OF AUTHORITIES
(Continued)

§ 667.5 3

§ 1033 98

§ 1096a 281

§ 459 215, 227

Vehicle Code § 10851 3

JURY INSTRUCTIONS

CALJIC:

No. 2.01 229

No. 8.21 228

No. 8.91.17 233, 234, 237, 238

No. 9.40 228, 239

No. 10.00 242

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INTRODUCTION

This Bakersfield case in which a black man was accused of the rape, sodomy, burglary, robbery, and murder of a white college student, and the theft and arson of her car, exemplifies what can happen to due process and reasonable doubt when a trial court ignores the obvious racial content inherent in such a case, denies a well-supported change of venue motion despite excessive and biased pre-trial publicity, allows and abets the creation of what amounted to a designer jury for the benefit of the prosecution; and consistently rules in favor of questionable prosecution evidence while excluding admissible defense evidence.

The facts presented at trial show that appellant Willie Leo Harris was a friend of Thea Bucholz, who was the roomate of the murder victim, Alicia Manning. Harris, a small-time robber and burglar, had no history of violence, either against his crime victims or his girlfriends. On the night of May 20, 1997, Manning was murdered in her bedroom, stabbed repeatedly and in a pattern such as to suggest a rage killing. Her car was stolen and later burned, and a television set, VCR, and boom-box were taken. The semen found in and leaking from her vagina was Harris's. However, there was no evidence beyond the violence associated with her murder to confirm either a rape or sodomy; there was no physical evidence in the apartment of forced entry or otherwise linking any part of the crime to Harris; the only

suspicious person seen at the scene of the car arson was Caucasian; and a witness saw a white man who resembled Manning's boyfriend carrying a television set from her apartment on the night of the murder. The boyfriend, Charles Hill, asserted the alibi of being at a friend's house the entire afternoon and evening of May 20, but his story differed significantly from his friends' in one obvious detail – the number of other friends present at his friend's house that day.

The jury in the first trial hung on all counts except that of an unrelated, later burglary. After a second trial on the remaining counts, Harris was convicted on all of the counts except burglary and sodomy.

In the penalty phase, the prosecution presented some non-violent priors (although it did characterize a purse-snatch as violent), and the defense offered a parade of witnesses – family, friends, and former girlfriends – who, without exception had never seen any violent tendencies in Harris. A psychological expert, after extensive testing, opined that such violence as was perpetrated against Manning was entirely contrary to Harris's personality. Nevertheless, the jury returned a verdict of death.

Appellant will show in this brief that it was the trial court's improper and unconstitutional rulings, not the evidence, which led to his conviction, requiring that it be reversed.

STATEMENT OF THE CASE

By an amended information filed on November 9, 1998, defendant Willie Leo Harris was charged with eight counts, as set forth in the margin, including, most importantly, the May 20, 1997 murder of Alicia Manning (Penal Code § 187, subd. (a)),[1] with special circumstances of rape, sodomy, robbery and burglary and three prior felonies.[2] (5 CT 1183-1195.) The

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[1] Unless otherwise specified, all further statutory references will be to the Penal Code sections as they existed in 1997 for the substantive law sections and in 1999 for the procedural law sections.

[2] The information misstates the subdivision numbers of section 190.2 and some of the substantive law subdivision designations; for clarity, the proper numbers are substituted here:

Count 1: Murder (§187(a)) with special circumstances of robbery robbery (§§ 212.5, subd. (a); 190.2, subd. (a)(17)(A)); rape (§§ 261, 190.2, subd. (a)(17)(C); sodomy (§§ 286, subd. (c), 190.2, subd. (a)(17)(D); and burglary (§§ 460.1 [former], 190.2 subd. (a)(17)(G). Count 1 also alleged enhancement allegations of use of a deadly weapon, to wit, a knife (§ 12022, subd. (b)(1); and three prior felonies, to wit: a November 1988 conviction for unlawful possession of a controlled substance (Health & Saf. Code § 11350, subd. (a), Pen. Code § 667.5, subd. (b)); and a December 14, 1990 conviction for burglary charged under both § 667, subdivision (a) and § 667, subdivisions (c)-(j) and § 1170.12, subdivision (a)-(e).

Count 2: Robbery (§ 212.5, subd. (a)) with a serious felony allegation (§1192.7, subd. (c)(19) and the same three priors.

Count 3: Rape (§ 261, subd. (a)(2), a serious felony (§ 1192.7, subd. (c)(3)) and the three priors.

Count 4: Sodomy (§ 286, subd. (c)), a serious felony (§ 1192.8, subd. (c)(4)) and the three priors.

Count 5: Burglary (§ 460, subd. (a)), a serious felony (§1192.7(c)(18).

Count 6: Theft of Manning's vehicle (Veh. Code § 10851, subd. (a), with the three priors.

(continued...)

additional charges of rape, sodomy, robbery and burglary were charged both as separate counts and as special circumstances to the murder. The additional counts were for theft and arson of Manning's car and an entirely separate residential burglary, of Bree Torigiani, on June 11, 1997.

A preliminary hearing was had on September 9th and 10th, 1977, before Hon. Charles P. McNutt, Municipal Judge, and appellant was held to answer on all counts. (2 CT 413-414.)

The first of two trials in superior court commenced with in limine motions on November 5, 1998, before Hon. Roger D. Randall (5 CT 1103-1104) and ended, on December 19, 1998, in a hung jury and a mistrial on Counts 1-7 and a guilty verdict on Count 8, the Torigiani burglary (5 CT 1286-1290). Appellant waived a jury trial on the prior crime allegations, which were on the same day found true by the court. (*Id.*)

Sentencing on Count 8 took place on January 7, 1998, and appellant, after rejecting a plea bargain for life without possibility of parole on counts 1-7, was sentenced on count 8 to a total of 18 years. (6 CT 1518-1519.)

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[2] (...continued)

Count 7: Arson of the vehicle (Pen. Code § 451, subd. (d), a serious felony (§ 1192(c)(14), with the three priors.

Count 8: Burglary of Bree Torigiani on June 11, 1997 (§§ 460, subd.(a), 462, subd. (a)), a serious felony (§ 1192.7, subd. (c)(18)), and the three priors.

Appellant filed a notice of appeal of the burglary conviction on January 12, 1999 (6 CT 1527). The Court of Appeal for the Fifth Appellate District appointed attorney Deborah Shulte to represent appellant (13 CT 3618), who ultimately filed a no-issue brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

Meanwhile, appellant sought to continue the second trial to a later date while he prepared a motion for a change of venue. (13 CT 3606-15.) That motion was granted (13 CT 3616-3617), and the motion for a change of venue was filed on April 16, 1999 (14 CT 3640-3774) and was heard on May 18th and 19th and denied (14 CT 3824-2826, 3830).[3] Appellant sought a writ of mandate in the Court of Appeal (17 CT 4552-18 CT 5064), which was denied on May 28th (14 CT 3929).

Following further pretrial motions, jury voir dire commenced on June 7, 1999 (15 CT 3937). The jury was sworn and opening statements in the second trial commenced on June 18th, again before Judge Randall (15 CT 3973-3975).

The jury retired to deliberate at 9:02 a.m., on June 30th, 1999, and returned verdicts at 3:45 p.m. on the same day – after 5-1/4 hours of

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[3] The change-of-venue motion was renewed following voir dire of the second-trial jury (14 CT 3870-3889), and again denied (14 CT 3903).

deliberation. The jury found defendant guilty on count 1, the murder, with special circumstances of robbery and rape, and a true finding on the weapon allegation; and guilty on counts 2 (robbery), 3 (rape), and 6 and 7 (theft and arson of the car). The jury returned not guilty verdicts on counts 4 (sodomy) and 5 (burglary). The court then struck the remaining special allegations (*i.e.*, the priors related to counts other than count 1). (15 CT 4028-4032; 34 RT 7698, 7703.)

The penalty trial began on July 1 (16 CT 4309-4312), and on July 6, 1999, the jury returned the verdict of death (16 CT 4322-4324).

On August 24, 1999, after denying appellant's motions for a new trial and reduce the sentence, Judge Randall imposed a sentence of death for count 1 plus a total fixed term of 18 years plus one year. (16 CT 4517-4520, 4551 [abstract of judgment].)[4] On September 28, in response to a September 1 letter from the Department of Corrections, the court stayed the determinate sentence pending execution of the death sentence. (33 CT 9243-9244, 9249.)

This appeal is automatic.

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[4] The Reporter's Transcript of the sentencing hearing is included with the Clerk's Transcript, at 16 CT 4522-4546, and is also found at 35 RT 8095-8104.

STATEMENT OF THE FACTS

I. GUILT PHASE

A. THE PROSECUTION'S CASE

On May 20, 1997, at about 11 p.m., Fire Captain William Hammons responded to a reported vehicle fire in the 300 block of Montclair Street in Bakersfield. (26 RT 6062.) The vehicle was isolated in an alley near a brick wall at the rear of an apartment complex. The driver's seat was burned and still smoldering a little bit; the driver's and passenger's seats were scorched and the roof lining damaged. (26 RT 6065-6066)

There were between 10 and 15 people standing around 20 to 30 feet from the car in what Hammons characterized as "a very well-disciplined scene," by which he meant that there wasn't anything obvious to give an indication that someone at the scene started the fire, or deterring the fire crew's entry to the scene, and no one in the crowd appeared unusually excited.[5] (26 RT 6065, 6069-6070.)

The owner of the car was identified by documents in a woman's purse on the floorboard of the back seat. (26 RT 6077.)

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[5] This was directly contrary to defense testimony that the one stranger among the bystanders was in fact quite agitated. See *post*, at pp. 47-49.

Bakersfield Fire Department arson investigator Jimmy Embry concluded that the fire had been deliberately set. He found residue on the right front seat with a strong odor of alcohol, which he concluded was the accelerant used. (26 RT 6083-6084.) Embry also opined that the fire had not lasted long, perhaps a couple of minutes, to cause the amount of damage seen; he also found a plastic bag with a portable CD player in the car, which did not appear to be damaged, and a pair of binoculars. (26 RT 6097-6098, 6105.)

Embry interviewed Christopher Bourgoine and his sister, Gloria, at the scene of the arson. Christopher Bourgoine had been sitting in his car in the alley talking with his then-girlfriend when he heard a sort of woosh, kind of like an explosion, over very quickly as all of the vapors were consumed. (26 RT 6101-6102.)

Shortly after midnight, Embry and Bakersfield Police ("BPD") Officer Mike Golleher went to the address found in the checkbook in the purse, but there was no answer to their knock. When he tried the phone number, there was a busy signal. (26 RT 6087-6088, 6111.)

At about 1:35 a.m., Manning's roommate, Thea Bucholz, returned to the apartment after having been gone since about 3 p.m. (27 RT 6167-6168, 6174.) She first noticed that the door was unlocked, which was very

unusual because Manning kept it locked when she was home. The blinds were partially open, which was also unusual. As she entered the living room, Thea noticed that the television was gone from its stand, though she assumed Manning had taken it to the bedroom to watch. There were a number of other items scattered about, but she attributed that to Manning's packing to leave. (27 RT 6174-6176.) After changing into her pajamas in the bathroom, Thea went into the bedroom and discovered Manning's body, nude from the waist down, lying face down in a pool of blood. (27 RT 6177-6179.) Thea called her name several times, and then went to get the phone, which was lying off the hook on the dining room floor, and called 911. (27 RT 6179-6180.)

Bakersfield Police Officer Mike Gollaher responded to the call. Bucholz led him to the body of her roommate, lying face down on the bed, her feet extending towards and on the floor. Officer Gollaher could locate no pulse or breath. The homicide detectives and paramedics arrived shortly thereafter. (26 RT 6113-6116.)

Bucholz reported the following items missing from the apartment: a portable CD player, a VCR which was intermittently functional, and their television set.[6] (27 RT 6186.)

Regarding Manning's car, Bucholz told Bakersfield Police Detective Bob Stratton that when she left the apartment – and Manning – at 3:30 p.m. on the day of the murder, she did not see Manning's car in its usual parking spot, although she also noted that she would not have seen it if it were parked in the usual alternate parking place that they used. (27 RT 6218-6220.)[7]

1. BUCHOLZ, MANNING, AND HARRIS

Thea Bucholz had been Alicia Manning's roommate for nearly two full school years, the most recent one in the apartment on Ming Avenue. (27 RT 6143.) Manning was scheduled to graduate the following month, in June, 1997. (27 RT 6144.) Manning, according to Bucholz, was very guarded and secretive; for example, she would tell part of a story to one

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[6] The portable CD player was hereafter referred to in the record as a boom box.

[7] This fact relates to the question of whether Manning's boyfriend Charles Hill was using the car that day, about which more is discussed in the description of the defense case, *post*.

friend, and another part to another friend, "but you wouldn't know everything." (27 RT 6228.)

Bucholz met appellant Willie Harris at a friend's house in early April, 1997. Between then and late May, she and Harris became "acquaintances." (27 RT 6154.) On cross, she explained that an acquaintance was someone you hang with occasionally, with whom you are "semi-close." (27 RT 6187.) Nevertheless, during the period between meeting Harris and Alicia's death, they saw each other once or twice a day, usually when she went to pick him up at his apartment. (27 RT 6154.) They would drive around together in her car, sometimes after midnight, and she would sometimes pick him up at his apartment, though she did not remember ever being approached by his girlfriend, Kristy Findley. She was aware that Findley was concerned about her friendship with Harris, but Harris said he had it handled. (27 RT 6191-6192.)

About one week after they first met, Harris came over to Thea's apartment and met Manning. In the ensuing period up until Manning's death, he had been to their apartment about five times, during which Manning was present about three times. (27 RT 6155-6156.)

Also during this time, Harris indicated a desire for a romantic relationship with Bucholz, but she told him she wasn't interested, and they

remained friends. (27 RT 6157.) Willie made passes at her, which she rebuffed; he was persistent, but never hostile or angry, and their relationship did not suffer from her refusals. (27 RT 6193.)

When he called, she was most often out, so he would leave a message, but he would also page her a couple of times a day. During the five days leading up to her death, Manning complained to Bucholz that Harris's calls to the apartment were interfering with her studies and bothering her. (27 RT 6157-6159.) The last of the several confrontations about Harris's calls occurred a couple of days before Manning's death, and Bucholz urged him to use her pager rather than calling her at home. (27 RT 6160.)

On Monday, May 19, the day before Manning's death, she confronted Bucholz and Harris, who was present, about a threatening phone call she had received from Harris's girlfriend Kristy. (27 RT 6160-6162.) Manning, according to Bucholz, told them that "some crazy woman was calling looking for me [Bucholz] and/or Willie, and calling frequently. And it turned into an argument and she threatened Alicia. Alicia had to call the police." (27 RT 6163.) Manning, who was usually quiet and shy, was obviously upset because she was moving erratically and her voiced was

raised, but appellant did not respond, other than to just stare at her.[8] (27 RT 6164-6165.)

On the evening of May 19, Manning went out to dinner with Charles Hill and his father. Manning and Hill returned to her apartment after dinner while Hill's father went to a meeting; the father picked up the son and they left for home at about 10:15-10:30. (30 RT 6536-6537). Bucholz got home about 10-10:30 that night, and no one else came over. Manning remained in the apartment until they went to sleep after listening to a radio show that ended at either midnight or 1 a.m. (27 RT 6166-6167.)

On May 20, the police discovered an answering machine tape, and a note from Manning to Bucholz that Harris had called her at 6:15, 9:00 and 9:30.[9] (27 RT 6204-6205.)

Bucholz answered a page from Harris at 4 a.m. on the morning of May 21, while she was at the police station after the murder. She told him she was at the police station and to page her later, which he did at about 9 or

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[8] Appellant's girlfiend, Zenobia "Kristy" Findley, gave a different account of the conversation, saying that she told Manning that it was important that she speak with Bucholz, that she would come over and wait for her, and when Manning said she'd call the police, that Findley would wait for her on public property, after which the call ended. (29 RT 6646-6647.)

[9] Bucholz stated in her testimony that the final call was at 9:15 (27 RT 6205). The note itself shows the final time as 9:30. (29 CT 8302.)

9:30 a.m. When she told him what had transpired, his first response was surprise, and concern (for Bucholz). She told him that she had given his name to the police, and they would be contacting him. (27 RT 6172-6173.)

2. MANNING AND HILL

As of the day she died, Alicia Manning had been going out with her boyfriend, Charles Hill, off and on for three years, and they were reportedly quite serious during the year prior to Manning's death. Manning's plan after graduation was to either go to North Carolina with Hill, where his aunt lived and he had a job waiting, or to go home to Virginia and later join Hill in North Carolina. (27 RT 6145-6146.)

At the time of Manning's death, Hill lived in Tulare, about 45 minutes away from Bakersfield. Because during the six months leading up to the murder Hill did not have car that worked, Manning would have to go get him, or he would have to get a ride to Bakersfield from a friend, Daniel, or from his father. (27 RT 6206.) He also used Manning's car on occasion. Manning had told Bucholz that Hill used her car when she was away on vacation, and Bucholz knew of at least one occasion when Manning was at home writing a paper and Hill used the car to go see a friend. (27 RT 6221.)

The defense questioned Bucholz regarding the relationship between Hill and Manning. On cross-examination during the prosecution's case-in-chief, Bucholz acknowledged that Manning wasn't sure that Hill could support her if they both moved right away to North Carolina, but she knew she could get a job if she went home first to Virginia; otherwise, she had "normal" concerns over whether Hill was the right guy for her. (27 RT 6229-6230.)

In the middle of the second trial, the prosecution "found" three notes that Manning had written, assertedly close to her death, in which she discussed her relationship with Charles Hill. Over vigorous defense objections, two of the three notes were admitted, for the limited purpose of showing Manning's state of mind toward Hill, after they were authenticated by Thea Bucholz and the time period of the writings was purportedly established as shortly before Manning's death. (30 RT 6910-6922.) One of them, Exhibit 13, was addressed to "Charles sweetheart," though it obviously remained in her possession; the other, Exhibit 14, was an unsent letter to a friend which discussed their plans to move to the East Coast following her graduation. (29 CT 8303-8305.)

Charles Hill's father, Lane Hill, testified regarding the relationship between his son and Manning. They had known each other for three-to-

four years, had been dating for the past year, and it had become increasingly serious. Manning had spent most of the weekends for the three-to-four months prior to her death visiting in the Hill household in Tulare. (30 RT 6924-6926.)

Charles was planning to move to Charlotte, N.C., to stay with his aunt and her husband and work in their tool business, and reunite there with Manning toward the end of the summer: "She was going to be going down to Charlotte to see him, see how things were going. And if she ended up in graduate school, they were going to go elsewhere, wherever that might be." (30 RT 6927.)

Charles Hill also testified for the prosecution. Hill acknowledged that he and Manning had experienced arguments and disagreements, such that he considered breaking up with her, but they stayed together. (30 RT 6952.)

On Monday May 19, after dinner with his father, he and Manning planned to have sex when they got back to Manning's apartment, but did not because Hill was feeling ill from the cheese he ate at the restaurant. (30 RT 6955.) When they were together at his parents' house, he explained, they did not sleep together because those were the rules of the house. (30

RT 6952.) Because of this, it had been two weeks to a month since they had sex. (30 RT 6970-6971.)

On cross-examination, Hill admitted that the weekend before the murder, he told Manning that he was thinking about breaking up with her, because they had had too many arguments about the amount of time he spent with his friends. She especially did not like one of them, Mike Gonzales. (30 RT 6967-6968, 6980.) In addition, Manning told him that she thought that she was suffering from a case of chlamydia that she had gotten from him, which was also a source of friction between them. (30 RT 6959, 6968.) Hill denied, however, a suggestion from defense counsel that he and Manning continued to argue on Monday, May 20, or that Manning told him she was having second thoughts about the relationship. (30 RT 6971.)

On re-direct, Hill's story changed: he said that it was Manning who had told him the previous weekend that she was thinking about breaking up, because of the chlamydia she thought she had, but later in the weekend she told him that she would find out first what the tests results were; and later said that if they still loved each other, she would stay with him no matter how the tests came out. (30 RT 6983.)

Regarding Manning's car, Hill testified that he commonly drove it without her, but did not have his own key, either to the car or to her apartment. (30 RT 6977-6978.) He had also told Detective Stratton that when they returned from the restaurant on May 19, he parked the car at the other end of the parking lot from the carport nearest her apartment that she usually used. (30 RT 6979)

Also, on cross-examination, it was brought out that at that time, May of 1997, Hill was neither in school nor had a job. (30 RT 6969.)

Carolyn Krown, a nurse at the Student Health Center at CSUB, testified that she called Manning on May 20 with the results of an STD culture, which was negative for all but a yeast infection. (30 RT 6988.)

3. HILL'S ALIBI

Hill testified that on the day of the murder, he went over to his friend Pat McCarthy's house in Tulare at about 4:30 in the afternoon, and stayed there until about 1 a.m., when he walked the two miles home to his parents' house. (30 RT 6956-6958.) He maintained that he and McCarthy were together during that entire time. In addition, according to Hill, 10-15 other friends came and went from McCarthy's house that day. (30 RT 6958, 6966-6967.)

Pat McCarthy confirmed that Hill had been with him on May 20, the day before McCarthy's 21st birthday. Crucially, however, McCarthy did not remember anyone else coming by that day. (30 RT 7009-7010, 7015, 7010-7021.) Indeed, he told Detective Stratton in early June of 1997 that no one else was there with them that day. (30 RT 7016.) The time of day McCarthy recalled first seeing Hill also differed from Hill's testimony: McCarthy remembered picking up Hill between 1 and 2 p.m., about three hours earlier than Hill estimated. (30 RT 7009, 7015.) Neither could he say for sure that Hill was in fact there the whole time; he could have been gone for a couple of hours, though McCarthy did not remember him being gone for more than 15-20 minutes.[10] (30 RT 7016-7017, 7021).

4. CRIME SCENE – APARTMENT

Bakersfield Police Department Criminalist Gregory Laskowski described the apartment as he found it, noting in particular a blood-stained T-shirt on top of a wooden steak knife lying on the floor of the living room

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[10] Detective Stratton testified on prosecution rebuttal that he had spoken with McCarthy twice – on May 23 and again, after Stratton had heard from Lori Hiler, on June 13 – and both times he confirmed that Hill had been with him that day. (32 RT 7365-7368.) On cross-examination, the defense brought out, first, that neither conversation with McCarthy had been in person; and second, more telling for the defense, McCarthy told Stratton that just the two of them, Hill and McCarthy, had been there; at no time did he mention that there were 10 to 15 others in and out of the house, as Hill testified. (32 RT 7369-7370.)

near the entryway. (27 RT 6288.) The transfer pattern of the blood on the T-shirt indicated that the knife had been wiped off with it. (27 RT 6289-6290.)

Laskowski identified and described a group of photographs of the bedroom, showing, *inter alia*, Manning lying cross-wise on the futon, various bloodstains on and around her, glass shards from two broken bottles and a pilsner glass, her plaid shorts on the floor, a fan on the floor, and several CD cases. (27 RT 6298-6414.) In addition to the steak knife found in the living room, the bedroom contained a long-bladed, "Miracle-Blade"-like knife with a very-fine-serrated edge and a fork-pronged end, with blood on it. Because the thin, surgical-steel blade was bent, Laskowski opined that it was used as a stabbing rather than a cutting instrument. (27 RT 6314-6317.)

After describing the various blood stains found on and around the victim in the photographs shown to the jury (27 RT 6317-6323), Laskowski testified that Manning was in a prone position when the majority of the blood spatter was formed, with her head on the surface of the futon, pressed against the pillow on the south wall, and repeatedly struck by either glass objects or the stabbing instruments. (27 RT 6323-6327.) It is possible that the initial blow or blows were delivered while she was standing up, but they

were sufficient to render her into a prone position so that there were no vertical blood stains. (28 RT 6372.)[11]

The signs of struggle were confined to the bedroom. (28 RT 6352.) The panties found the floor had no blood on them, and the sanitary napkin within appeared to have menstrual blood on it. (28 RT 6359-6360.)

Criminalist Jeanne Spencer confirmed that neither the plaid shorts nor the panties had any significant blood stains (though there was apparent blood on the edge of the panties and seemingly-menstrual blood on the sanitary napkin within it); and she could find no evidence of semen. (28 RT 6397-6403.) The blood on the bent, forked-tip knife found in the bedroom, the steak knife and T-shirt found in the living room, and from some of the broken glass pieces from the bedroom, were consistent with Manning's blood type. (28 RT 6405-6408, 6419-6421.) The blood samples were not consistent with appellant Harris, Charles Hill, or Hill's friends Anthony Chappell and Michael Gonzales. (28 RT 6409.) A vaginal swab was

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[11] On cross, defense counsel questioned Laskowski about his failure to collect the cardboard backing of the legal pad found on the bedroom floor. If the bloodstain on it was caused by a cut on the perpetrator, then that failure prevented suspects, including defendant, from being ruled out. (28 RT 6337-6339.) Laskowski did opine, however, that this was from a splatter and not a drip because of the way it was deposited on the cardboard and the other spattering in the surrounding area. (27 RT 6340.) The inference, presumably, was that it was therefore Manning's blood.

positive for sperm, and there was semen in the urine found pooled between Manning's legs. There were also semen stains found on the bed *underneath* the comforter found next to her on the bed. All of the foregoing *except* the semen stain from underneath the comforter – which would have tended to confirm that the sex was consensual -- were submitted to Cellmark Labs for DNA analysis.[12] Also submitted to Cellmark were controlled blood samples from Manning, Harris, Hill, Gonzales and Chappelle. (28 RT 6423.)

There were apparent head hairs found in Manning's hands and on her left arm, some clenched in her fist, that were visually consistent with being her hair. (28 RT 6410-6411.) The fact that these were not tested was the subject of cross-examination by the defense, about which see *post*, at pages 35-36.

Fingernail scrapings yielded no significant evidence. (28 RT 6440.)

According to Criminalist Laskowski, the apartment yielded no evidence of a break-in. (28 RT 6348-6349.)

5. DNA EVIDENCE

Charlotte Word, the Deputy Director of Cellmark Diagnostics (28 RT 6470), reported the results of their DNA testing on the controlled blood

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[12] There is nothing in the record to explain why the semen stain from underneath the comforter was was not submitted to Cellmark.

samples of Manning, Harris, Hill, Gonzales and Chappelle, and a piece of the top of the maroon comforter from the bed, a piece from the center of the comforter, some black fibers from a "fur-like" blanket on the bed, cellular material from a urine sample, four anal swabs and four vaginal swabs. (28 RT 6489-6490.)

From the sperm fraction taken from an anal swab, there was DNA from more than one individual; Hill, Gonzales and Chappelle were excluded; Manning and Harris could not be excluded, but some of the male-fraction results, while consistent with Harris, were below the level of interpretation so she could not definitively state whether he was included or excluded as a source. (28 RT 6494-6496.)

From the sperm fraction of the urine sample, the DNA was consistent with Harris only, and consistent to a statistical probability of 1/1100 in the African-American population, 1/11,000 in the Caucasion population; and 1/13,000 in the Hispanic population. (28 RT 6498.)

From the vaginal swabs, the non-sperm fraction was female and Manning could not be excluded; the four males other than Harris were excluded, and Harris was included to a statistical certainty of 1/410 million for African-Americans, 1/1.6 billion for Caucausions, and 1/1.5 billion for Hispanics. (28 RT 6501-6503.)

The remaining samples, from the fur-like blanket and the comforter, gave mixed, but non-definitive, results. Word did note that while the samples from the swabs would have indicated semen deposited within 24-48 hours, there was no such limit for the dried samples on the various textiles. (28 RT 6498-6504.)

6. MEDICAL EXAMINER'S TESTIMONY

Forensic Pathologist Donna Brown conducted the autopsy of Alicia Manning at 1 p.m. on May 21, 1997. (28 RT 6505, 5010.) There were four distinct areas of significant blunt-force trauma along the left side of her head of sufficient force that it crushed the tissues of the scalp, though it did not fracture the skull. (28 RT 6313-6314.) There were shards of glass embedded in the scalp, consistent with the pilsner glass found broken in the bedroom. (28 RT 6316.) The vertical nature of some of the injuries and horizontal nature of others indicated that she was struck from different directions. (28 RT 6417.)

The blows to the head were sufficient to render her unconscious or even to kill her; in addition, though, there were 57 stab wounds about the front, side and back of the neck, and 20 superficial slicing marks along the right cheek. (28 RT 6418.) Also along the right cheek was a deep, almost bivalved stab wound, two inches long and three inches deep, running

parallel to the right side of the jaw underneath the skin. (28 RT 6518-6519.)

There were also 10 incised marks, as well a relatively superficial stab wound to the left side of the abdomen; an irregular, angulated stab wound across the front part of the neck, three inches long and deep, which cut into the voice box area, both above and below it. This wound indicated more than one stroke, because there four different areas in the neck above and below the voice box that showed four different attempts to try to drive the knife into her throat. (28 RT 6519, 6425.) There were, in addition, a number of other scrapes marks on the left arm and along the left side of her chest and abdomen, and a few cuts on her hands, especially the left one. (28 RT 6529.) These, Dr. Brown testified on cross-examination, were consistent with being defensive wounds; their relatively small number indicated that she was unconscious "for quite a bit." (28 RT 6546-6547.)

Brown, using photographs 155 and 250 from Exhibit 1-A, showed the jury the wounds which were produced by the two-pronged, "Ginsu-type" knife found in the bedroom, amounting to 16 of the 57 wounds to the chin and the neck. (28 RT 6521-6522.)

All of her tissue surface areas showed vital reaction that indicates that Manning was alive when the blows to the head were inflicted, as well

as the stab wounds. This would be consistent with her having been rendered unconscious from the blunt force blows to the head and then stabbed, but it could have come in a variety of sequences. (29 RT 6565.)

Regarding the alleged rape, there was no vaginal trauma observed, although Dr. Brown related that in her experience with sexual trauma – which consisted of two years' work, 16 years earlier – it is neither common nor uncommon to see vaginal trauma in sexual assault cases. (28 RT 6526, 6534.) Regarding the alleged sodomy, she did find three very small contusions, or bruises, at, on, and in the anal verge area.[13] (28 RT 6534-6535.)

In conclusion, Dr. Brown averred that the cause of death was bleeding from the multiple wounds, contributed to by the blunt injuries to the head, within a period of minutes from when the injuries began to be inflicted. (28 RT 6537-6538.)

7. CRIME SCENE - CAR

Criminalist Laskowski also investigated the burned car after it had been impounded at the police department. He found no blood or serological

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[13] The defense experts challenged the significance of these bruises as indicators of rape, and the jury believed them, acquitting Harris of the sodomy charge. Accordingly, this part of the prosecution's case will not be completely described. Dr. Brown's further discussion of the alleged sodomy appears at 28 RT 6535-6537.

evidence, nor any patent or latent fingerprints. (27 RT 7328-6330.) He did find the melted remains of a plastic container with a label indicating that it at one time held a solution of 70% isopropyl alcohol. (27 RT 6331-6332.) This was consistent with Fire Captain Embry's having smelled alcohol in the car at the scene of its burning.

8. THE POLICE INVESTIGATION

Detective Bob Stratton determined that Harris's apartment was 8/10ths of a mile from Manning's apartment, and 3/10th's of a mile from the scene of the car fire – less if you go through the apartment complexes between them. (29 RT 6663, 6666.)

Stratton requested help from the Tulare Police Department in contacting Charles Hill, asking them to look for injuries on his body.[14] (29 RT 3382.) Stratton contacted him at about 8:15 in the evening of May 21, and did look briefly for injuries while talking with him, on the visible portions of his hands, arms, head and neck, but did not ask him to agree to remove his shirt to determine if he had any apparent injuries or cuts to his body. (29 RT 6682, 6702.)

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[14] Hill testified that the Tulare police officers came to his house at about 5 a.m. on May 21, waking him up and informing him that Alicia had been murdered. (30 RT 6959.)

Criminalist Debbie Fraley, who's first-trial testimony was read to the second-trial jury, found few useable fingerprints. She did find some on the outside of Manning's burned car, which were neither Harris's nor Hill's, but were not matched to anyone else. (30 RT 6872, 6874-6875.) In addition, the prosecution and defense stipulated that a useable latent print was lifted from a Bud Light beer can located and seized from Manning and Bucholz's bedroom; it was compared only with, and did not match, Harris, Manning, Runnerstrom, Sexton and Chappelle. (30 RT 6890.)

9. HARRIS'S STATEMENTS TO THE POLICE

Stratton and other police personnel spoke with appellant Harris on several occasions. In their first meeting on the afternoon of May 22, Harris told Stratton that he had been home with Findley the entire evening of May 20, and had not been at the Ming Avenue apartment since Monday morning, when he was there with Bucholz. He had been at their apartment only four or five times, he said, and never when Bucholz was not there; and he denied going back to the women's apartment on Tuesday night. (29 RT 6689-6690, 6707, 6709-6710.)

On May 30, Detective Richard Herman drove Harris to a lab for a DNA blood draw. (29 RT 6757-6758.) Harris pressed Herman for information about what had been found at the scene of the crime, and

Herman eventually mentioned that there was evidence found at the scene that could be screened for DNA, and appellant's demeanor changed from cheerful and conversational to extremely nervous. Asked why, Harris answered that he was afraid of needles. (29 RT 6759-6761.)

On the way back from the lab after the blood draw, Harris still appeared nervous, and Herman asked him if he had ever had sexual intercourse with Manning. After a few seconds' hesitation, Harris stated that he had, a couple of times – once in April, shortly after meeting her, in her apartment, the second time on May 19, the night before her murder, at around midnight. Asked why he had not mentioned this before, Harris told Herman that, because of the nature of the case, he was trying to avoid getting involved in it.[15] (29 RT 6764-6768.)

On June 11, after Harris was arrested on the Torigiani burglary, Detectives Stratton and Herman interviewed Harris again at the Lerdo jail, secretly taping the conversation. (29 RT 6786-6787.) Harris waived his *Miranda* rights and told them again that he and Manning had intercourse on Monday night – the night before the murder – at between 11 p.m. and 1 a.m.

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[15] Regarding Harris's reasons for not saying anything about having sex with Manning earlier in the investigation, Herman admitted on cross that the answer he relayed was a paraphrase, taken from his report which was dictated anywhere from several days to two weeks after the conversation. (29 RT 6775-6777.)

He had called Manning during the day and asked her if it was alright to come over later, and after Kristy Findley was asleep, he went over and had intercourse with Manning, for about 15-20 minutes, on the living-room floor. (29 RT 6788-6793.) Asked about his earlier statement to Herman about having sex with Manning twice, Harris at first denied having said that, and then, confronted by Herman with what he had said, he said again that the first time was in April. (29 RT 6793.) Stratton then told him that the lab people had advised him that they would be able to differentiate the age of the semen samples, Harris said he'd only had contact with Manning on Monday, not Tuesday, night. (29 RT 6794-6795.) Stratton then told him that if the semen from Tuesday came back with his DNA, he would be arrested for the murder. Herman said that if he was there Tuesday and had sex with her and then someone came in after him, he should tell them now, and Harris admitted to being there on Tuesday. (29 RT 6795-6796.) He had called Manning and told her Bucholz was not coming home until 10 and asked her if he could come over, and she assented. He got there about 9, after Findley had come home and left, and had consensual sex with her, removing the condom before ejaculating. (29 RT 6798-6799.)

Stratton told Harris that he did not believe that the sex with Manning was consensual; and Harris stated that he did not kill her. Stratton then

testified that, after being confronted and changing his story several times, Harris said, "'you guys are just conniving." They told him he was the one who was conniving. Then Stratton, in violation of an in limine order, told the jury that Harris said "I'm conniving just like you're conniving, but I didn't kill the bitch."[16] (29 RT 6799.) At no time did Harris admit to either committing violence against Manning or stealing anything from her: the sex was consensual. (29 RT 6807.) It was either at about 9 o'clock or later, and they just talked briefly on the sofa, he asked her how things were with her boyfriend, and they just went into the bedroom and they sex. (29 RT 6809-6810.) Without saying why, Harris said he tried to hurry the sex with Manning.[17] (29 RT 6818.)

Stratton asked again why he initially told them that the sexual encounter with Manning was on Monday instead of Tuesday, Harris said that he didn't want to be anywhere near there on Tuesday. (29 RT 6811.)

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[16] Not surprisingly, this statement was the subject of an immediate in-chambers sidebar and a motion for mistrial, which was denied. Instead, the court informed the jury that it was taking judicial notice that "in our society young African-American males frequently use the word bitch in a non-pejorative fashion . . . ." (29 RT 6803-6804.) The court's wholly insufficient response is the subject of a claim of error, *post*, at pp. 272-274.

[17] If, as noted previously, Harris believed Bucholz was coming home at 10, then it is isn't difficult to imagine why he might have been in a hurry.

10. THE TORIGIANI BURGLARY

Over defense objection, and despite the fact that appellant had been convicted of it in the first trial, the prosecution was allowed to place in evidence the facts related to the later, June 11, 1997 burglary of Bree Torigiani.

At about 1 a.m. in the early morning of June 11, Ms. Torigiani returned home to find things disturbed in her apartment and items, such as her VCR, gone. When she turned from her living room to go back into the kitchen to call 911, she heard someone inside the apartment and called out her brother's name. Within a second, a man whom she later identified at a field show-up as Harris, came running from the hallway with her suitcase, went directly to and out the front door, and she then called 911. (29 RT 6733-6736.)

Patrol Officer Dennis West heard the description of the perpetrator and saw someone of that description inside the quad area of one of the nearby apartment buildings, carrying a suitcase. (29 RT 6720-6722.) It was Harris, and West found several items of jewelry and a Walkman-type radio on him, and in the suitcase was a VCR and camera. (29 RT 6727-6728.) He detained Harris until another officer brought Torigiani, who identified

him as the burglar (on the scene and later in a line-up), and the items in the suitcase as hers. (29 RT 6728, 6739-6740, 6748-6752.)

On cross-examination, Torigiani made clear that at no time in the apartment did Harris advance toward her nor, indeed, even look in her direction, and when she chased after him, he did not turn around to come toward her or attack her. (29 RT 6743-6744.)

11. OTHER PROSECUTION EVIDENCE

Debra Cain, a friend of Harris, testified that in the time period which included the spring and summer of 1997, Harris asked her if she was interested in buying a VCR, but when they went to her apartment and plugged it in, it did not work. (30 RT 6998-7000.) Regarding when this took place, she stated that it was in early April, shortly after her granddaughter was born, and denied that she told District Attorney's Investigator Bresson that it happened in May or June. (30 RT 7001, 7003.) She remembered it was early April because she had just come back from a checkup for her granddaughter. That would have been in April because after the infant was over one month old, her mother took her to the checkups. (30 RT 7004-7007).

Investigator Greg Bresson testified that when he interviewed Cain on March 4, 1999 (nearly two years after the incident), she told him first that

Harris tried to sell her the VCR in June of 1997, and then stated that was in May. (30 RT 7027.) Bresson also searched her apartment, with permission, to locate Manning's missing TV and VCR, but neither was found. (30 RT 7025.) On cross-examination, however, Bresson acknowledged that the mention of June was before he began tape-recording the interview; and that she subsequently said on the tape, five separate times, that it was in late April or early May, and before the Manning murder took place. (30 RT 7032-7035.)

The prosecution called Anthony "Amp" Denweed, who was a good friend of appellant's, and Denweed's girlfriend Michelle Holiday, to show that Harris had tried to sell them items from Manning's apartment after the incident. On the stand, Denweed denied that he told DA's investigator Clerico that Harris had tried to sell him a TV set after May 20; or that he had told Michelle Holiday that; or that Harris tried to sell him a radio; or even that he had testified in the first trial. (30 RT 7039-7043.)[18] Holiday also denied telling the investigator that Denweed had told her that Harris

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[18] Denweed did say, on cross, that the DA's investigator took from him a cell phone, two radios, and the pink slip to his truck, did not give him receipt, and has not returned those items. (30 RT 7046-7047.) Holiday confirmed the items seized, and characterized Clerico's treatment of them as hostile and angry. (30 RT 7058.) Clerico, characterized the conversation as "professional and – but official and to the point." (30 RT 7067.)

had tried to sell him a TV set after the murder of Manning. (30 RT 7053-7054.) She had told Investigator Clerico, she averred, that Harris had tried to sell her some things, including a TV set and some baby items, but that was when she was pregnant and before her baby was born in March, 1997. It was Clerico that suggested that this took place after the murder – she did not tell him that. (30 RT 7054-7057.)

District Attorney's Investigator Clerico admitted that neither of the two boombox-style radios that he seized at Denweed's house belonged to Buchholz. (30 RT 7064.) Holiday, he testified, had told him that Denweed had told her after the murder that Harris had tried to sell him a TV; Denweed, however, denied to him that it had happened, or that he had told Holiday that it had. (30 RT 7065-7066.)

B. THE DEFENSE CASE

Preliminarily, there were several gaps in the prosecution's case-in-chief, and the police investigation. For example, neither Manning's brown-plaid shorts or panties found on the floor near her body were torn, and the sanitary napkin was still attached by its adhesive to the panties, suggesting that the panties and shorts had been removed voluntarily. (28 RT 6426-6427.) Moreover, while there was blood on the oral swab, there was no blood on either the vaginal or anal swabs. (28 RT 6437-6438.) Some

apparent head hair found clenched in Manning's fist and on her left arm was consistent with her hair, and was obviously not Negroid hair, *but was not compared with Hill's hair*, even though it could have come from any light-haired person.[19] (28 RT 6410-6411, 6439-6440, 6449-6450.) Similarly, the fingernail scrapings yielded no significant evidence in the form of obvious hair or fiber, but Criminalist Spencer failed to send the scrapings to Cellmark for DNA testing. (28 RT 6444.)

Dr. Brown, the prosecution's forensic pathologist, agreed with defense counsel that the stabbing here was consistent with a rage killing because it is all patterned about a particular area of the body, with poking in a spoke-wheel sort of placement. (28 RT 6342-6343.) On redirect, she stated that "rage killing" meant savage, and agreed with the prosecutor's statement that such a characterization was "simply descriptive of the extent

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[19] There was a small piece of Negroid hair on the one the pillows (the one shown in Photo No. 46), on the side of the pillow facing the wall and opposite from the blood spatter. It was too small to microscopically compare with appellant's hair (28 RT 6451); the presence of the hair on the pillow, however, even if it were appellant's, is as consistent with the defense theory of the case as the prosecution's. Indeed, it is more consistent with the defense theory, because if the entire engagement between them was forced rather than voluntary, it would be more likely to have been on the same side of the pillow as the blood spatter, while if they had intercourse voluntarily and her head was on the pillow and he were above her, it is more likely that a small piece of his hair might end up on the far side of the pillow.

and nature of the injuries inflicted." It did not necessarily imply any relationship between the victim and the perpetrator. (28 RT 6578.) On re-cross, however, she agreed with the defense that frequently – more than 50% of the time – rage killings do involve people in a relationship. (28 RT 6585-6587.)

1. POLICE INVESTIGATORY FAILURES

In his cross-examination of Detective Stratton regarding Stratton and Detective Herman's interview with Harris on June 11, after his arrest on the Torigiani burglary, defense counsel brought out that Stratton had not asked Harris where in the bedroom he had sex with Manning on May 20, whether he saw anyone as he left and walked home, what route he took, or how long it took him to get there. (29 RT 6813-6814.)

In addition, with respect to Stratton's initial interviews with both Harris and Hill, the defense brought out that in neither case did the police ask the men to take off their shirts to see if there were scratches or cuts on them in non-obvious locations. (29 RT 6702-6703.) At a later time, Harris voluntarily removed his shirt to show the lack of injuries. (29 RT 6703.)

During the prosecution's rebuttal, when Detective Stratton was reviewing the two conversations he had with Pat McCarthy, Hill's alibi witness, the defense brought out that both conversations were by phone, not

in person. (32 RT 7369.) Moreover, when asked to describe how one tests alibi witnesses, Stratton admits that the best way is to get as much detail as possible from each individual, and to do the interviews as close in time as possible. While Stratton was able to claim that taking the interviews closely in time was not possible, he could not explain why he did not take a detailed summary from Hill about what he did with McCarthy; nor did he do that with McCarthy in their first interview. (32 RT 7369-7375.)

2. DEFENSE MEDICAL EXPERTS

Dr. Marven Ament, a professor of pediatrics at UCLA and an expert at pediatric gastroenterology, serves as an expert on anal injuries on the medical center's sexual abuse team. (31 RT 7080-7082.) His testimony was presented for the most part to rebut the charge of sodomy; that he did so successfully is reflected in the jury's not guilty verdict on that charge. Accordingly, a detailed description of that testimony is unnecessary to this appeal.

Dr. William Stanley was an obstetrician and gynecologist and infertility specialist. While it had been a decade since he had done rape examinations on live victims, he testified that he kept abreast of the literature on consensual and non-consensual sex, including studies of and

physical findings on the victims of non-consensual sex, including chemical markers, DNA markers as well as physical findings. (31 RT 7129-7132.)

Dr. Stanley's report of statistical studies of visible injuries in cases of rape showed such a wide variance, from about 40% up to 98%, that there was little little more than a weak inference that an absence of physical markers suggested an absence of rape. (31 RT 7142, 7145.) On cross-examination, Dr. Stanley testified that both vulvar signs of injury and other signs on the rest of the body, such as scratches, scrapes, stabbing or cut wounds, or bludgeoning injuries, appeared in 80% of cases.

On re-direct, Dr. Stanley stated that he saw no evidence of non-consensual sex, and that he would have expected to see injuries around the vaginal opening, the region between the vagina and the rectum, tears of the vulva in the vaginal region, or other injuries involving the uterine, cervix or the lower portion of the womb. Many believe, Stanley explained, that when sex is non-consensual, the uterus and cervix do not move in a normal manner, so that damage from the penis occurs to the cervix. This can be seen microscopically and with special imaging techniques, but those tests were not performed here and he did not see from the autopsy reports that there was any damage to the cervix. (31 RT 7153.) When challenged by the prosecutor that one can't really say for sure whether you would expect

to see cervical trauma if Manning were raped, Dr. Stanley reiterated that based on his experience and reading of the literature, you would. (31 RT 7154.) Neither, he said, did he see in the reports that there was any of the evidence of trauma to vaginal or vulvar areas that is commonly found in cases of rape. (31 RT 7157.)

3. THE TWO PERCIPIENT WITNESSES

There were two percipient witnesses whose testimony undercut Hill's alibi: Lori Hiler, who saw someone she initially identified as Charles Hill carrying a TV set toward where Manning's car was parked on the night of Tuesday, May 20; and Loli Ruiz, who was pretty sure she saw Hill pulling in and parking Manning's car in the early evening of May 20. According to Detective Stratton, both witnesses picked Hill's picture out of a photo lineup. (31 RT 7344.)

(a) Lori Hiler

On the evening of May 20, Lori Hiler spoke with Ray White, another neighbor of Manning's, in the pool area of the Ming Avenue Apartments. Hiler told White she would come to his apartment for a drink after she put her son to bed. They left the pool area at about 9:00 p.m. and she left for White's at about 10:08 p.m. by the clock on her microwave. (31 RT 7183, 7238-7240.) As she was walking in front of the building housing

Manning's apartment, Hiler passed by a man carrying a TV set toward the carport. (31 RT 7182-7183.) Although she did not remember the race of the man by the time of the trial, she did, when Charles Hill's picture was published in the newspaper about two weeks after the murder, identify him as that man. (31 RT 7186.) She also saw Manning's car, with the dome light on and the door open a little bit. (31 RT 7187-7189.) When this was reported to Detective Stratton, he showed her a photo lineup and she identified the picture of Hill, writing on the copy of the line-up, "I saw him with the TV on Tuesday night." (31 RT 7191-7192; People's Exs. H. H-2.)

Hiler testified that when she spoke with Stratton the next day, she wasn't sure if it was the same man or not, but the defense did confirm with her that when she saw the photo lineup, she made no objection that all of the men appeared to be Caucasian, and she told Stratton that she believed then that the person she saw was Caucasian. (31 RT 7193.)

She began to have doubts when she saw appellant's picture in the newspaper, identified as the suspect, and her boyfriend kept asking her if she was sure the guy was white. She initially described him to Stratton as a white male, about 6' 2" or 6'3" tall, with blond or brown shoulder-length hair, and heavy-set. (31 RT 7231.) Harris, in contrast, was described in

the probation report following the first trial, as 5'10" tall and 185 lbs., with black hair. (See Probation Officer's Report, filed January 7, 1999.)

The prosecutor's cross-examination made much of confusion regarding chronology – not of the event, to begin with, but of when Hiler saw the picture and reported her identification of Hill to her apartment house manager and then to Stratton. Much was made also of the seeming inconsistency of her having first said that she that her initial reaction was, "gosh, that's the guy I saw carrying the TV" and her statement to Stratton that it took her a while to place who that picture depicted and where she had seen him before. (31 RT 7214-7215.) She explained, however, that on first seeing the picture, she recognized Hill as someone she had seen around the apartments, but a couple of days later, when she read an article about the TV having been stolen, she realized the person carrying the TV appeared to be the person in the newspaper photo identified as Hill. (31 RT 7216-7219.)

The prosecution then sought to shake Hiler's story about *when* she saw the man carrying the TV. On the stand, she had said she was quite sure that it was right after she left her apartment to go have a drink at another apartment in the same complex, and that she looked at the digital clock on the microwave and it read "10:08." (31 RT 7220.) Moreover, it was then

because she was walking alone at the time, and her later trip back to her apartment and then back to the neighbor's she was accompanied by the neighbor, Ray White. (31 RT 7220-7221.) When asked why, when she was first speaking with Stratton, she told him that it might have been the second time she was walking from her apartment to White's, she explained that while she was speaking with Stratton, White came up and reminded her that he had accompanied her on the second trip, so she was sure she saw the man carrying the TV on the first trip to White's apartment. (31 RT 7220-7223.)

Also on cross, while Hiler admitted that she at trial was not sure who it was carrying the TV, when she was shown the photo lineup on June 9 she thought it could have been Hill. (31 RT 7223.) Moreover, contrary to the prosecutor's suggestion, it was not when she saw the picture of Harris that she began to doubt her identification of Hill, it was when she read that they had someone else, Harris, in custody. (31 RT 7226.)

The prosecutor then sought to impeach Hiler with the contents of an interview that he and Investigator Bresson conducted with her in December, 1998, during the first trial. He noted that he told her that she wasn't sure who the person was that she saw, that she was in a hurry because she had told Ray White that she would be over at 9:00 (rather than 10:00). Hiler

responded on the stand that it was 10:00, an hour after they left the pool area at 9:00, and if she said it was 9:08, she was confused about the time. (31 RT 7236-7238.) She then described in detail the chronology leading up to her leaving her apartment to walk to White's at 10:08. (31 RT 7238-7240.) The prosecutor persisted in his impeachment (even to the extent of the court sustaining three asked-and-answered objections), but Hiler pointed out that she told Stratton in her first conversation with him, two-to-three weeks after the murder, that it was 10-10:15 p.m. (31 RT 7242-7249.)

On redirect, defense counsel brought out that when she told the prosecutor, the day before she testified in the first trial, that it was an hour earlier, the prosecutor never pointed out to her that she had told Stratton it was 10 o'clock in their post-murder interview. (31 RT 7251-7256.)[20]

Defense counsel showed Hiler the two *Bakersfield Californian* pictures that had been published of Charles Hill. She was unsure which one triggered her memory, but confirmed that she told Stratton then that the perpetrator was white, approximately 28-30 and approximately 200 lbs., 6'2" to 6'3", heavyset with a very big build and straight blond hair, all of one

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[20] During the prosecution's rebuttal case, and over defense objection, the prosecution was allowed to play portions of the December, 1998 interview of Hiler by the prosecutor and investigator Bresson. (32 RT 7378-7387).

length, and that she saw him carrying a 19-inch television set (the size of the one missing from Manning's apartment), and this was within a minute of seeing Manning's car in the carport. (31 RT 7256-7263.)

(b) Loli Ruiz

Teodula (Loli) Ruiz also lived, in 1997, at the Ming Avenue apartments. (31 RT 7308.) On the night of the murder, when the police first came to her door at 2:30 a.m., they did not tell her what had happened but only asked her if she had seen or heard anything, and she told them no. (31 RT 7309-7310.) Later, when she was speaking with her cousin, she remembered that, on Tuesday, between 5:15 and 5:30, she saw a white man pull Manning's green Ford Escort into the carport. It was noticeable both because the driver seemed to hesitate while pulling into the space, and then parked at an angle. (31 RT 7313.) There was no one with him.[21] (31 RT 7315.) Although his baseball cap kept her from seeing him well, she later picked Charles Hill's picture out the photo lineup as the person who most resembled the man she saw, at least as to his cheek and chin. (31 RT 7322.)

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[21] The fact that there was no one in Manning's car with the man, who presumably was Hill, precludes Ruiz having seen this on Monday, as Manning was with him on Monday when they returned from dinner with his father. (30 RT 6953, 6960.)

The prosecution's impeachment focused on Ruiz's failure to mention this to the police on the night of the incident, and on the fact that Ruiz initially told Detective Stratton that she wasn't sure whether this happened on Monday or Tuesday. Ruiz explained that when the police got her out of bed on the night of the murder, she was not thinking clearly, and it did not pop into her head until the next day. (31 RT 7326-7328.) Regarding what day it was, she knew it was Tuesday because her daughter was at the pool at the time, and she did not let her daughter swim on Mondays at that time because of the volume of homework she had on Mondays. (31 RT 7317, 7331.)

Detective Stratton testified that when he first spoke with Ruiz, she first said she was pretty sure she saw the car drive up and park on Tuesday night (i.e., May 20), then said she could not say for sure whether it was Monday or Tuesday, but was leaning toward Tuesday. When he spoke with her the second time, she was thinking it was Tuesday but was still not 100 percent sure. (32 RT 7350-7351.)

Hill, however, had testified that he and Manning returned from dinner with his father on Monday, he had parked the car at the other end of the parking lot from the carport nearest her apartment that she usually used.

(30 RT 6979) This supports Ruiz's testimony that she saw him park the car on Tuesday.

4. THE MAN AT THE SCENE OF THE CAR ARSON

Christopher Bourgoine worked as a seasonal fire-fighter for the Bureau of Land Management. On May 20, at about 11 p.m., he was sitting in his car in the alley behind his apartment, speaking with his then-girlfriend, when he heard a "phoof" noise, looked around, and then noticed in his rear-view mirror a fire. (31 RT 7271-7274.) He told his girlfriend to call 911, grabbed a fire extinguisher out of his car and ran toward what he thought was a fire in a dumpster, but turned out to be in a car behind the dumpster.

As Bourgoine was spraying the fire through the open driver's window, he saw over his right shoulder a guy who seemed to come over the fence, who came running up to him and saying, as Bourgoine related it, "good job, good job did, did you see anybody, who did this, and stuff like that."[22] (31 RT 7276-7277.) This fellow seemed nervous, asking Bourgoine three or four times whether he had seen who set the fire. (31 RT

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[22] This person seemed to come over the fence, Bourgoine later explained, because Bourgoine heard the sound of someone landing on the pavement, and did not see him come up the alley. (31 RT 7286.)

7278-7279.) Bourgoine described the nervous fellow as about 3 inches shorter than his own 6 feet, with dark curly brown hair, a "Magnum P.I."-like thick mustache, in his late-twenties or early-thirties, and white. (31 RT 7279-7281.)

Bourgoine, who had lived in his apartment for about two years, had never seen this person before, and had not seen him in the two years up until he recently moved from there. When others from the neighborhood arrived at the scene, this fellow continued to ask people in the crowd if they had seen who did it.[23] When, however, the fire investigator arrived and began asking questions, this person disappeared within minutes. (31 RT 7280-7283).

Bourgoine's twin sister, Gloria Bourgoine (who will be referred to as "Gloria" to distinguish her from Christopher), lived in the same apartment as her brother, and when Christopher's girlfriend ran into the house and said a car was on fire, Gloria went into the alley and watched her brother put it out. (31 RT 7293-7295.) A few minutes later, while her brother was still putting out the fire, she saw the same man, the white male with brown shoulder-length hair and a mustache, come up. He did not look like he

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[23] In addition, this unidentified person, Bourgoine testified, was the only one, in the crowd that gathered in the alley, that he did not recognize as someone from the neighborhood. (31 RT 7285.)

belonged there, because he was very clean-cut looking and he just appeared out of nowhere. (31 RT 7295.) Although he said he lived in one of the houses behind their apartment complex, she also had never seen him before, and has not since, and she also characterized him as acting nervous and continually asking if anyone had seen who started the fire, what happened, and the like. (31 RT 7296-7297.)

C. TIMELINE EVIDENCE

Prabhjeet (Jerry) Singh lived next door to Bucholz and Manning; his apartment shared a landing with theirs. (29 RT 6589.) On the night of May 20, he was home in the evening. He intended to go out at about 10:10 to meet a friend at the racquetball courts, when he heard someone go up and down the stairs three times (that is, three round-trips up and down). During the period prior to his leaving, Singh heard nothing untoward from Manning's apartment – no screaming, no glass breaking, no furniture being moved about. (29 RT 6603.) The two apartment living rooms are separated by a stairwell, so they do not share a common wall. (29 RT 6601-6601.)

Just before Singh left his apartment at 10:10, he heard the women's apartment door being opened, and about five seconds later he opened his door and somebody, of indeterminate race and gender, was at the bottom of

the staircase and turning left.[24] (29 RT 6592-6793.) By the time Singh got to the bottom of the stairs, that person had vanished. (29 RT 6593.) When he went to the carport for his car, Manning's car was there, but nobody was near it. The dome light was on, and as he walked near it, he saw a TV set sitting on the front passenger's seat and a boombox in the back, but not a VCR. (29 RT 6596-6597, 6606.)

James Ave, another resident of the Ming Avenue Apartments, testified that either at 7:30 when he left his apartment or at 10 when he returned, he also saw Manning's car in the parking area closest to her apartment, with the dome light on. (28 RT 6457-6459.) Although he wasn't sure which time he saw it, on cross examination he indicated that, because of the brightness of the dome light, it must have been at the later time–10 p.m.–that he saw it. (28 RT 6464.)

If these two witnesses are correct about the times that they saw the car, the dome light was on by about 10, and the TV and boombox were in the car by 10:10 p.m.

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[24] On the question of what time Singh left his apartment, defense counsel had him review his testimony from the first trial to refresh his recollection about what time he left. Singh acknowledged that he said then it was between 10:10 and 10:15, but closer to the former; and he was now saying it was exactly 10:10. (29 RT 6608-6609.)

Zenobia "Kristy" Findley, Harris's girlfriend, shed more light on the time line. Harris lived in an apartment with Findley and her brother, and she indicated that she had concerns that Harris was involved with or seeing Thea Bucholz. (29 RT 6613-6614, 6618-6619.) On May 20, according to what she told Detective Stratton, Findley got off of work at 8:30 p.m., and withdrew money from an ATM at a 7/11 store at 8:48 p.m., and got home a few minutes later, at approximately 9:00 p.m. She told Harris, who was there, that she was going to a friend's house and would be back, and left at 9:15-9:20. (29 RT 6222-6228, 6683-6685.) She got a page from Harris asking when she was coming home, and then shortly after a second page at 10:56. She left her friend's and returned home 10 minutes later, at about 11. Stratton's report states that she told him she got home at 11:30 (29 RT 6687), but Findley insisted on the stand that it couldn't have been that late. (29 RT 6628-6633, 6635, 6645.) It would only have taken her 5-7 minutes to get home from her friend's. (29 RT 6649.)

On cross-examination, Findley explained that there was nothing unusual about the page or in Harris's voice when they spoke; he paged her often when she was not at work but not at home, so it was not at all unusual for Harris to see Findley at 9 and then page her a couple of hours later. (29 RT 6635, 6643-6344.) When she got home, he was on the balcony, listening

to music, and when they spoke there was still nothing unusual or different about his tone of voice or appearance. (29 RT 6635-6636.)

In terms of the timeline, Harris was at home when Findley left between 9:15 and 9:20 p.m, and again at 11 p.m. Stratton's notes of his interview with Findley suggest an even earlier time for her departure. She told Stratton that she got home shortly after the 8:48 timestamp on her ATM receipt, spoke with Harris only briefly and gave him a beverage, and then left for her friend's house (29 RT 6685), which would have left Harris free at very nearly 9 p.m.

Accordingly, the time line for all this to happen – Harris walking to Manning and Buchholz's apartment, having sex with Manning (whether consensual or otherwise) and, according to the defense theory, Harris leaving and Hill coming in, killing Manning, and then carrying the stolen items out to the car and leaving, could have been from as early as 9:00 to about 10:10 p.m.[25]

D. DELIBERATIONS AND VERDICT

The jury retired to deliberate at 9:02 a.m. on June 30, 1999, was excused for lunch from 12:02 to 1:32, and returned its verdict at 3:45 p.m.

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[25] The prosecutor, in his first closing argument, asserted that everything happened "in 40 minutes, basically, 45 at the very outside." (33 RT 7487.)

the same day. Including the time to notify the court and counsel and reconvene for the verdicts, the deliberations consumed 5-1/4 hours. (15 CT 4028-4032; 34 RT 7698, 7703.)

II. PENALTY PHASE

A. PROSECUTION'S CASE

The prosecution introduced victim-impact testimony from Manning's father, Lee Manning (34 RT 7770-7775), and then proved several priors.

Beatrice Thompson was the victim of a purse-snatch in February, 1997, near a 7-11 store. Ms. Thompson testified that after she left the store and was crossing the street toward her apartment, Harris asked her for her purse, and when she refused, grabbed it from her and ran away. (34 RT 7779-7781.) She identified Harris after she saw a photo of him in the newspaper. (34 RT 7776, 7779-7780, 7783-7789.) In addition, Bakersfield Police Detective Kevin Legg testified that Harris could be seen in the store's security video. (34 RT 7813.)

The prosecution also introduced documentary evidence of three prior convictions: a 1990 conviction for first-degree burglary; a 1988 conviction for possession of cocaine; and a 1998 guilty plea to possession of a

controlled substance. (People's Exhibits 10, 11, 19; discussed at 34 RT 7820-7823.)

B. DEFENSE CASE

1. APPELLANT'S BACKGROUND AND FAMILY LIFE

Appellant's mother, Jerlene Harris, explained that Willie was the youngest of six children, all of whom were at least 7 years older. (35 RT 7851.) His father died when he was six weeks old, and two years later she went back to work to get off of welfare, and a man next door watched Willie while she was at work and his siblings in school. When his oldest sister, Delora, got home from school, she helped care for him. (35 RT 7852-7854.)

Willie was always "hyper" and had difficulty being still, but always stepped into intra-family arguments with a joke, because arguments made him nervous. (35 RT 7857-7858.) He was always very positive, and awoke each morning with a smile. (35 RT 7858.) Although he had many girlfriends, he was very polite and never violent with them. (35 RT 7857.)

Appellant's sister, Delora Harris, continued the story: After she noticed Willie clinging to her as they passed the neighbor's house who cared for him, she left school one day at noon and found them beating him.

(35 RT 7862-7863.) And though her mother sent Willie there with breakfast and lunch each day, he would come home starving. (35 RT 7864.) Once, when Willie was about two-and-a-half, he was accidently left behind after a family reunion at the park – the girls thought he was with the boys, and vice-versa. Willie managed to find a policemen and direct him to their home, but no one was there because they were all out looking for him, but luckily their mother's aunt's house was across the street. (35 RT 7865-7866.)

They were very close: When Delora was at an out-of-town college, when Willie was 7-8 years old, she would come get him every Friday and bring him home every Sunday, and after she returned to live in Bakersfield, he would call her and come over nearly every day. (35 RT 7866-7868.)

Delora continued the theme of their mother, reporting that, except for some minor altercations in elementary school, since he was 18 she never knew Willie to have been in a fight or to lose his temper, and in family situations, he was the mediator. (35 RT 7869-7870.) He did, however, through another family member, get involved with crack cocaine when he was 16 or 17. (35 RT 7877.)

2. THE ABSENCE OF VIOLENCE

A number of witnesses picked up the theme of appellant's complete lack of a history of violence.

Dracena (Kizzy) Smith is Delora's daughter and appellant's niece, but is only 8 years younger than he, and she considers him more a brother and friend than an uncle. (35 RT 7879-7880, 7887.) She related that when someone Willie knew and did not approve of gave her a "cavie" to smoke (finally chopped crack cocaine smoked in a cigarette), he sat her down and told her all of the bad things about drugs, and she has never smoked another one. (35 RT 7882.)

In response to a question about whether he was ever violent, Kizzy related an incident with a girlfriend of his that Willie was involved with, who, once when they were kissing, "hawked up" some phlegm from her throat as he was moving forward for another kiss and spit it into his mouth. Willie just calmly told her something like "I ain't trippin' on you no more" and walked out and went home. (35 RT 7882-7884.)

Kizzy also noted that, while Willie hung around with some of the bad boys in the neighborhood, he never joined a gang. (35 RT 7886.) Mostly, she said, he always wanted to be loved and for everyone to feel like a family. He just had a high need for affection, so if his main girlfriend was

at work, he would look for someone else to be with, to have a conversation with, or to hold. (35 RT 7885-7886.)

Karisha James grew up and was friends with appellant's niece Kizzy, and was the one described in the spitting incident. She testified that she met appellant when she was about 16. She became friends with him, and though they were just friends, she confirmed Kizzy's story that once, when they were kissing, Willie accidently bit her lip, and she "hawked up a lugie" and spit it in his mouth. She also took a lighter and burnt him with it, but he did nothing, said he was sorry and didn't know he bit her. They remain friends to this day, and she has never known him to be violent. (35 RT 7949-7952.)

Appellant's girlfriend at the time of the Manning murder, Kristy Findley, lived with Willie from January, 1996 until he was arrested in June, 1997. She related that he was playful and full of energy, over-hyper, and the drugs he used would slow him down somewhat, make him stay at home and then go to sleep. (35 RT 7895.) When they would argue, he would not stay around, and their arguments never escalated to violence. Findley did hit him, and he once called the police on her, but he never hit her back, and she never saw him in a fight. (35 RT 7895-7896.) Most of their fights were

about his being unfaithful, but, she said, she still loves him. (35 RT 7896, 7899.)

Avonda Jones had a six-to-seven-month relationship with Harris from which a son was was born. She repeated the theme: while they were together, she got upset with him, but he never got upset with her, and he was never violent. If he got mad, he would just walk away. (35 RT 7943-7946.)

The defense read the testimony of Tamika Hall from the first trial, because, though under subpoena, Hall could not be found. Hall is the cousin of Sonia Green, who lived at Hall's house when Harris was her boyfriend. Harris at first just visited there, and later came to live with them for three to four months. (35 RT 7955-7957.) Hall never saw appellant angry or exhibiting signs of violence; rather, he remains a great friend to her. He's nice, very funny, and she has never seen him any other way. (35 RT 7958.)

3. THE DEFENSE PSYCHOLOGIST

Dr. Cecil Whiting, a clinical psychologist, had extensive experience working with the California Youth Authority, the Baldwin Park Police Department and the Fresno District Attorney. (35 RT 7901-7904.) He was asked by the defense to do a mental status examination of appellant, and

conducted extensive interviews with him and with members of his family, as well as psychological testing. (35 RT 7904.)

Dr. Whiting administered four tests to Harris. (35 RT 7907.) Viewing the results, he concluded that Harris showed no major deficits, although he had a mild impairment in long-term memory. That shouldn't be present in someone of Harris's age, suggesting to Whiting repression as a psychological issue. There was probably a mild impairment in concentration, and Harris was easily distracted, but that is to be expected with someone previously assessed with having attention deficit hyperactivity disorder. (35 RT 7911). The ADHD, Dr. Whiting thought, came not from neurological causes but from the fact that, because his mother went back to work, he was raised by his five brothers and sisters, and so was getting inconsistent messages from five different people. (35 RT 7917-7918.)

Regarding Harris's social history, Dr. Whiting related that Willie found out as an adult how his father really died: he was a well-known street hustler and pimp in Bakersfield and he was murdered by a woman with whom he was having an affair. (35 RT 7914-7915.) When asked about this, Willie said he didn't know how to feel, which was a strong sign of sensory numbing and repression. (35 RT 7915.) A person who represses

has a tendency to compensate, and one of those is Willie's verbal impulsivity. (35 RT 7915-7916.) By answering a question before it is completed, he might not get a question that he would have difficulty with, or is painful, so he covers what is going on with a lot of talking. His friendliness, too, is a cover for the repression and psychological pain. (35 RT 7916.)

Another result of the group parenting by his siblings can be seen in Harris's adult relationships with women. Both of his two adult girlfriends were dominating women – Sonia, a former girlfriend, cut him with a box cutter, and Zenobia (Kristy) tried to change him, moved him away from his home to Stockdale, and hit him – including once when he tried to leave her – and yet he stayed with them. (35 RT 7919-7921.)

Dr. Whiting then described the results of a number of other tests he administered, all of which showed some learning disabilities but no brain damage. (35 RT 7923-7928.) He did find that Willie had two further psychological problems: He was afraid of blood, and afraid of darkness, such that he always slept with a nightlight and kept extra bulbs for it around. (35 RT 7929.)

Dr. Whiting described the results of a Life Stressors test, in which the facts of appellant's life leading up to the murder is compared to a scale

on which someone whose score of 300 or higher is considered to be experiencing life stress. Appellant's score for the two years leading up to his arrest was 554 points. That, Dr. Whiting said, when combined with the stress of the police interrogation, would lead Harris to revert to earlier life situations, and in particular the sort of harshness of language he experienced with his older siblings as he was growing up.[26] (35 RT 7931-7932.)

Dr. Whiting concluded that appellant is a rather passive person, jovial, friendly and outgoing, and this is inconsistent with other convicted murderers. (35 RT 7932.)

On cross-examination, the prosecutor tried to relate appellant's verbal impulsivity to a more general impulsivity, but Dr. Whiting was aware of no research doing so. Rather, there is a showing of 60% relationship of right-temperal-lobe damage leading to psychotic rage syndrome and homicide, and how violent impulses from the limbic system can be expressed if there is left frontal lobe damage, but none of these factors were present in appellant. (35 RT 7936-7942.)

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[26] Though not made explicit, this appears to explain Harris's use of the term "bitch" while referring to Manning during interrogation.

4. THE PRISON EXPERT

The defense presented the testimony of James W.L. Park, who had 31 years of experience with the California Department of Corrections, beginning as a clinical psychologist at Chino, through two stints as an associate warden at Soledad and San Quentin, and then on to department-wide responsibilities in Sacramento, finishing up as the assistant director for policy. (35 RT 7965-7969.)

Park reviewed appellant's prison record. Regarding his first stay in prison, appellant was about normal for a 20-year-old, with some good aspects; the second showed an above-average work record; nothing in the records showed any violent behavior. Appellant, Park concluded, had made good adjustments to prison life. (35 RT 7976-7978.)

ARGUMENT

PART ONE: PRE-TRIAL ERRORS

I. INTRODUCTION: THE COURT'S ERRORS BEFORE THE SECOND TRIAL CREATED WHAT AMOUNTED TO A DESIGNER JURY FAVORING THE PROSECUTION

This is a case in which race was bound to play a role. It is difficult to imagine anyone, in any part of the country let alone rural, conservative Kern County, not being aware that a charge against an African-American that he raped, sodomized, and murdered a white college student, would be racially explosive. Yet the trial court, in a striking comment in pre-second-trial hearings, after it had heard extensive testimony from the change-of-venue expert on the clear effects of race on the case, made the remarkable comment that it didn't "see [race] as being a huge issue in this case." (14 RT 4204.) The court then, by its rulings, made sure not only that it would not have to confront the obvious, but also that racial undertones in the case would result in a conviction.

In this Part One, appellant will discuss how the denial of his change-of-venue motion (Argument II, *post*) and the court's conduct of voir dire (Argument III, *post*) led to a jury before which appellant had no chance for a fair trial. In Part Two, the brief turns to the trial court's guilt-phase evidentiary errors, including arguments that neither the robbery nor the

robbery special circumstance, and neither the rape nor the rape special circumstance, can survive review. Finally, Part Three will discuss the penalty phase errors which undermine the jury's imposition of the death penalty.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S CHANGE OF VENUE MOTION WAS CONTRARY TO THE EVIDENCE, AND WAS PREJUDICIAL ERROR

In a recent case, this court described the relevant appellate standards as follows:

> State law provides that a change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county. (§ 1033; *People v. Vieira* (2005) 35 Cal.4th 264, 278–279 [].) " ' "The factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim."' " (*Id.* at p. 279.)
>
> (*People v. Prince* (2007) 40 Cal.4th 1179, 1213.)

The error is subject to independent review. (*Ibid.*)

A. FACTUAL BACKGROUND TO THE CHANGE OF VENUE MOTION

1. DEFENSE EXPERT DR. EDWARD BRONSON

Prior to the second trial, the defense commissioned a detailed study of the extent and impact of the media coverage of Manning's death, the investigation, the arrest of Harris and the first trial on the community's awareness and opinions about the case. The results of that survey were described in the testimony of the defense expert, Dr. Edward Bronson, who has been a leading figure on venue issues since 1983. (16 RT 3859.) Dr.

Bronson's credentials were uncontested: he earned an LL.M. from New York University and a Ph.D. in Political Science at Chico State University, where at the time of his testimony he remained a professor. (16 RT 3854-3855.) Dr. Bronson's record did not show him to be a defense-oriented expert biased in favor of change of venue: He had consulted with District Attorneys and Attorneys General as well as defense attorneys; he had recommended against a change of venue 83 times, more often than he had recommended one; and he had testified against a change of venue regardless of which side called him as an expert. (17 RT 3965-3968; *see also* 29 CT 8403-8404 [list of cases in which Bronson recommended *against* a venue change].)

The prosecutor acknowledged Dr. Bronson's expertise on the likely effects of the publicity on the jury pool, but objected to him opining on the "legal conclusion" of whether there was a reasonable likelihood of appellant receiving a fair trial. (16 RT 3880-3881.) After questioning Bronson, the court appeared to rule that he could testify as to the number or percentage of the juror pool that might arrive having pre-judged the case, but not to the ultimate question for which he was offered as an expert,

whether or not there is a reasonable likelihood that the defendant could receive a fair trial.[27] (16 CT 3876, 3883-3885.)

Dr. Bronson conducted a survey to assess the community's awareness of this case, and its thoughts and feelings about it. In analyzing the survey data, Bronson explained, the criteria he used was derived from this court's analysis in *Maine v. Superior Court* (1968) 68 Cal.2d 375 [referred to by Dr. Bronson simply as *"Maine* and its progeny"] (16 RT 3861).[28] In the sections that follow, appellant will describe the evidence pertinent to each factor in turn, presenting the results of Dr. Bronson's study as well has his analysis of that evidence. Appellant will then argue that the data and Dr. Bronson's conclusions show a fair trial could not have been, and was not, had. Appellant will also demonstrate why this case is

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[27] The phrase "appeared to rule" in relation to the court's action on the prosecution objection arises from the fact that its ruling was literally "that's different from what you are offering him for in my mind." (16 RT 3885.) Thus, one has to return to page 3876, where counsel explained the reason for proffering the expert, to glean the meaning of the court's "ruling."

[28] As described by Dr. Bronson, the *Maine* factors are identical to those more precisely formulated in *People v. Prince*, *supra*. He described them follows: (1) the nature and extent of the publicity; (2) the relative status of the defendant and victim in the community; (3) the nature and gravity of the crime; (4) the size and nature of the community and whether there are political or controversial overtones; and (5) whether there is a reasonable likelihood that in the absence of a chance of venue the defendant can receive a fair trial. (16 RT 3861-3862.)

distinguishable from both *People v. Prince*, *supra*, and *People v. Ramirez* (2006) 39 Cal.4th 398, two recent cases in which this court upheld trial court denials of changes of venue.

2. FIRST *MAINE* FACTOR – NATURE AND GRAVITY OF THE OFFENSE

The first *Maine/Prince* factor is the nature and gravity of the offense. "The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its 'nature'; the term 'gravity' of a crime refers to its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582.) In the instant case, the relevant "peculiar facts" were that this murder occurred in the context of rape and sodomy allegedly committed by an African-American defendant on a white college student, coupled with the additional recent publicity regarding a first trial ending in a hung jury.

(a) Nature of the Crime and Terminology

According to Dr. Bronson, the importance of the nature of the crime is influenced by how the crime is described in the media. A homicide, for example, can be a vicious murder, an execution-style slaying, a torture slaying. Further, he noted, even if such a description is technically accurate, the terminology carries an emotional overlay that can be

inflammatory. (See, *e.g.*, *Williams v. Superior Court* (1983) 34 Cal.3d 584, 590 ["sexual assault" or "rape" used 145 times; "bullet-ridden body" 4 times; "execution-style killing" 12 times, with an additional 3 variations].) For example, even if it is used without embellishment, the term "rape" can have a prejudicial effect, "particularly when you get very lurid and detailed and use these adjectives that are so very powerful." (RT 3927-3928.) As detailed below, this is precisely what the media did in the instant case.

In this case, the newspaper reports repeatedly referred to the victim's throat being slashed, or slit, and to her 57 stab wounds. One article reported that Manning was raped and stabbed more than 30 times in her neck, shoulder and head; and in the same article, that the slashing had severed her trachea and esophagus; that she was brutally beaten, stabbed; and there was a reference to the rape having occurred while Manning lay unconscious, while blood covered most of her face and spattered the wall. Obviously, Dr. Bronson opined, these things have an impact on the way people feel about the case and can be prejudicial with respect to both guilt and penalty determinations. (16 RT 3928; see complete list at 29 CT 8396-8397, ¶ III, B.)

The "nature of the crime," in terms of its prejudicial effect, also has to do with the simple recitation of the charges, if they are by nature

prejudicial. The newspaper reports in this case, merely in the recitation of the charges, included 10 references to murder, burglary, rape and sodomy; four references to rape and sodomy; 15 references to rape and murder; 3 references to murder, rape and sodomy; 1 reference to rape, robbery and murder, and 2 references to raped and killed. (See Defendant's Exhibit F, at 29 CT 8397, ¶ D.) To the extent that these terms were used after Harris was identified as the suspect (and see the detailed descriptions of the newspaper articles, *post*), they were even more prejudicial.

(b) Nature of the Crime and "Salience"

Another aspect of the nature of the crime factor is "salience," which, Dr. Bronson explained, has to do with how prominent the case is in the community and how it "grabs" people on an emotional level, such as how the Oklahoma City bombings were special to the people of Oklahoma City in a way far beyond those of the rest of the nation, even though everyone knew of it. (16 RT 3929-3930.) "This case," it seemed to Bronson, "did grab the local people in a way that was somewhat special." Besides the fact that the victim was a student at the local university,

> The murder caught the community's attention by its viciousness and the apparent innocence of victim. She was in the right place at the right time, at home, preparing a final paper when she was stabbed and [her] throat slit. Like the girl next door. A victim's victim. Did nothing to make herself vulnerable. The stuff of nightmares for many women.

> It goes on at some length with that vein. And that's what this community experienced for some period of time.
>
> (16 RT 3930.)

As an example of the salience of the crime, on August 24, 1998, fully 15 months after the crime, the local newspaper, the *Bakersfield Californian,* began a series on Alicia Manning and the crime with a very powerful article. In this series, she became almost a member of everybody's family – very much personalized, humanized, and that, Dr. Bronson explained, is what salience is all about – "She's not some abstraction any more, but she becomes sort of like everybody's daughter, sister, or whatever." (16 RT 3932.)

The August 24 article (30 CT 8710-8711) was the first of 14 consecutive articles that highlighted the sexual aspects of the crime by putting the sexual descriptors first. The article emphasized that Manning was raped and stabbed. The article described the crime as being the stuff of nightmares for many women; and included what Bronson described as an awful, detailed, lurid description of the murder – the violence of it, the blood, the number of stabs, and all the rest. The article also promoted the notion that such a murder could happen to anyone, implying that the perpetrator, by implication, wasn't her boyfriend because it was random, and ghastly. By contrast, Manning's boyfriend, Charles Hill was described

as a good-hearted guy. This, the statement that two of Harris' female friends had abandoned him publicly, and the article's triumphant conclusory statement that the case broke with the arrest of Willie Harris – presumably meaning "we've got our guy and he's guilty" – directly undercut that defense theory that it was Hill, not Harris, who murdered Manning. (17 RT 3959-3960; 30 CT 8711.) The article, Bronson concluded, was very long, very prejudicial, and began on the front page. (17 RT 3961.)

On cross-examination, Dr. Bronson characterized that article as:

> very prejudicial and very emotional . . . and was sort of a time at which everything shifted, where the publicity, which was a matter of concern before, suddenly became very personal, very hostile, very emotional, and, thus, I think prejudicial.
>
> (17 RT 4045.)

3. SECOND *MAINE* FACTOR – NATURE AND EXTENT OF NEWS COVERAGE

The second *Maine/Prince* factor is the nature and extent of the news coverage. Most of Dr. Bronson's testimony in the change-of-venue motion hearing, as well as the survey results he presented, related to the nature and extent of the publicity and its effect on the prospective jurors.

Dr. Bronson pointed out that while the newspaper coverage was heavier early on, diminishing as time went by (which might tend to mitigate

the effects of the adverse publicity on the jury pool), the trend in television coverage, because of the first trial, "was dramatically reversed." (16 RT 3896.) The heavy television coverage of the first trial was an important additional source of adverse publicity (16 RT 3886), "[a]nd it was the kind of event that television loves . . . . [T]he trial and the testimony of witnesses and the opening and closing statements and that sort of thing was the sort of thing that they feasted on." (16 RT 3897.)

Unlike many communities of its size, Kern County is served by only one daily newspaper, the *Bakersfield Californian.* (29 CT 8389.) Dr. Bronson made an analysis of its coverage, set forth in Defendant's Exhibit F. (29 CT 8389-8400.) Dr. Bronson noted first that 35 of the 48 newspaper articles relating to the case appeared on either the front page or on the first page of Section B. This is important because stories so placed are more likely to be read, and because their placement represents an editorial judgment regarding the interest of the local population. (16 RT 3897-3898.) Moreover, there was a comparatively large percentage of lengthy articles – 31 of the 48 were continued on an inside page – and some were very lengthy. (16 RT 3898.) There were, in addition, two sidebars (not counted as separate articles), one of them characterized by Dr. Bronson as very powerful. (16 RT 3899.)

(a) Dr. Bronson's "Hierarchy of Prejudice" with Respect to News Coverage

Regarding the nature of the publicity, Dr. Bronson explained what he called the "hierarchy of prejudice," which he had developed from both court rulings and social science research on what has the greatest tendency to create bias. (16 RT 3904.) It includes, in order from most prejudicial to less-so-but-still-prejudicial, (a) inflammatory publicity; (b) inadmissible material; (c) inaccurate coverage; and (d) material which creates a presumption of guilt.[29] (29 CT 2389; 16 RT 3904-3905.) Though, as indicated in Defendant's Exhibit F, there was no obviously inaccurate coverage noted in the newspaper publicity analysis, the same cannot be said for some of the headlines, discussed *post*, and there were numerous and stark examples of the three other forms of prejudice. (29 CT 8399-8400.)

(1) Inflammatory Publicity

In this case, the inflammatory coverage began, before anyone was arrested, with reports of fear in the community because of the murder; some women no longer walked to the laundry or left their doors unlocked; the early indications that this was perpetrated by a stranger; and the fact that no

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[29] Dr. Bronson derived the "hierarchy of prejudice" both from court rulings and from social science research on what has the greatest tendency to create bias. (16 RT 3904.)

one was in custody and the police were seeking the public's help. (16 RT 3905-3906.) In addition, the articles were filled with inflammatory words, which Dr. Bronson recited, including "brutal," "grisly," "ghastly," "viciousness," "stuff of nightmares," "horribly," "shocked," "shocking," "traumatized," "pain," "anger," "terrible tragedy," "mystery," and "disturbing" (16 RT 3907; see list at 29 CT 8390-8391).

(2) Inadmissible Material

The inadmissible material in this case, Dr. Bronson explained, arose from the media coverage of the result of the first trial. The 11-1 verdict was reported over and over again. In addition, it was reported that the holdout holdout juror's vote was based on his opinion that Harris did not look like a killer, and on how Harris was raised. The newspaper also reported that the holdout juror was irrational and irresponsible, not looking at both sides, and rigid in his conclusion. All of that told the prospective second-trial jurors that 11 jurors had found guilt but one irrational juror had not. (16 RT 3921; *see* list at 29 CT 8394, ¶ 10.) The suggestion that the holdout juror was acting irresponsibly was, for all intents and purposes, extraneous information persuading the potential jurors to vote guilty before the second trial even started. (16 RT 3907-3908.)

(3) Inaccurate Coverage in the Headlines

Although his report did not list any inaccurate material within the news stories themselves (29 CT 8391), Dr. Bronson did note an inaccurate headline that said "Test Match DNA Markings to Pair." In truth, the evidence adduced at the first trial was that the sample taken was too small to make any DNA conclusions. Bronson added that, given the power of DNA in the public's mind, the headline itself was prejudicial. (16 RT 3911-3912.) So, too, was a continuation-page headline in a different story that said "MANNING: Suspect's ex-female friends quit trying to defend him," when the evidence at trial was otherwise. Indeed, Dr. Bronson remembered that headline as being associated with the most prejudicial article he read. He assumed, without knowing more, that the headline was correct; if correct, it was at least somewhat prejudicial; if incorrect, it would be that much worse. (RT 3912-3913; the article in question is at 30 CT 8710, and the headline cited by Bronson is on the jump-page, at 30 CT 8711).

(4) Presumption of Guilt

Regarding the creation of a presumption of guilt, Dr. Bronson quoted in his report, and then on the stand, from *Williams v. Superior Court, supra,* 34 Cal.3d at p. 590, to the effect that unfairness may arise

even though the news coverage is neither inflammatory nor productive of overt hostility.[30] (16 RT 3314.) The prejudice arises from two factors revealed in social science research. The first is the notion of *uncontrol*, meaning that people are reading these things outside of the controlled, structured atmosphere of the courtroom. The second is called the *primacy effect*, meaning that information learned early on tends to be best remembered. (16 RT 3915.) The primacy effect creates or contributes to a presumption of guilt, by creating a

> sort of mindset as to how one is going to view the case. . . . It doesn't mean that the defendant can't be acquitted or the fact disproved. But . . . *the burden has shifted.* And, you filter the trial experience through the attitude you bring to it.
>
> (16 RT 3916; emphasis added.)

Under the primacy effect, the juror so influenced by pro-prosecution news coverage gives different levels of credibility to prosecution versus defense witnesses. The juror has a story of what happened, and it has become part of him or her. Those things that confirm it are more likely to be accepted and remembered, while the things that are in conflict with the

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[30] *Williams* quoted *Corona v. Superior Court* (1972) 24 Cal. App. 3d 872, 877: "A reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility." The *Williams* opinion put it this way: "[E]ven factual accounts, if continuous and extensive enough, can be potentially prejudicial." (34 Cal.3d at p. 590.)

story are not remembered as well. In effect, *the juror's threshold of reasonable doubt has shifted*. (16 RT 3917.) Moreover, in this case, after the newspaper coverage slacked off, the TV coverage picked up, reinvigorating initial impressions. As a result, any possible curative effect of the passage of time, referred to in the cases and discussed *post*, at page 138, was in large part lost. (16 RT 3917-3918.)

Even more damaging for purposes of the presumption of guilt, Dr. Bronson explained, was the publicity contradicting Harris' defense of consensual sex, especially as it came out during the first trial:

> [C]learly the claim of consensual sex is the heart of the case. The rape, whether or not there was a rape, and whether or not there was or could have been consent, that's what this case is about, it seems to me. And, there are constant attacks, reported comments at the hearings and trial and by roommates and others on whether or not there was any consensual sex. And . . . one would think that it [that the sex was consensual] is almost a ludicrous claim the way it is presented in the media.
>
> (16 RT 3920-3921.)

Further, Dr. Bronson explained, there were many conclusory statements of guilt, both by the police and by the newspaper. Again and again, the police reported that Harris was the right guy, that they had the evidence and were confident in the case, that the parents were relieved that Harris had been arrested, that the case was strong even without the DNA

evidence, that the case was solid, and the like. (16 RT 3922; *see* list at 29 CT 8395, ¶ 11.) Similarly, the newspaper reported in several articles that the victim *had* been raped, thereby pre-judging what may have been a determinative issue in the case. (16 RT 3922.)

The newspaper also reported both that Harris had turned down three requests for interviews and that he did not take the stand – suggesting a tacit admission of guilt, and that he was covering up. This, Dr. Bronson explained, involved an underlying implication: "Clearly, if he weren't guilty, he would have no reason not to talk to the newspapers and not to talk or take the stand in the case. Unfortunately, that's perhaps a shared perception that jurors have as well." (16 RT 3923.) To the extent that the primacy effect sets these views into the minds of the jurors, it undercuts the later standard instruction regarding the Fifth Amendment privilege against self-incrimination. (U.S. Const., Amend. V.)

Even when there was exculpatory evidence reported – and Dr. Bronson acknowledged that exculpatory evidence *was* reported – it was almost invariably followed, most often in the same article, by inculpatory evidence. For example, a report that appellant's girlfriend said that she knew he didn't do it, that he wouldn't do such a thing, was followed in the same article by reporting that the suspect's former female friends had

stopped trying to defend him. Similarly, when there was some talk about an alternative suspect in this case, that was almost invariably followed by assertions that Hill's alibi had been checked out or confirmed by the police. (16 RT 3924-3925.) Dr. Bronson particularly noted the impact of this coverage on the second trial, when the evidence at the first trial showed that the alibi was not so airtight:

> Well, clearly, one reading this coverage would be left with very little room to believe that it was Mr. Hill. And that was particularly so because of the fact that he had what appeared to be an ironclad alibi. If, in fact, that were not the case, as your hypothetical suggests, clearly that would be very significant. . . .
>
> In other words, to the extent that people say well, maybe he did it, but equally possibly maybe the boyfriend did it, that's quite different from entering with a belief that the possibility of Mr. Hill having done this because of his strong alibi is de minimus. That just isn't part of one's considerations.
>
> (16 RT 3925-3926.)

(b) Television Coverage

In his testimony, Dr. Bronson explained that while the television coverage did not introduce a lot of new information beyond what the *Californian* had covered, it covered the case in a very different of way, with, for example, repeated showings of the body bag being placed on the gurney. More troublesome, however, was the fact that the overwhelming number of television stories were more recent, with daily coverage of the

first trial. One of the three television channels had 78 of its 130 reports in December, 1998, alone (the period of the first trial); and another had close to 50% of its coverage during the first trial. A major concern of Dr. Bronson's was that the coverage of the first trial and verdict emphasized the racial underpinnings of the case, and "the various ways that the subtle and sometimes not so subtle bias of the coverage affects the way people will consider and evaluate any evidence that they may hear in court." (17 RT 3962-3964.)

4. THE THIRD *MAINE* FACTOR – SIZE OF THE COMMUNITY

The third *Maine/Prince* factor is the size of the community. As of the beginning of 1999, the population of Kern County was 648,400, the 14th largest in the state. The 13 larger counties had almost 80 percent of the state's population, the 44 smaller counties had just 18.8 percent. (RT 3949-3950.)

The size of the community is important in this sense: In a large county, such as Los Angeles, you could have 90% of the population absolutely prejudiced against the defendant; the remaining 10%, however, would still allow you a very large number from which to pick a jury. (17 RT 3950.) Thus, statistically, there is a hedge against a tainted venire. However, in a small county, as Dr. Bronson explained, if you wish to avoid

those who have been exposed to prejudicial publicity, you have to be willing to accept such a limitation on available jurors that the remainder would tend statistically to be a fairly unrepresentative jury. Since almost everyone in the community knows about the case and has an opinion, you have to end up with a jury composed of people who don't know what everybody else knows, who don't read the local paper, watch the television news nearly as much, who are very uninvolved in their community. Though a certain incidence of such a prospective juror is present in every venire, and it should not be suppressed, there is a perverse concentrating effect in high profile cases if all or most of those who have been exposed to media bias have been excused. (17 RT 3950-3951.)

Moreover, in a small community, with fewer "awful" crimes, the more serious crimes "become embedded in the psyche of the community and, therefore, [are] remembered longer . . . ." (17 RT 3952.) And fewer crimes means longer community memory, as well as a higher percentage of the community being somehow linked to the crime through people they know, whether they are witnesses, or friends of the victim, or the like. (17 RT 3952.)

Dr. Bronson characterized the community as follows:

> [T]here is a sense here of a small community, that even though the population got larger, the ambiance, the culture,

> does not appear to have that great sense . . . that you're in a large city . . . . It's much more like what you'd find in a much smaller community."

(17 RT 3954.)

What Dr. Bronson does not mention as an additional factor is that Bakersfield and its environs were served by only one daily newspaper, which could only enhance the "smallness" of the community for these purposes.

5. THE FOURTH AND FIFTH *MAINE* FACTORS – RELATIVE COMMUNITY STATUS OF DEFENDANT AND VICTIM

The fourth and fifth *Maine/Prince* factors, the community status of the defendant and the prominence of the victim are, in most of the cases, spoken of together.

In this case, the differences in relative status arose from the publicity itself, which is fully described *post*. In addition to the inherent differences between this "angel in heaven" and the defendant who "allegedly" raped, robbed, sodomized and killer her, the differences extend even to the pictures used by the newspaper. Photographs of the defendant, in which he appeared alone 11 times, and two additional times alongside a picture of the victim, showed of course that he was African-American (29 CT 8398, ¶ V.A.) In addition, the initial pictures were of very poor quality,

or showed him facing away from the camera. (*E.g.*, 30 CT 8695, 8708). In contrast, there were 15 better-quality pictures of Manning, most showing her smiling and happy. (*E.g.,* 30 CT 8680, 8689, 8710, 8713.)

The most obvious difference, however, arose from the respective races of the victim and the defendant. The racial difference, Dr. Bronson opined, just could not be ignored, especially as an implicit factor in the discussions of why the victim would not have had consensual sex with this defendant:

> Race is particularly dangerous in a case where the defense was consensual sex. And so here we have that volatile mix of pretrial publicity, a death qualified jury with all kinds of implications from that, and a colorable claim of reasonable doubt, if not factual innocence. There is a theme that a white, attractive, successful blond wouldn't have sex with a black man. Especially one with a criminal record involved in drugs and with no formal education . . . . [¶] But that same reticence didn't seem to apply when newspapers discussed her boyfriend, even though there were enough references for me to become aware that he, too, had been involved in drugs, and perhaps still was, and had no formal education like Mr. Harris.
>
> (16 RT 3940-3941.)

Moreover, noted Bronson, the dangerous brew of race and sexuality was further exacerbated by the *Californian*, which, after it began the very damaging series on August 24th, 1997, consistently used the terms rape and murder together (with "rape" consistently preceding "murder") in 14

consecutive articles leading up to the first trial. (16 RT 3941-3943.) Six of those articles were accompanied by pictures of Manning and Harris, four of them in which they both appeared. (30 CT 8710-8728.)

6. THE PUBLIC OPINION SURVEY

Dr. Bronson noted initially that even before conducting a public opinion survey – that is, simply on the basis of his review of the media content – he had concluded, "First, that the prospective jury pool would be unfairly guilt oriented. [¶] And second . . . that the penalty portion would also be somewhat biased by the nature of the coverage." (RT 3964.)

Turning to the public opinion survey conducted February 11-20, 1999 (after the first trial), Dr. Bronson first noted that the recognition rate (the percentage of respondents who said they were familiar with the case after two questions) was "pretty high" – 71.5% – in comparison with other appellate-reported survey results in venue-change cases. (17 RT 3985; 30 CT 8767.) Thus, the recognition rate was only 65% in *Williams v. Superior Court, supra,* and 50% in *People v. Williams* (1989) 48 Cal.3d 1112, and the court changed the venue in both of them, one on a pre-trial writ, the other on a post-conviction reversal. (17 RT 3987; 29 CT 8372.)

The survey results divided those who had prejudged the case into two separate percentages – the percentage of prejudging respondents

among *all* of the respondents, including those who were not familiar with the case, and the percentage who had prejudged the case of those who were familiar with it. Among all respondents, 39% indicated prejudgment of guilt. Among those who were familiar with the case, 54.9% had prejudged it and believed Harris to be definitely or probably guilty. (17 RT 3985-3987; 30 CT 8767.)

In his charts comparing these and other survey results, Bronson designates the percentage of all respondents prejudging guilt as "Guilt I," and the percentage of those familiar with the case as "Guilt II." (The charts appear at 29 CT 8371-8372.) Bronson testified that only two reported California cases had a higher Guilt I number, one in which a change was ordered, the other in which it was not. Only one case had higher Guilt II numbers, the Rodney King case (*Powell v. Superior Court* (1991) 232 Cal.App.3d 785), in which the trial court's denial of a venue change was reversed. (17 RT 3993; 29 CT 8371.) Moreover, as Dr. Bronson noted, (and see chart at 29 CT 8371), many cases in which a venue change was ordered had Guilt I and Guilt II numbers *lower* than those found in the instant case.[31]

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[31] The cases, and the Guilt I and Guilt II numbers for each (or Guilt I or Guilt II, where it was not clear which it was), are as follows:
(continued...)

The survey also showed the following startling results among those who recognized the case: 80.8 percent of the survey respondents were aware of the racial differences between appellant and Manning. Of the 16 previous cases in which Bronson had used surveys with racial questions, this number was exceeded in only one of them. (17 RT 4002-4403; 29 CT 8402; 30 CT 8768; and see *People v. Williams*, *supra*, 48 Cal.3d at p. 1129; quoting *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 594 [prejudicial mix of racial, sexual, and social overtones].) Further results among those familiar with the case showed that 45 percent chose the death penalty as the appropriate sentence; almost half, 47.2 percent, had heard that the jury hung 11-1 for conviction in the first trial, and 60 percent of those said that fact made them more likely to believe the defendant was guilty. Moreover, almost two-thirds of those who did not know that fact but were informed of it said it would make them more likely to believe in guilt. (17 RT 4001-4002; 30 CT 8768.)

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[31] (...continued)
People v. Tidwell (1970) 3 Cal.3d 62 (Guilt I = 31%; Guilt II = 31%); *In re Miller* (1973) 33 Cal.App.3d 1005 (Guilt I = 18%; Guilt II = 17%); *Martinez v. Superior Court* (1971) 29 Cal.3d 574 (Guilt I or II = 5%); *Williams v. Superior Court* (1983) 34 Cal.3d 584 (Guilt I or II = 22%). (29 CT 8371.)

Several "specific recognition" questions were asked of those who recognized the case, in order to measure the level of recognition (*see* the questions and results at 30 CT 8769-8770, questions 5a-f). The average number of those having specific recognition of facts about the case, 59.1 percent – which included one answer as low as 22 percent but all the others ranging from 47.2 percent to 80.8 percent – was, in Dr. Bronson's expert view, "very high, in some ways surprisingly high." (17 RT 4004-4005.) Another way to view the high incidence of specific knowledge is that 93.4 percent of those who recognized the case also knew of at least one or more of the specific facts asked about the case. (17 RT 4005-4006; 30 CT 8795.) After reviewing for the court the percentages of those who knew two, three, and more of the specific facts asked about,[32] Dr. Bronson indicated that, "these numbers are, comparatively speaking, quite high." (RT 4006.) Defendant's Exhibit J perhaps provides the answer as to why so many knew so much: 95 percent of the 400 respondents either read the local newspaper and/or listened to local television or radio news at least

[32] The additional numbers were that 85.7 percent knew of two or more specific facts; 75.5 percent knew of three or more specifics; 56.6 percent knew of four or more specifics; 34.3 knew of five or more, and 8.7 percent knew all six of the specific facts asked about. (30 CT 8795.)

three times a week, and 68 percent of them did both. (17 RT 4007; 30 CT 8796.)[33]

This high incidence of knowledge correlated directly with prejudgment of guilt. Page 8 of Exhibit J (30 CT 8799), which shows a cross-tabulation of the degree of recognition of specific facts about the case with the degree of prejudgment of guilt, makes this clear. Prejudgment ranged from a low of 21.1 percent of those who recognized no specifics about the case up to 66.3 percent of those who recognized five or six specific facts as having prejudged defendant as guilty. Thus, the more people knew about the case from the media, the more they prejudged guilt. (17 RT 4014-4015.) Similarly, page 9 of Exhibit J cross-tabulates knowledge of the vote in the first trial with those who say that vote would make a difference prejudging guilt, 74.4 percent of the time, and, on the next page, that number goes to 76 percent of those who are informed of the

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[33] Page 6 of Ex. J (30 CT 8797) contains a cross-tabulation, which confirms a direct relationship between the degree of media penetration and knowledge of the case, where high media penetration (i.e., both regular newspaper reading and some electronic media), led to 77.4 percent recognizing the case; for medium (read or listens/watches but not both) it is 63 percent, and for low (does not read and does not listen/watch regularly) it is down to 40.9 percent. So that is further validation for the survey, as is the chi square test, which yielded a "sig" in which a 1/100 chance of its being spurious is considered highly statistically significant, and the 1/10,000 result here, "if there were such a thing, would be highly, highly statistically significant." (17 RT 4012-4013.)

11-1 verdict and say that it would influence their vote. (17 RT 4015; 30 CT 8800-8801.)

Another disturbing set of statistics, especially in light of a venire in which African-Americans were strikingly under-represented,[34] showed that on the survey question concerning the appropriate penalty if Harris were found guilty (30 CT 8766, question 4), only 11.1 percent of blacks surveyed opted for the death penalty, while 47.3 percent of non-blacks did (30 CT 8803).[35] Similarly, only 16.7 percent of blacks prejudged Harris guilty, while 57.5 percent of non-blacks did (30 CT 8804). (17 RT 4016-4017.)

Lest one's eyes glaze over in reading the foregoing recitation of statistics, the underlying tale is clear: The results of the survey confirmed Dr. Bronson's publicity analysis: media penetration in Kern County was deep, foreknowledge of the case was high, and the number of those with

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[34] The under-representation of African-Americans in the second-trial venire is fully discussed *post,* at pages 172-173.

[35] The survey asked the following question about an appropriate penalty: "Q4. The district attorney is seeking the death penalty for Willie Harris. Let's assume the jury finds Harris guilty of murdering Alicia Manning. Then there will be just two possible sentences, either the death penalty of life without possibility of parole. Based on what you know about the case and the defendant from the media, which sentence do you believe the jury should select, the death penalty or life without possibility of parole?" (30 CT 8766; underscoring in original.)

foreknowledge who had prejudged the case, especially among non-African-Americans, should have been dispositive of the change of venue motion in appellant's favor.

Could prospective jurors set aside their foreknowledge and prejudgment? Dr. Bronson was asked why he didn't include in the survey a question whether, if they had an opinion about defendant's guilt, they could set it aside. Dr. Bronson explained that, based on empirical studies he had conducted, survey responses to such a question yield no meaningful information, because the question is " too leading, too self-serving, and indeed, in the [recently developed standards for venue surveys Dr. Bronson was involved in developing], it's a type of question that is not deemed appropriate." (17 RT 3993.) For example, in anonymous surveys of "shadow jurors" (those called to the courthouse but not into court), answers included " really ugly stuff, racial epithets, talk about lynching and the like, but when you get into the courthouse, everyone is in good-citizen mode." Similarly, only 3 to 5 people out of 400 anonymously surveyed say that they cannot prejudge guilt because there is a presumption of innocence, but one in the courtroom, the frequency of this answer goes up significantly, and it goes up even more for the actual jury pool. (17 RT 3995; *see also* 17 RT 4024-4029 [cross-examination].)

7. DR. BRONSON'S CONCLUSIONS

Dr. Bronson reached a conclusion that, when one adds together the racial factors, Harris's prior record, and the sexual characteristics of the case, it resembled and even exceeded the factors which led this court to require changes of venue in *People v. Williams*, *supra*, 48 Cal.3d 1112 and *Williams v. Superior Court*, *supra*, 34 Cal.3d 584. (16 RT 3936-3937.)

Later, Bronson took up possible remedies. He thought that delaying the trial, while sometimes effective, would not help in this case. (17 RT 4019.) He also opined that the normal voir dire alternatives, including questionnaires, individualized and sequestered voir dire, some partially attorney-conducted voir dire using open-ended questions rather then the leading and close-ended type, or granting extra peremptory challenges to the defense, would be helpful but insufficient in this case.[36] (17 RT 4020-4022.) The only remedy, given the extensive and pervasive harm to the jury pool by the pretrial publicity, would be a change of venue. (17 RT 4023.)

Asked at one point for his overall conclusion regarding the impact of the pretrial publicity, Dr. Bronson stated that "there is a reasonable

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[36] Of course, the trial court here not only denied the venue-change motion but denied many of the other palliative efforts suggested by Dr. Bronson and requested by the defense.

likelihood that the defendant could not have a jury panel that was unaffected by the pretrial publicity and could afford him the presumption of innocence to which he's entitled."[37] In response to an objection by the prosecution, the court struck the final portion of Bronson's statement, after "that was unaffected by the pretrial publicity." (17 RT 4018.) Similarly, the trial court later sustained an objection to the question of whether Mr. Harris would be able to begin his trial with the burden of proof properly in place. (17 RT 4022.)

In argument, the defense pointed out that the pre-trial test for prejudice in a change of venue motion was one of reasonable likelihood that a fair trial could not be had, and that *the level of publicity in this case was in the top 10 of the appellate cases, while the level of prejudgment by prospective jurors was in the top three.* (17 RT 4071-4072.) Moreover, despite the prosecutor's belief that this could be resolved in voir dire, the cases suggested otherwise, in particular *Corona v. Superior Court*, *supra*, 24 Cal.App.3d at pp. 878-879) and *People v. Williams*, *supra,* 48 Cal. 3d at p. 1129 (a juror's declaration of impartiality is not conclusive). In short,

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[37] In response to an objection by the prosecution, the court struck the final portion of Bronson's statement, after "that was unaffected by the pretrial publicity." (17 RT 4018.) This was error.

the survey's finding of 95 percent media penetration showed that the reasonable likelihood standard had been met. (17 RT 4085-4086).

8. THE TRIAL COURT'S RULING

In stating its reasons for denying appellant's motion to change venue, the trial court concluded that the defendant could have a fair trial in Kern County, or, conversely, that there was not a reasonable likelihood that he would not be able to obtain a fair trial. (17 RT 4098-4099.) First, the court correctly observed, "This is a case that is "as serious as a case can get in that the defendant's life is on the line . . . ." (17 RT 4095.) The court accurately described the *gravity* of the crime, that is, it's seriousness in the law and possible consequences to the defendant. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 582.)

Regarding the nature and extent of the coverage, the court acknowledged that it was substantial, including the nature and brutality of the crime and its sexual overlay; however in looking at the electronic media coverage, the media regularly reported on the defense theory of the case and that similar homicides occurred while Harris was custody. (17 RT 4090-4091.) Regarding the publicity about the prior 11-1 verdict, the court said, the holdout juror was interviewed and explained his reasoning, and that was reported in the newspaper. (17 RT 4091.) The court also noted

that while there was extensive coverage, it was not only of the prosecution's theory of the case as it can be when there isn't much doubt about the perpetrator. (17 RT 4091-4092.) In response to a question by defense counsel, the court found that press coverage was pretty even-handed. (17 RT 4093.) The court also found that the media did not paint an unsympathetic portrait of defendant, referring to his priors as petty and quoting his girlfriend saying that he was sweet-tempered and not given to violence. (17 RT 4093.)

Regarding the size of Kern County, the court noted that of the seven counties with more than 500,000 but less than 1 million persons, only Kern County is of large geographical size. This, the court said, was significant because the survey did not cover the desert area of the county, except for 26 calls to Ridgecrest, while there was no effort made to sample Tehachapi, Mojave, Rosamond and the small communities of Boron and North Edwards, from which the venire would also be drawn. (17 RT 4095-4096.)

Regarding the status of the victim and the accused, the court decided that the most important point was that the defendant was a local person with a long family history in the community, while the victim was from Virginia. (17 RT 4095-4096.) The court acknowledged: "I don't gainsay

the fact that the press painted a very empathetic picture of the victim . . . . She was humanized. [¶] She was even, if you would, canonized in the press." (17 RT 4096.) The court also found significant that the defendant was not demonized in press, and was not "quoted as having said things that were callous or uncaring about the victim." (17 RT 4096-4097.)

9. DENIAL OF APPELLANT'S RENEWED MOTION

Shortly before the second trial, the prosecution sought to introduce in the coming trial the testimony of one Baird, a pre-trial jail inmate of Harris's, who claimed that Harris had all but confessed to him the killing of a CSUB co-ed. On May 25, 1999, the *Bakersfield Californian* ran a front-page, above-the-fold article, headlined "Molester may testify on Harris Comments in Cell." That afternoon, the defense again sought a change of venue based on the *Californian* article about Baird's allegation which appeared on May 25, 1999. (The exhibit was marked Court's Exhibit I.)

Voir dire commenced on June 7, 1999 (15 CT 3937), and there would be no dissipation of the taint by time, the defense argued, and even if a potential juror came in and said "I can be fair," Dr. Bronson had explained that such declarations overestimated juror's ability to do so when there is highly salient coverage. The article renewed mention of many of the facts of the case – the stab wounds, the mistrial, and the like – re-

embedding it all in the consciousness of the community. And, the defense noted, the court in *Maine* said that voir dire could not cure this kind of problem. (18 RT 4163-4169; see *Maine, supra*, 68 Cal.2d at p. 380 ["'there will remain the problem of obtaining accurate answers on voir dire – is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community.'" (Citation omitted].). In addition – and the defense could not know this at the time – Baird was not called, so the information was not only extra-judicial but extra-evidentiary.

The court again denied the motion, noting that the article included that Harris had denied saying anything of that sort to Baird, and that the rest of the information was no different than what had been reproduced in the past. (18 RT 4162.) The trial court concluded, again erroneously, that the *Maine* standard had not been exceeded. (18 RT 4170.)

B. THE COURT'S DENIAL OF THE VENUE MOTIONS WAS ERROR AND PREJUDICIAL, GIVEN THE SUBSTANTIAL LIKELIHOOD THAT APPELLANT COULD NOT GET A FAIR TRIAL DUE TO THE PRE-SECOND-TRIAL PUBLICITY

The Sixth Amendment to the United States Constitution declares that the accused in all criminal prosecutions shall enjoy the right to a trial by an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148-154.)

This fundamental right includes the right to a trial by a jury free from outside influences, such as prejudicial pretrial publicity. (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 362-363.) If an impartial jury cannot be impaneled, the defendant is constitutionally entitled to a change of venue, regardless of state statutory provisions governing the procedure. (*Groppi v. Wisconsin* (1971) 400 U.S. 505, 509-511.)

The California Constitution affords the same protections. Article I, section 16 guarantees a criminal defendant the right to a trial by an impartial and unprejudiced jury (*People v. Wheeler* (1978) 22 Cal.3d 258, 265), including the right to a change of venue if no such jury can be impaneled (*People v. Welch* (1972) 8 Cal.3d 106, 113).

Penal Code section 1033 states, in pertinent part: "In a criminal action pending in the Superior Court, the court shall order a change of venue: (a) on motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The statute incorporates the standard enunciated in the seminal federal and California cases, that the trial court must grant a change of venue where there is a "reasonable likelihood" that in the absence of such relief, the defendant will be denied a fair trial. (*Sheppard*

v. Maxwell, *supra*, 384 U.S. at p. 363; *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 383.)

Regarding the standard of prejudice that the superior court should have applied, "'[t]he phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.' [Citation.] Further, when the issue is raised before trial, *any doubt* as to the necessity of removal to another county should be resolved in favor of a venue change. [Citations.]'" (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 588, quoting *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578; emphasis added.) In this case, the very nature of the trial court's recitation of its reasons for denying the venue motion shows both that it was employing a balancing test and that it ignored this court's injunction that "any doubt" should be resolved in favor of defendant's motion. Simply put, the results of Dr. Bronson's survey, the nature and extent of the publicity, especially after its renewal during the first trial, and Dr. Bronson's extensive and conclusive findings, could not for any reasonable court add up to less than "any doubt."

In the following sections, appellant will explain the myriad ways in which the court erred, preventing anything resembling a fair trial.

1. THE TRIAL COURT ERRONEOUSLY EXCLUDED THE EXPERT'S OPINION THAT APPELLANT COULD NOT BEGIN HIS TRIAL WITH THE PRESUMPTION OF INNOCENCE INTACT

Dr. Bronson opined that there was a reasonable likelihood that appellant could not obtain a jury that was unaffected by pretrial publicity that prejudiced his presumption of innocence. (17 RT 4018.) When Dr. Bronson was asked whether appellant could begin the trial with a presumption of innocence, the court sustained the prosecutor's objection that it called for a legal conclusion. (17 RT 4022.) This was error.

> In *Maine v. Superior Court, supra*, 68 Cal.2d 375, this court adopted the comprehensive standards outlined in the Reardon Report for determining when a change of venue is properly required: [including the standard that the] determination [that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that a fair trial cannot be had] may be based on such evidence as qualified public opinion surveys or *opinion testimony offered by individuals*, or on the court's own evaluation of the nature, frequency, and timing of the material involved.
>
> (*Williams v. Superior Court, supra*, 34 Cal.3d at p. 588; emphasis added.)

Thus, it is appropriate for an expert witness to express an opinion that a fair trial cannot be had. Dr. Bronson's "legal conclusion" should have been admitted.

2. ON BALANCE, THE *MAINE* FACTORS COMPELLED A CHANGE OF VENUE, BECAUSE NOT ONE OF THEM WEIGHED AGAINST IT

As previously set forth, the trial court concluded there was not a reasonable likelihood that Harris would not be able to obtain a fair trial. (17 RT 4098-4099.) The court's reasoning betrays a refusal to view the evidence as a whole, ignores the clear weight of the inflammatory media coverage and Dr. Bronson's testimony regarding its affect on prospective jurors, and exposes the court's persistent refusal to acknowledge the prominence of race in the case. The court's reasoning does not withstand scrutiny.

(a) The Actual Media Coverage Fatally Tainted the Jury's Ability to Presume Appellant Innocent

In finding the coverage even-handed, the trial court focused on the electronic media's coverage of the defense theory of the case and the occurrence of other homicides while appellant was in custody. (17 RT 4090-4091.) This was beside the point. As Dr. Bronson explained, whenever defense-favorable information was included in the newspaper, it was immediately countered with pro-prosecution information in the same article. Moreover, the court seems to have focused exclusively on the *content* of the publicity, rather than on the *emotional effect* of the nature of

the crime and the very words used in the charges. And, once the prejudice inhered, as Dr. Bronson explained, the later, first-trial publicity, most heavily in the electronic media, only served to renew the original feelings created by the initial publicity rather than overcoming them.

Such additional publicity tends to persuade in favor of granting a change of venue. (See *Martinez*, 29 Cal.3d at p. 583; *Fain v. Superior Court* (1970) 2 Cal.3d 46 [venue motion denials reversed].) In *Martinez* the additional publicity was from a co-defendant's prior trial, and *Fain* involved a penalty re-trial following a well-publicized trial, convictions, appeal and reversal of the penalty. (2 Cal.3d at p. 53.) Similarly in this case, the widespread media coverage of the first trial served both to remind those who were exposed to it of all that had gone before, as well as providing the additional prejudice arising from the coverage of the first trial.

Similarly, the fact the holdout juror in the first trial was interviewed and explained his reasoning (17 RT 4091), far from mitigating the impact of the coverage, only made matters worse, for the hold-out juror's explanation, as Dr. Bronson explained, was non-rational. (16 RT 3921, discussed *ante* at page 75.)

Cherry-picking a select few items (such as the observation that appellant's priors were not serious) from a mass of negative publicity again elevates content over emotion. The prejudice arose here due to the heavily emotion-laden language with which the facts were described (see excerpts from the newspaper coverage, *post*, at pp. 105-114, 116-118), the breadth of the coverage, and the increased intensity in coverage of the first trial that renewed the "facts" (and emotions) remembered from the earlier coverage due to the "primacy effect."

The trial court further overlooked the high degree of prejudgment (54.9 percent) among those who had knowledge of the case, choosing instead to focus on the lower percentage (39.3) of those who had prejudged the case among the total number of survey respondents. According to Dr. Bronson's chart of appellate cases in which there were surveys that included prejudgment numbers, this case fell below only two of the reported cases in terms of the former number (Guilt I), and was second highest on the latter number (Guilt II). (29 CT 8371.)

(b) The Newspaper Coverage Expressed and Created Public Opinion Sympathetic to Manning and Hostile to Appellant From Which the Jurors Could Not Have Been Immune

The news reports in this case resembled the public outpouring of sympathy that occurred in *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 294-295. (*See, e.g.*, The *Bakersfield Californian*, May 24, 1997 [announcing that the California State Senate and Assembly adjourned their Friday floor sessions in honor of Ms. Manning].) In *Frazier*, "[t]estimonials to the deep sense of loss caused by [the] murder [of a local doctor] and that of his wife and sons filled the newspapers, and several reward funds were set up for the apprehension and conviction of those responsible." (*Frazier v. Superior Court*, *supra*, 5 Cal.3d at p. 289.) In *Frazier*, the public sentiment, as "expressed in the press" devolved into "fears . . . that the killers might strike again, and both gun sales and requests for guard dogs increased substantially." (*Id.*, at pp. 289-290.) There were similar reports in this case, such as the *Californian* article of May 24, 1997, under the front-page headline, "Residents stoic after slaying." The reporter of that article spoke with the residents of Manning's apartment complex, and wrote that much was unchanged since the murder. "But fear is here, indeed." One neighbor said she was taking precautions she hadn't before.

She also reported that another neighbor -- like Manning a single woman who attended the university – was

> "more nervous than ever because police don't have anyone in custody. [¶] 'She's . . . been scared, and I've definitely been locking my doors' said the resident, who was fearful enough to ask that her name not be used. 'I don't even take the garbage out without locking my doors.'"
>
> (30 RT 8363.)

More telling, however, were the repeated descriptions of the crime, in practically every story published. Keeping in mind what Dr. Bronson and this court have said about even neutral, factual descriptions, those descriptions are reproduced here to illustrate the likely impact on prospective jurors, even of factual descriptions of the highly inflammatory charges:

Articles Pre-Dating the Start of the First Trial:

> –May 29, 1997, pp. A1, A2. Alicia's father said he was told his daughter "was hit over the head, stabbed in the side of the neck and finally had her throat slit"; the death certificate lists the causes of death as stab wounds, with blunt force trauma; and her roommate found her stabbed and beaten body. (30 CT 8687-8688).
>
> –June 3, 1997, p. B1, describes crime as a "brutal stabbing death" (30 CT 8689).
>
> –June 6, 1997, pp. A1, A1. "Manning was stabbed repeatedly in the neck and face, then had her throat slashed. She also had been struck in the head with a blunt object, which was listed as another significant injury on her death

certificate. The official cause of death was lack of oxygen due to blood loss caused by a sliced and stabbed throat." (30 CT 8691-8692.)

–June 13, 1997, p. A1. "She had been stabbed repeatedly in the neck and face, and her throat was slit by her attacker. She also had been struck in the head with a blunt object, which was listed as another significant injury on her death certificate." (30 CT 8693.)

–June 13, 1997, p. A1 [sidebar to main story]. Manning's roommate, when she got home that night, and after brushing her teeth and combing her hair, tripped on the fan as she went into the bedroom, and so turned on the light. "What she saw still makes her shudder. [¶] 'There was just a lot of blood and her laying there,' she said. 'It was just so awful looking that the person would have had to have been absolutely nuts, and I want to think that I don't know anybody like that.'" (30 CT 8694.)

–June 18, 1997, pp. A1, A2 [the first story identifying Harris as the suspect]. Manning was found slain. "She had been stabbed repeatedly in the neck and face, and her throat was slit by her attacker. [¶] She also had been struck in the head with a blunt object . . . " (30 CT 8695-8696.)

–June 20, 1997, pp. A1, A2, reporting that the District Attorney has charged Harris with burglary, murder, rape and sodomy, and that the strongest evidence police have collected against Harris appears to be his inconsistent statements to detectives. "The inconsistencies in Harris' statement appear to center around his story that he had consensual sex with Manning." This is followed by quotes from Harris's various statements to the police. (30 CT 8697-8.) Later in the article, the following description appears:

"Manning was found lying on her stomach wearing only a white T-shirt with a Los Angeles Dodgers logo on it, reports show. [¶] There was a large amount of blood around her head and broken shards of glass. [¶] In addition to apparently being beaten about the head, she suffered stab

wounds to her face, neck and chest area, the coroner reported. Samples of semen also were found, the report said. The reports do not link the semen to any suspects. [¶] Police reported apparent defense wounds on Manning's left arm. Investigators also found a stainless steel bread knife with blood on it on the floor, they reported. [¶] Another serrated-edge slicing knife with two prongs at the end of the knife was found near the bed, the police reports state. [¶] It appeared the victim had been beaten in the head with glass bottles and a glass that were found broken, lying near the victim's body. Also, it appeared she had been stabbed numerous times with the two knives that were found, said a police report that was filed in court." (30 CT 8698.)

–June 21, 1997, p. A1. The story reports on Manning's complaints about Harris' repeated calls to her and Bucholz's apartment, revealed in documents "after charges were filed Thursday against Harris for murder, burglary, rape and sodomy." (30 CT 8699).

–June 24, 1997, p. B1. "Investigators claim they have a strong case against Willie Leo Harris, 28, the man charged with the killing, raping and sodomizing the 22-year-old Cal State Bakersfield student in her Ming Avenue apartment on May 20." (30 CT 8701.)

–June 26, 1997, p. B2. In daily "Law and Order" box, a report that preliminary hearing in June 11 burglary was postponed also recites the charges of "murder, rape and sodomy" in the death of Manning (30 CT 8703).

–June 27, 1997, p. B3. The daily "Law and Order" box on page B3 contains a report that police are also seeking to charge Harris with February purse-snatch, and recites that "Harris is charged with murder, rape and sodomy for allegedly stabbing Manning to death." (30 CT 8704.)

–July 3, 1997, p. B1. Harris, "the man accused of stabbing Alicia Corey Manning to death" pleaded not guilty,

after the judge "slowly read the charges of murder, burglary, rape and sodomy" (30 CT 8705.)

–July 17, 1997, p. B1. In a report on Harris being held to answer on the Torigiani burglary: "In an unrelated case, Harris, 28, is charged with murder, rape and sodomy in the stabbing death of Alicia Corey Manning . . . ." (30 CT 8707.)

–July 22, 1997, p. A1. In box in lower right corner of front page: "Coming Sunday – The murder of Alicia Manning, a 22-year-old Cal State Bakersfield student, shocked everyone who knew her and the community. It was a senseless and vicious murder of a young woman in her apartment preparing a final paper for graduation and a career in foreign service. Beginning Sunday, *The Bakersfield Californian* will take a closer look at this murder and details of the police investigation." (30 CT 8709.)

–July 24, 1997, pp. A1, A6. In long feature-length story headlined "Student's final hours recounted:"

"In the hours before her throat was stabbed and sawed with a pronged serving fork and steak knife, Alicia Manning called her East Coast friends to chat about her homecoming."

. . . . .

While the East Coast friends were trying to call her back, inside Manning's cluttered southwest Bakersfield apartment bedroom that night, "the young woman had been or was being raped and stabbed more than 30 times in her neck, shoulder and head. . . . [¶] The slashing that killed Manning severed her trachea and esophagus. Four blows to her head with a glass Pilsner bottle could have rendered her unconscious during much of the attack, according to the coroner's statements to police. The blows left shards of glass deeply embedded in her scalp."

. . . . .

"[P]olice believe they have their killer in Harris, a man with a long criminal record that stretches back to his early teens and includes two burglaries similar in style to the one at Manning's apartment." (30 CT 8710-8711.)

–August 31, 1997, p. A1. In a second feature-length article, which included a quote from a friend that "She was a princess on earth, . . . and now she's an angel in heaven," there is also this: "She had been beaten, stabbed in the face and neck and her throat was slit. She also had suffered head injuries. [¶] Willie Leo Harris, 28, the acquaintance police believe is responsible for the murder, is in jail, awaiting a preliminary hearing on murder, burglary, rape and sodomy charges . . . . Harris has pleaded innocent to all charges." (30 CT 8713.)

–September 7, 1977, pp. B1, B2. In Sunday feature-length story focusing on Harris, with the sub-headline, "Nothing in petty criminal's past foreshadows rape, murder Willie Harris is being accused of":

"But nothing in his past, at least the parts documented in his criminal records, foreshadows the shocking rape and murder he is now accused of committing."

. . . . .

"It was a crime marked by an unusual degree of violence – a frenzy of stabbing, a blow to the victim's head that left glass shards deeply embedded in her skull, a rape that may have been committed while Manning lay unconscious on the floor, experts have said."

. . . . .

"He is accused of rape, sodomy, burglary and robbery during he course of a first-degree murder . . . . A person found guilty of any one of these special circumstances, along with a first-degree murder conviction, could face the death penalty." (30 CT 8715-8716.)

–September 10, 1977, p. B2. In a "Law and Order" box on page B2, there is a report of a defense motion to exclude the public and media from preliminary hearing of "Willie Leo Harris, accused of murder, rape, sodomy, burglary and robbery . . . ." (30 CT 8717)

–September 11, 1997, p. B2. From a report headlined "57 wounds found on slain coed":

"Willie Leo Harris, 28, is charged with murder, rape, sodomy, burglary and robbery in connection with Manning's death. [¶] The violent crime left Manning with blunt force trauma to her head and at least 57 wounds . . . ." (30 CT 8718)

–Friday, September 12, 1997, pp. B1, B2, headlined: "Harris ordered tried in Manning murder":

Harris "will be tried for the murder and rape" of Manning.

. . . . .

"Harris, 28, is accused of the May 20 murder rape, sodomy, burglary and robbery of Manning . . . ." (Id.)

. . . . .

"Manning's death was marked by violence – a frenzy of stabbing and blunt force wounds that left her dead in her own apartment." (30 CT 8719.)

–Sunday, September 14, 1997, p. B6–Opinion page, letter to editor, under the headline: "No sympathy needed for murder suspect""

. . . . .

"Harris does not deserve any sympathy whatsoever. He is an apparent liar . . . , a thief and drug abuser . . . . Now he is accused of being a rapist and a murderer. No one should feel any sympathy for him." (30 CT 8721.)

–Wednesday, Sept. 24, 1997, p. B3, "Law and Order" Box – reports superior court arraignment and plea of innocence. "Harris is charged with first-degree murder, rape, sodomy, robbery and burglary in connection with [Manning's] death." (30 CT 8722.)

–Friday, September 25, 1998, p. B5 – "Law and Order" box – reporting that Judge Gildner denied defense request to unseal documents in two other murder investigations.

"Harris, 29, is charged with murdering and raping Manning in May 1997 . . . ." (30 CT 8723.)

–Friday, Sept. 26, 1997, p. B3, “Digest” box – “Harris relatives march at Kern County Courthouse”:

Family members marched at courthouse Thursday, professing his innocence.

“Harris is charged with the May 20 rape and murder of 22-year-old Alicia Corey Manning. Harris has pleaded innocent.” (30 CT 8724.)

–Monday, January 26, 1998, pp. B1, B2. This is the only story which does not related strictly to this case. Under the headline: “Only one child slain in Kern in ‘97 >Teens are suspects, however, in 14 of Kern’s 64 killings for the year,” the story related a number of murders.

On page B2, there were two paragraphs on Manning: “The innocent nature of the [previously mentioned] victim matched another well-publicized homicide, the May stabbing, beating and rape of Alicia Corey Manning, 22, a Cal State Bakersfield senior.” (30 CT 8726.)

–Friday, September 25, 1998, p. B5 – “Law and Order” box – reporting that Judge Gildner denied defense request to unseal documents in two other murder investigations.

“Harris, 29, is charged with murdering and raping Manning in May 1997, . . .” (30 CT 8723 [note that this is bound and paginated out of order].)

Articles From Start of First Trial Forward:

–Tuesday, Nov. 24, 1998, pp. A1, A2. The story focuses on Bucholz’s testimony: “‘There was . . . blood covering most of her face and splattered on the wall. I saw a knife over by my bed and towels with blood on it in a couple of different areas of the bedroom.’” (Id)

. . . . .

“Harris, 29, is the man responsible for the grisly scene where Manning was repeatedly stabbed and had her throat slashed, according to Deputy District Attorney John Somers.”

. . . . .

"The bloody knives, the smashed bottles and pilsner glass were the signs along the road that point to Harris, Somers said." (30 CT 8728-8729).

–Wednesday, Nov. 25th, 1998, p. B1, "Like a carpenter building a house," Somers [the prosecutor] "is using the evidence to build his case against Harris, who is charged with raping and murdering 22-year-old Alicia Corey Manning.

–Tuesday, December 1, 1998, p. B3, a story that begins by describing defense witness Findley's positive statements about Harris, goes on:

"But Findley's description of her boyfriend's character is incongruous with the one painted by prosecutors. [¶] "Harris is on trial for the rape and murder of 22-year-old Alicia Corey Manning . . . [and] could face the death penalty if found guilty . . . ." [¶] Manning was found "lying in her own blood after repeatedly being stabbed and bashed in the skull with a blunt object." (30 CT 8731)

–Wednesday, Dec. 2, 1998, p. B1: "Blood covered Manning's bed and was spattered against the walls. She bled to death after being stabbed more than 50 time and having her throat slashed. She was also struck several times in the head with a blunt object. [¶]Harris is on trial for raping and murdering manning Manning. He could be sentenced to death if convicted." (30 CT 8732.)

–Thursday, December 3, 1998, pp. B1, B2: "Harris is charged with raping and murdering Manning. The 22-year-old student died three weeks shy of graduating with a degree in political science." (30 CT 8734.)

–Friday, December 4, 1998, p. B1, 2, describing the prosecutor's closing arguments: "When Manning, who knew Harris, surprised her [*sic*: him], Harris raped and killed her before taking a portable stereo, television and videocassette recorder, [prosecutor John] Somers said."

. . . . .

"Alicia Manning had 57 separate puncture wounds," [defense attorney John] Coker told jurors. "With each one of the wounds, Alicia Manning cries our from her grave one word – rage."

. . . . .

"You're looking at a scene not of an act of consensual sex followed by an argument with someone else," Somers said, referring to a picture of the the murder scene. "It's a scene of a rape, murder."

"Somers said there was a 45-minute window . . . that gave Harris enough time to . . . rape and murder Manning before completing the burglary." (30 CT 8735-8736.)

–Saturday, December 5, 1998, pp. B1, B2, reporting that the jury met briefly in the afternoon to begin deliberations before being excused for the weekend. "The verdict could prove to be a life-or-death decision for Harris, who is charged with a variety of crimes, including rape and murder. If convicted of murder and a combination of the other crimes, he could be sentenced to death."

. . . . .

"'The crime scene says it's not consensual sex, but rape and sodomy,' Somers said.". (30 CT 8737-8738).

–Tuesday, December 8, 1998, p. B2 – "Law and Order box" – reporting that the jururs completed their first full day of deliberations.

"Harris is charged with numerous crimes, including rape, sodomy and murder in connections with the May 20, 1997 slaying of 22-year-old Alicia Corey Manning. [¶] If Harris is convicted, he could be sentenced to death." (30 CT 8739.)

–Thursday, Dec. 10, 1998, pp A1, A2, reporting the mistrial: The jury of seven men and five women deadlocked 11-1 to convict Harris of rape, robbery and murder in connection with the 1997 slaying of 22-year-old Alicia Corey Manning." (30 CT 8744)

– Friday, Jan. 8, 1999, p. B1, reporting on the sentence for the Torigiani burglary, for which Harris was convicted in the first trial, repeats arguments of counsel, including that DDA Somers argued to the jury that "Harris raped and murdered Harris during a bungled burglary attempt." (30 CT 8746. [Note that these are the reporter's words, not Somers'].)

–Wednesday, Feb. 3, 1999, p. B3, reporting on motion to continue in order to conduct the change-of-venue survey: "If convicted of rape and murder as charged, Harris could be sentenced to death." (30 CT 8747.)

Thus, of the 46 articles which appeared in the *Californian* between the time of the crime and the taking of the survey prior to the second trial, 37 included references to rape, murder, sodomy, blood, stabbing, etc.

Appellant's point in reciting all this is simply that it was impossible for prospective jurors not to be affected by the constant, consistent, and repeated drumbeat, in those 37 articles, of highly inflammatory, emotionally-loaded words, even if they might be factually correct. To the average reader – and prospective juror -- what came through was rape, murder, sodomy, Harris, blood, stabbings, slit throat, Harris, death penalty, gruesome, Harris, white college student, rape, black man, murder, Harris.

"'The goal of a fair trial in the locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media.'" (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 581, quoting *Corona v. Superior*

Court, *supra*, 24 Cal.App.3d 872, 878.) The harm from the press coverage is in its prevalence, not necessarily in its "hostility" toward a named defendant. "'A reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility. When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt.'" (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 580, quoting *Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 877.) The press coverage in *Maine v. Superior Court*, *supra*, 68 Cal.2d 375 and in *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623 was neither inflammatory nor "particularly hostile." (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 580, citing *People v. Tidwell* (1970) 3 Cal.3d 62, 70 and quoting *Steffen v. Municipal Court*, supra, 80 Cal.App.3d at p. 626.) Yet, in each of those cases, a change of venue was ordered . The coverage in appellant's case was at least as damaging.

Moreover, the coverage in this case was not "balanced." The trial court's finding that the coverage was "evenhanded" and included the defense theory as well as the prosecutor's theory (discussed *ante*, at pp. 94-95) is belied by the evidence. (17 RT 4091-4093.) First, as Dr. Bronson

pointed out, the coverage of the first trial, which ended in an 11-1 verdict, created in the minds of the prospective jurors a prior guilty verdict. (16 RT 3707-3708.) Second, the defendant's prior record, including the first-trial burglary conviction, made the defendant out as a career criminal. (16 RT 3908-3909.) Third, as Dr. Bronson explained, the primacy effect – by which information learned early on is the best-remembered – cannot be ignored. In this case, most of the early coverage focused on the crime and, once he was arrested, on Harris as the one who did it. Fourth, Dr. Bronson detailed the media characterization of Manning, by which she became an almost mythic All-American girl, but one who was raped, sodomized, and stabbed to death. By Harris. Even-handed coverage this was not.

(c) The Early Coverage and the Primacy Effect Created a Public Presumption of Guilt From Which the Potential Jurors Could Not Be Immune

The power of the primacy effect in this case is illustrated in the following samples of the early newspaper reports in the two-plus months which followed Harris's arrest. Note that *none* of these challenged the prosecution theory or presented Harris's. If the earliest reports regarding Harris are the ones best-remembered by prospective jurors, then this is what they remembered:

–Wednesday, June 18, 1997, pp. A1, 2, reporting that police had sent the evidence to the district attorney:

The detectives "feel confident that Harris is our suspect . . . ," says Sgt. Henry. (30 CT 8695.)

–Friday, June 20, 1997, pp A1,2, under the headline: "Charges filed in Manning homicide > Man already arrested on other grounds now faces murder, rape trial:

Reports that District Attorney has filed charges of murder, burglary, rape and sodomy against Harris.

The strongest evidence police have collected against Harris appears to be his inconsistent statements to detectives.

"The inconsistencies in Harris' statement appear to center around his story that he had consensual sex with Manning." (30 CT 8697).

This is followed by quotations from what he told the police in his various interviews (30 CT 8697)

Then, after a detailed account of the crime scene, the article describes the Torigiani burglary and repeats that police say the fact that burglary also involved some electronics make it similar to this one.

Further, it reports how Harris became nervous and anxious when a policeman told him about why they wanted his blood for a DNA screen.

Manning's boyfriend expressed relief at the charges – "I'm just glad they think he is the one, they have somebody," he said. (30 CT 3897-3898.)

–Saturday, June 21, 1997 pp. A1, 2, under the headline: "Reports: Suspect annoying >Manning told friends of bothersome calls."

Alicia "told friends the day before she was killed she was repeatedly bothered by the man accused of her murder, reports filed in Bakersfield Municipal Court show." She told her boyfriend and his father that Harris "incessantly called the Ming Avenue apartment looking for Manning's roommate." Also, she complained to them that she couldn't sleep or study.

The story again reports on and details Harris' inconsistent statements to the police.

Sgt. Henry says that the case is strong even without DNA evidence. (30 CT 8699-8700.)

–Tuesday, June 24, 1997, pp. B1, B2 (sidebar box about how DNA fingerprinting works), headlined: "Genetic fingerprints due in Manning case >Results of blood samples taken in the investigation ready for review soon"

Investigators are waiting for one of the "final touches" on their case

"Investigators claim they have a strong case against Willie Leo Harris, 28, the man changed with the killing, raping and sodomizing the 22-year-old Cal State Bakersfield student in her Ming Avenue apartment on May 20."

Laskowski, after explaining how DNA works, is quoted, regarding the semen: "'We basically have an admission from the suspect that it is his . . .'"

Then, after stating that the existence of DNA evidence may have led Harris to change his story, there is a repetition of his inconsistent statements to the police. (30 CT 8702.)

–Thursday, July 3, 1997, pp. B1, B2, reporting the arraignment and plea, states that BPD investigators say they have a strong case against Harris. (30 CT 8705.)

–Sunday, August 24, 1997, pp. A1, A6, under the headline "Student's final hours recounted >Alicia Manning was preparing for her final exams the night she was raped and killed:

"[P]olice believe they have their killer in Harris, a man with a long criminal record that stretches back to his early teens and includes two burglaries similar in style to the one at Manning's apartment."

The article reports that Harris's story – that he had consensual sex with Manning once in April and once that night – became increasingly suspicious because of the type of person they were learning Manning was: a conservative girl who was deeply in love with Hill. Harris' claim of consensual sex with her in April was further undermined when Bucholz told police that she didn't even meet Harris until May.

> Bucholz told the paper there was "no way" Manning would have a sexual relationship with Harris.
>
> The story again repeats the details of Harris's inconsistent statements to police, and that Harris has since lost the support of Bucholz and Findley. (30 CT 8711).

Thus, in the nine weeks and four days between Harris's arrest and his preliminary hearing, the newspaper coverage – found by the trial court to have been "even-handed"– recited no less than six times either the evidence against appellant or how sure the detectives were that they had their man. In addition, of course, they contained the afore-mentioned drumbeat of inflammatory language attaching Harris's name to rape, murder, sodomy, stabbing, etc.

Besides the obvious, however, there are more subtle clues to belie the trial court's finding of even-handedness. Contrast, for example, the following three paragraphs which appeared in the November 24, 1998 story (two-and-a-half months before the public survey was conducted) reporting on the first-trial opening statements:

> Harris, 29, is the man responsible for the grisly scene where Manning was repeatedly stabbed and had her throat slashed, according to Deputy District Attorney John Somers.
>
> . . . . .
>
> The investigation focused on Harris after he reportedly made inconsistent statements, was arrested for a burglary that shared some traits with the Manning investigation and DNA evidence from semen found on Manning that is consistent with Harris' DNA markings, Somers said.

> But James Coker, one of two deputy public defenders serving as Harris' attorneys, told jurors Somers' map took a wrong turn and calling Harris the killer is a dead end.
>
> (30 CT 8729.)

What is notable here is that the two paragraphs describing what the prosecutor said are written as fact, only stating at the end that this was what Somers asserted, while the paragraphs describing appellant's view of the evidence always *begin* with the fact that this information is from the defense attorney, and this style of reporting continues in the paragraphs following the ones quoted.

In another example, describing first-trial testimony on December 1, 1998 (detailed *ante* at pp. 112), a story which begins with Kristy Findley's positive statements about Harris goes on to state how that is contrary to the picture painted by the prosecutor, followed by yet another repetition of the charges of rape and murder and the possibility of the death penalty. (30 CT 8731.)

This is not even-handed coverage.

This court considered the nature and extent of the coverage as one of the two determining factors (along with the size of the community) in *People v. Ramirez, supra*. In that case, the trial court "viewed hours of videotape recordings of television news broadcasts" and "described the

news coverage of this case as 'saturation, as much as they possibly can give,' but noted that this was not the only case in Los Angeles that had received such extensive news coverage." (*Ramirez*, *supra*, 39 Cal.4th at p. 433.) Moreover, the *Ramirez* opinion observed, "defendant did not show that the media coverage was unfair or slanted against him or revealed incriminating facts that were not introduced at trial. (Compare *Sheppard v. Maxwell* (1966) 384 U.S. 333 [].)" (*Id.* at p. 434.)

In contrast, in this case, there is the obvious fact that while this might not be the only case in Kern County to receive such extensive coverage, it was perforce among a much smaller number than in *Ramirez's* Los Angeles County. More to the point, the coverage as described by Dr. Bronson was extremely prejudicial in both its use of emotion-laden words to describe the crimes and its elevating of Ms. Manning to being a "victim's victim," while appellant was characterized as a wanted criminal with little redeeming character.

In light of the pervasive use of highly inflammatory words in practically every article in the only newspaper serving the vast majority of Kern County residents, the trial court's findings that (1) the press coverage was pretty even-handed (17 RT 4093); and (2) that the media did not paint

an unsympathetic portrait of defendant (17 RT 4093) ignored the evidence, the only expert's opinion, and common sense.

(d) The Television and Radio Coverage, Especially the Coverage of the First Trial, Exacerbated the Primacy Effect of the Early Print Coverage, Maintaining and Enhancing the Presumption of Guilt Among the Second-Trial Potential Jurors

Analysis of the television coverage is necessarily less detailed than that of the newspaper coverage, for several reasons. First, the videotapes available in the record show few of the actual news reports as they appeared; rather, they consist of snippets of coverage and only a very few full reports.[38] Second, the scripts which appear in the record are incomplete to the extent that many of them, while setting forth the news anchors' introductions to live "stand-up" reports, do not contain the content of those live reports. And third, there is simply no way to convey the power of a television report without seeing the accompanying visuals. Lacking videotapes of the actual reports, this court cannot view them for

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[38] The full reports are found on Defendant's Exhibit D-3, from television station KBAR, and D-4 from KERO-TV. See especially, from D-3: (1) a report of the graduation ceremony and memorial service preparations at the university, at 17:05 minutes into the tape; (2) a report on the preliminary hearing at 7:00; and (3) a report on the closing arguments of the first trial at 5:20. See, on Exhibit D-4, a report on the opening arguments from the first trial at 19:20.

their impact in the same way that it can read the actual *Bakersfield Californian* articles in the record.

Nevertheless, a review of the television and radio scripts included with the record discloses some remarkable aspects of the coverage, especially during the first trial. For example, a simple count of the sort of inflammatory words Dr. Bronson highlighted in his newspaper analysis – rape, raping, brutal or brutally, grisly, gruesome, vicious attack, sexual assault, kill or killing, murder, stab, stabbing, or cutting, slit or slashed throat, massive head trauma, and sodomy or sodomized – yields the following results, (1) taking all of the scripts combined, (2) but starting only with the first report which mentioned Harris as the suspect (that is, taking only those reports which mentioned Harris), and (3) remembering that the television scripts excluded the words of any "live" or "newsroom" reporters to whom the anchors "tossed" the report: the prospective jurors were exposed to a total of 383 uses of those terms in reports linked to Harris.[39]

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[39] There were a total of 188 reports for which there were radio and television scripts in the record; 69 of these were broadcast beginning with the start of the first trial in early November, 1998 and extending through the end of the first trial in early January, 1999, with a few reports in February and as late as April, 1999. (*E..g.*, 30 CT 8531, 29 CT 8418.) The second-trial venire was called on June 7, 1999. (15 CT 3937.) It is also
(continued...)

Remembering what Dr. Bronson said about the mere use of the words in otherwise neutral (or even favorable) reports, and that, unlike the newspaper, the electronic media tended to focus on the "breaking" news and in particular the first trial, the potential jurors were inundated with inflammatory coverage linked to appellant, less than six months before they were called to serve on the venire.

Additionally, the coverage of the first trial, as discussed *ante*, renewed the public's earliest memories of the case due to the primacy effect. Moreover, it told the prospective jurors that the first jury voted 11-1 for guilt.[40] And no one was immune: Appellant's tabulation of the juror questionnaires shows that 100 percent of the seated jurors and alternates

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[39] (...continued)
worth noting that 27 of the reports mentioned "death penalty" or an analogous phrase in relation to Harris.

[40] Dr. Bronson explained it thus:

> Clearly the fact that he was virtually convicted is pretty, pretty telling. That 11 to one jury verdict and headlines and mistrial, that was reported many times. The basis of that juror's holdout that was very much undercut where it said that he feels Willie Leo Harris doesn't look like a killer, based his vote not on the evidence but how Harris was raised, said Harris didn't look like a killer, where it was reported that that juror wasn't looking at both sides. He reached a decision and nothing could change his mind. That is at least tantamount to finding that 11 people from this community . . . had found the defendant guilty except for this one irrational juror who held out. (16 RT 3921.)

answered "yes" to question 27, whether they watched television at least three times a week, and 13 of the 16 seated jurors and alternates – 81 percent – also checked that they watched the local news. Similarly, 14 of 16 indicated that they regularly listened to the radio (question 28), and 6 of them specified local news. (28 CT 7903-29 CT 8252.)

This court often speaks of the ameliorating effects of the passage of time as an antidote to inflammatory publicity. (*E.g.*, *People v. Prince, supra*, 40 Cal.4th at p. 1214; *People v. Ramirez, supra*, 39 Cal.4th at p. 434, citing *People v. Panah* (2005) 35 Cal.4th 395, 448 and *People v. Jenkins* (2000) 22 Cal.4th 900, 944.) Such mitigation of the early inflammatory publicity cannot be found here, for the simple reason that coverage of the first trial, concentrated in late 1998 and early 1999 but extending to as late as early April, 1999, renewed the memories of the case for those exposed to the publicity.

(e) Though Covering A Large Geographic Area, The Relative Size and Demographics of Kern County Ensured That the Media Coverage Would Taint the Jury Pool

As noted above, Kern County's population in 2000, one year after the trial herein, was 1/13th the size of Los Angeles County one year after the *Ramirez* trial, and about 1/4 of the size of San Diego County at the time of the *Prince* trial. In contrast, at about 660,000, Kern County was nearly

the exact size of San Mateo County at the time of the trial in *Steffen v. Municipal Court*, *supra*, 80 Cal.App.3d 623, where a change of venue was ordered.

While Kern County in 1999 was slightly larger than San Mateo County's population at the time of *Steffen* in 1978, it was less uniformly populated than San Mateo County, consisting mostly of rural agricultural land and a concentration of population in and around Bakersfield. Moreover, the size of a county is also relevant as an indication of the character of the community. "[S]ize of community does not in itself resolve the venue issue." (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 582.) Indeed, the notion that merely because a venue contains a large population, preconceptions about the case are not likely to have "become embedded in the public consciousness" has been rejected by this Court and others. "We do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely." (*Maine v. Superior Court*, *supra*, 68 Cal.2d at p.387, fn. 13.) "Carried to its logical conclusion, the [premise], if valid, would require that all motions for a change of venue in Los Angeles County must be denied because of its population, regardless of the amount of pretrial publicity which surrounds a

notorious criminal case." (*Powell v. Superior Court* (1991) 232 Cal.App.3d 785, 795.)

The question, then, is whether the relationship between the media coverage, and the size, density and distribution of the population demonstrates a likelihood that the defendant could get a fair trial. Here, while the venue is more populous than, say, Stanislaus County, the media coverage in this case was intense, emotion-laden, and persistent. Moreover, the population in Kern is concentrated in the Bakersfield area, which is primarily served by a single daily newspaper, the *Californian*, the source of much of the pervasive and inflammatory coverage. Accordingly, the impacts from media coverage typically found in small communities were found in the Kern County survey done in this case: fear, concern and memorials for the victim, and the salience of the case. (17 RT 3957-3958.) The survey's findings that 60.5 percent of the households read the *Californian* corresponds with the percentage of the population living in the Bakersfield metropolitian area. (14 CT 3793-3794.)

Appellant's tabulation of those in the venire who lived in the "greater Bakersfield area" (per question 4 of the second-trial questionnaire, 18 CT 5044), tracked the survey numbers – 61 percent. More troubling, however, is that 81 percent of the sworn jurors and alternates lived in the

"greater Bakersfield area." And still more troubling is that their answers to question 27 (18 CT 5047), regarding their television watching habits, showed that 75 percent regularly (*i.e.,* at least three times a week) watched local news programs. (28 CT 7903-29 CT 8252.)

While there is no bright line to be found in terms of population, it bears repeating that, at least with regard to the size-of-community factor of the *Maine/Prince* analysis, this Court's reliance on the size of Los Angeles County, in *Ramirez*, and San Diego County in *Prince* in affirming the trial courts' denials of venue change motions simply cannot be applied to Kern County in 1999.

(f) The Relative Status of Manning and Appellant as Represented to the Community from Which the Venire was Drawn Ensured a Bias Against Appellant

The relative status of the victim and defendant are most often spoken of as they existed before (or at the time of) the crime. (See, *e.g.*, *Frazier v. Superior Court*, *supra*, 5 Cal.3d at p. 295 [defendant was an "an alienated member of an unpopular ['hippie'] subculture accused of a bizarre and senseless mass murder of prominent citizens [a doctor and his family]."].) In this case, the relative status of the otherwise anonymous victim and defendant were established not prior to the crime, but by the publicity following it. That should be determinative, for the issue before

the trial court was their relative status at the time of the motion to change venue.

Here, as in other cases, the significance of their relative status arises from relationship to each other and to the jurors. "'When the significance of associations between victims or witnesses and the jurors who actually determined defendant's fate is explored, the impossibility of an impartial adjudication of defendant's guilt and selection of penalty becomes obvious.'" (*People v. Williams* (1989) Cal.3d 1112, 1129, quoting *People v. Tidwell*, *supra*, 3 Cal.3d at p. 73.)

Though *Maine* enumerated the victim's "prominence" in the community, that factor has not been read to require a showing of notoriety. In *People v. Williams*, the fact the victim's family was well-connected locally was sufficiently weighty. Here, like the victim in *Williams*, "though [Ms. Manning] was herself not especially prominent" (*People v. Williams*, *supra*, 48 Cal.3d at p. 1129), her social status was repeatedly revealed and reflected in the news coverage and the community's response to her death. First, her socioeconomic status as an upper-middle-class college student resonated throughout the media coverage. (See, *e.g.,* the Sunday, August 31, 1997 article, "Remembering Alicia," 30 CT 8713-8714.) In addition, she came from a family with connections sufficient to inspire a symbolic

adjournment of the California Legislature in honor of her memory; indeed, if this symbolic act was not done due to family connections, it demonstrates just how significant her murder was perceived by the local community. Her prominence was bolstered by the second page headline of the May 28, 1997 *Bakersfield Californian*, which boldly states "MANNING: Burial in Arlington National Cemetery," elevating Ms. Manning from a nice, middle-class white college sudent who, in the public's perception, would not have consorted with criminals, to a figure deserving national attention and honor.[41] (30 CT 8686.) By contrast, though appellant had been a local resident since birth, he was part of a 5 percent racial minority, and there were no politicians pulling for his side in the press. Rather, his story as relayed by the media was that of an unemployed petty criminal, and a black man having sex with (or raping) white women behind his girlfriend's back. Manifestly, this case did not involve two parties perceived locally as being of equal stature. "[T]he social, racial and sexual overtones were precisely the kind which could 'most effectively prejudice' defendant." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1129, quoting *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 594.)

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[41] According to the article, her father's service in the military of more than 20 years qualified both him and his dependents for burial at Arlington. (30 CT 8685.)

Regarding the status of the victim and the accused, the trial court decided that the most important point was that the defendant was a local person with a long family history in the community, while the victim was from Virginia. (17 RT 4095-4096.) While it is not clear that being born in Bakersfield of parents who lived there would constitute a long family history in the community, the court's reasoning ignored the more salient facts: that the defendant was a black man with a criminal record accused of raping, sodomizing and murdering a white student at the local university. She may not have been from the local community, but the media's coverage made her everyone's neighbor. (See, *e.g.*, the discussion regarding salience and the media descriptions of the victim, *ante*, at p. 71.) Though the court acknowledged this, it considered the fact appellant was not demonized in press mitigated the elevated status Manning achieved. (17 RT 4096-4097.) Whether or not appellant was demonized is not the point. It is hardly necessary to demonize a black man accused of raping, sodomizing, and murdering a white college student to tap into a community's racial prejudices. Moreover, the fact that he was local and she was from Virginia was entirely overcome and reversed by the media coverage.

In *Ramirez* this court focused on the defendants' and victims' status *before* the crimes and the subsequent publicity, and found this factor to be insignificant because [n]either defendant nor the victims were known to the public prior to the crimes and defendant's arrest[.]" (*People v. Ramirez, supra*, 39 Cal.4th at p. 434, citing *People v. Panah, supra*, 35 Cal.4th at p. 449, and *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 46.) On a somewhat different tack in *Prince*, the court effectively eliminated the possibility that the publicity itself can create an insurmountable difference in status, reasoning that "'[a]ny uniquely heightened features of the case that gave the victims and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent where the defendant was tried.'" (*Prince, supra*, at p. 1214, quoting *People v. Dennis* (1998) 17 Cal.4th 468, 523.)

With all due respect, this reasoning effectively eliminates as a factor the difference in status resulting from the very publicity complained of. It becomes, instead, an automatic non-factor. This idea – that status differences will merely follow the case to a new venue – appears entirely unexamined, and contrary to Dr. Bronson's uncontradicted testimony regarding the primacy effect and the important of early media coverage, which would be absent in a new venue. Moreover, it suggests that if such

factors merely follow the case to a new venue, and if all that is needed to insure a fair trial is that jurors say they can put aside their prejudices, this effectively abrogates, even in even the most severe cases of prejudicial publicity, the rulings in *Sheppard v. Maxwell*, *supra*, 384 U.S. 333, and *Maine v. Superior Court*, *supra*, 68 Cal.2d 375, and their constitutional underpinnings.

(g) The Nature and Gravity of these Offenses Could not Have Been More Prejudicial

A capital murder is "a crime of the utmost gravity." (*People v. Adcox* (1988) 47 Cal.3d 207, 231.) While the gravity of a capital murder in itself is not sufficient to require a change of venue (*id.*), there are some, like *Martinez*, in which this factor "must weigh heavily" in favor of a determination that "it is reasonably likely a fair trial was not had." (*Martinez, supra,* 29 Cal.3d at p. 582.) What made it so in *Martinez* were that case's "peculiar facts," which captured the attention of the community for months, and continued to maintain it through a first trial and the appellate process, resulting in a remand for the new trial which gave rise to the venue motion at issue. (*Id.*)

Though perhaps the least controversial of the *Maine* factors in this case, in ruling on the motion, the trial court's discussion of the nature and gravity of the offense missed the point. Though the court accurately

described the *gravity* of the crime, it completely ignored the *nature* of the crime – "the peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community." (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 582.) Thus, the court completely ignored, as to this factor, the very racial and sexual aspects of the case which cried out for a change of venue.

3. THIS CASE IS DISTINGUISHABLE FROM BOTH OF THIS COURT'S RECENT CASES AFFIRMING DENIALS OF CHANGE-OF-VENUE MOTIONS

This case is distinguishable from both of this court's recent cases affirming denials of change-of-venue motions in high-publicity cases.

In *People v. Prince*, *supra*, 40 Cal.4th 1179, defendant was convicted of six counts of first degree murder, five counts of burglary and one count of rape. As in the instant case, there was a pre-trial survey, in which 74 percent of the respondents were aware of the case, but in which only 25 percent of those who were aware of the case were predisposed towards guilt (*Id.*, at p. 1211); in the instant case, more than twice that number (54.9%) were predisposed towards guilt. In *Prince*, the bulk of the publicity occurred more than a year before trial (*Id.*, at p. 1214; and see pp. 1218-1219 [defense expert noted small number of articles and reports published between preliminary examination and motion to change venue]),

while in this case the publicity surrounding the first trial renewed memories and knowledge of the case, a few months before the survey.

The nature of the publicity in *Prince* was described by this court as "merely recount[ing] the facts of the crimes, the course of the investigation, and the circumstances of defendant's arrest." (*Id.*, at p. 1218.) As was described by Dr. Bronson in this case, and set forth in the detailed descriptions and quotations, *ante*, the newspaper articles in this case went far beyond such "mere recounting." Similarly distinguishing the two cases was the fact that in *Prince*, "the investigation continued for a protracted period, during which two persons other than defendant were arrested, and residents appeared uncertain whether defendant actually was the culprit." (*Id.*, at p. 1212.) In the case at bench, beginning shortly after that time that Harris was arrested, there was no doubt expressed in the press that he was guilty; nor was there doubt expressed by over half the population that were familiar with the case.

Finally, *Prince* took place in San Diego County, the population of which was estimated at the time of trial as two million (*Id.*, at p. 1213), whereas the instant case took place in a county one-quarter that size.

Similarly distinguishable is *People v. Ramirez* (2006) 39 Cal.4th 398, in which the trial court's denial of a change of venue motion was also

upheld. In *Ramirez*, as in this case, "The 'nature and gravity' of the present offenses could not have been more serious." (*Id.* at p. 434.) *Ramirez* explains, however, that the nature and gravity of the of the offense is not sufficient alone to require a change of venue. Accordingly, the crucial factors in that case, as in this case, were the nature and extent of the coverage and the size of the county. And those two factors are where this case is most distinguishable from *Ramirez*.

Preliminarily, it should be noted that in *Ramirez*, "defendant did not show that the media coverage was unfair or slanted against him or revealed incriminating facts that were not introduced at trial." (*Id.* at p. 434.) In this case, despite the trial court's statements to the contrary, the media coverage was unbalanced in the extreme. The trial court focused on the fact that mention was made of the defense version of the case, but the simple fact is that the *Californian* made Manning out as an angel, while using the most loaded of words when describing what had happened to her, especially after Harris was named as the only suspect.[42] Unlike *Ramirez*, when the

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[42] Dr. Bronson's review of the newspaper coverage identified both inflammatory themes and inflammatory words. The latter included: brutal (used in 8 separate articles), grisly, ghastly, viciousness, stuff of nightmares, horribly, shocked and shocking, traumatized, pain, anger, disturbing, and tragedy (including a statement from then-State Sen. Maddy that "It's a terrible tragedy." (29 CT 8390-8391.)

sheer number of victims blurred the focus on any one of them, in this case the *Californian* created a very personal and very idealized picture of the victim. (*See, e.g.*, 30 CT 8713-8714 ["Remembering Alicia – Family . . . remembers young woman with dreams for future"; "'She was a princess on earth, and now she's an angel in heaven.'"].)

As noted, however, the two most striking factors distinguishing this case from *Ramirez* are the size of the county and the effect of the first trial in reinvigorating the community's knowledge and feelings about the case. In *Ramirez*, this court specifically relied on the size of Los Angeles County, and thus the number of available uninfected potential jurors. Los Angeles County, in 1990 (one year after Ramirez's trial), had a population of 8,863,052; in contrast, Kern County in 2000 (one year after the trial herein) had a population of 661,645, less than 1/13th the size of the population the trial court in *Ramirez* had from which to draw jurors.[43] Moreover, while Los Angeles County is one of the largest media markets in the nation, more than 80 percent of Kern County resided in the Bakersfield area and were exposed to the single daily newspaper in the area and the same relatively

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[43] The 1990 and 2000 census data is from the a California Department of Finance table, Historical County and State Population Estimates, 1990-2000, with 1990 and 2000 Census Counts (found at www.dof.ca.gov/html/demograp/ReportsPapers/ReportsPapers.asp).

few television and radio news reports. It is not surprising, then, that 60.5 percent of the households in the Bronson survey read the *Californian*, and 82.8 percent watched the local TV news broadcasts or heard local news on the radio (14 CT 3756).[44] Simply put, Kern County is no L.A.

An equally striking difference between this case and *Ramirez* is that, while in the latter case the passage of time had, this Court found, ameliorated the prejudice, in appellant's case the publicity of the first trial not only eliminated whatever sanguinary effects the passage of time might have had, it added to them by introducing the damaging information that the first jury had split 11-1 for guilt, and the dissenting juror's reasons for doing so barely stood the test of reason.

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[44] Dr. Bronson's survey revealed a statistical correlation between those who were exposed to the most media (i.e., newspaper and television frequently during the week) and the likelihood that the individual would prejudge this case. He found that among the "high media people . . . 61 percent say guilty," while those with less media exposure were less likely to prejudge appellant guilty. (17 RT 4013-4014.) That result was bolstered by the finding that there was a statistically significant correlation between those who had learned the most about the case through the media and those who were most likely to prejudge appellant guilty: 66 percent of those that had read or heard the most detail believed appellant was most likely guilty, compared to 21 percent of those who had read or heard least. Similarly, those who had been made aware of the 11-1 hung jury in the first trial were more likely to believe appellant was more likely guilty. (RT 4014.)

C. THE ERRONEOUS DENIAL OF APPELLANT'S MOTION REQUIRES REVERSAL

1. VOIR DIRE IS INEFFECTIVE AS AN INDICATOR OF PREJUDICE

Asked whether the degree of prejudice of the pretrial publicity could be just as easily ascertained in voir dire as in a survey, Bronson thought not, because, he explained, voir dire is like a job interview – you want to pass the interview, so one tends to give answers that are consistent with the sociopsychological expectations (17 RT 3868):

> I've tried to study this in various ways and they have all led me to believe not that the most rabid people can't be identified and excluded . . . but that many people don't recognize what they know that's prejudicial. [¶] They dramatically overestimate their ability to put aside prejudices, to unring the bell, as it were, and you tend to get the kind of answer that confirms that jury panels can be fair, even in the most egregious cases where I've had the ability to, I think , really know the extent to which the voir dire undermeasured the extent of the prejudice.
>
> (RT 3968-3969)

Dr. Bronson is not alone in this view. Justice Thurgood Marshall, dissenting in *Mu'Min v. Virginia* (1991) 500 U.S. 415, 440, gathered a number of judicial statements consistent with Dr. Bronson's:

> [T]he only firm conclusion that can be drawn from our impartial-jury jurisprudence is that a prospective juror's own "assurances that he is equal to this task cannot be dispositive of the accused's rights." *Murphy v. Florida* [(1975) 421 U.S. 794], at 800. As JUSTICE O'CONNOR has observed, an

> individual "juror may have an interest in concealing his own bias . . . [or] may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-222 [] (1982) (concurring opinion). "Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial." *United States v. Dellinger*, 472 F.2d 340, 375 (CA7 1972); compare *Irvin v. Dowd* [(1961) 366 U.S. 717], at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father"). It is simply impossible to square today's decision with the established principle that, where a prospective juror admits exposure to pretrial publicity, the trial court must do more than elicit a simple profession of open-mindedness before swearing that person into the jury.

Ramirez and *Prince* also relied on prospective jurors' *voir dire* answers to find a lack of prejudice in the pre-trial publicity. While only one member of the *Ramirez* jury had not heard of the case, "they all stated they had not 'formed any opinion as to the guilt or innocence of Richard Ramirez regarding this case' and could be fair." (*Ramirez*, *supra,* 39 Cal.4th at pp. 434-435.) Similarly, the *Prince* opinion repeats what has become a standard mantra in change-of-venue cases: "Significantly, the jurors asserted that the publicity would not prevent them from serving as unbiased jurors. (See *People v. Panah*, *supra*, 35 Cal.4th at p. 448 [relying upon similar assertions]; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 46 [same]." (40 Cal.4th at p. 1214)

The court's faith in voir dire to ensure that only jurors who can truly "set aside" any prejudgments they may have appears to be an unexamined presumption. If one traces the foregoing citations back, one gets to *Irvin v. Dowd* (1961) 366 U.S. 717, 723 ["It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"].[45] *Irvin* cites for this proposition three cases, from 1910, 1887, and 1878, all of which, taken together, may establish legal authority but all of which predate the sort of social science, described below, which suggests that exactly the opposite is true.[46]

Indeed, to require simply that all the prosecution need show on appeal is that the jurors stated they could lay their opinions aside is nothing more than simplistic bootstrapping. The jury will, necessarily, consist of persons who *all* will have *said* they could be fair; otherwise they would not have remained on the jury. If this is the touchstone for post-trial change-

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[45] In *Irvin*, the court, while citing the principle, nevertheless found that the denial of the change of venue motion was error due to the pervasiveness and the nature of the publicity. (366 U.S. at pp. 727-728.)

[46] The three cases cited in *Irvin* all upheld convictions in which prospective jurors admitted holding prior opinions based upon newspaper reports, but could set those opinions aside and decide the case fairly. The Supreme Court in each instance stated that, absent manifest error, the trial court's decision not to excuse the jurors for cause would be upheld. (*Holt v. United States* (1910) 218 U.S. 245, 248-249; *Spies v. Illinois* (1887) 123 U.S. 131, 179-180; *Reynolds v. United States* (1878) 98 U.S. 145, 156.)

of-venue review, then no conviction will ever be reversed on such grounds. The pertinent question, rather, is whether such assertions by prospective jurors that they can set aside their prejudices are *trustworthy*. The answer, even regarding the most sincere of the prospective jurors, appears to be "Not very."

Dr. Bronson, as noted *ante* at page 91, testified to how unreliable such assurances are. He is not the only expert to come to this conclusion. Dr. Craig Haney, a professor of psychology at the University of California, Santa Cruz, writes in a recent book:

> Unfortunately, this heavy reliance on jury selection overlooks the limitations of a process in which prospective jurors are queried publicly about their own biases. . . . [J]urors often are asked only whether they think they can remain impartial in light of the information they already have about the case. [Footnote omitted.] Whatever its legal rationale, this doctrine is based on several psychologically untenable assumptions. These assumptions include the notion the persons are aware of all of their biases, that they are willing to admit to them in open court and in front of authority figures who expect them to be unbiased, and that they are capable of predicting whether and how much those biases will affect their future decision making.
>
> . . . To most psychologists, the opposite predictions seem much more defensible; that is, it is often the case that those who are most biased are least aware of their prejudices, least willing to admit to others that they have them, and are

the least reliable judges of whether they fan and will set them aside.[47]

(Craig Haney, Death by Design (2005; Oxford Univ. Press) [hereafter cited simply as "Haney"], p. 98 [fn. on p. 275].)[48] The courtroom setting, Haney explains, works against candor and self-disclosure by prospective jurors who know they are supposed to appear fair and impartial. The phenomenon is documented in many social science studies. In one such study, for example, Haney and a colleague found that jurors who survived the voir dire process and sat on felony juries did so even though they held opinions contrary to the basic tenets of American criminal law jurisprudence (i.e., the presumption of innocence) – beliefs about which they had been asked during voir dire. Moreover,

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47 "Social psychologists have long understood that many of the persons who harbor the greatest bias and deepest prejudice believe their views to be normative or commonsensical. Others may be aware that they hold problematic counternormative views but are defensive about expressing them. Finally, there is much evidence that people are unaware of whether and how their beliefs shape and affect their judgments, decision, and behavior. For example, see R. Nisbett and T. Wilson, Telling More Than We Can Know: Verbal Reports on Mental Process, 84 *Psychological Review* 231 (1977)." (Haney, *op. cit. supra,* at p. 275, n. 17.)

48 The foregoing footnote, as well as others, *post*, in which the footnote designator is within super-scripted brackets (thus: [*]), are quoted directly from the endnotes accompanying the text in the quoted sources. Where they are endnotes, the pages on which those endnotes appear are also cited, as in the parenthetical at the end of the previous note.

> nearly half of the actual jurors in several felony cases said in posttrial interviews that they had *not* been able to 'set aside' their personal opinions and beliefs even though they had agreed, during jury selections, to do so.[49] Another study that relied on posttrial interviews of persons who sat on criminal cases estimated that between a quarter to nearly a third of jurors were not candid and forthcoming in accurately and fully answering questions posed during the voir dire process.[50]

Why does this happen? Both Haney and Bronson speak of a number of psychological and social-psychological forces at work simultaneously in a courtroom during voir dire. Haney summarizes it thus:

> People who are placed in unfamiliar situations, like the courtroom, tend to be more sensitive and responsive to the social pressures of others.[51] They also may experience what has been termed "evaluation apprehension" when they feel they are being judged by persons in authority or high-status positions.[52] What prospective jurors learn about the

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[49] "C. Johnson and C. Haney, Felony Voir Dire: An Exploratory Study of Its Content and Effect, 18 *Law and Human Behavior 487* (1994)." Haney, *op. cit. supra,* at p. 275, n. 19.)

[50] "R. Seltzer, M. Venuti, and G. Lopes, Juror Honesty During the Voir Dire, 19 *Journal of Criminal Justice* 451 (1991)." (Haney, *op. cit. supra,* at p. 275, n. 20.)

[51] "For example, S.E. Asch, The Effects of Group Pressure Upon the Modification and Distortion of Judgments, in H. Guetzkow (Ed.), *Groups, Leadership and Men,* Pittsburgh, PA: Carnegie Press (1951)." (Haney, *op. cit. supra,* at p. 275, n. 21.)

[52] "One study of persons who actually had served as jurors concluded that precisely these psychological pressures—evaluation apprehension, expectancy effects—led some of them to give the answers (continued...)

expectations of others—particularly powerful others or authority figures—can influence the candor with which they express their own views.[53] Thus, it is not uncommon for jurors to adopt what is called a "social desirability response set"[54] in which they attempt to respond during voir dire in a socially appropriate manner instead of one that is entirely forthcoming or revealing. Although certain kinds of voir dire conditions and procedures can help to overcome the difficulties prospective jurors may have with candor—studies show that individual, sequestered voir dire . . . is most effective—*there is no jury selection process that can completely neutralize these psychological reactions and the way they limit the effectiveness of the jury selection process itself.*[55]

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[52] (...continued)
that they thought were expected of them in voir dire, irrespective of their actual true beliefs. See L. Marchall and A. Smith, The effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire, 120 *Journal of Psychology* 205 (1986). For a [sic] more general discussions of evaluation apprehension, see . . . [four additional articles cited]." (Haney, *op. cit. supra,* at p. 275, n. 22.)

[53] "On how knowledge about the beliefs of others affects our own attitudes and beliefs, see Craig Haney, *Consensus Information and Attitude Change: Modifying the Effects of Counter-Attitudinal Behavior With Information About the Behavior of Others,* doctoral dissertation, Department of Psychology, Stanford University, 1978." (Haney, *op. cit. supra,* at p. 275, n. 23.)

[54] "D. Marlowe and D. Crowne, Social Desireability and Response to Perceived Situational Demands, 25 *Journal of Consulting Psychology* 109 (1968)." (Haney, *op. cit. supra,* at p. 275, n. 24.)

[55] "Michael Nietzel and Ronald Dillehay found that individual sequestered voir dire appeared to produced [sic] the most honest responses from prospective jurors. See M. Nietzel and R. Dillehay, The Effects of Variations in Voir Dire Procedures in Capital Murder Trials, 6 *Law and Human Behavoir* 1 (1982), and M. Nietzel, R. Dillehay, and M. Himelein,
(continued...)

(*Id.* at 99; emphasis added)

Haney notes a study by Dr. Bronson, discussed below, regarding the "minimization" effect, under which prospective jurors, especially when they "sense that they may know something about a case that they are not supposed to know," will give answers that "understate the significance of or distance themselves from what they know." (*Id.*, at p. 99.)

Dr. Bronson tried to explain this to the court below, to no avail. Prospective jurors, in answering voir dire questions – which are often leading – most often give the socially acceptable answer. Asked on cross-examination why he did not include in the survey whether respondents who knew about the case could put their opinions aside, Dr. Bronson explained

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[55] (...continued)
Effects of Voir Dire Variations in Capital Trials: A Replication and Extension, 5 *Behavioral Sciences & the Law* 467 (1987). See also N. Vidmar and J. Melnitzer, Juror Prejudice: An Empirical Study of a Challenge for Cause, 22 *Osgoode Hall Law Journal* 487 (1984), who found that individual sequestered examination of prospective jurors was far more successful in eliciting canded information than panel questioning of the entire group. Federal judge Gregory Mize reported that he was able to elicit much more candor from prospective jurors when he interviewed them individually, in a separate room, than when he posed questions in standard, open-court, group voir dire. See G. Mize, On Better Jury Selection: Spotting Unfavorable Jurors Before They Enter the Jury Room, 36 *Court Review* 10 (1999). However, another study suggested that, in general, judges are not especially adept at eliciting candor from prospective jurors. See S. Jones, Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 *Law and Human Behavior* 131 (1987)." (Haney, *op. cit. supra,* at p. 276, n. 25.)

that, while acknowledging that people *can* do so, reliance on their *saying they can* is misplaced, because, "I think the most obvious thing is that it's such a socially desirable answer to give, particularly both in a survey and even more so in court, that we should be very reluctant to rely on it." (17 RT 4026.)

Dr. Bronson described a recent experiment he had done, in which subjects were told they had been selected for jury service and then were individually told that would learn as they got into the case that the victim was their father (a legally-unacceptable bias). Nevertheless, 25 percent of the subjects said that they could still consider the case fairly, impartially, and put aside their feelings and whatever they may have heard about it. (17 RT 4026-4027).

In another experiment, four juries underwent a simulated trial in which the jurors were told about the defendant's prior driving problems, or arrests, and were instructed to put aside that information. The deliberations were taped, and all four juries discussed the information they were told to set aside. (17 RT 4027.)

That is why, Dr. Bronson explained, in working on the development of Standards for Survey Research in Connection with Change of Venue Motions in 1988, Dr. Bronson and his colleagues said:

> Direct questions about a respondent's ability to be fair and impartial, if called to be a juror in the case, should be avoided. Such questions and others that inquire whether the respondent can set aside prejudicial information and reach a verdict based on the evidence at trial yield inflated estimates of this ability.

(17 RT 4030.)

In an article published in 1989, Dr. Bronson described a Florida rape-kidnapping-murder case in a small, insular community.[56] The two defendants were black males and the victim was a white woman. In a series of face-to-face interviews with investigators in the small rural county, local people made recorded remarks like "Damn niggers should be hung;" "It's a shame all those niggers come down from Tallahassee and commit crimes;" "They ought to cut their cocks off;" "Twenty years ago they would have hung 'em instead of all this crap;" "People are ready to take the jail apart. They better not get turned loose;" "It's about as serious as the Bundy case. If they need a hangman, I'll be glad to donate my time free;" and many others. The interviewers themselves were threatened with

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[56] E. Bronson, *The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect*. California State University, Chico. Discussion Paper Series, 1989. Also published as *The Effectiveness of Voir Dire in Discovering Prejudice in High Publicity Cases: A Case Study of the Minimization Effect* in 20th Anniversary Celebration Seminar, California Attorneys for Criminal Justice, 1993, and presented as *Does Prejudicial Pretrial Publicity Affect Jurors?* at national meeting, Law and Society Association, Madison, 1989.

guns and late-night anonymous phone calls. A scientific survey documented the extent and depth of the prejudice, and content analysis of the newspaper coverage of the interracial rape-murder (similar in that regard to the case at bench) made the prejudice obvious. A very substantial percentage of this county of just 10,000 was either related to or knew the victim or her family, who owned and ran the general store. (*Id.*)[57]

In court, however, the tone of the jurors' answers in the open voir dire was entirely different from what had been measured through interviews and the survey. Reading the transcript of that voir dire, Dr. Bronson notes, one found not a single racial epithet, no threats of lynching, and no characterizations of the trial as "crap," even though the surveys and interviews demonstrated how widespread those feelings were in that jury pool. Some expressed opinions about guilt, but all minimized their knowledge and everyone assured the court they could be fair and impartial. At the end of the trial, it took just under to an hour to bring in the guilty verdict and a mere half-hour more to bring in the death penalty. *(Id.)*

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[57] Citations to this article are general, rather than to specific pages, because counsel has access only to an electronic version of it rather than the original published version; the page numbers, therefore, would not necessarily correlate.

In a survey conducted prior to the trial, and presented to the Florida Supreme Court, 99 percent of the respondents (83/84) recognized the case, 41 percent believed the police had arrested the right man, and 17 percent knew the victim. The appellant presented these along with an extensive survey of the publicity, as well as the sort of opinions expressed before anyone got into court, described above. The court rejected these findings based upon the juror's voir dire answers:

> The transcript of the jury selection proceedings reveals that every member of the jury panel had read or heard something about the crime. However, they all said that they would be able to disregard the previously gained information and render a verdict based on the evidence presented in court.
>
> *Copeland v. State* (Fla. 1984) 457 So.2d 1012, 1017

It is not surprising, then, that when asked during the motion hearing in the instant case about the percentage of people who actually can put aside an opinion that they've formed in order to serve on a jury, Dr. Bronson said he had no data, no hard numbers, but, while "surely there are some who would be able to do that, . . . it's difficult and it's a pretty slender reed upon which a defendant should be asked to depend." (17 RT 4031.)

And yet this court, in relying on jury voir dire questioning and answers when reviewing cases in which a venue change has been denied, relies precisely on that slender reed. Under this court's jurisprudence,

post-trial review after conviction permits resort to the voir dire transcript, which "may demonstrate that pretrial publicity had no prejudicial effect." (*People v. Harris* (1981) 28 Cal.3d 935, 949, citing *Murphy v. Florida, supra*, 421 U.S. at pp. 800-802 and *People v. Manson* (1976) 61 Cal.App.3d 102, 187-188; accord, *People v. Prince, supra,* 40 Cal.4th at p. 1215)

> "It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

People v. Harris, *supra*, 28 Cal.3d at pp. 949-950, quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723.) Although this principle has been accepted in California, it has been qualified by the caveat that "a juror's declaration

of impartiality is not conclusive."[58] (*People v. Williams*, *supra*, 48 Cal.3d at p. 1129, citing *Irvin v. Dowd*, *supra*, 366 U.S. at p. 728.)

Williams, however, has become the exception that proves the rule: instead the court has, at least in cases from larger counties such as *Ramirez* and *Prince*, both *supra*, opted to rely on the "slender reed" of prospective-juror assurances, a reliance which no longer ought go unexamined.

In this case, unlike the "two jurors" in the 1981 *Harris* case whose "assertions that they would not be persuaded by the brief news accounts they had seen" were persuasive to the court (*People v. Harris*, *supra*, 28 Cal.3d at p. 950), Ms. Manning's "brutal murder had obviously become deeply embedded in the public consciousness," and "it is more than a reasonable possibility that the case could not be viewed with the requisite impartiality." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1129.)

Thus it is that one prospective juror – who actually sat on the jury – when asked if he knew something about appellant's case from the newspapers, answered: "You can't hardly avoid it if you read the daily

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[58] This was, in fact, recognized by the court as far back as 1981 in an earlier *Williams* case: "In fact, some authorities suggest that the accuracy of a person's estimation of his own fairmindedness is likely to be inversely proportional to the depth of his actual prejudices and predispositions. (See Friendly & Goldfarb, Crime and Publicity (1967) p. 103.)" (*People v. Williams* (1981) 29 Cal. 3d 392, 402, fn. 2.)

newspaper." (21 RT 4935.) Another prospective juror noted "it was pretty out in the spotlight," (23 RT 5429), while still another noted that everything he had read and heard had all been negative (27 RT 5765). Another admitted that he did "remember . . . at the time how I felt about reading the media's interpretation of the events. . . . My opinion was that he was guilty of it." (19 RT 4475.) Another juror, who read the newspaper regularly and had read most of the articles about the case, admitted that when he arrived in court, "From what I've read and heard in the media, my opinion is that he must be guilty of something to be here today. (24 RT 5711.)

At least nine prospective jurors admitted that they had prejudged the case (19 RT 4475 [quoted immediately above]; 21 RT 4817; 22 RT 4980; 23 RT 5308; 23 RT 5488; 24 RT 5656-5658; 24 RT 5690-5691; 24 RT 5697-5699; 24 RT 5766). Another put it this way:

> Well, if I remember correctly, what I read there was some evidence at that time that I says (sic) well, he has to be guilty because the evidence was there. I mean, if I'm not mistaken (sic) this case with some other case. What I read I felt at the time he was guilty according to the paper.
>
> (24 RT 5761.)

Others – and these are the ones that tend to show the accuracy of Dr. Bronson's analysis – admitted media influence while tending to minimize

it. Bronson's article on the minimization effect identified some of the commonly repeated language of minimization: "just," "only," "that's all," and "nothing but." (Bronson, *op. cit. supra* at p. 148, fn. 56.) Such minimizing terms abound in this case. Thus, one referred to "whatever was on TV and what I have read in the newspaper, *but that's about it.*" (24 RT 5743; emphasis added.) Prospective juror J.L. acknowledged in her questionnaire that she did tend to believe that Harris was guilty, but then wrote she was very open minded and would give him a clear mind on her part. (23 RT 5307.) The court then elicited the obvious answer to its leading question:

> Q. . . . is it your opinion at this point, given that you are a fair-minded person, that you can start this case, as you have to be able to do in a criminal case, with a presumption that Mr. Harris is innocent?
>
> A. I think that I would be able to, yes.
>
> (23 RT 5308.)

Another juror said he felt Harris was guilty, but could start with the presumption of innocence. (23 RT 5466, 5490.) Still another admitted hearing of the case in the media on an ongoing basis – even to the extent of reading the newspaper and watching the news three times a day – but said she thought she "would be inclined" to put her feelings aside. (24 RT 5555.)

Venireman J.V., when asked what information he had beyond what the judge had told the panel when they first met, said "*Just* the media coverage and stuff that's been covered in the newspaper I've seen, yes, sir." (22 RT 5123; emphasis added.) Had this led him to prejudge the case? "Somewhat. But I don't know all the evidence involved either. I think the evidence would play a major role in my decision." (22 RT 5124.)

Prospective juror M.B. saw mention of the case in the paper, but just "skimmed" those parts (22 RT 5144). The venireman who said "it was pretty out there in the spotlight, and remembered that a car had been burned near the defendant's residence, also averred that he hadn't prejudged the case. The following portion of his voir dire is worth setting forth:

> Q [by the Court, regarding venireman's affirmative answer to question 62 on the juror questionnaire]. Have you ever expressed an opinion or impression as to the guilt or innocence of Willie Leo Harris?
>
> A. I think I recall. [¶] Yeah, seeing the initial first few days of coverage, it looked like whoa, someone's in a heap of trouble.
>
> Q. Right.
>
> A. Again, I said it looks like. That was kind of my opinion. Obviously, there's more to it than that.
>
> Q. Does that cause you, as you sit here faced with the prospect of serving on this jury, to be concerned that you cannot start this case with a presumption of innocence?

A. No. [¶] Wait a minute. I'm trying to think - -

Q. In other words, you can - -

A. I can do it.

Q. Start with the presumption of innocence.

A. Right.

(23 RT 5433-5434.)

This colloquy contains both the leading questions and minimization that Dr. Bronson warned of, and this from the person who admitted that the case was "pretty out there in the spotlight." (For further discussion of the trial court's leading questions in rehabilitating marginally-acceptable jurors, see Argument V, *post* at p. 192.)

In addition, as noted above, this case can be distinguished from *Ramirez*, *Prince*, and other cases in which the denial of a change-of-venue motion was affirmed on appeal, by the sheer number of persons in the case which the pre-second-trial survey showed both to have knowledge of the case – 71 percent – and to have, among those, predispositions toward guilt – 54.9 percent – and toward a sentence of death – 45 percent. In light of these numbers, it borders on cavalier to rely on protestations of impartiality in voir dire subject to the many psycho-social factors described by Drs.

Haney and Bronson and the substantial social-science research underlying their concerns.

2. THE ERROR ALSO INFECTED THE JURY'S PENALTY DETERMINATION WITH BIAS IN FAVOR OF THE DEATH PENALTY

Another prejudicial aspect of the publicity involving the nature of the crime was its effect on the penalty determination. In a penalty phase, the defense wants to humanize the defendant, while the prosecution wants to demonize the defendant and humanize the victim. In this case, the media did a very powerful job particularly in humanizing, and making very sympathetic and tragic, the victim. (17 RT 3935.) Moreover, there were over 40 references to the death penalty in the articles, so it was very much in the forefront of the pre-trial publicity, and the victim's parents were quoted a few times as being in favor of the death penalty, both in general and for the defendant in this case. (RT 3935-3936.)

3. CONCLUSION

As set forth in the introduction to this argument, the best evidence of the prejudice arising from the court's denial of the venue motion is the contrast between the deliberations of the first-trial and second-trial juries. To reiterate: In the first trial, the jury deliberated for approximately 9 ½ hours – *not* including the time spent listening to 7 different read-backs of

testimony – before reporting to the court that it was unable to reach a verdict on the 7 Manning-related counts. (CT 1262, 1266-1268, 1279-1281, 1286-1287). In the second trial, however, the jury (1) did not ask for any read-backs, and (2) deliberated for approximately 5 hours. (15 CT 4027-4028.) Not all of this difference can be reasonably attributed to the first trial's lone holdout juror, for that jury also reported that it had taken four separate votes on counts 1-7, and divided on count one the first time 8-4, then 9-3, then 10-2 before reaching its 11-1 impasse. (15 RT 3748.) Contrast this with the second jury's five-hours-to-guilt, and the prejudice that arose from the trial court's errors – and in particular in not recognizing the profound impact of the initial media blitz as reinforced by reporting of the first trial – becomes clear.

Over and above the prejudice, however, is the simple fact that if *Sheppard v. Maxwell, supra*, 384 U.S. 333, 362-363 and *Maine v. Superior Court, supra*, 68 Cal.2d 375, are not to become moribund, honored only in the degree to which they are distinguished, there are few cases which present a more compelling case for reversal than the one at bench.

III. THE COURT ERRED IN LIMITING QUESTIONS RELATING TO RACE IN THE PROSPECTIVE-JUROR QUESTIONNAIRE AND IN INDIVIDUALIZED VOIR DIRE

The trial court almost completely eliminated race questions in the first trial voir dire, and severely limited them in the second trial. Most strikingly, the court went so far as to prohibit in both trials the most crucial question, which asked for each prospective juror's ethnicity (2 RT 626.).[59] This led in the case of at least one juror to speculation by counsel and the court, in a *Batson* motion hearing during second-trial voir dire, about how one multi-racial juror viewed herself, left the defense and this court without reliable statistics on which to analyze the racial composition of the venire, and hampering a comparison of questions to and answers of white vs. minority jurors. Thus, while we are able to identify the three African-Americans who were in the second-trial venire, the ethnicity of the remaining jurors, while it can be inferred by surnames, is shielded from certainty by the court's strange ruling.

The errors, however, went much further.

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[59] The court did not explain itself, other than making the statement: "I don't allow questions about . . . racial or ethnic background . . . ." (2 RT 626.)

A. FIRST TRIAL QUESTIONNAIRE

In the first-trial hearings on the juror questionnaire, the court court rejected a series of racial questions proposed by the defense.[60] (2 RT 632-633) The *only* questions which the court allowed to remain in the questionnaire which were in any way related to race were the following two:

"43. This case may produce evidence of an interracial relationship. Do you have any opinion as to the propriety of such a relationship? YES ___ NO ___." (*E.g.*, 6 CT 1559.)

"45. Do you have any prejudice against Afro-Americans?" YES___ NO ___." (*E.g.*, 6 CT 1560.)[61]

Question 45, of course, is laughably useless, along the lines of "Do you still beat your wife?" As Dr. Bronson later explained (and discussed *ante* at pp. 144-145, and fn. 52), but the court should have understood, the social unacceptability it would prevent all but the most brazen to answer "yes." The question as posed could be expected to yield nothing of value to the voir dire process.

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[60] The court rejected questions 53-62 in the defense-proposed questionnaire, at 5 CT 1032-1034.

[61] Question 45 is a modification of the proposed question: "Do you belong to any organization which is concerned with racial or ethnic issues? YES ___ NO ___. If yes, please describe the organizations." (4 CT 1031.) The court indicated that it was leaving that question in (2 RT 632), but it appears to have been modified, without explanation in the record, in the next draft that was discussed (2 RT 642-643).

B. THE SECOND-TRIAL QUESTIONNAIRE AND MOTION FOR INCREASED INDIVIDUAL, SEQUESTERED VOIR DIRE

Prior to the second trial, appellant filed a motion in limine to allow much more extensive questioning regarding racial bias. (14 CT 3850-3855.) Appellant also filed, in conjunction with that, a motion to allow expanded individual, sequestered voir dire of the prospective jurors in the areas of race, human sexuality, and publicity. (14 CT 3890-3902.)

The motion for further questioning on racial bias proceeds from an interview counsel conducted after the first trial with Juror No. 6 (the holdout juror, an African-American), who indicated to counsel that race may have played a part in the jury decision. (14 CT 3851.) The motion cited and quoted from *Turner v. Murphy* ((1986) 476 U.S. 28, 34-35, and 39 (Brennan, J., concurring), to the effect that the dangers of racism operating but remaining undetected are especially serious in death penalty cases.[62] The defense motion noted especially the *Turner* opinion's reference to "fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime [and] might incline a juror to favor the death penalty." (*Id.*, at p. 35.) As the motion noted, there was in this case a black male defendant, and a white female victim who was "stabbed over fifty times, her

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[62] *Turner* is discussed more fully in the argument, *post* at p. 169.

throat was cut, her head was hit with blunt objects at least four times, . . . she was robbed, burgled, raped and sodomized, . . . her car was stolen and burned, [and] certainly a juror, if he/she were to have any racial bias, would be hard pressed not to allow that bias to infect the decision making process." (14 CT 3853.) Finally, the motion quotes *People v. Wells* (1992) 5 Cal.App.4th 1299, 1313-1314, regarding the fact that bias is seldom overt and admitted; it is, rather, more often hidden and beneath the surface, whether the juror has an interest in concealing it or is simply unaware of it; and the court must be willing to ask prospective jurors relevant questions substantially likely to reveal such bias. (14 CT 3854.)

In addition, the trial court had by then heard from Dr. Bronson in the just-concluded change-of-venue hearing, regarding the effect of pre-trial publicity on the race question. In particular:

> Race is particularly dangerous in a case where the defense was consensual sex. And so here we have that volatile mix of pre-trial publicity, . . . and a colorable claim of reasonable doubt, if not factual innocence. There is a theme that a white, attractive, successful blonde wouldn't have sex with a black man. Especially one with a criminal record involved in drugs and with no formal education, at least that I could see.
>
> (16 RT 3940-3941.)

During the second-trial pretrial proceedings, defense counsel presented a new proposed questionnaire, which included several more racial-bias questions than were allowed in the first-trial questionnaire, some of which, set out in the margin, were accepted by the court,[63] and some of which were rejected.[64] (18 RT 4181-4187.)

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[63] The following questions became a part of the second-trial questionnaire: 50, 54 (which appeared as question 52 on the questionnaire given to the jurors), 55-59 (53-57), 63-64 (58-59). The defense-proposed questions appear at 16 CT 4479-4482. The racial questions in the questionnaire as given appears, *e.g.* , at 18 CT 5060-5061.

[64] The following questions were rejected by the court:

"51. How would you rate your opinion as to interracial marriage?
A. Strongly against such a relationship ___
B. Somewhat against such a relationship ___
C. Both for and against such a relationship ___
D. Somewhat for such a relationship ___
E. Strongly for such a relationship ___
If you wish you may explain your response . . .

"53. What is the ethnic makeup of your neighborhood?
Predominantly White or Caucasian? ___
Predominantly Hispanic? ___
Predominantly Black or African-American? ___
Predominantly Asian? ___
Racially mixed? ___

If mixed, what ethic backgrounds are represented?

"60. Please check the box that would most closely fit your completion of the following sentence: "Blacks complain about racial discrimination _________."

(continued...)

Regarding the rejected questionnaire questions, counsel argued unsuccessfully that under the Sixth Amendment the questions were necessary to reach below the surface to ferret out the jurors' attitudes, some of which they might not even be aware of themselves. (18 RT 4192-4195.) The rejected questions went directly to the heightened necessity to prevent unconscious racial bias to operate in a capital setting. (18 RT 4197-4198.) Moreover, counsel sought to introduce the testimony of Juror Number 6 from the first trial, to the effect that several of the jurors in that trial spoke

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[64] (...continued)

A. Too much ___
B. As an excuse ___
C. Only when it applies to them ___
D. Only when warranted ___
E. Not enough ___

"61. Please rate the following statement: "Some races and/or ethnic groups tend to be more violent than others"

Strongly agree ___
Agree ___
Disagree ___
Strongly disagree ___
No opinion ___

"62. Are you more disturbed to learn that a white person killed a non-white person, that a white person killed another white person, or that a non-white person killed a white person?

More disturbed by a white person killing a non-white person ___
More disturbed by a white person killing a white person ___
More disturbed by a non-white person killing a white person ___
Disturbed equally by all of the above situations ___

of appellant as a pervert, which, in the absence of allegations of abnormal sexual behavior, suggested that racial bias was at work. In that setting, the court's rejection, for example, of proposed question 51 regarding interracial marriage undercut the court's and counsel's ability to recognize the biases that might be there. (18 RT 4200-4201.)

C. THE COURT DISALLOWED INDIVIDUAL, SEQUESTERED VOIR DIRE ON QUESTIONS OF RACIAL BIAS

Appellant also sought in his motion to ask questions related to race bias during expanded individual, sequestered voir dire. (14 CT 3897-3899.) The prosecutor appeared to support this in his discussion of the rejected questionnaire questions. Those questions, he noted, were on a writing with the jurors' names on them, which was likely to result in "socially acceptable" answers.

> I think if there is a concern about potential bias that is exposed, I think those people are more likely to be candid in the give and take of voir dire. It might be perhaps that that would be most appropriately addressed in the individual voir dire rather than in the panel or open voir dire. But I think that's probably the more effective way to address it than in terms of additional questions in the questionnaire.
>
> (18 RT 4203.)

The court, however, made the remarkable comment that it didn't see race "as being a huge issue in this case." (18 RT 4204.) Accordingly, the

court ruled that it would not allow individual voir dire beyond the issue of death-qualification; everything else would have to be handled in group voir dire. (18 RT 4204-4207.) The only latitude would be questions arising directly from answers given on the questionnaire, which would be subject to questions by counsel during the individual voir dire (18 RT 4207). Of course, to the extent that, as the prosecutor predicted, the answers to those questions would be the "socially acceptable" answers, there would be no basis on which to delve further during the individual voir dire. This was, therefore, a concession without substance.

The court's seeming indifference to the racial issues inherent in this case is remarkable first because of the High Court's pronouncements on the subject. (See, *e.g.*, *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424 ["the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made [by a state trial court] into racial prejudice"]; *Powers v. Ohio* (1991) 499 U.S. 400, 415-416 [where racial bias is likely to influence a jury, an inquiry must be made into such bias]; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189-190 [trial judge to inquire into racial bias on voir dire when the defendant requests the inquiry and there are "substantial indications" that racial or ethnic prejudice will

likely affect the jurors].) Second, it is remarkable because Kern County (1) had a history of racism that included a lynching as recently as 1947 ("Legacy of Shame: Auther says Kern prominent in story of Western lawlessness," *Bakersfield Californian* (June 12, 2005), p. A5); (2) was a county in which an African-American municipal court judge in 1990 decried racism before the county Board of Supervisors ("Judge flays Kern racism," *Bakersfield Californian* (March 28, 1990), pp. A1, A2); and (3) in which, in 1992, an Hispanic couple in nearby Oildale were subjected to a cross, with the letters KKK on it, burning in their front yard ("Burning 'KKK' cross planted in Oildale yard"), *Bakersfield Californian* (December 31, 1992), p. B2. To imagine that racism had somehow magically disappeared in Kern County by the time of the trial in 1999, such that there would simply be no bias worth the court's attention during voir dire of a trial in which a black man was charged with raping, sodomizing, and murdering a white woman, simply beggars belief.

The defense renewed its motion for expanding the individual voir dire to questions of race, citing *People v. Wilborn* (1999) 70 Cal.App.4th 339. (14 CT 3897; 18 RT 4213-4214.) *Wilborn* cites *People v. Holt* (1997) 15 Cal.4th 619, 660-661, for the proposition that a case involving a black defendant and a capital crime against a white victim requires adequate

inquiry into possible race bias. (70 Cal.App.4th at p. 346.) Counsel reminded the court of Dr. Bronson's testimony that such questioning is far more effective in individual voir dire, as it is with questions about sexual evidence and the pre-trial publicity. (18 RT 4213.) The court again denied the motion, stating that Dr. Bronson observed that the best way to get people to tell you candidly that they are racist is by a written questionnaire that asks them point blank questions. (18 RT 4214.)

Appellant is at a loss to understand where the court got this impression. Dr. Bronson in fact said the following when asked for alternative remedies to changing venue:

> There are various voir dire procedures that certainly are useful, *but I don't believe are sufficient here.*
>
> Utilizing juror questionnaires, perhaps what you do routinely in cases of this sort in this county. Many others do.
>
> The *Hovey* voir dire, individualizing and sequestering the voir dire, *at least as it focuses on the difficult issues here* of pretrial publicity, *of race*, and the like.
>
> Some partially conducted attorney voir dire, the use of open-ended questions rather than the leading and close-ended type, a standard which allows you to inquire into matters that could lead to peremptory challenges.
>
> (17 RT 4020; emphases added.)

With regard to the nature of the questions to be asked in a survey, Dr. Bronson, reading from the then-recently compiled "Some Standards for

Survey Research in Connection with Change of Venue Motions," (1998) read the following regarding the wording of question:

> Direct questions about a respondent's ability to be fair and impartial, if called to be a juror in the case, should be avoided. Such questions and others that inquire whether the respondent can set aside prejudicial information and reach a verdict based on the evidence at trial yield inflated estimates of this ability.
>
> (17 RT 4030.)

It is notable that in its own voir dire questioning of the group jury panels, *the court did not once raise the question of race*. This is perhaps not surprising in light of its view that race would not be a "huge" issue in this case. But the court's additional insistence that individualized voir dire be limited to death penalty questions, thereby ignoring both the clear racial implications of the case and Dr. Bronson's clear explanation of the only way to ferret out racial bias, amounted to an abuse of discretion.

Moreover, the trial court's ruling limiting individualized voir dire was federal constitutional error. "[A] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." (*Turner v. Murray* (1986) 476 U.S. 28, 36-37; accord, *Ham v. South Carolina* (1973) 409 U.S. 524, 527.) While the trial court retains substantial discretion regarding the form and number of the questions, and whether they should be asked individually and collectively (*Turner,* 476 U.S. at p. 37) the trial court had

just heard from Dr. Bronson that both the race and the sexuality questions arising in this case were highly charged issues, and that answers made in the social setting of group *voir dire* had little chance of eliciting anything other than socially acceptable answers. Under these circumstances, not to allow individualized questioning on both the race and sex, or a combination thereof (*e.g.*, "Would you automatically vote for the death penalty if you found that a black man had both raped and killed a white woman?") is a violation of appellants rights to due process and a fair trial. Accordingly, reversal is in order because the state cannot show that the trial court's failure was harmless beyond a reasonable doubt.

It was also a prejudicial abuse of discretion under state standards. An abuse of discretion regarding the manner in which voir dire is to be conducted "shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice" under "Section 13 of Article VI of the California Constitution." (Code Civ. Proc. § 223.) The "miscarriage of justice" standard is most often characterized as a trial in which a result more favorable to the defendant was reasonably likely absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) However, in *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, this court began to clarify the standard, ruling that a "reasonable probability exists when there is merely a reasonable chance, more than an abstract

possibility" of a different outcome.[65] Under this standard, the trial court's head-in-the-sand ignoring of the racial issues involved in the case, and its truculence in prohibiting reasonable ferreting out of the jurors' views on race, raised at least a reasonable probability that those views would remain hidden.

Moreover, "criminal defendants, regardless of their guilt or innocence, are entitled to a fair trial, and the denial of a fair trial, in and of itself, results in a miscarriage of justice, whether or not the defendant meets the *Watson* standard of prejudicial error." (*People v. Sherrod* (1997) 59 Cal.App.4th 1168, 1174-1175.) Under this standard, as well as the *College Hospital* formulation, the failure to allow private, individual *voir dire* on the crucial, yet elusive, racial issues inherent in this case, was prejudicial.

In addition to its prejudicial effect on its own, the trial court's refusal to expand individualized voir dire remains part of a pattern which,

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[65] It is striking that in the near-decade-and-a-half since *College Hospital* was decided, a mere eight decisions of this court and the courts of appeal have reaffirmed this new formulation of the *Watson* standard. (See, *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 68; *Ghilotti v. Superior Court* (2002) 27 Cal.4th 888, 918; *Cassim v. Allstate Insurance Company* (2004) 33 Cal.4th 780, 800 ("We have made it clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*" (emphasis in original); *Kinsman v. Unocal Corp.* (2006) 37 Cal.4th 659, 682; *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 525; *In re Willon* (1996) 47 Cal.App.4th 1080, 1098; *People v. Elize* (1999) 17 Cal.App.4th 605, 616 ("reasonably possible"); *People v. Racy* (2007) 184 Cal.App.4th 1327, 1335-36; *Red Mountain, LLC v. Fallbrook Utility District* (2006) 143 Cal.App.4th 333, 348.) There is no indication, however, that it does not remain good law.

combined with the other errors detailed in this section of the brief, resulted in a jury before which this defendant began his trial having to prove his innocence.

IV. THE COURT ERRONEOUSLY FOUND NO PRIMA FACIE CASE WHEN THE DEFENSE MADE A *WHEELER-BATSON* CHALLENGE TO THE PROSECUTOR'S PEREMPTORY STRIKES OF TWO OF THE THREE AFRICAN-AMERICANS IN THE VENIRE

A. THE DEFENSE CHALLENGE TO THE VENIRE PUT THE COURT ON NOTICE THAT THERE WERE FEW AFRICAN-AMERICANS AVAILABLE TO SIT ON THE JURY

After the first jury panel of the second trial was called and filled out their questionnaires, the defense brought a motion to discharge the panel due to under-representation of African-Americans on the panel. While African-Americans comprised at least 5% of the Kern County population, there was only one among the 70 in the first panel. Moreover, the defense asserted, jury panels in Kern were selected from voter and motor-vehicle registration records, which consistently led to the under-representation of blacks. (18 RT 4313-4315.) The court denied the motion at that time. (18 RT 4320.)

The defense renewed the motion following the appearance of the second panel of 70, in which there were only 3 blacks, for a total of 4 blacks among the 140-person venire, or 2.8% (18 RT 4345-4346). The court again denied the motion, ruling that under *People v. Horton* (1995) 11 Cal.4th 1068, the defense had not shown either that representation on jury venires is not fair and reasonable in relation to their number in the

community, nor that under-representation was due to systematic exclusion (18 RT 4346-4347).

While appellant would take issue with the court's second-prong finding,[66] he is aware of no court which has found either that using voter roles and car registrations, as a rule, or as applied in Kern County, systematically under-represents African-Americans, the third prong of *Horton.*

Nevertheless, the striking under-representation of African-Americans in the venire is backdrop for the trial court's failure to find a *prima-facie* case had been made on appellant's *Wheeler/Batson* motion.[67]

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[66] Under the test described in *People v. Sanders* (1990) 51 Cal.3d 471, 491-492, and taking the lower percentage, 5%, as the applicable percentage of blacks in Kern County, the absolute disparity would be 2.2%, and the comparative disparity 44%. This, appellant contends, would be ample to satisfy the second prong of *Horton.*

[67] Regarding the impact of that under-representation, it is well to remember the statistics adduced from the public survey conducted by Dr. Bronson, discussed *ante*: In response to a question regarding whether death would be the appropriate penalty if Harris were found guilty, only 11.1 percent of blacks opted for the death penalty, while 47.3 percent of non-blacks did. (30 CT 8803.) Similarly, only 16.7 percent of blacks prejudged Harris guilty, while 57.5 percent of non-blacks did. (30 CT 8804; 17 RT 4016-4017.)

B. THE PROSECUTION EXERCISED PEREMPTORY CHALLENGES AGAINST TWO OF THE THREE AFRICAN-AMERICAN JURORS LEFT ON THE PANEL, OVER THE OBJECTION OF THE DEFENSE

After the prosecution excused the second of two African-American jurors, the defense brought a *Wheeler* motion. (*People v. Wheeler* (1978) 22 Cal.3d 258.) Counsel explained that defendant objected not only to the second strike, of juror K.P. (Juror #3287), but also to the first one, against H.C. (Juror #1863).[68] The defense explained that it had not objected to the dismissal of H.C. because it felt that the prosecutor's excusing one African-American was insufficient to trigger *Wheeler* protections. When the prosecutor additionally struck K.P., the defense brought the motion. (26 RT 5983.)

Regarding H.C., counsel noted that he was qualified to sit on the jury, as amply demonstrated herein, *post*. K.P. was of mixed race, but the African-American in her was "obvious." Moreover, nothing that she said in voir dire showed any unwillingness or inability to be fair and impartial. Counsel also reminded the court that the holdout juror in the first trial was that jury's lone African-America. (26 RT 5984.)

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[68] Empaneled jurors are identified in the Reporter's Transcript by their juror numbers, only the last four digits of which are replicated here. Other indications in the record allow the matching of those numbers with names. In order to avoid the eye-glazing difficulty that comes with using numbers in this discussion, the jurors' initials will be used where possible, consistent with this court's recent practice.

The court responded that K.P. had raised with them the issue of her having to delay her progress toward transferring to a four-year college. Counsel noted, however, that the court did not find that sufficient to excuse her for cause. Nevertheless, the court declined to find that the defense had made out a *prima-facie* showing of race-based exclusions. (26 RT 5985.)

The court then invited the prosecutor, if he chose, to state his reasons for the strikes. The prosecutor declined, commenting, however, that counting K.P. as an African-American, the panel at that time included 3 blacks of the 69 who remained on the panel, which was near to the five percent of African-Americans in the local population. (26 RT 5985-5986.) This was disingenuous, of course: the relevant number was the percentage in the original panel, which, as explained *ante*, was a mere 2.8 percent of the venire.

After voir dire was complete, there was, on the final jury, one African-American. She was a woman, Juror No. 5727, who was (1) a correctional officer, (2) whose husband was a cook at the prison; (3) whose brother-in-law was a CHP officer; and (4) who had another friend who worked for the Department of Corrections. (24 RT 5598-5599.) Though African-American, her profile indicated that she would otherwise be about as pro-prosecution a juror as one could imagine.

Following the district attorney's final acceptance of the panel, the defense, acknowledging that it had one peremptory challenge left, chose not to use it, but noted for the record its dissatisfaction. (26 RT 5991, 5993.) Defense counsel explained that, as the defense had only one peremptory left and the prosecution had four, they did not want to risk getting an even worse jury than they had. The court denied a request for additional peremptory challenges. (26 RT 5994.) Defendant Harris spoke up, and asked the court how he could get a fair trial with 11 whites and one Hispanic on the jury. (26 RT 5994-5995). (It was only after this comment that one of the white women on the jury was replaced by the African-American woman referred to above, the correctional officer. (26 RT 6006.))

While the court's refusal to ask jurors to state their race makes a final assessment impossible, appellant's comment certainly provides strong evidence that, in this trial of a black man who was accused of murder, rape and sodomy against a white female college student, his jury consisted of ten whites, one African American correctional officer, and one Hispanic.

C. THE TRIAL COURT ERRED IN FAILING TO FIND A *PRIMA-FACIE* CASE OF RACE-BASED EXCLUSION, IN APPARENT RELIANCE ON AN ERRONEOUS STANDARD

This is a case in which the trial court did not expressly state the standard it used in determining whether the defendant had made out a prima facie case for race-based peremptory strikes. In such a case,

> because the trial court did not state the standard it used to determine whether he established a prima facie case of discrimination, we must presume the trial court used the improper more-likely-than-not standard under *People v. Johnson*. (See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [trial court is presumed to follow established law absent evidence to the contrary].) Therefore, [appellant] asks that we independently determine whether he established a prima facie case of discrimination using the reasonable inference test under *Batson*. As in *People v. Cornwell*, "[r]egardless of the standard employed by the trial court, and even assuming without deciding that the trial court's decision is not entitled to deference, we have reviewed the record and, like the United States Supreme Court in *Johnson* ... [we] are able to apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Cornwell*, [2005] 37 Cal.4th [50], at p. 73.)
>
> (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1101; see also *People v. Bell* (2007) 40 Cal.4th 582, 596-597.)

Appellant will argue in the following sections that (1) there was no basis in the questionnaire or voir dire answers of Juror H.C. to have justified his being struck, and little to differentiate Juror K.P. from similarly situated white jurors who were sworn; and (2) that a totality of the relevant

circumstances shows that the court's failure to find an inference of discrimination was reversible error.

1. THE AVAILABLE EVIDENCE POINTS TO AT LEAST AN INFERENCE OF RACE-BASED EXCLUSION, AND SPECIFICALLY TO AN ENTIRELY UNSUPPORTABLEEXCLUSION OF ONE OF THE AFRICAN-AMERICAN JURORS

Preliminarily, it must be noted that, as with the trial court's exclusion from the questionnaire of several questions going to racial bias (see *ante*, at pp. 160-165), the court also significantly weakened the ability of both the prosecution and defense counsel to use the questionnaire to plumb the feelings of the prospective jurors regarding the death penalty by its exclusion of questions on the jury questionnaire.

The prosecutor's proposed questionnaire included eight questions directly or indirectly going to the death penalty. (4 CT 876-877.) The defendant's proposed questionnaire included 28, some of which were also in the prosecution package. (4 CT 1039-1045.) Nevertheless, the court stated during pre-trial discussions that it would not use the death-penalty questions proposed by the defense:

> The death penalty questionnaire I don't want to use. . . . [I]f I use that, I wouldn't do the Witherspoon questioning. And the reason that I still do that on an individual basis is that I think it is important not that we just get answers to those questions, but that we all be observing these people because those of us who have tried these know that sometimes answers are given quite forthrightly and you think, well, this is really the person's thinking. Other times you will see the

> twisting and turning and agonizing that tells you that the person perhaps really hasn't concluded whatever it is they are telling you. So I don't want to use the death penalty portion of the [proposed] questionnaire.
>
> (2 RT 640)

Ultimately, at the urging of the prosecutor, the court approved two death-penalty questions that which were included in the questionnaire. (2 RT 648-649; *see, e.g.*, 28 CT 7900, questions 68-69.) These questions are indirect at best, asking if the juror feels that the sentence of life without the possibility of parole (q. 68) or the death penalty (q. 69) is used too often, too seldom, or selectively (whatever that means), with an opportunity to explain the answer. While they did provide a springboard for voir dire questioning, they provide little grist for appellate review; the questions did, however, provoke juror responses that contributed to what the trial court should have found was an inference of discrimination.

While this court has disfavored juror question-and-answer comparisons at the first stage of *Batson* analysis (*People v. Bell* (2007) 40 Cal.4th 582, 600-601), the struck jurors answers were a part of the "totality of the circumstances" before the trial court – and before this court – in determining whether an inference of discrimination had been raised. In the following three sections, appellant will analyze the jurors' answers, and analyze and distinguish *Bell* and its ruling.

2. THE ANSWERS GIVEN BY THE TWO STRUCK AFRICAN-AMERICAN JURORS DIFFER FROM THOSE OF WHITE JURORS LEFT ON THE JURY, IF AT ALL, BY BEING MORE IN FAVOR OF THE DEATH PENALTY

(a) Other Than the Fact that He Was African-American, There Is Nothing in the Record to Indicate That Juror H.C. Would Haved Been Anything But an Ideal Juror for the Prosecution

A review of the record reveals nothing to justify the prosecution's peremptory strike of Juror H.C. Indeed, as explained below, he was perhaps the most pro-death-penalty juror questioned. This alone should have been sufficient to raise an inference of race-based exclusion, even without the subsequent strike of the second African-American juror to sit in the box.

H.C. was a basketball coach at the University from which Manning was to have graduated. In response to the two questionnaire questions regarding the death penalty, he indicated that LWOP was used "too often" and the death penalty "too seldom." (24 CT [6681].) This alone distinguishes him from the non-minority jurors who were not struck by the prosecutor: H.C. was much more pro-death penalty. His answers to the remainder of the voir dire questions did nothing to minimize his pro-death stance:

–If the defendant were found guilty, would he refuse to return that verdict because of any conscientious opinion about the death penalty? No. (23 RT 5242).

–If the defendant were found guilty during the penalty phase, would he refuse to find the special circumstance true because of any conscientious opinion he had about the death penalty? No. (*Id.*)

–Did he have any opinion about the death penalty that, regardless of evidence, would cause him to automatically refuse to vote for the death penalty in any case? No. (23 RT 5243.)

–Did he have any opinion about he death penalty that would cause him to refuse to consider LWOP?

> I think there are certain circumstances that I would probably vote for life and opposed to the death sentence, but I think it would be an individual situation more than anything else and I can't really expound that, but I know there would have to be certain circumstances.
>
> (*Id.*)

–Asked by the court to expand on this answer for the record, that he was saying he could apply either penalty, H.C. answered:

> Right. I mean, it's not an either/or situation. I mean, you take into consideration the life sentence as opposed to the death sentence. Both are the worst-case scenario, but it depends on the case and what's going on and the evidence and the penalty phase and what I hear in the circumstances. There's always different degrees of everything, so I would take into account what's presented by the People.

(23 RT 5243-5244.)

–Asked by the prosecutor whether, after returning a guilty verdict with at least one special circumstance, and after concluding during the penalty phase that death was the appropriate penalty, could he actually vote to return a verdict of death, his answer was again simple and direct: "Yes." (23 RT 5247.)

–In a followup question, the prosecutor indicated his understanding that "what you're saying is that you perhaps in the abstract might tend to favor the death penalty in certain cases, but you would have to look at each case individually before making a decision what was appropriate. Is that correct?" H.C.: "Correct." (*Id.*)

Now, what is striking about this is that every time H.C. was asked directly if he could impose the death penalty, he answered yes. Any possible ambivalence was created not by him, but by the additional questioning of the judge and prosecutor. Of course, even that "ambivalence" amounted to nothing more than saying what was obvious (and proper): he would consider all the evidence, apply it as he saw fit, and not foreclose either penalty.

(b) Neither Did the Answers of K.P. Indicate Any Particular Antipathy to the Death Penalty, and Some of the Non-Struck White Jurors' Answers Were More Ambivalent Than Those of Both H.C. and K.P.

The defense brought its *Batson* motion right after the prosecution's strike of juror K.P., of mixed race but treated as African-American . While not as obviously pro-death-penalty as H.C., she had answers similar to those of the non-struck, non-minority jurors set forth below. Thus, she did not state on her questionnaire that the death penalty was used too seldom and LWOP too often, But her answers were otherwise similar to those of the white jurors who preceded her into the box and were not struck. Like them, most of her answers to the court's leading questions were the appropriate "no's" (see, e.g., 21 RT 4919-21), and her somewhat extended answer to a question from the prosecutor certainly gave little cause for concern. The question was the prosecutor's standard question of whether she could actually vote to return a verdict of death, she answered: "If I thought that – if I believed he was guilty and I like weighted all the options and all that and that's what I thought, then I would have no problem voting for it." (21 RT 4926.)

Neither K.P.'s, and certainly not H.C.'s, answers were as ambivalent regarding death as those of one of the sworn non-minority jurors, J.B. (Juror #7554). When asked by the court if , after returning a verdict of guilt and at least one special circumstance, she had an "conscientious opinions about the death penalty" that would prevent her from voting for it, she answered, "Oh, I am kind of indecisive about the death penalty. . . . [¶] I would have to look at everything

and I guess I would have to say, I don't, I don't know how I would feel." (21 RT 4689-4690.) Similarly, asked what, before she knew she was going to be a juror in a murder case, she thought about the death penalty, she answered:

> I have waxed and waned about it. I thought it was a good idea for a while, then I thought it was bad. And, I think you have to look at each case individually before you can decide.
>
> (21 RT 4690.)

Similarly, I.S. (Juror #9063), asked to explain her answer to question 68 on the questionnaire,[69] said this:

> Well, I think – I think people can receive the death penalty, and I feel that if it's awarded, a death penalty, it has to be a definite proof of the guilt and that the death penalty is merited.
>
> I don't feel that if a person merits – it is felt a person merits the death penalty, if there's any doubt at all about the situation, then I think life imprisonment without parole is an alternate.
>
> (21 RT 4942.)

The foregoing analysis is limited to a comparison of the struck African-American jurors with those non-minority but ultimately sworn jurors in the box when the defense made its *Batson* motion. Assuming that a prima-facie case had been found by the trial court and the prosecutor had given the usual death-penalty-ambivalent reasons for striking Jurors K.P. and H.C., and assuming that this court would now be engaging in a comparison of those jurors answers with those of the entire non-minority panel of non-struck jurors, the racial component of the strikes is even more evident.

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[69] Question 68 asked whether life without parole was used too often, to seldom, or selectively. Juror I.S. answered "Selectively," and then wrote in: "An option to mask deserved death penalty." (20 CT 8085.)

The simple fact is that no one on the panel was as strong a death penalty advocate than H.C. He was the only one who said, in his questionnaire answers, that LWOP was imposed too often, and the death penalty too seldom. His answers, as set forth above, were consistent and pro-death. If J.K. (Juror #4778) had been African-American, it is difficult to believe that she would not have been struck, and that the prosecutor would not have justified this on the basis of her answer to his question about whether she could return a verdict of death: "I believe that I would, but I believe that it would bother me." (21 RT 4880.) Similarly, L.M.T. (Juror #8695), asked if she had any conscientious opinion about the death penalty that would cause her to refuse to impose it, explained her answer thus: "I am willing to give it if – if a person is guilty beyond a reasonble doubt. I don't – like, I would feel I feel sad to give it because that's taking someone's life. But I'm said to give it but I would." (22 RT 5109.)

Whether or not these comparisons, *vel non*, would be enough to warrant reversal in a case in which the trial court had found a prima facie case and thereafter denied the defense motion is not the point, here. Rather, it is that, were the trial court either (1) using the proper, inference standard, or (2) serious about viewing the prosecutor's strikes from a *Batson* perspective, the prosecutor would have been ordered to give his reasons. Failing that, and failing the opportunity on review to assess the prosecutor's reasons, reversal is the only logical remedy. (See *post*, at pp.190-191, for further discussion of this remedy.)

In addition, however, defendant submits that the entire process of this court's evaluation of inference on the basis of trial transcripts is misplaced.

Despite the understandable reluctance to adopt a standard which would reverse every case in which the court might have used the incorrect standard, that is what federal constitutional jurisprudence mandates.

3. WHILE THIS COURT HAS DISFAVORED COMPARISONS AT THE FIRST *BATSON* STAGE, THERE IS LITTLE ELSE UPON WHICH A DEFENDANT CAN RELY WHEN THERE ARE SO FEW MINORITY JURORS IN THE VENIRE

"'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Snyder v. Louisiana* (2008) ___U.S.___, ___, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175, 181, quoting *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902.) However, in *People v. Bell, supra,* this Court indicated both that (1) it would not engage in the *Miller-El*-style of comparisons in the first stage of *Batson* analysis, whether an inference has been shown of race-based exclusions, and (2) that no inference could be drawn solely from the striking of two out of three of the cognizable group. (*Bell, supra,* 40 Cal.4th at pp. 597-598, 600-601.); *Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [explicitly incorporating side-by-side comparisons of the answers of similarly situated minority and white jurors in third *Batson* stage].)

Bell did, however, set forth several factors which did not amount to an inference of discrimination in that case, but which – especially in light of the comparisons set forth above – should amount to one here. While an

inference can arise from "any information in the record," there were in particular four specific types of evidence that would be relevant for this purpose: (1) whether the party has struck, or has used a disproportionate number of his peremptories against the group; (2) whether the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogenous as the community as a whole; (3) whether there were such circumstances as the failure of the prosecutor to engage these jurors in more than desultory voir dire, or none whatsoever; and (4) whether the defendant is a member of the excluded group, especially if the alleged victim is a member of the group to which a majority of the remaining jurors belong. (40 Cal.4th at p. 597.)

Bell is distinguishable from this case in several ways. First, Bell challenged the striking of two out of three black women from jury, in a case in which the defendant was not black and in which four black men remained on the panel. (40 Cal.4th at p. 595.) In the instant case, only one of the four blacks in the entire venire, and of the three remaining when the motion was made, was sworn, Second, Bell was not a member of the disfavored group (African-American women), and the prosecutor did not exercise peremptories against four of his parallel group, African-American men. In this case, taking the genders together, Harris *was* a member of the disfavored group (African-Americans). And the victim was, like 10 of the

12 jurors, white. Regarding the two remaining factors, it is difficult to judge heterogeneity when speaking of two struck jurors, and the prosecutor put the same questions to them as to other jurors.

Bell states that the fact that two out of three members of the cognizable group were struck cannot *alone* raise an inference of discrimination. (40 Cal.4th at pp. 597-598.) In combination with the other factors – two of the only three remaining Blacks in the venire, a Black defendant and white victim, it is difficult to imagine what more would be needed as "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170.)

There was, however, more: The answers to the questionnaire and voir dire questions given by jurors H.C. and J.K. In *People v. Bell*, *supra*, this court disavowed the usefulness, at the first stage, of comparisons such are mandated for the third stage of *Batson* analysis. (40 Cal.4th at pp. 600-601; *Miller-El v. Dredke*, *supra*, 545 U.S. at pp. 241-252.) *Batson*, however, teaches that the defendant may rely on not only the sort of factors discussed above, but "any other relevant circumstance" to show the inference of discrimination needed at the first *Batson* stage. (*Batson* v. *Kentucky*, *supra*, 476 U.S. at p. 96 [see also language referencing "the totality of the relevant facts." (*Id.*)].) Even without engaging in the sort of

detailed comparisons now commonly made in third-stage *Batson* analyses, the court had before it the answers it had seen and heard from these jurors, as well as those of all of the jurors that preceded them into the box. H.C.'s pro-death-penalty answers were striking and distinctive, and certainly qualify as "any other relevant circumstance."

This court in *Bell* also noted that making out an inference of discrimination on the basis of the excusing of only one or two members of a group is "very difficult." (40 Cal.3d at p. 593, fn. 3.) If taken too far, this limitation could so crab the *Batson* principles in a case such as this as to render them – and the constitution – a nullity, giving the prosecution what amounts to a free pass to make race-based peremptory strikes whenever there are only a few members of defendant's minority race in the venire. Fortunately, in this case, the fact of two of three black jurors being excused, when the venire was already 44% short of representative of blacks in the local population (see *ante*, p. 174, fn. 66), was not the sole indication.

It is this court's practice, when it is unclear from the record which standard the trial court used in rejecting a defendant's assertion that he has shown an inference of discrimination, to review the record independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis. (*Bell, supra,* at p. 597, citing *People v.*

Cornwell, *supra*, 37 Cal.4th at p. 73; accord, *People v. Avila* (2006) 38 Cal.4th 491, 554.) Whether viewed from the perspective of what the trial court knew at the time the *Batson* motion was made, or upon review of the record by this court, an inference was made out. Where a state court's ruling on a *Batson* motion is "at odds with the prima facie inquiry mandated by *Batson*, [t]he judgment . . . must be reversed." (*Johnson v. California*, *supra*, 545 U.S. at p. 173.)

V. THE COURT ENGAGED IN SEVERAL OTHER PRACTICES WHICH CONTRIBUTED TO CREATING A "DESIGNER JURY" FOR THE BENEFIT OF THE PROSECUTION

In addition to the above-described racial component to the jury selection, the trial court engaged in several other practices which resulted in a jury tilted in favor of the prosecution. These included failures to sustain challenges for cause, which in one case resulted in a juror who was sworn, and persistent questioning of prospective jurors in a manner so as to "save" them from being challenged or excused for cause. While none of these may alone be prejudicial error, they contributed to the overall pattern which resulted in a jury that was, from the start, biased toward the prosecution, and a resulting denial of due process.

Preliminarily, it is useful to remember that, while the defense accepted the jury with one peremptory challenge unexercised, it made clear that (1) it wished to have additional peremptory challenges; (2) it was unsatisfied with the jury; but (3) was unwilling to use its final peremptory challenge because the prosecution had four unused peremptories remaining and the risk was too high that it would end up with an even worse jury. (26 RT 5994, 2006-2007.) As will be argued below, this was more than a speculative fear.

A. THE COURT FAILED TO SUSTAIN THE CHALLENGE FOR CAUSE OF A JUROR WHO WAS EMBEDDED IN THE CRIMINAL JUSTICE SYSTEM, THEREBY INCREASING THE PRO-PROSECUTION BIAS OF THE JURY

Following the voir dire of Juror R.C. (Juror #9910), the defense brought a challenge for cause. R.C. was a registered nurse who worked at the county jail (referred to in the record as the "Lerdo facility.") He had treated potential witness Baird (a fellow jail inmate who claimed that Harris had all but confessed to him); he had had contact with defendant Harris; and, the day before being questioned, he had heard a detention officer at the jail commenting that the jury was being picked for the second trial, and that Harris was "scum" or a "scumbag." (22 RT 5024-5026.) In addition, his wife was a court reporter, working in the juvenile court, and his brother was a deputy sheriff. (22 RT 5027.) R.C. had also been a victim of a car theft in 1988, which was one of the charges herein. (22 RT 5029-5030.) Despite all this, he claimed, he would have no trouble remaining unbiased, nor with coming to a "not guilty" finding. (22 RT 5026-5028, 5030, 5033.) The defense brought a challenge for cause:

> The problem is that he works around detention officers all day every day. And by that one comment about Mr. Harris being scum, I cannot help but believe that it would create a hostile work environment for him, and he is going to have to come to that realization that if he came back and found Mr. Harris not guilty. And no one wants to work in a hostile work environment. I think he would be tempted to see the evidence more toward a prosecution standpoint to avoid that possibility.

> And, therefore, I don't think he can be a fair and impartial juror. I think he may be a fair and impartial person, but because of his situation, I don't think practically speaking he is going to be able to render a fair verdict.
>
> (22 RT 5053.)

The court denied the challenge:

> I have to make this call based upon what he has told us. He has told us he can be fair. And I am going to deny the motion. It is my intention, should he serve on the jury, to order that he is not to attempt to work, let's say, shifts on the side or something like that during the time that he is in trial here. He will be paid for his time so there is no reason to be concerned about that. But, in any event, the motion is denied.
>
> (*Id.*)

The court misapprehended everything defense counsel said. The problem, counsel made clear, arose not from any work R.C. might be doing during the trial, but rather a valid concern – which might not arise until he was well into his service on the jury – that if he voted not guilty, he might thereafter *return* to a hostile work environment.

Moreover, regarding the court's comment that it could only "make this call based upon what he has told us" (*id.*), what the juror told them was of little practical use. As explained by Dr. Bronson to the court during the change-of-venue motion hearing, answers to highly leading, closed-end questions by the judge yield nothing more than the socially acceptable answers. (See *ante* at pp. 139-140.) What else, for example, would the

juror have said than what he did in answer to the court's question about the effect of the detention officer's comment:

> Q. Now the fact that somebody might have referred to the defendant in that fashion is that going to affect your judgment in this case?
>
> A. No. Huh-uh.
>
> (22 RT 5026.)

And how else might any self-described fair-minded person have answered than the way R.C. answered the court's question about his relationships to law enforcement:

> Q: And the fact that you work in law enforcement, although as a medical person, and your brother works in law enforcement, is that going to affect your ability to fairly judge the testimony of peace officers in this lawsuit?
>
> A: Affect?
>
> Q: Right. In other words, are you going to be able to weigh the testimony of peace officers in this lawsuit just as you would the testimony of anybody else who might come in?
>
> A: Yes.
>
> (22 RT 5027-5028.)

Regarding the legal standards when a defendant challenges on appeal a trial court's denial of a challenge for cause, the cases mostly concern death penalty qualification. In such a case,

> If a defendant contends that the trial court wrongly denied a challenge for cause, he or she must demonstrate that the right to a fair and impartial jury thereby was affected. (*People v.*

> *Garceau* [1993] 6 Cal.4th 140, 174; *People v. Bittaker* [1989] 48 Cal.3d 1046, 1087-1088.) Initially, a defendant must establish that he or she exercised a peremptory challenge to remove the juror in question, exhausted the defendant's peremptory challenges, and communicated to the trial court the defendant's dissatisfaction with the jury selected. (*People v. Morris* (1991) 53 Cal.3d 152, 184 [279 Cal.Rptr. 720, 807 P.2d 949]; *People v. Bittaker*, *supra*, 48 Cal.3d 1046, 1087.) "[I]f he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different. [Citations.]" (48 Cal.3d at pp. 1087-1088; *cf. People v. Mason* (1991) 52 Cal.3d 909, 954 [277 Cal.Rptr. 166, 802 P.2d 950] [6th Amend. claim obviated by exercise of peremptory challenges to exclude prospective jurors not excused for cause, without comment by this court on other potential constitutional claims].)

(People v. Crittenden (1994) 9 Cal. 4th 83, 121-122; *accord, People v. Avila* (2006) 38 Cal. 4th 491, 539 [failure to express dissatisfaction]; *People v. Maury* (2003) 30 Cal. 4th 342, 379 [defendant accepted jury with three peremptories remaining]; *c.f., People v. Cunningham* (2001) 25 Cal. 4th 926, 976 [because exercise of peremptories eliminated offending jurors, defendant was not prejudiced]).

All of the foregoing cases concerned death qualification, but neither the United States nor the California Constitutions limit the right to an impartial jury to the issue of death qualification. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726; *People v. Crittenden*, *supra*, 9 Cal. 4th at pp. 120-121.)

If, as in *Cunningham*, the defendant had used a peremptory challenge

to excuse R.C.; or if, as in *Avila*, he had expressed no dissatisfaction with the jury; or if, as in *Maury,* he had accepted the jury with three peremptories remaining, he would have no argument here. In this case, however, defendant was hamstrung by having only one peremptory left while the prosecution had four remaining; expressed dissatisfaction with the jury; and, worst of all, was afraid of using that peremptory to excuse R.C. (discussed further below). Under the *Crintendon* formulation reversal is available where the offending juror *is* excused by peremptory challenge, all of defendant's other challenges are used up or there is an excuse for them not to be, and he expresses dissatisfaction. *A fortiori*, it must be available when the offending juror is sworn and hears the case.

B. THE DEFENSE FEAR OF USING ITS LAST PEREMPTORY WAS ENTIRELY JUSTIFIED, GIVEN THAT THE COURT PERSISTENTLY REHABILITATED JURORS WHOSE INITIAL ANSWERS WOULD HAVE LED TO THEIR BEING EXCUSED FOR CAUSE

Another prejudicial voir dire technique used by the trial court, perhaps not error in itself but part of the pattern of abuse of pre-trial discretion, was the court's persistent rehabilitation of jurors whose initial answers during voir dire would have led to their being excused for cause.

That this prejudiced appellant is shown by the fact that, at the time that he decided not use his last peremptory challenge because the

prosecution had four peremptories remaining, one of the jurors in question, P.P. (Juror #3635), remained in the venire.

What did he have to fear? Here are some of the ways in which the trial court led jurors to "acceptable" answers from their initially suspect ones:

Juror P.P.

P.P. was a firefighter from the same engine company called to put out the car fire in this case. Though he worked a different shift, he heard fellow firefighters talking about it, after which the murder was linked up with the fire. (24 RT 5618.) P.P. also had a sister who worked for the District Attorney, in the child support division. (24 RT 5614)

The court asked P.P. about his response to the question on the questionnaire about the use of drugs and alcohol, and whether P.P. would prejudge a case against a drug or alcohol user, even if that was not involved in the crime. P.P. initial response was affirmative:

> I believe it might cause me to prejudge that individual. My sister-in-law has been in and out of jail, has used drugs most of her life. . . . I tend not to look too kindly on individuals who are drug users.
>
> (24 RT 5616.)

The court, however, was not content with that answer, and launched into a hypothetical about someone accused of robbing a 7-11 store at gunpoint, and who on other occasions might have overused alcohol, but the issue for

the jury to decide was whether he entered the 7-11 with intent to rob, did commit the robbery, etc.

> Q. [by the Court] Could you fairly decide whether he did or did not commit that offense?
>
> A. I think it might cause me to look closer at that individual.
>
> Q. Would you still consider, however, evidence – the evidence to determine whether or not on the evidence as a whole you were persuaded that he had or had not committed the offense?
>
> A. I'd look at the evidence.

(24 RT 5617.)

When a trial judge begins a question to a prospective juror with "could you fairly" or "would you still consider," it is the rare citizen, firefighter or not, that will say "no."

In addition, P.P. knew both of the government's fire department witnesses, Captains Embry and Hammons, and was quite close to Embry during P.P.'s first three years as a reserve firefighter. Embry took P.P. under his wing, showed him the ropes, and P.P. had worked with Embry in the investigations of several structure fires. He had also worked with Hammons, who was his captain for about three years, and with whom had spent off-duty time. (24 RT 5619-5620.) The court, quite naturally, asked P.P. whether, if other expert witnesses testified to matters also testified to by Hammons and Embry, P.P. would be able "listen to those witnesses,

judge their credibility, look at their credentials, and then make decisions about issues presented by Captain Hammans and Captain Embrey [sic]?"

> A. Yes, sir, but I believe I would probably listen to Captain Embrey [sic] and Captain Hammons a little bit closer because of my personal relationship with them.
>
> (24 RT 5620.)

The defense, of course, might have some concern about this, and the court might have as well, if it had not made sure that the answer would not stand:

> Q. Sure. Would it be true, however, that you might – and again, I'm not sure at all that we're going to get into this, but would it be true, also, that you might be impressed with the credentials of someone who came in to testify about one aspect of the case and find them more credible, not because Embrey [sic] or Hammons was lying, but because that person had more expertise or knowledge about a specific area?
>
> A. I don't think so.
>
> Q. You don't think it would be a problem?
>
> A. I don't think anybody would be able to come in and greatly impress me with their credentials where they would know more than Captain Embrey [sic] or Captain Hammons.
>
> (24 RT 5620-5621.)

This, it would seem, should have been enough. But the court persisted:

> Q. But so that we're clear on this, so far as them just being observers or a crowd or things happening not involving fire suppression, you could judge their testimony as you would any other witnesses' testimony?

A. Yes, sir.

(24 RT 5621.)

The court repeated this pattern regarding another questionnaire answer by P.P. Question 51 asked about the appropriateness of pre-marital sexual relationships, and P.P. indicated that he was strongly against such a relationship. Asked whether, if he heard about such a relationship in this case it would cause him to pre-judge the case, P.P. said, "I believe it might." The following ensued:

> Q [by the Court]. Find the person guilty of a crime not involving consensual sex if you heard that they'd had that sort of a lifestyle?
>
> A. I believe so.
>
> Q. How do you see that playing out?
>
> A. I view premarital sex as immoral and wrong.
>
> Q. Right. Right.
>
> A. And I just don't agree with that lifestyle.
>
> Q. Let's go back to our hypothetical situation of the guy holding up the 7-11.
>
> A. Sure.
>
> Q. The only thing you know about the guy other than the fact that he's saying I didn't do it and you're going to try it is that he's been living with a lady that he's not been married to.
>
> A. Uh-huh.

Q. Is that going to cause you to say he's got to be guilty of holding up the 7-11 because of that?

A. No, sir.

Q. That's what I'm asking.

A. Okay.

Q. Nobody's trying to get you to say yeah, that's a great lifestyle, okay?

A. Okay.

Q. But you see the difference.

A. I understand.

(24 RT 5622-5623.)

What is wrong with this picture? Well, first, that the court was unwilling to accept the answers to its first two questions, which clearly showed an antipathy to those engaged in pre-marital sex. Second, the trial court was itself prejudging the case when it stated explicitly that this was a case "not involving consensual sex." Third, the 7-11 analogy is a false analogy, because this case was not about robbing stores – it was about a murder in which the defendant, the one involved in the non-marital relationship with his girlfriend – was also accused of *sexual* crimes. And finally, the hypothetical itself must fail because the question is not as the court stated it – "Is that going to cause you to say he's *got* to be guilty of

holding up the 7-11 because of that?" – but rather "does it predispose you against him," a question which was never asked but which, given P.P.'s first two answers, clearly was "yes."

Still another example arose with regard to question 60, for which P.P.'s answer indicated that he might have problems discussing sexual activities of young people in a mixed-gender jury room. More specifically, that he could do it, but would feel somewhat embarrassed by it.

> Q [by the Court]. If you had to discuss sexual activity of young people in a clinical setting in the jury room, not in a titillating fashion, but in the sense of discussing the evidence, could you do that?
>
> A. I feel that it would be very difficult. I would be very uncomfortable doing that in mixed company.
>
> (24 RT 5624-5625.)

Again, the court was unwilling to let this stand. And again, through the art of the leading question, the court brought forth an "acceptable" answer:

> Q. Let's assume that you're sitting back there and some issue – again, it would not be in the sense of boisterous conversation in a bar, but in the sense of talking about the evidence.
>
> You hear the jurors talking about certain testimony about sexual conduct and you have a view, perhaps, that they are mischaracterizing what they heard or that maybe you heard something else different than what you hear a juror say.

> Could you point that out to them, I was listening carefully and I heard this statement made rather than that statement?
>
> A. I believe I could.
>
> (24 RT 5625.)

So, what we know about P.P., who was still in the venire when defense counsel announced he was unsatisfied with the jury but unwilling to use his one remaining peremptory, was that he was (1) a firefighter who worked with and had great respect for the two fire captains who would testify for the prosecution; (2) who was also predisposed against persons, like the defendant, who used drugs and alcohol and (3) engaged in pre-marital sex; and (4) who would be very uncomfortable discussing sexually-related evidence in a mixed-gender jury deliberation. (Elsewhere, he also admitted that he had had negative experiences with Hispanics and blacks early in his firefighting career (24 RT 5623-5624), and that he would give police witnesses the benefit of the doubt in terms of believing his testimony (24 RT 5634).)[70]

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[70] The trial court engaged in a similarly egregious attempt to "save" a juror in its questioning of V.G. (Juror # 6543), but ultimately excused him in response to a defense challenge for cause. The court's exchange with V.G. regarding his prejudgement of the case is at 24 RT 5697-5701.

P.P. was still in the venire when the defense, dissatisfied with the jury, nevertheless felt constrained not to use its final peremptory challenge because of the four remaining for the prosecution.

C. EVEN IF THE COURT'S REHABILITATING MARGINALLY ACCEPTABLE JURORS WAS NOT ERROR, IT JUSTIFIES APPELLANT'S DECISION NOT TO USE HIS LAST PEREMPTORY, AND CONTRIBUTED TO THE PATTERN OF SELECTING A JURY DESIGNED FOR THE BENEFIT OF THE PROSECUTION

The practice of a trial court's rehabilitation of prospective jurors has not been directly addressed in the cases, but in a similar situation, this court has allowed for limits on *counsels'* attempts at rehabilitation:

> When a juror has clearly expressed an inability to vote for the death penalty regardless of the evidence that may be produced at trial, the court has discretion to limit further voir dire directed toward persuading the juror that there may be some circumstance which he has not considered that could cause him to modify his conscientious or moral attitude toward the death penalty. (Citation omitted.)
>
> (*People v. Mattson* (1990) 50 Cal. 3d 826, 846. *Cf. People v. Jones* (2003) 30 Cal. 4th 1084, 1103-1104 [prosecutor is justified in excusing black juror based on her answers before trial court rehabilitated her].

In this case, of course, it was the trial court itself which undertook the questioning "directed toward persuading the juror" that the juror didn't really mean what he or she had just said (and in some instances repeated after further questioning). But, given what Dr. Bronson and others have

said about the reluctance of jurors, especially when questioned by a judge, to vary from the socially acceptable answer, the continued, and leading questioning by the trial court in the instant case certainly made clear to the jurors what the acceptable answers would be.

The Supreme Court of Montana has faced this issue head on, and said the following:

> [W]e have repeatedly admonished trial judges to refrain from attempting to rehabilitate jurors by putting them in a position where they will not disagree with the court. [Citations.] As we stated in [*State v.*] *Williams* [(1993) 262 Mont. 530 [866 P.2d 1099]] and repeated in [*State v.*] *DeVore* [(1998) 292 Mont. 325, 336 [972 P.2d 816], "few people would show the kind of contempt for a judicial officer that would have been necessary to persist in her admissions of bias under those circumstances. . . . It is not a district court's role to rehabilitate jurors whose spontaneous, and thus most reliable and honest, responses on voir dire expose a serious question about their ability to be fair and impartial."

(*State v. Good* (2002) 309 Mont. 113, 126.) Regarding specifically the difficulty a juror has in maintaining the non-socially-acceptable position – meaning "socially acceptable" in the context of the courtroom – a concurring opinion in *Good* put it this way:

> [W]hen a juror "is sitting in an unfamiliar and imposing courtroom surrounded by her peers, attorneys, possibly other members of the community, and the trial judge, it strains credulity to believe that a prospective juror is going to persevere in her personal concerns about her ability to fairly hear the case . . ."

(*Ibid.*, quoting *State v. Brown* (1999) 297 Mont. 427, (conc. opinion of Nelson, J.).) While it is true that, in this situation, the jurors in question were being questioned individually, the scene still lacked only the prospective jurors' peers and other members of the community.

Wherever the line is, the trial court crossed it in this case. As it made clear in the first instance of Juror R.C., it would rely on the final answers given by the jurors after the court's directed and leading questioning, rendering any further challenges for cause futile. Indeed, even absent the example of R.C., the court's very conduct, its pattern of persistently rehabilitating questionable jurors, was itself enough to warn defense counsel of the futility of raising challenges for cause. While such conduct by the court may be one step removed from improper denial of a challenge for cause, its results are the same, "an unqualified juror being forced on the defendant in violation of constitutional and statutory rights." (*People v. Szymanski* (2003) 109 Cal.App.4th 1126, 1133, quoting 5 Witkin & Epstein, Criminal Law (3d ed. 2000) Criminal Trial, § 490, p. 693.) More broadly, it is part of a persistent pattern which ended up with a jury that was so tilted toward conviction and death that due process, reasonable doubt, and the presumption of innocence were, for Harris, little more than empty promises.

VI. CUMULATIVE ERROR: THE COURT'S SERIAL PRE-TRIAL ERRORS INSURED THE SELECTION OF A JURY THAT WAS TAINTED BY PUBLICITY AND TILTED TOWARD CONVICTION AND DEATH, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS AND FAIR TRIAL

As detailed *ante*, the trial court made a series of pre-trial errors that resulted in what amounted to a designer jury on behalf of the prosecution. Viewed alone, one or more of these errors might be viewed as non-prejudicial. As a whole, and indicative of a disturbing pattern, they add up to a prejudicial violation of the defendant's rights to due process and a fair trial.

Preliminarily, it is well to remember that this was not a slam-dunk case on the facts. While there was temporal proximity of appellant's having had sex with the victim and her subsequent murder, there was no physical evidence of rape; there was no discernable reason for appellant to have burgled the home of a friend, the victim's roommate, with whom he was in daily communication; the only "suspicious" person at the scene of the car fire was white, not African-American; a witness saw a white man who she initially identified as the victim's boyfriend carrying the television set from the victims's apartment; there was no other physical evidence which could be tied to appellant; and appellant's entire criminal history involved situations in which he avoided or ran from encountering his theft victims, or

in the case of the purse-snatch, was already on the run. There was no history of violence against either women in general or his theft victims in particular, and the number and pattern of knife wounds suffered by the victim clearly indicated the sort of rage that would have been far more likely to have been inflicted by a boyfriend who had just found out that his girlfriend had sex with appellant, or someone else who carried a deep grudge against the victim.

The trial court's refusal to order a change of venue prior to the second trial, despite overwhelming evidence that emotionally-laden and salient language pervaded the print and broadcast media, and was renewed and refreshed and expanded by reporting on the first trial, on its own practically insured a prejudiced jury. No matter the protestations to the contrary – many of them the result of leading and closed-end questions by the trial court which they could only answer in the socially-acceptable manner – there was little chance that the jurors chosen for the jury were able to set aside what they had heard and read. And that amounted to a litany of Harris, rape, murder, Harris, DNA from semen, Harris, her throat was slit, etc.

Having denied a venue change, the trial court proceeded to conduct voir dire in a manner which discouraged any focus on the obvious, and

volatile, racial components of the case. The trial court also denied a challenge for cause to an obviously compromised juror, and questioned subsequent jurors in a manner to insure that their answers would be "acceptable" in the same way that he found the challenged juror's answers acceptable.

Whether viewed through the prism of the Sixth Amendment right to a trial by an unbiased jury (*Duncan v. Louisiana, supra,* 391 U.S. at pp. 148-154; *Sheppard v. Maxwell*, *supra*, 384 U.S. at pp. 362-363), or the Fifth Amendment's right to due process (*Id.*; *Ham v. South Carolina* (1973) 409 U.S. 524, 526-527; *Hathorn v. Lovorn* (1982) 457 U.S. 255, 263), the court's pre-trial decisions, alone and especially together, insured a jury that was improperly and prejudicially inclined to convict and to impose the death sentence.

PART II: GUILT-PHASE ERRORS

VII. THE COURT PREJUDICIALLY ERRED IN ADMITTING THE FACTS OF THE ALREADY-ADJUDICATED TORIGIANI BURGLARY FOR PURPOSES OF IDENTITY AND INTENT

Appellant was initially charged with both the Manning murder and also a separate crime, the burglary of the apartment of Bree Torigiani, which occurred after the Manning murder. The first jury, while it hung on the Manning counts, convicted Harris of the Torigiani burglary. Prior to the second trial, the prosecutor moved for admission in that trial of the facts of the burglary, pursuant to Evidence Code section 1101(b), on the issues of intent and identity. The court granted the motion, allowing in evidence of the *facts* of the Torigiani burglary, but not that there had been a conviction.[71] (14 CT 3905; 18 RT 4237.)

In response, the defense filed points and authorities and moved to exclude the evidence. (14 CT 3920-3926.) In their moving papers, the defense argued that under *People v. Ewoldt* (1994) 7 Cal.4th 380,

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[71] The court's oral ruling is ambiguous, in that after stating that the evidence would be allowed in, the court also states that it "finds that the prejudicial effect does – is not outweighed by the probative value, specifically that in the Torigiani burglary there was no assault upon the young lady." Nevertheless, the minute order recites that the court ruled the evidence admissible (14 CT 4237), and Ms. Torigiani did testify on the facts of the burglary in the second trial. (29 RT 6932 *et seq.*)

insufficient similarity was demonstrated between the Torigiani burglary and the charged offenses to make it relevant for purposes of showing intent or identity; that it was, thus, merely propensity evidence inadmissible under subdivision (a) of section 1101; and that it was otherwise more prejudicial then probative under Evidence Code section 352. The court denied the motion, affirming its decision to admit the evidence.[72] (14 CT 3919.)

The admission of the evidence of the Torigiani burglary was a violation of section 1101, subdivision (a), as propensity evidence, was a violation of due process, and played into the prosecution's racial themes.

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[72] Penal Code section 1101, to the extent relevant here, provides as follows:

> (a) Except as provided in this section . . . evidence of a person's character or a trait of his or her character (whether in the form of . . . evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act.

A. THE COURT ABUSED ITS DISCRETION IN FINDING SUFFICIENT SIMILARITIES TO SHOW INTENT AND IDENTITY

Rulings on the admissibility of evidence are reviewed for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) A discretionary ruling based on an erroneous application of law is an abuse of discretion. (*Id.*, at p. 188.)

In considering the admissibility of evidence of uncharged misconduct, the reviewing court must weigh: (1) the materiality of the fact to be proved; (2) the probative value of the uncharged conduct to prove or disprove that fact; and (3) whether any extrinsic policy requires exclusion, such as Evidence Code section 352, which requires exclusion of evidence whose prejudicial effect outweighs its probative value. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) The prejudicial effect of "other crimes" evidence generally has been long recognized. (*Michelson v. United States* (1948) 335 U.S. 469, 475-476 [propensity evidence is relevant but tends to "overpersuade" the jury and deprives the defendant of a fair opportunity to defend against the charge]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [evidence of uncharged crimes which have not resulted in convictions may cause jury to punish defendant for the uncharged crimes regardless of guilt of charged crime].) It is the jury's natural and inevitable tendency to give

excessive weight to uncharged wrongdoing and either "allow it to bear too strongly on the present charge or to take the proof of it as justifying condemnation irrespective of guilt of the present charge." (*People v. Alcala* (1984) 36 Cal.3d 604, 631.)

Under this court's standards, set forth in *Ewoldt,* the least degree of similarity between the other crime and the charged crime is required to be relevant to prove intent, while the greatest degree of similarity is required to be relevant to prove identity. (7 Cal.4th at pp. 402-403.) In this case, the differences between the Torigiani and Manning crimes were simply too great to overcome the prejudicial effect, whether considered for intent or identity.

1. THERE WERE INSUFFICIENT SIMILARITIES, AND TOO MANY DISSIMILARITIES, TO MAKE THE LATER BURGLARY RELEVANT TO THE INTENT TO COMMIT A BURGLARY AGAINST MANNING

"Intent," as it is used for the purpose of section 1101, means "'the state of mind with which an act is done.' (Webster's New Collegiate Dict. (9th ed. 1990) p. 629.)" (*People v. Balcom* (1994) 7 Cal.4th 414, 423, fn. 2, citing *Ewoldt, supra,* 7 Cal.4th at 394, fn. 2, *People v. Robbins* (1988) 45 Cal.3d 867, 879-880.)

The only possible intent that could be shown in appellant's second trial from the introduction of the facts of the Torigiani burglary would be the burglary, which was charged here as both a special circumstance of the murder and as a separate count. Burglary, then, as relevant here, would involve entry into the Manning apartment with the intent to commit either the rape/murder, or the larceny involved in the stealing of the television and other electronic equipment.[73]

As to the rape/murder, there is simply nothing relevant in the facts of the Torigiani burglary which relates to the raping or killing of Manning. That is, the intent to enter Bree Torigiani's house to rob her of her jewelry was inadmissible to show an intent to enter Manning's apartment with the intent to rape or kill her. (*Balcom*, *supra*, 7 Cal.4th at pp. 422-423 [in light of the inherent inflammatory nature of the other crimes evidence, it was error to admit a subsequent robbery to show intent to commit rape].)

Regarding the intent to commit larceny in some form, it is perhaps useful to start with the similarities and dissimilarities between the two incidents. The defense, in its points and authorities, set forth both the similarity arguments asserted by prosecution (taken from 18 RT 4226) and

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[73] Penal Code section 459, as relevant here, defines burglary as entry into a dwelling with the intent to commit larceny or any felony.

the converse dissimilarities asserted by the defense. (14 CT 3922-3923.)

The similarities recited by the prosecution were:

1. Similar apartments;

2. The apartments were close together;

3. The crimes were close in terms of time;

4. They took place at roughly the same time of day;

5. Similar items were taken;

6. The apartments were within walking distance of Harris's apartment; and

7. The perpetrator armed himself with a weapon from the apartment.[74]

Among the dissimilarities cited by the defense:

1. Torigiani did not know Harris; Manning did.

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[74] The defense pleading noted that the bayonet not taken from Ms. Torigiani's apartment had value as an object of theft, not for arming. (14 CT 3923.) The idea that Harris "armed himself" with a weapon from Torigiani's apartment borders on the ludicrous. As Ms. Torigiani testified (citations here are to the first trial), a bayonet owned by her brother had been moved from beneath his bed to near the door by her bedroom, in which Harris found the suitcase he used to take what he was attempting to steal. (12 RT 2890, 2894-2895.) There is no evidence that this was anything more than an item of possible value that he chose to leave behind, especially considering that after Torigiani announced her presence, the bayonet was left on the bedroom floor as Harris fled. (12 RT 2890-2891.)

2. Harris never had been in Torigiani's apartment before; he had been in Manning's at least a few times prior to the incident;

3. The Manning killing occurred prior to the Torigiani burglary, not after;

4. Entry into Torigiani's apartment was through an window, in her absence, while entry into Manning's was through the door (and apparently not forced) while she was there;

5. Harris fled from Torigiani, but was accused of great violence against Manning;

6. Jewelry was taken from Torigiani; electronics from Manning;

7. Torigiani burglary took place at 12:50 a.m. (when most people are asleep), Manning at 9:30 p.m. (when most are awake).

The dissimilarities should have been enough for the court to have rejected admission of the Torigiani burglary for purposes of showing intent under section 1101, subdivision (b). However, there is also this: The court, having presided over the first trial, was fully conversant with the facts that were about to be introduced against Harris. Among those facts were absolutely none which could possibly lead to the belief that at the time he entered the Manning apartment, without any apparent force and while Manning was there, he could possibly have had an intent to steal anything

(1) from a person, Manning, who knew and could identify him, and (2) from her roommate Thea Bucholz, with whom Harris had a close enough friendship that he had tried calling her that night at 6 p.m, 6:15, 9, and 9:15, and again at 4 a.m. the next morning.[75] Not even the jury, which acquitted appellant on the burglary charge, believed that Harris entered the apartment with felonious intent.

Accordingly, no one familiar with the facts of the case, as was the trial court, could reasonably conclude that the probative value of the facts of the Torigiani burglary regarding either the intent to commit rape or to kill, or the possible intent, which beggars belief, to steal from Manning and Bucholz, could outweigh the substantial prejudice that resulted from admitting those facts. Facts of the later crime did not tend to prove intent in the earlier crime because the crimes committed were different crimes.

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[75] The 6 p.m., 9, and 9:15 calls were to the apartment; the 6:15 p.m. and 4 a.m. calls were to Bucholz's pager. (27 RT 6104-6105, 6169-6171.)

2. IF THERE WERE INSUFFICIENT SIMILARITIES AND RELEVANCE WITH REGARD TO INTENT, THEN, *A FORTIORI,* THERE WERE INSUFFICIENT SIMILARITIES AND RELEVANCE WITH RESPECT TO IDENTITY

As noted above, the greatest degree of similarity is required for the admission of a prior (or in this case subsequent) offense to prove identity. For the uncharged conduct evidence to be relevant regarding identity, it and the charged offense must share common features that are so distinctive as to create a "criminal signature." The characteristics of the two offenses must "logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403; *People v. Felix* (1993) 14 Cal.App.4th 997, 1005.)

Even a superficial reading of the similarities and dissimilarities listed in the prior section cannot give rise to a "criminal signature." At the most basic level, Harris entered the Torigiani apartment through a window when she was not present with the intent to steal, and when she came home and confronted him, he ran. The only similarities with what happened at the Manning apartment were that (1) it took place in an apartment; (2) the victims were women; and (3) some goods were removed. In 1997, the Bakersfield police reported 2,837 burglaries. Of these, many surely took place in women's apartments, and many of these surely involved the

removal of goods. ("CRIMES REPORTED FOR SELECTED CALIFORNIA JURISDICTIONS, January through December, 1997 and 1998," http://ag.ca.gov/cjsc/publications/preliminarys/prejd98.pdf.) Appellant cannot imagine how this could add up to a "criminal signature," which could "logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety."

B. THE ADMISSION OF THE OTHER CRIMES EVIDENCE WAS PREJUDICIAL

As argued above, there was little evidence that the Manning killing involved burglary, whether it be with an intent to steal or intent to rape or to kill. Harris was engaged in an active friendship with Manning's roommate, and to imagine that at the time he entered their apartment he did so with the intent to either steal from them or to rape his friend's roommate is beyond logic. Indeed, the jury so believed, acquitting him of the burglary count and special circumstance.

What is left, then, is propensity, pure and simple. And it is prejudicial. The prosecutor, while warning the jury against using the Torigiani burglary as evidence of appellant's propensity to commit crimes (33 RT 7529-7530), went on to argue that the Torigiani burglary – in combination with the entry into Manning's apartment – showed a "pattern of committing burglaries right in his neighborhood, close by his residence."

What the prosecutor did not explain was the difference between a propensity and this "pattern." More important, what he did not say (and did not have to say to this jury of almost all white men), was "look, here is this black guy who goes into white women's apartments to commit crimes late at night."

The prejudicial effect of "other crimes" evidence generally has been long recognized. (*Michelson v. United States* (1948) 335 U.S. 469, 475-476 [propensity evidence is relevant but tends to "overpersuade" the jury and deprives the defendant of a fair opportunity to defend against the charge].) It is the jury's natural and inevitable tendency to give excessive weight to uncharged wrongdoing and either "allow it to bear too strongly on the present charge or to take the proof of it as justifying condemnation irrespective of guilt of the present charge." (*People v. Alcala* (1984) 36 Cal.3d 604, 631.)

These caveats are especially applicable in a case such as this, which involved the rape/murder of a white woman by a black man, in which the prosecution used *voir dire* to carefully scrub the jury of minorities, and in which the prosecutor managed, by mistake or otherwise, to refer to appellant twice as "Willie Horton" in his penalty-phase closing argument.[76]

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[76] In his penalty-phase closing argument, the prosecutor
(continued...)

[76] (...continued)
managed to morph Willie Harris into Willie Horton. Discussing the prior criminal conduct of a purse snatch from Beatrice Thompson, the prosecutor's exact words were:

> Mrs. Thompson came in two years later, she identified Mr. Harris in court. She had picked him out of a photo lineup at the time. And she was in the store with him. Because she hadn't just seen him when she was two feet away from him face to face as he snatched her purse she also had seen him in the store a little bit earlier. And the photograph, People's No. 16, shows Mr. Harris in the store behind her at the counter. It is a side view of the face as you will see it if you look at the evidence during deliberations. But it is recognizable as him. He has the beard. She described at the time the short hair. You heard from *Mr. Horton* about jeri curls, but then what he saw, he said was jeri curls, I guess it is a matter of definition where the hair is really short. Even *Willie Horton* said he had on the hooded sweatshirt, the same type of garment, the same kind of –

The prosecutor was at that point interrupted by the court, who pointed out: "You said Willie Horton," to which the prosecutor said, "I'm sorry. Willie Harris followed Mrs. Thompson from the store . . ." (35 RT 7998-7999.)

It matters not whether the reference to Horton rather than Harris was accidental. One of the two ads, run against Democratic presidential candidate Michael Dukakis in October and November, 1988, included the fact that Horton, who had been released from prison on a weekend pass in Dukakis-governed Massachusetts, "murdered a boy in a robbery, *stabbing him 19 times.*" (See text of ad at www.insidepolitics .org/ps111/ independentads.html. *See also* the ads themselves, at www.youtube.com/ watch?v=EC9j6Wfdq3o, and at www.youtube.com/watch?v= -lFk78R_qYM.) In addition to the campaign's airing of the ads, network news programs played portions of the two ads 22 additional times. (*See* analysis following the text on the web page previously cited.) Thus, even assuming the substitution of Horton for Harris was unintentional, the reference to a black man who stabbed his victim multiple times is too (continued...)

Erroneous admission of evidence violates due process where it "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (*Dowling v. United States* (1990) 493 U.S. 342, 353 [107 L.Ed.2d 708, 110 S.Ct. 668].) While a rule can be found not to violate due process by virtue of its "long-standing and widespread use" (*Spencer v. Texas* (1967) 385 U.S. 554, 564), the opposite is true here: The rule *against* introduction of propensity evidence is of "long-standing and widespread use." (*People v. Alcala, supra*, 36 Cal.3d at pp. 630-631 ["The rule excluding evidence of criminal propensity is nearly three centuries old in the common law"]; *People v. Ewoldt, supra,* 7 Cal.4th at p. 392 [the rule excluding evidence of criminal disposition derives from early English law and is currently in force in all American jurisdictions by statute or case law]. But see, *Estelle v. McGuire* (1991) 502 U.S. 62, 75, fn.5 [declining to determine whether a state rule permitting introduction of propensity evidence violates due process]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["long-standing [and widespread] practice does not necessarily reflect a

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[76] (...continued)
similar, even if the reference was mistaken, not to have had a substantial effect, on the jurors.

fundamental" principle of fairness, where numerous exceptions to it are recognized].)

The Ninth Circuit has held in unmistakable terms that where prior conduct evidence is irrelevant for any legitimate purpose under a provision such as California's section 1101, subdivision (b), and its only remaining relevance is propensity, its use violates the defendant's right to due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384, citing *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) *McKinney*'s holding was not based on an analysis of whether the introduction of evidence complied with state law. Rather, it recognized a federal constitutional prohibition against state law permitting introduction of such evidence for the sole purpose of proving propensity. Where evidence of uncharged conduct is not relevant under any of the exceptions in subdivision (b), therefore, its admission is a federal constitutional violation. Accordingly, the introduction of the Torigiani burglary evidence requires reversal unless the state can show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1384.) The state cannot make that showing.

Even if the evidence of the Torigiani burglary was found by this court to be admissible to show either intent or identity, the court's

admission of it over appellant's Evidence Code section 352 objection was error. Whether the trial court properly evaluated evidence under section 352 is reviewed for abuse of discretion. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) Whether the trial court properly exercised its discretion must be evaluated within the boundaries of the legal standards "governing the subject of its action" (*People v. Eubanks* (1996) 14 Cal.4th 580, 595.), and an abuse of discretion will be found if the trial court's ruling falls outside the bounds of reason under the applicable law and the relevant facts. (*People v. Williams* (1998) 17 Cal.4th 148, 158-160.)

Section 352 requires exclusion of evidence if the probative value of the evidence is clearly outweighed by its prejudicial effect. (*People v. Scheid* (1997) 16 Cal.4th 1, 18.) In this case, where the probative value was at best minimal, the prejudice was great, owing to the aforementioned racial aspects of the case – a black man going into white women's apartments for criminal purposes.

Under this court's most recent formulation of the state standard of prejudice, a "reasonable probability" of prejudice exists when there is "merely a reasonable chance, more than an abstract possibility" of a different outcome. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *see also, People v. Blakeley* (2000) 23 Cal. 4th 82, 99 (Mosk, J.,

dissenting); *People v. Coddington* (2000) 23 Cal. 4th 529, 660 (Mosk, J., dissenting); accord, *In re Willon* (1996) 47 Cal.App.4th 1080, 1098; *People v. Elize* (1999) 17 Cal.App.4th 605, 616; *People v. Racy* (2007) 184 Cal.App.4th 1327, 1335-36.) Under this standard, given that there was no physical evidence linking appellant to this crime other than his semen, which was also consistent with consensual sex, given the aforementioned racial aspects of the case and the minimal (if any) relevance of the Torigiani burglary evidence to the case, and given the dangers inherent in propensity evidence, discussed above (citing *Michelson v. United States, supra,* 335 U.S. at pp. 475-476, *People v. Ewoldt, supra,* 7 Cal.4th at p. 405), a different outcome is more than an abstract possibility; appellant's conviction and sentence should be reversed. Moreover, as discussed *post* at pages 283-285, it was part of the multiple errors which, cumulatively, require reversal.

VIII. A LACK OF EVIDENCE, A PROSECUTORIAL OMISSION, AND INSTRUCTIONAL ERRORS REQUIRE REVERSAL OF THE ROBBERY COUNT AND THE ROBBERY SPECIAL CIRCUMSTANCE

The most serious aspect of the propensity evidence discussed *ante* has to do with race – this is a black man who enters white women's apartments at night to steal from them. The jury did not, in fact, find guilt on the burglary charge, but the propensity evidence carried over to the robbery charge, exacerbated by a striking omission in the prosecutor's explanation of the charges in his closing argument, the court's failure to instruct on the importance of when the intent to steal was formed, and an error in the court's special circumstance instruction. There was, moreover, insufficient evidence of when the intent to steal was formed, making both the true finding on the robbery special circumstance and the guilty verdict on the robbery count unsustainable.

A. THERE WAS NO EVIDENCE TO SUPPORT A FINDING THAT THE INTENT TO ROB WAS FORMED BEFORE THE MURDER

The jury found the defendant not guilty of burglary, precluding a finding that appellant entered the apartment with the intent to steal Manning's property or to rape her. The elements of burglary are (1) entry into a building, (2) with the specific intent, at the time of the entry, to commit grand or petit larceny or any felony. (§ 459.) As there is no

question that Harris entered Manning's apartment, the not guilty verdict can only mean a jury determination that, at the time Harris entered, he had not formed an intent to either steal or rape, or commit any other felony.[77] In terms of the robbery, the question then becomes, what evidence did the jury have to determine when Harris did form the intent to steal? The answer is, quite simply, "none." The time at which Harris formed the intent, however, makes the difference between a robbery incident to a murder, or a simple petty theft following a murder. If the intent to steal was formed after the murder, the defendant is guilty only of theft, not robbery. (*People v. Bolden* (2002) 29 Cal.4th 515, 556 [discussing CALJIC Nos. 8.21, 9.40] ; *People v. Kelly* (1992) 1 Cal.4th 495, 528 [if intent to steal arose only after force was used, the offense is theft and not robbery; *People v. Green* (1980) 27 Cal. 3d 1, 53-54, harmonized on other grounds in *People v. Guiton* (1993) 4 C.4th 1116 [if taking of property from deceased occurred as afterthought there is no robbery, although grand theft or petty theft may have been committed], overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and *People v. Martinez* (1991) 20 Cal.4th 225, 236-237.)

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[77] In the words of the trial court, the jury "obviously concluded that whatever intent the defendant formulated was formulated after he entered the apartment . . . ." (34 RT 7720 [commenting during post-guilt phase, pre-penalty-phase *in limine* hearing].)

In order to find the robbery special circumstance, the jury was instructed that it had to find, *inter alia*, that the murder was committed "while the defendant was engaged in the commission of the robbery." (15 CT 4171-4172; 33 RT 7672-7673.) There was, however, insufficient evidence upon which the jury could determine whether the murder was committed while appellant was engaged in a robbery, or the theft took place as an afterthought. The fact that they made this finding, therefore, suggests that they did not understand, or ignored, the instruction that if circumstantial evidence permits two reasonable interpretations, one of which points to innocence, they must adopt that interpretation. (CALJIC No. 2.01, 15 CT 4094.)

The claim of insufficient evidence requires a finding by this court that no rational trier of fact could have found the elements of the crime, given the facts presented at trial. (*People v. Frye* (1998) 18 Cal. 4th 894, 953, and cases there cited.) *Frye* also holds that the fact the victim has been murdered does not preclude a finding of robbery, as long the intent to take the possessions was formed before the victim was killed. (*Id.* at p. 956). Here, there was no evidence on which the jury could have based such a finding, once they had decided (as shown by the burglary acquittal) that the intent had nor been formed at the time of entry. To the extent that the jury

may be said to have determined that the intent to steal was formed after entry and before Manning's death, it could only have done so by speculation. There was no physical evidence linking Harris to the robbery – none of the stolen items were ever found and connected to him. Harris was not seen near Manning's car when the television set was seen therein, and Harris was not at the scene of the car fire – the only suspicious person seen in the area was white. (31 RT 7280.) Even if the jury credited the equivocal evidence regarding Harris's attempting to sell similar items to his friends, this says nothing of when the intent to steal was formed. (Neither, it will argued below, was it sufficient on the robbery count.) There was no physical evidence found in the apartment that supports a conclusion the theft began or was completed before the killing. Neither was there anything about the murder that directly suggests it was done to facilitate the theft. In fact, the manner of the killing, which the Medical Examiner testified suggested a rage killing (28 RT 6342-6343), involved an emotion not explained by robbery.

The dearth of evidence regarding when an intent to steal was formed impacts both the special circumstance finding and robbery verdict (discussed below). Moreover, the lack of evidence was joined here by a crucial prosecutorial omission and a further misstatement in his explanation

of the charges during argument, an erroneous special circumstance instruction, and a fatal failure of the court to clearly explain to the jury the importance of when the intent to rob was formed.

B. A CRUCIAL OMISSION IN THE PROSECUTOR'S CLOSING-ARGUMENT EXPLANATION OF THE ELEMENTS OF THE CRIMES, COUPLED WITH ERRONEOUS INSTRUCTIONS AND A FAILURE TO EXPLAIN THE IMPORTANCE OF WHEN THE INTENT TO ROB WAS FORMED, UNDERMINES ROBBERY-SPECIAL-CIRCUMSTANCE VERDICT

1. THE PROSECUTOR'S OMISSIONS LURED THE JURY INTO THE ROBBERY SPECIAL CIRCUMSTANCE FINDING

While the court's instructions are central to whether the jury knew of and was able to apply the law, in this case they were preceded by erroneous argument by the prosecutor which both lured the jury into finding the robbery special circumstance and cried out for clarification by the court, which was not forthcoming. Thus, one possible explanation for the jury's finding despite the absence of evidence arises from a striking omission in the prosecutor's closing argument. Using charts, the prosecutor began his closing argument by explaining the elements of each of the charges. (33 RT 7460 *et seq.*; references to charts at, *e.g.*, 7460) In doing so, he properly explained that burglary required intent to steal at the time of entry:

> If you find there was no intent at the time the residence was entered to take the property, but the perpetrator, Mr.

> Harris, developed the intent to take the property later, then he's guilty of the crime of petty theft. The key is what his intent was at the time of entry for residential burglary, and for second-degree burglary, for that matter.
>
> (33 RT 7477-7478.)

The prosecutor failed, however, to give a similar explanation with respect to the robbery – that if Mr. Harris did not develop the intent to rob until after Manning was dead, he was guilty only of petty theft. Indeed, the prosecutor suggested the opposite, by specifically informing the jury that the only way they could reach petty theft is if they found no force was used on Manning. He failed to explain that the force must have been used after the intent to steal was formed:

> "The only way you would reach the lesser offense of petty theft is if you found that Miss Manning's property was taken, but it wasn't taken by means of force or fear. In that case the offense would be petty theft. [¶] Obviously, however, that taking of her items here was accomplished by the stabbing and bludgeoning of her which led to her death, and that is robbery. It is not petty theft."
>
> (33 RT 7474.)

It is petty theft if the intent did not arise until after Manning was dead – a legal fact the jury needed to know and that the prosecutor failed to explain.

It is, of course, improper for the prosecutor to misstate the law generally. (*People v. Bell* (1989) 49 Cal. 3d 502, 538.) Nor need there be a

showing of bad faith for a misstatement of law to be misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822.) It can be no less a misstatement, and therefore misconduct if, by selective inclusion and exclusion, the jury is left with a mistaken impression of the law. Given the prosecutor's argument, the jury could, quite naturally, assume that the timing of when the intent to steal was formed impacted only the burglary. Combined with the state's false argument regarding petty theft, the jury was lured into an erroneous finding of the robbery special circumstance.

2. THE COURT COMPOUNDED THE PROSECUTOR'S ERRORS BY BOTH BY AN ERROR IN THE SPECIAL CIRCUMSTANCE INSTRUCTION AND BY ITS FAILURE *SUA SPONTE* TO INSTRUCT ON WHEN THE INTENT TO ROB AROSE

The lack of evidence and the prosecutor's explanatory omissions, discussed *ante*, were exacerbated by the trial court's giving of an erroneous version of CALJIC No. 8.81.17.

This court has held that CALJIC 8.81.17 is erroneous and subject to the *Chapman* standard of harmless error review when the two separate findings the jury must make are described in the disjunctive ("or') rather than the conjuntive ("and"). (*People v. Stanley* (2006) 39 Cal. 4th 913, 957 [clause in instruction explains that, per *People v. Green, supra,* 27 Cal.3d at pp. 53-54, special circumstance does not apply if robbery is only incidental

to murder] ; *People v. Prieto* (2003) 30 Cal. 4th 226, 256 [the error is subject to review under harmless-beyond-a-reasonable-doubt standard].)

In this case, the court gave the proper instruction (using "and") in its oral instructions (33 RT 7672-7673), but sent an erroneous written version (using "or") to the jury for their deliberations.[78] (15 CT 4171-4172.) In cases of such inconsistency, this court has held that the content of the written instructions are determinative. (*People v. Osband* (1996) 13 Cal. 4th 622, 717; *People v. Crittenden*, *supra*, 9 Cal. 4th 83, 138.) This makes

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[78] The court gave two versions of CALJIC No. 8.81.17; orally with the proper conjunctive "and," (33 RT 7672-7673) and in the written instructions with the erroneous disjunctive "or." (15 CT 4171-4172). As given, the relevant portion of the instruction was as follows:

> To find that the special circumstance referred to in these instructions as murder in the commission of rape, sodomy, robbery or burglary is true, it must be proved: One, that the murder was committed while the defendant was engaged in the commission or attempted commission of a rape, sodomy, robbery and/or burglary; [and/or] two, that the murder was committed in order to carry out or advance the commission of the crime or rape, sodomy, robbery or burglary, or to facilitate the escape therefrom, or to avoid detection. In other words, the special circumstances referred to in these instructions are not established if the rape, sodomy, robbery or burglary was merely incidental to the commission of the murder.

That the instructions were sent into the jury room can be inferred from the court's including in CALJIC 1.00 that they would be. (15 CT 4084; 33 RT 7647.)

sense, as it is far more likely that, as between that one spoken "and," and the printed "or" contained in the written instructions in the jury room, the jury would have relied on the latter rather than the former.

The erroneous instruction invited the jury to find special circumstances in either of two ways – if the murder was committed *while* defendant was engaged in the robbery, *or* (rather than *and)* in order to carry it out – rather than requiring that both elements be present. The confusion was furthered by the fact that all four special circumstances were mentioned in both sub-paragraphs, so that the possibility exists that the jury could have in fact found separate felonies for each of the subparagraphs. (See text of instruction set out *ante* at p. 234, fn. 78; 15 CT 4171-4172.)

Unfortunately, this is not a case in which a special instruction cured the error. (*Cf. People v. Stanley*, *supra*, 39 Cal. 4th 913, 957 [special instruction on when intent arose].) Rather, under the circumstances, this is a case in which a *sua sponte* instruction on the timing of intent was called for. Thus, while a petty theft instruction was given as a lesser-included offense to both the burglary and the robbery (33 RT 7683-7685), the court made no effort to explain to the jury how they could reach petty theft as a lesser-included offense to robbery by finding that the intent was formed after the rape and killing was completed.

Even without a request, a court must instruct on the general principles of relevance to the issues raised by the evidence, those "closely and openly connected with the facts of the case before the court." (*People v. Birks* (1998) 19 Cal. 4th 108, 118 (internal quotation marks omitted); *People v. Hood* (1969) 1 Cal. 3d 444, 449.) Because of the lack of evidence on when the intent to rob was formed; because there was no evidence of breaking in; because it made no sense that Harris would set out to rob a friend and her roommate; and because either of them could identify him if he were caught in the act of theft, there is simply no logic pursuant to which the jury could have reached the special circumstance finding regarding robbery had it understood the importance of after-informed intent. Without a *sua sponte* instruction on this issue, it is clear that the jury *did not* understand the significance of the time when intent was formed. The not-guilty verdict on the burglary and sodomy counts show that the jury was careful in following instructions. Since there was no evidence of when the intent to rob was formed, it is likely the jury did not understand the importance of that event of how it connected to the robbery special circumstance.

Even if, *arguendo*, no *sua sponte* duty to instruct on when the intent to rob arose from the evidence, it certainly did when the prosecutor

bamboozled the jury by connecting the timing of intent only to the burglary but not the robbery, and by his erroneously limiting the facts on which the jury could find petty theft (33 RT 7474, 7477-7478), as discussed in the previous subsection.

3. THE ROBBERY SPECIAL CIRCUMSTANCE CANNOT SURVIVE ANALYSIS UNDER THE HARMLESS-BEYOND-A-REASONABLE DOUBT STANDARD

As noted previously, the instructional error, the giving of CALJIC No. 8.81.17 in the disjunctive rather than the conjunctive, is subject to the *Chapman* standard. It cannot survive unless it can be said to be harmless beyond a reasonable doubt. (*People v. Prieto, supra,* 30 Cal. 4th at p. 256.) While there are cases in which other instructions have been said to have rendered the error harmless (e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 358-359 and cases there cited), this case presents the opposite situation; the error was exacerbated by the prosecutor's omitted explanation that the timing of intent applied to the robbery as well as the burglary; the prosecutor's explanation that the jury could reach petty theft "only" if the property was taken without force or fear, without the further explanation that the absence of force or fear might arise if the victim were dead before the intent to rob arose; and by the court's failure *sua sponte* to instruct on the question of when the intent arose. Absent the errors, it is not clear

beyond a reasonable doubt that a rational jury would have returned a true finding on the special circumstance. (*Neder v. United States* (1999) 527 U.S. 1, 11-13 [reviewing harmless error standards in cases of misdescription- and omission-of-element cases].) Finally, the proof that it was not harmless lies in the fact that the jury rendered its verdict finding the robbery special circumstance without a scintilla of evidence to support it.

C. THE ROBBERY CONVICTION SUFFERS FROM THE SAME INSUFFICIENCY OF EVIDENCE, PROSECUTORIAL ERRORS, AND THE COURT'S FAILURE TO INSTRUCT ON WHEN THE INTENT TO ROB AROSE

With the exception of the inapplicability of CALJIC No. 8.81.17, the errors outlined in the previous subsection B. apply equally to the robbery count: (1) The prosecutor related the import of the time that intent was formed only to the burglary, when it applied equally to the robbery (33 RT 7477-7478); (2) the prosecutor informed the jury erroneously that petty theft was only available if there was no force or fear, without mentioning that this would occur if Ms. Manning were already dead when the intent arose (33 RT 7474); (3) there was no evidence upon which the jury could determine when the intent to rob arose, once they had determined that it had not arisen before or upon entry into the apartment; and (4) the trial court

gave them no guidance as to the meaning of determining when the intent to rob arose.

The robbery instruction, CALJIC No. 9.40, did not help. While it defines "immediate presence" and "against the will," its setting forth of the elements gives no indication of the importance of when the intent to rob was formed:

> In order to prove the crime, each of the following elements must be proved: One, a person had possession of the property of some value however slight; two, the property was taken from that person or from her immediate presence; three, the property was taken against the will of that person; and four, the taking was accomplished by force or fear; and five, the property was taken with the specific intent permanently to deprive that person of her property.
>
> (33 RT 7676; 15 CT 4180-1481.)

While lawyers and judges, parsing those words, might notice the fact that a taking cannot be against the will of a dead person, such cannot be expected of a lay jury, especially one exposed to the prosecutorial arguments present in this case.

Beyond the problems with the timing of intent and the entire lack of evidence regarding it, to imagine that Harris intended to rob Manning strains credulity. If, as the jury found, Harris entered the apartment without the intent to rob Manning (or commit any other felony), the state would have us believe that he committed a rape and murder of a friend's roommate

in order to get a television set, a partly dysfunctional VCR, and a boom-box – all of which might in fact have belonged to his friend Bucholz.

At base, however, the problem with the robbery conviction is what it was with the robbery special circumstance: The timing of the formation of intent is crucial in this case (see cases cited *ante* at p. 228); there was no evidence upon which a rational jury which had rejected pre-entry intent could decide when the intent was formed; and even if there were, they were so mis-informed by the prosecutor and mis-instructed by the court that the finding cannot withstand analysis under either the state or the federal standard.

If one views the error in failing to instruct on the timing of intent as omitting an element, then the result is the same as for the special circumstance: the *Chapman* harmless-beyond-a-reasonable-doubt standard applies. (*United States v. Neder, supra*, 527 U.S. at pp. 11-13; *People v. Prieto*, *supra*, 30 Cal.4th at p. 256.) Under that standard, given the state of the evidence described above, and as explained in the previous subsection, it cannot possibly be harmless beyond a reasonable doubt.

If it is viewed as allowing the jury to convict on alternative theories of guilt, in which one of theories is erroneous, the federal standard is whether the error "'had substantial and injurious effect or influence in

determining the jury's verdict.'" (*Hedgepath v. Pulido* (2008) ___ U.S. ___, 129 S.Ct. 530, 530-531, 172 L.Ed.2d 388, quoting *Brecht v. Abrahamson* (1993) 507 U.S. 619, 623.) Given, in this case, the lack of evidence as to when intent was formed, the prosecutor's omission and affirmative misstatement, and the trial court's failure to specifically instruct on the timing issue, the jury was left untethered, and this substantially and injuriously affected their verdict.

Even under the state standard, it is not harmless; all of this adds up to far more than "merely a reasonable chance, more than an abstract possibility" of a different outcome. (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th 704, 715; *People v. Flood* (1998) 18 Cal.4th 470, 490 [California standard applies to most instructional error not of constitutional dimension].)

IX. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF LACK OF CONSENT NECESSARY FOR RAPE

A. THERE WAS INSUFFICIENT EVIDENCE OF LACK OF CONSENT

The prosecution had the burden to prove non-consent beyond a reasonable doubt. (*People v. Key* (1984) 153 Cal.App.3d 888, 895; *People v. Degnen* (1925) 70 Cal.App. 567, 591; CALJIC No. 10.00.) In this case, it failed to do so. Appellant's semen was found in Manning's vagina. While that is strong circumstantial evidence that they had engaged in sex, it is not evidence that the sex was against Manning's will. There was no physical evidence of force related to sexual intercourse. There were no bruises on Manning's thighs or inner legs, no vaginal trauma, no redness or abrasions to her vagina, no bruises on Manning's arms or wrists indicating that she had been held down. Appellant had no scratches or bruises on him. The jury had no forensic evidence supporting the charge that a rape had occurred.

What the jury did have in front of it was forensic evidence that Manning was the victim of a rage murder. While in some cases this may be circumstantial evidence of rape, in this case it is not. When the evidence on a particular issue is circumstantial, the court must scrutinize that evidence even more closely to determine whether a reasonable trier of fact could

have found the defendant guilty beyond a reasonable doubt. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.) In this regard, "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Kunkin, supra,* 9 Cal.3d at p. 250.)

Thus, inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*People v. Marshall* (1999) 15 Cal.4th 1, 35; *People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543.) Courts often state the test as follows: "Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . , it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The need for proof beyond a reasonable doubt requires that the "hypothesis" to be tested be logical and based on fact.

Here, Manning was brutally stabbed, over fifty times. The killing was, as testified by the Medical Examiner, consistent with someone in a rage. (28 RT 6342-6343.) Given that, the complete lack of any physical

trauma supporting a rape takes on more significance. As the prosecutor acknowledged, there was no way of knowing the sequence of events that occurred that night. (33 RT 7622.) What the evidence did show was that appellant entered Manning's apartment without the use of force. Then, according to the prosecution theory of the evidence, at some point, appellant became so enraged he hit Manning over the head with a bottle and stabbed her repeatedly. In the same time frame that this violent frenzy occurred, appellant raped Manning in a way that left no marks, bruises, abrasions or tears.

The prosecution simply invited the jury to speculate that appellant must have been raped Manning because he had sex with her the night she was murdered. However, this speculation does not create a logical hypothesis, because it is unsupported by sufficient facts. When there are no other facts to turn the speculations into permissible inferences, this becomes a "hypothesis contrary to fact," that is, arguing from something that might have happened, but without proof that it did.

A hypothesis in scientific inquiry may indeed be constructed from an argument that something "might" have happened, which the scientists can then test with the scientific method. In law, such a hypothesis is only as good as the other facts that can be brought to bear to support it. And here

there are none. A lay person might be tempted to apply Occam's Razor, and suggest that appellant's guilt is the simplest explanation, the one requiring the introduction of the fewest new factors. But again, that would be incorrect in the law, because the burden of proof is on the prosecutor, and any resort to logical assumptions such as Occam's Razor would relieve the prosecutor of his burden.

A lay person might also ask, what is the likelihood that appellant had consensual sex with Manning the night of her murder? However, that would not be the correct construction of a hypothesis in a court of law. Conversion of expected frequency of occurrence into odds of occurrence, sometimes called "The Prosecutor's Fallacy," can easily create misinterpretations. (See William C. Thompson and Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy* (1987) 11 Law and Human Behavior 167.) Furthermore, it is inconsistent with the requirement of proof beyond a reasonable doubt.

In this case, the prosecutor had only two pieces of circumstantial evidence to support the allegation that Manning was raped. The first, as discussed above, is that she was murdered. The other, as discussed below,

is that she had a boyfriend. Neither of these circumstances provides sufficient evidence to support the inferences that lead to rape.

B. WITHOUT MORE, THE MANNING-HILL RELATIONSHIP DOES NOT SUPPORT A FINDING OF LACK OF CONSENT

Other than the fact of the murder itself, the only evidence the jury had to consider in determining that Manning did not consent to sex with appellant was the asserted relationship between Manning and Hill. Again, this evidence fails to support a finding of rape. Missing was any evidence that such a relationship would necessarily prevent Manning from having sex with appellant, that she would be faithful. There was no testimony from the witnesses that Manning and Hill had exchanged promises of fidelity, that Manning intended to be faithful to Hill or that Manning had a pattern or practice of being monogamous to the men she dated. Indeed, the evidence suggests that Manning did not view Hill as being faithful; within mere days of the murder she had accused Hill of giving her a sexually transmitted disease.

The argument that Manning's relationship with Hill provides proof that she did not consent to sex with Harris is on built on one explicit and two implicit assumptions, rather than on actual evidence. The explicit assumption, as noted, was that if Manning was in a relationship with Hill

and if the prosecution could prove to some degree that she loved him, she would not voluntarily have had sex with appellant. The first implicit assumption is that if a woman declares her love for one man, she would not consent to having sex with another. The second implicit, and far more pernicious assumption is that this upstanding white college girl would not have consented to sex with a black man. None of these assumptions were supported by evidence.

The prosecution's substitution of evidence with unproven assumptions was supported both explicitly and implicitly by the court. There were evidentiary errors which were reflective of these erroneous assumptions and contributed to their prejudicial application to the case.

1. THE TRIAL COURT'S EVIDENTIARY RULINGS GAVE THE JURY A FALSE PICTURE OF THE MANNING-HILL RELATIONSHIP, THEREBY BOLSTERING THE PROSECUTION'S ASSUMPTIONS REGARDING CONSENT

In the first trial, the court excluded two items of evidence which showed that there might have been problems in the Manning-Hill relationship.[79] In a mid-second-trial ruling, the court admitted two writings

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[79] As noted previously, the court indicated before the second trial that its *in limine* rulings in the first trial would be renewed for the second trial. (18 RT 4249.) There would have been no reason for the defense to believe that seeking new rulings on evidence that was excluded (continued...)

of Alicia Manning, purporting to show her love for Charles Hill (thus presumably precluding consensual sex with appellant). The court abused its discretion by disallowing defense evidence, yet allowing questionable prosecution evidence, on the issue of the Manning/Hill relationship. It thereby furthered the aforementioned assumption that the fact or even the quality of the relationship established non-consent while unfairly bolstering the prosecution's evidence of it and minimizing the defendant's evidence to the contrary.

(a) The Court's Admittance of Two Letters Written by Manning Further Tilted the Playing Field Toward the Prosecution

During the second trial, the prosecution sought to recall Thea Bucholz and introduce three documents which purported to be written by Manning and to show her love for Hill. The defense objected, both because the writings had not been identified before trial and because they could not be authenticated as to the time they were written. After determining that the documents had been among the boxes of discovery made available to the defense, the court rejected the discovery objection. (30 RT 6891-6893.)

On the question of their admissibility, the defense objected on the grounds that they were undated, and what was important was Ms.

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[79] (...continued)
in the first trial would be anything but futile.

Manning's state of mind on May 20. Moreover, the evidence at the first trial (which would come out later in the second trial) was that on the weekend before, two or three days before the murder, Manning and Hill had talked about ending their relationship. (30 RT 6899.) In admitting them as relevant, the trial court adopted the assumption of the prosecution, if Manning professed her love for Hill, then she did not consent to sex with Harris; that proof of one was proof of the other.

The court ruled that as the relationship between Manning and Hill had been put in issue by the defense, the subject matter of the notes was relevant. As to one of them, it was not dated, and therefore inadmissible. The other two, Exhibits 13 and 14, were admitted as datable by their content, or by testimony from Buchholz. As to Exhibit 13, set out in the margin,[80] the prosecution proposed to recall Bucholz to discuss Manning's

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[80] Exhibit 13 states as follows:

Charles sweetheart,

I love you so much! I'm having a problem concentrating on my homework because I am thinking about my love for you. You drive me slightly crazy!!! I kept thinking about you giving my amigo some quality time this morning - but wish I had more for him - maybe later on when there is more time!

Anyways, I wish that you were here so I could concentrate on my paper at least a little bit! I love you so much!

With my love for you always,

(continued...)

customs and habits, and that they were both written within the last week of Manning's life. (30 RT 6901.) As to Exhibit 14,[81] the date could be inferred because it states that it is written 31 days before her graduation, or on May 14.[82] (30 RT 6900-6901.)

The court erred in two crucial respects. The first is that the relationship was not put into issue by the defense; rather, it was a crucial (if insufficient) factor in the prosecution case. The prosecution put that evidence on in its case-in-chief, as it had to do. It was the prosecution, not the defense, that put the relationship at issue.

Second, the letters were hearsay, purportedly admitted to show Manning's state of mind.[83] The defense objected that the documents,

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80 (...continued)
Alicia
(29 CT 8303.)

81 Exhibit 14 is a letter to a friend, Dave, which does state that she graduates in 31 days, and discusses her plans with Hill for both of them to come to North Carolina and for her to spend the summer in Virginia. (29 CT 8304-8305.)

82 Thea Bucholz testified that their graduation was June 14. (30 RT 6913.) This is confirmed by a television script from June 13, 1997, which indicates that Manning's class would be graduating "tomorrow" – June 14. (30 CT 8656 [date at bottom, also on "Rundown Report" at 30 CT 8594].

83 Defense counsel Mueller stated in argument that she assumed that the letters were to come in under Evidence Code section 1250 (which (continued...)

written the week before the incident were irrelevant to her state of mind on May 20, when she was killed. In addition, they were unreliable as an exception to the hearsay rule.

The court's interpretation of the relevant time period, making the letters admissible, was too broad. Exhibit 14 was shown to have been written 6 days before the incident. In Thea Bucholz's purported authentication of Exhibit 13, the "Charles dearest" note, she stated that the "paper" referenced in the note was "her voting paper" that she started a week before and was working on up until her death. (30 RT 6912.) Assuming *arguendo* that the reference to something as common to a college student's life as a "paper" could be pinned down to that particular paper, that still leaves both of the writings having been written as early as Tuesday or Wednesday of the week prior to the incident. The defense, however, argued that Manning consented to sex with Harris, focusing on the four days leading up to the incident; in particular, that during the weekend before the incident – and following the apparent date that the two exhibits were written – the two talked about breaking off their relationship. (30 RT 6967-6968, 6980 [Hill told her he was thinking of breaking up with her]; 30

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[83] (...continued)
authorizes the state-of-mind hearsay exception), and there were no statements by the prosecutor or the court to indicate it was otherwise. (30 CT 6899).

RT 6959, 6968 [Manning told Hill about possible STD].) Thus, the writings were of only marginal relevance, and entirely cumulative of what the jury was told by Bucholz and Charles and Lane Hill. (See *ante*, pp. 14-18.)

Viewed by its content, Exhibit 14 is even less relevant, because it says nothing of Manning's feelings about Hill; rather, it only recites their upcoming plans, which, again, was entirely cumulative. While the content of Exhibit 13 is more relevant of Manning's emotions when she wrote it, it is simultaneously more prejudicial.

The admissibility of the two documents is even more questionable when viewed from the perspective of hearsay and reliability. The entire purpose of the hearsay rule is to keep out unreliable evidence; recognized exceptions to the hearsay rule allow admittance because of their reliability despite being hearsay. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 398-399; *People v. Ayala* (2000) 23 Cal. 4th 225, 268.) In this case, even if the two documents were relevant – that is, if their having been written the week before goes to their weight rather than their admissibility – they were, because of the passage of time between when they were purportedly written and when Manning was killed, of too little reliability to allow applicability of the exception. Moreover, their reliability is further undercut by the fact

that, six days after they were written, they were found among her effects at the scene of the crime. (30 RT 6893.) Thus, they had not been sent to persons for whom they were presumably intended, and might well have no longer reflected her state of mind.

The language of Evidence Code section 1250 is instructive:

> [E]vidence of a statement of the declarant's *then existing* state of mind . . . is not made inadmissible by the hearsay rule when: [¶] 1. The evidence is offered to prove the declarant's state of mind *at that time* or at any other time *when it is itself an issue in the action*; . . .
>
> (Emphases added.)

The *only* time at issue was Manning's state of mind on the night that she had sex with Harris. Accordingly, it was an abuse of discretion for the court to admit the documents purporting to show her state of mind in the prior week.

The defense, as noted, sought an Evidence Code section 402 hearing prior to admission of the two notes; the court, however, decided to authenticate them in front of the jury. While the court has broad authority to do so, by explicitly admitting them over defense objection in front of the jury, the court deepened for the jury the erroneous assumption, discussed *ante*, that the relationship itself was evidence of non-consent.

Whether or not these documents were admissible, that they were admitted is particularly egregious in light of the court's exclusion of defense evidence to counter the prosecutions questionable proposition that there was lack of consent by virtue of the relationship between Manning and Hill.

(b) The Court Erred in Sustaining Relevance Objections to Evidence Showing Problems in the Manning-Hill Relationship

The court sustained a relevance objection in the first trial when the defense asked Thea Bucholz if Manning had told her of problems she had with Hill's relationship with his friend, Mike Gonzales; and in the same trial ruled against the defense asking Hill about a drug-possession conviction. Both questions went directly to the defense theory that Manning was having second thoughts about their relationship because of Hill's use of drugs.

"[T]he constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky* (1986) 476 U.S. 683, 690 (citation omitted) [reversing exclusion of evidence of unreliability of confession]; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294-295.) Only relevant evidence is admissible (Evid. Code §§ 210, 350), and "[t]he test of relevance is whether the evidence tends 'logically,

naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Harris* (2005) 37 Cal. 4th 310, 337; quoting *People v. Garceau*, *supra*, 6 Cal.4th 140, 177.)

In this case, given the thrust of the prosecution's case, the defense reasonably sought to show that it was more rather than less likely that Manning might have engaged in consensual sex with appellant. To do so, it had to build the case that all was not well in Manning's relationship with Charles Hill. A principle issue between them, it seemed, was Manning's dislike of Hill's use of drugs, which was closely tied to his friendship with Gonzales.

During the cross-examination of roommate Thea Bucholz during the first trial, defense counsel asked her whether, in the months of April and May, Manning told Bucholz that she had problems with Hill's association with Gonzales. The prosecution objected on grounds of relevance. (10 RT 2272.) At sidebar, counsel explained that it was the defense contention that Manning and Hill were having serious problems in their relationship; that one of the problems was the amount of time Hill spent with Gonzales; that she and Gonzales disliked and were hostile toward each other; there was suspicion of homosexuality; and that Hill's drug problem got worse when

he spent too much time with Gonzales. (10 RT 2273.)[84] In response to the prosecutor's relevance and hearsay objections, counsel explained that as to the hearsay, the question went to Manning's state of mind; and as to relevance, he pointed out that the prosecution, through Bucholz, was painting a picture of love and devotion, and if it turned out they were fighting, that she was trying to break up with him, it was relevant. The court disagreed:

> [T]he only thing that's relevant in all of this is whether or not she had expressed to Ms. Bucholz or other people who may be called that she was having second thoughts about the relationship, that she planned to break up. . . . The only other relevant conduct would be if she had expressed some fear for her safety with regard to defendant. . . . But whether she was thinking of breaking up with Mr. Hill because of some – that he gave her chlamydia or that he was hanging around with a buddy she didn't like, she was beginning to wonder if he was gay or that he got arrested, she heard he got arrested on drugs, none of that is relevant, and the objection is sustained.
>
> (10 RT 2271-2272.)

In a similar ruling, in the first trial (and, as previously noted, presumably applicable to the second trial), the court prevented the defense from asking Charles Hill about a drug conviction he had suffered, again going to the issue of Manning's discomfort with Hill's use of drugs. The

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[84] Counsel also explained the other evidence of relationship problems that he intended to introduce: that Hill was not working nor going to school; that he had been arrested for drugs, and that she might have gotten infected with chlamydia through him. (22 RT 2274.)

court sustained the prosecutor's motion to exclude the evidence that he had suffered a narcotics possession conviction (for which he had successfully completed diversion), over the defendant's explanation that there was evidence elsewhere that Hill's use of drugs was an issue between them. (12 RT 2944-2946.) After determining that the drug conviction and diversion were in 1996 (the year before the incident), the court precluded the defense from asking Hill about it, though it would allow the defense to ask Hill if he fought with Manning about his drug use.[85] (12 RT 2946-2947.)

Under Evidence Code section 351, all relevant evidence is admissible. Evidence Code section 210 defines relevant. "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code §210.) The trial court is vested with wide discretion in deciding whether evidence is relevant or not. (*People v. Warner* (1969) 270 Cal.App.2d 900, 908.) A defendant must demonstrate that the court's discretion has been abused. (*Id*; See *San Diego Gas & Electric Co. v. Davey Tree Surgery Co.* (1970) 11 Cal.App.3d 1096, 1103.)

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[85] Hill admitted on cross-examination to several arguments about his friendship with Mike Gonzales; it was why he suggested breaking up the weekend before her murder. (30 RT 6967-6968, 6980.)

"In a criminal case evidence is generally admissible if it tends logically, naturally and by reasonable inference to establish any material fact for the People or to overcome any material matter sought to be proved by the defense." (*People v. Durham* (1969) 70 Cal. 2d 171, 186.) "There is no precise and universal test by which relevancy may be determined." (*Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 420.) "Evidence tends 'in reason' to prove a fact when 'the evidence offered renders the desired inference more probable than it would be without the evidence.' (Citations omitted.)" *(People v. Warner, supra*, 270 Cal.App.2d 900, 907.) Evidence is relevant not only when it tends to prove or disprove the precise fact in issue but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred. (*People v. Warner, supra*, 270 Cal.App.2d 900, 908; Law Revision Com. Comment, Evid. Code § 210)

Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury. (*People v. Hess* (1951) 104 Cal.App.2d 642, 676.) The relative strength or weakness of such evidence is to be determined by the jury. (*People v. Demond* (1976) 59 Cal.App.3d 574, 588-589; *People v. Slocum* (1975) 52 Cal.App.3d 867, 891.)

In this case, the prosecution used evidence of Ms. Manning's relationship with Mr. Hill to prove she did not consent to sex with appellant. Clearly, the trial court found the fact of that relationship to be relevant in proving the lack of consent element of the crime. However, when it came to admitting details about the relationship, the trial court's rulings were arbitrary and conflicting. Evidence that Ms. Manning was happy within the relationship was deemed relevant and admissible; however, evidence that there was trouble within the relationship was deemed irrelevant unless Ms. Manning was planning to break up with Mr. Hill. There is nothing in the record supporting the trial court's assumption that only if Ms. Manning were ending her relationship with Mr. Hill would she consent to sex with someone else.

If the fact that Ms. Manning had a boyfriend is relevant to the issue of consent, then the fact that she might have been unhappy with that boyfriend is also relevant, regardless of whether or not she was ending the relationship. For the trial court to hold otherwise was an abuse of discretion and it severely impacted appellant's ability to defend himself against the rape charge. It left the jury with an incomplete, and therefore false, understanding of Ms Manning's state of mind.

2. THE ERRORS WERE PREJUDICIAL

Taken together, the court's admission of the two letters, of questionable reliability and relevance, and its exclusion of defense evidence which was entirely relevant to rebutting the prosecution's case for lack of consent, were both in themselves an abuse of discretion and bolstered the erroneous idea that the very fact of the relationship between Manning and Hill established the lack of consent.

That assumption was insufficient to show a lack of consent in the absence of further evidence. The court's rulings were blatantly one-sided and erroneous. Both of these facts go directly to an absence of due process and a fair trial. Further, the manner of the murder itself in conjunction with the absence of any physical evidence of forced sex further undercut the validity of the jury's verdict. Without substantial evidence that Manning did not consent to sex with appellant, the rape conviction should be reversed.

X. THE COURT MADE A SERIES OF ADDITIONAL ERRONEOUS AND PREJUDICIAL EVIDENTIARY RULINGS THAT HAD THE EFFECT OF UNFAIRLY FAVORING THE PROSECUTION AND DISABLING THE DEFENSE

In addition to the already-discussed evidentiary rulings, the trial court made a series of additional rulings – some of them in the first trial which carried over to the second – which further tilted the playing field toward the prosecution, so as to result in a denial of appellant's Fifth and Sixth Amendment rights to due process and a fair trial.

In the subsections below, appellant will argue with respect to some of them that they are themselves prejudicial; with regard to others, where the prejudice is not argued, it will be argued at the end as part of a summary of the cumulative prejudice.

A. THE COURT ERRED IN RULING THAT THE PROSECUTION COULD INTRODUCE IRRELEVANT BLOOD EVIDENCE, DISCOURAGING THE DEFENSE FROM INTRODUCING THE LACK OF BLOOD ON APPELLANT'S CLOTHING THE NIGHT OF THE KILLING

During the first trial, the prosecution's DNA laboratory expert testified that a spot of blood found on Harris's sneakers, found in his closet after he was arrested, could not be linked to the victim, Alicia Manning. At the second trial, the court excluded mention by the prosecution of the blood-stain, but when Harris sought to introduce testimony from the prosecution's

criminalist that the shirt that Harris's girlfriend said he was wearing the night when Manning died had no blood on it, the court ruled that the prosecutor could introduce the blood spot on the shoes. The defense chose not to introduce the criminalist's testimony.

As a foundational matter, it should be noted that while Kristy Findlay testified in the first trial that Harris had been wearing the t-shirt – on which no blood was found – on the night of the murder, there was no evidence that the shoes found in Harris's closet were the shoes he wore that night. On that basis, alone, then, the blood spot on the tennis shoe was irrelevant. The trial court erred in admitting it in the first trial, and in threatening to admit it as a *quid pro quo* in the second trial if the defense chose to inform the jury of the lack of blood on the t-shirt. In addition, the trial court's treatment of the blood evidence was in error for the following reasons:

1. THE BLOOD SPOT ON THE SHOES. BECAUSE IT COULD NOT BE LINKED TO THE VICTIM, WAS IRRELEVANT AND PREJUDICIAL

(a) The DNA Evidence Excluded Both Manning and Harris as Sources of the Blood Stains on Harris's Shoes

During the first trial, Charlotte Word, who presented the DNA laboratory results for the prosecution, testified regarding tests to three apparent blood stains on a left shoe found in Harris's closet. She first

testified that one of the stains contained blood from more than one individual. Both Alicia Manning and Willie Harris were excluded as primary sources of the DNA from the stain. (12 RT 2854.) As to the secondary source, the results were too faint to either include or exclude Harris and Manning. (12 RT 2855.) On cross-examination, however, she went further, testifying that the "secondary source" contained such faint results that it may not have even been true human DNA but rather "background results." (12 RT 2861-2862.) With regard to the two other blood stains on the shoe, Word testified that both Harris and Manning were excluded as donors. (12 RT 2857.)

In sum, each of the tests on the three separate blood stains on the shoes excluded both Manning and Harris as a source, and the possible "secondary source" of one of the stains did not include them, and was perhaps not even human DNA. That there was evidence of blood on the tennis shoe is prejudicial; that none of the blood can be traced by sophisticated scientific analysis to the victim or accused makes its admissibility unreasonably prejudicial.

(b) The Prosecution Conceded the Inadmissibility of the Shoe-Blood Evidence for the Second Trial, but the Court Ruled Mid-Trial that Mention of the Blood-Less T-Shirt Would Open the Door for It

Before the second trial, the defense sought to exclude entirely the shoe-blood evidence in a motion *in limine*, on the grounds that the evidence was irrelevant to any matter in dispute, and more prejudicial than probative. (14 CT 3856-3863.)

At the hearing on the motion, defense counsel presented the additional point that in speaking with the holdout juror from the first trial, he learned that some of the jurors thought that the blood stain on the shoe connected Harris with the crime, even after he (Juror No. 6) pointed out to them that it did not. (18 RT 4209.) Moreover, the *Bakersfield Californian* also misunderstood Ms. Word's testimony during the first trial. Under the headline "Tests match DNA marking to pair," the article challenged Harris's claim that he left Manning's apartment before she was killed, stating: "But evidence introduced . . . suggest[s] blood samples taken from Harris' shoes contain DNA markings from three people, including Harris and the victim." (18 RT 4209-4210; see *Californian* article at 30 CT 8732.) In fact, of course, Ms. Word said not only that Harris, Manning, and

Anthony Chappell could not be excluded, *but neither could they be included.* (12 RT 2854.)

The prosecutor admitted that, because the test results were below the level of significance, there was "probably a foundational or reliability problem for the evidence." For that reason, conceding the motion, the shoe stains would not be offered in the second trial. (18 RT 4211-4212.)

The court agreed, ruling that Ms. Word could testify only that as to the testable [i.e., the primary] source, Manning, Harris, Gonzales, Hill and Chappell were excluded. (18 RT 4212.)

During the second trial, however, while the defense was cross-examining the prosecution's criminalist Jeanne Spencer, counsel sought a sidebar to discuss eliciting testimony that Spencer had found no blood on Harris's "black Budweiser shirt," the t-shirt Kristy Findley had testified (in the first trial) Harris was wearing both before and after Manning was killed. (28 RT 6442.) The prosecutor asserted that this would open the door to evidence of the blood stains on the shoes. Defense counsel again raised the question of its relevance, as well as its admissibility under Evidence Code section 352. (28 RT 6442-6443.)

The prosecutor agreed that he would not ask DNA expert Charlotte Word about the blood stains on the shoes, but argued that he should have

the right to counter that there were some shoes seized, there was blood on those shoes, but the material was too limited to determine its source. The court agreed that the door would indeed be opened, though with the limitation that Word could not be asked about her analysis of the blood on the shoe. (28 RT 6443.)

Defense counsel indicated that, because of the trial court's ruling, he would not ask about the absence of blood on the black t-shirt. (*Id.*)

2. THE COURT'S RULING WAS ERROR, FORCING THE DEFENSE TO FOREGO INTRODUCING RELEVANT AND USEFUL EVIDENCE TO AVOID INTRODUCTION OF IRRELEVANT PROSECUTION EVIDENCE

Because the court accepted the prosecutor's self-limiting concessions at the pre-trial hearing, it did not at that time rule on appellant's section 352 claim. (18 RT 4209-4212.) When the matter came up again during trial, and section 352 was again raised, the court made no explicit ruling that the relevance was greater than the prejudice. (28 RT 6441-6442.) Had it made such a ruling, however, it would have been an abuse of discretion.

Admission of evidence "without making an explicit determination that this risk of undue prejudice did not substantially outweigh the probative value of the evidence" is error. (*People v. Green*, *supra*, 27 Cal.3d 1, 26.) Even if one accepts the trial court's admission of the shoe-blood evidence

as the implicit result of weighing under section 352, its ruling was an abuse of discretion. In *People v. Burgener*, the issue was the admissibility of a criminalist's testimony about a blood stain found on a defendant's shoes. In that case, it could not be determined whether the stain was human blood, or indeed blood at all. Nevertheless, the *Burgener* court ruled that the evidence was not entirely irrelevant, because "the presence of a substance which might be blood on defendant's shoes certainly has some tendency in reason to prove that he might have been present at the scene of a bloody shooting the night before his arrest." (*People v. Burgener* (1986) 41 Cal. 3d 505, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 752–754.)

In this case there was an additional fact that rendered the blood spot of even less relevance than the blood in *Burgener*: Here, the primary donor of the blood found on appellant's shoe, while determined to be human, was determined to be from neither from Harris nor Manning. The shoe-blood evidence was irrelevant, period, and thus its admission was error. (Evid. Code § 350 [only relevant evidence admissible]; *People v. Scheid*, *supra*, 16 Cal.4th 1, 14 [trial court lacks discretion to admit irrelevant evidence].) Moreover, as noted *ante*, there was no direct evidence that Mr. Harris was even wearing these shoes on the night of Ms. Manning's murder.

Even if, however, one assumes some scintilla of relevance in the shoe-blood evidence, that relevance was certainly outweighed by the prejudice in its admission, especially after the prosecutor had conceded its foundational weakness. This is especially true when the trade off was effectively to exclude defense evidence that there was *no* blood on the shirt Harris was wearing that night, either before or after the time of the killing. *That* blood, had it been present, would have been powerful evidence of Harris's guilt. Its absence – given the unlikelihood that the killer somehow got no blood on his clothes despite the amount of blood evident from both the testimony about and pictures of the crime scene – provided substantial doubt. Thus, to say that the absence of blood on the shirt that Harris's likely wore on the night of Manning's murdert – blood which almost certainly would have been interpreted as coming from Manning – opened the door for evidence of blood on Harris's shoe, containing blood of unknown origin and uknown in time, and from which both Harris and Manning were excluded as primary donors, was error.

3. THE TRIAL COURT'S ERROR WAS PREJUDICIAL

Assuming this court accepts that the trial court committed error, there remains the question whether the court's ruling of admissibility resulted in a miscarriage of justice (Cal. Const., art. VI, § 13) and,

accordingly, whether, absent the error, there was "merely a reasonable chance, more than an abstract possibility" of a different outcome. (*College Hospital, Inc. v. Superior Court*, *supra,* 8 Cal.4th at p. 715.) The trial court's ruling, however, led to the defense's withdrawal of relevant evidence, implicating appellant's Sixth Amendment right to present a defense and, therefore, the federal constitutional standard of prejudice. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

If the jury had believed Findley's proffered testimony, then the error prevented Harris from presenting evidence of the absence of blood on his clothes that night – the clothes Findley saw him wearing both earlier in the evening and after the time of the murder. This would have bolstered significantly his defense – a defense centered on the complete absence of physical evidence linking him to the crime, as well as a complete absence of motive and violent history.

Taken alone, this error meets the criteria for prejudice under both the federal and the state standards. Taken together with the myriad other errors, evidentiary and otherwise, it amounted to a denial of due process, as discussed *post* at pages 283-285.

B. THE COURT ALSO ERRED IN LIMITING THE TESTIMONY OF A DEFENSE EXPERT WITNESS

A defense expert, Dr. Marvin Ament, was called to testify, *inter alia*, regarding the lack of physical evidence of rape. His credentials were established, and he testified that he had reviewed the autopsy report, pictures of the scene, transcripts of the first-trial medical testimony, and a medical report from the university. (31 RT 7129-7131.)

Dr. Ament was asked to describe the sorts of tests that were commonly used in examination of rape victims, and he related the examinations and testing that was done to establish the rape. (31 RT 7132-7134.) Then the following occurred:

> Q. In any of the information that you read concerning this case, were any of those procedures followed?
>
> MR. SOMERS: I am going to object, your Honor, as calling for hearsay.
>
> THE COURT: It is sustained.
>
> BY MS. MUELLER:
>
> Q. To your knowledge, were any of those procedures followed in this particular case?
>
> MR. SOMERS: Object as calling for – lack of personal knowledge.
>
> THE COURT: It is sustained.
>
> (31 RT 7134.)

Ms. Mueller moved on to something else and did not return to the issue.[86] The court's ruling was error. Neither hearsay nor lack of personal knowledge are objectionable for an expert witness. (Evid. Code § 801, subd. (b)[87]; *People v. Gardeley* (1996) 14 Cal.4th 605, 618 [even ordinarily

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[86] It is not a surprise that counsel did not challenge the court's ruling. Prior to the first trial, the court distributed to counsel a two-page handout, the first page of which was entitled "Trial Rules for Department 6." (Supp. CT 95; see also Supp CT at p. 130, wherein the prosecutor, though he refers to them as "handwritten" rather than "typewritten," confirms that these were, indeed, distributed to counsel before trial.)

Among the eight rules are two which are here relevant:

> (2) Counsel will make objections in terms of the Evidence Code (e.g., "Objection: Hearsay"), and will not argue objections in front of the jury. *Opposing counsel will not respond to objections unless a response is requested by the court.*
>
> (5) Requests for sidebar conferences are to be kept to a minimum. Anticipated evidentiary problems should be handled by <u>in limine</u> motions at times which do not infringe on the jury's time.

(Supp. CT 95; underline in original, italics added.)

Thus, trial counsel were instructed both that they could not respond before the jury unless asked by the court, and that they should not ask for a sidebar.

[87] Evidence Code section 801, subdivision (b), provides in relevant part that expert testimony is limited to such an opinion as is, *inter alia*:

> Based on matter . . . made known to him at or before

(continued...)

inadmissible matter can form basis for expert's opinion testimony]; *In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base "opinion on reliable hearsay, including out-of-court declarations of other persons"].) In this case, the "hearsay" had already been the basis of the Kern County Medical Examiner's testimony, so could hardly be challenged by the People as unreliable.

The medical examiner had already testified for the prosecution that she had not observed any vaginal trauma (28 RT 6584), and there was no issue regarding the presence of semen. The defense, however, was prevented from establishing doubt regarding the medical examiner's conclusions. Once again, the court constrained the presentation of the defense, and tilted the playing field in favor of the prosecution. The cumulative error will be argued below.

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[87] (...continued)

> the hearing, *whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . .

(Emphasis added.) Certainly an expert on rape examinations could reasonably rely upon the autopsy report to determine what, if any, tests were conducted.

C. THE COURT ERRED IN NOT GRANTING A MISTRIAL FOLLOWING THE DETECTIVE'S MENTION THAT HARRIS REFERRED TO MANNING AS "THE BITCH"

Prior to the first trial, the defense sought to keep out certain statements that appellant had made to Detective Stratton regarding his consensual activities with Manning, in which he referred to her as "the bitch." (4 CT 959-966; the statements are set forth on p. 961.) At the pre-trial hearing at which it was discussed, the judge indicated hesitance over only the use of the word "bitch" in referring to Ms. Manning. The prosecutor said he did not intend to play the tape of the interview, only to have Detective Stratton narrate its contents. (2 RT 676.) The court ruled, under Evidence Code section 352, that the word "bitch," used commonly in the African-American community, was still offensive in Anglo culture, and thus granted the motion with regard to that word.[88] (2 RT 678-679.) The prosecutor indicated that he would so instruct the detective. (2 RT 679.)

In the second trial, however – and remember that the first-trial *in limine* rulings were explicitly made applicable to the second trial (18 RT 4249) – the detective quoted Harris from the interview, including the offending word:

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[88] The court's caveat was that if the defense decided to play the tape for the jury, it would not be redacted to exclude that word. (2 RT 679.)

Q [by the Prosecutor]. Did you ever make any statements to Mr. Harris during the course of that interview that you did not believe the story that he was telling you?

A [Detective Stratton]. Yes.

Q. Did he ever make any statements to the effect during the interview specifically as to whether he had or not killed Miss Manning?

A. Yes, indicated that he did not kill her.

. . . . .

Q. And did he make any further statements regarding [the detectives they were conniving]?

A. Right, we told him that he was the one that was conniving and changing the story, and he stated I'm conniving just like you're conniving, but I didn't kill the bitch.

(29 RT 6799-6800.)

The defense immediately objected, and during a sidebar moved to strike it and to admonish the jurors, but further, to move for a mistrial. (29 RT 6801.) After argument, the court offered to either strike the comment or to tell the jury that in the African-American community the word "bitch" is not used in a negative or pejorative sense. The defense chose the latter. (29 RT 6801-6802.) The court gave the instruction, as follows:

Ladies and gentlemen, you just heard the officer testify to a quotation from the defendant and I'll take judicial notice of something.

Judicial notice is sort of like a stipulation, that the attorneys stipulate to certain facts, you accept them as true.

> Judicial notice is a notice by the Court that something is accurate or factual, such as that the 19th of May in 1997 was a Monday, for example. That would be judicial notice.
>
> I'll take judicial notice that in our society young African-American males frequently use the work bitch in a non-pejorative fashion, whereas it is generally true that Caucasian males and Hispanic males, if they use that word, are using it in an angry fashion with regard to females.
>
> Next question.

(29 RT 6803-6804.)

This was not enough. The mistrial should have been granted. Not only could the bell not have been un-rung, the jury had been carefully scrubbed of African-Americans (except for the one black female correctional officer) and other minorities, and it is hard to imagine a more visceral reaction than that of a white man or woman on the jury hearing that Mr. Harris had said "I didn't kill the bitch." His exculpatory statement was excluded in the first instance precisely because of what it became when voiced on the stand: damning and offensive.

D. THE COURT ERRONEOUSLY AND PREJUDICIALLY RULED IN FAVOR OF A PROSECUTION OBJECTION, DESPITE THE FACT THAT THE PROSECUTOR HAD WITHDRAWN IT

During closing argument, defense counsel sought to soften the effect of the prosecution's interview with Lori Hiler, in which she seemed to agree with the prosecutor that she saw the white man carrying the TV at 9 p.m. rather than at 10 p.m. This undercut her testimony, making her less

credible, because the time line otherwise established that while this could have happened at about 10:00, it would not have occurred as early as 9:00.[89]

The jury was played the tape of the interview, in which the prosecutor did not correct Hiler's estimate of the time, but rather sought to get her to repeat it, time and again.

In her testimony, Hiler had said that she had left her apartment at 10:08 p.m. and had seen a Caucasian that she later identified as Charles Hill carrying a television set. This was consistent with the 10-10:15 p.m. window that she initially reported to Detective Stratton. (31 RT 7168-7169, 7183; 32 RT 7344, 7362-7363.) In Prosecutor Somers' interview with her before her first-trial testimony, Hiler shifted the time back by one hour, abetted by Somers:

> Hiler: . . . I was trying to hurry because I told him I'd be there about what nine, and I was running a little bit late. But I remember my microwave had a clock on it.
>
> Somers: Uh huh.
>
> Hiler: Looking at the clock and I think it said um, I can't remember was it 9:08 or 9:14. Something like that. So, it was within that time.
>
> Somers: Okay, so it was around 9:00, between 9:00 and 9:15 or so that you saw the ah, that were were walking . . .

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[89] See timeline evidence, *ante* at pp. 49-53. As noted there, Manning took a phone call from Harris at 9:30, so she could not have been dead at 9 p.m.

Hiler: That I walked-

Somers: . . . over to Mr. White's house

(29 CT 8316)

In his closing argument, defense counsel Coker sought to point out that Mr. Somers had done nothing to correct Hiler in terms of what she had told Stratton just after the murder, and to suggest why. The prosecutor initially objected, and then withdrew his objection. The court, nevertheless, sustained the objection:

> MR. COKER: . . . He is looking for something he can turn around and use against her later. Because if the time is so important, as you ladies and gentlemen know it is, the time is so important, why would [sic.] he sit there and say, now you are saying nine o'clock now. Do you remember telling Detective Stratton you said 10:00. Wasn't it 10:00. Are you sure it was 9:00 and not 10:00. Why doesn't he ask those questions if it is so important. And the answer is, because he is not going there to investigate, he is going there so he can find something to use against her when she testifies because –
>
> MR. SOMERS: Your Honor, I am going to object to that as arguing outside any evidence.
>
> MR. COKER: I have a right, he became a witness.
>
> THE COURT: Just a minute.
>
> MR. SOMERS: Second thought, I will withdraw the objections, your Honor.
>
> THE COURT: Just a minute.

MR. COKER: May I continue then, your Honor?

THE COURT: No, you may not. Objection sustained.

(32 RT 7587.)

The court, then, not only sustained an objection that had been withdrawn, but in doing so committed another legal error to the detriment of the defense. The tape of Prosecutor Somers' questioning of Hiler was in evidence, and defense counsel was doing nothing more than advancing a "theory fairly within the evidence." (5 Witkin, Cal. Crim. Law (3d Ed., 2000) "Criminal Trial"§ 570.)[90] The full quote from Witkin regarding the scope of prosecutorial argument is that "The prosecuting attorney may discuss the facts and the law as seen fit, advance any theory fairly within the evidence, and urge any conclusions deemed proper." (*Id.* at § 570.)

Despite the paucity of cases discussing the scope of defense counsel's argument – at least as broad, one would think, as the prosecutor's – this court has had occasion to comment that "the defense is typically given wide latitude in its closing argument." (*People v. Farmer* (1989) 47 Cal. 3d 888, 922 [rejecting reading of not-in-evidence transcripts from

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[90] The cited section in Witkin discusses the scope of *prosecutorial* argument, but a later section explains that there is little precedent discussing the scope of a defense argument because of the unavailability of appeals when the defendant is acquitted. *Id.* at § 600.

prosecutor's closing arguments in other trials]; *People v. Polite* (1965) 236 Cal. App. 2d 85, 92 [counsel should be given wide latitude in argument].

In this instance, defense counsel was doing nothing more than advancing a reasonable theory based on the evidence before the jury of the prosecutor's interview with Hiler, commenting fairly on his failure to question Hiler about the obvious inconsistency between what she had told Stratton shortly after the murder and what she was saying in the interview. That this was proper was recognized by the prosecutor when he withdrew the objection. That the objection was nevertheless sustained is just one more in the long chain of pro-prosecution rulings by the court below. While the trial court's ruling may not on its own be deemed prejudicial, it certainly is prejudicial when considered in combination with other errors. Together, the errors denied Harris his right to due process, as argued *post* at pages 232-284.

E. THE COURT'S INSTRUCTIONAL ERRORS FURTHER HAMPERED THE DEFENSE

The defense submitted a Forecite instruction on third-party culpability and, at the behest of the prosecution, the court modified it by striking out its most important sentence, and practically denuding it of

meaning. The instruction is set forth below, with ~~strikeout type~~ showing the matter deleted, and *italics* showing the matter added:

> You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant's guilt. ~~Such evidence may by itself raise a reasonable doubt as to defendant's guilt. However, its~~ *Its* weight and significance, if any, are matters for your determination. If, after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of ~~the~~ *that* doubt and find him not guilty.
>
> (15 CT 4134; 32 RT 7660.)

As originally written, the third sentence clearly is prefatory to the fourth, the one struck by the court. Read as modified, it merely restates the obvious without the crucial point – the entire point of the paragraph – that the third-party culpability evidence may itself provide the reasonable doubt necessary for an acquittal. The court's modification essentially denuded the instruction of meaning.

> The trial court is required to instruct the jury on which party has the burden of proof and on the nature of that burden. "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and *as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing*

proof, or by proof beyond a reasonable doubt." (Evid. Code, § 502, italics added [by *Simon* court].)

(*People v. Simon* (1995) 9 Cal. 4th 493, 501.)

It is settled that the defense has a right to a pinpoint instruction on the theory of the defense and on the applicability of the burden of proof to that theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120 [rejecting *sua sponte* duty to instruct on diminished capacity, but noting that defendant could have sought pinpoint instruction]; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1137 [discussing pinpoint instructions generally].) In *People v. Sears* (1970) 2 Cal.3d 180, the court explained that, notwithstanding the language of Penal Code section 1096a, rendering the giving of the statutory language of section 1096 sufficient on the subjects of presumption of innocence and reasonable doubt, the defendant has a right to request an instruction "that directs attention to evidence from a consideration of which a reasonable doubt of his guilt could be engendered." (*Id.* and p. 190, citing *People v. Granados* (1957) 49 Cal.2d 490, 496.).

Crucial to the sentence deleted by the trail court in this case is the statement in *People v. Hall* (1986) 41 Cal.3d 826, 833, that third-party culpability evidence, in order to be admissible, "need only be capable of raising a reasonable doubt of defendant's guilt." The necessary corollary is that if it is admissible as capable of raising a reasonable doubt, it is

sufficient to do so – the very point the language deleted would have made clear to the jury.

The trial court's error in editing the instruction was not harmless. The due process and trial by jury clauses of the Fifth and Sixth Amendments to the federal constitution mandate that the defense is entitled to instructions on recognized defenses for which evidence has been introduced. (*Mathews v. United States* (1988) 485 U.S. 58, 63.) While the instruction was given, it was neutered by the court's unfortunate edit. Because of its close relationship to reasonable doubt, the error in the instruction should be considered reversible-per-se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [giving of erroneous reasonable doubt instruction vitiated jury finding altogether and was reversible per se].) At minimum, because the instruction error goes to reasonable doubt, use of the federal *Chapman* standard is required. Given the vital importance to the defense of the third-party culpability evidence in this case, the failure of the court to include the sentence highlighting that the third-party evidence by itself was sufficient to raise a reasonable doubt, the error was not harmless beyond a reasonable doubt.

XI. THE PRE-TRIAL AND GUILT-PHASE ERRORS, TAKEN TOGETHER, CONSTITUTE A FAILURE OF DUE PROCESS AND THE OPPOSITE OF A FAIR TRIAL

Willie Harris, in this case, had no chance.

Willie Harris, in this case, might as well have pled guilty.

Willie Harris, in this case, ran up against a juggernaut of persistently emotion-laden and unbalanced media coverage; the erroneous denial of a change-of-venue motion; a judge who both declared that race would not be an issue in this case and then proceeded to make it so by ignoring the obvious; the selection of a biased jury; and a series of evidentiary rulings, denial of a mis-trial, and instructional errors, which so tilted the playing field that Willie Harris quite simply didn't have a chance.

This court and others have held that the cumulative effect of several errors can infect a trial with such unfairness as to constitute a denial of due process. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179; *People v. Hill*, *supra*, 17 Cal.4th 800, 844, 847; *People v. Buffam* (1953) 40 Cal.2d 709, 726; *People v. Cardenas* (1982) 31 Cal. 3d 897, 907.) The Court of Appeal has described the test as follows: "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' (*People v. Kronemyer* (1987) 189 Cal. App. 3d 314, 349 [].)" (*People v. Cuccia* (2002)

97 Cal. App. 4th 785, 795.) In this case, the cumulative error resulted in a mockery of due process.

Here, the court ignored an objective and experienced experts view that this was one of the strongest cases he had ever seen for a change of venue; disregarded the under-representation of blacks and other minorities in the venire and the jury; allowed the prejudicial and irrelevant facts from the Torigiani burglary to infect the jury, and then mis-instructed the jury regarding the robbery special circumstance after the prosecutor misled them regarding the importance of the timing of the formation of the intent to rob; mis-instructed them regarding the rape special circumstance while ruling in favor of prosecution evidence and against defense evidence on the crucial issue – which still had a fatal gap in proof – of whether the victim consented to have sex; and consistently undercut the defendant's right to present his third-party-culpability defense.

This was a close case. There was no forensic evidence that Harris raped or murdered Manning; no direct evidence that she would not have consented to have sex with him; no evidence of her blood on any his clothes and little evidence (if that) that he actually possessed any of the items stolen from the apartment; and nothing to tie him to arson of Manning's car. There was, however, evidence that the person seen carrying the television

from Manning's apartment was at least white and looked like Hill; that the only suspicious person in the area of the arson was white; that Hill and his alibi witness differed on a crucial aspect of their story; and evidence of a rage killing that bore more marks of an angry boyfriend than a black man who was friendly enough with Manning's roommate to have called her several times before and after the incident.

What made it not a close case were the court's serial errors, argued in the preceding sections of this brief.

The basic requirement of due process is a fair trial in a fair tribunal. (*In re Murchison* (1955) 349 U.S. 133, 136.) This aspect of due process was violated when the court denied the motion for a change of venue. In addition, due process protects against conviction of every fact necessary to constitute the crime of which he is charged. (*In re Winship* (1970) 397 358, 364.) This aspect of due process was violated when Harris was convicted of rape when there was no forensic evidence of rape and no evidence that Manning's relationship with Hill would necessarily prevent her from consenting to sex with Harris.

The errors were prejudicial, for absent them, there is a high probability that the jury would have returned a more favorable verdict.

PART III: PENALTY PHASE ERRORS

XII. THE COURT ERRED IN NOT DECLARING A MISTRIAL, OR AT MINIMUM DISMISSING A JUROR WHO REPORTED TO HER FELLOW JURORS DURING DELIBERATIONS ON SOMETHING SHE THOUGHT THE DEFENDANT HAD COMMUNICATED TO HER

A. FACTUAL BACKGROUND

After the jury had retired for their penalty deliberations, the court received a note from the jury foreman (16 CT 4318) which recited that Juror No. 6 felt the defendant was trying to intimidate her. (35 RT 8036.)

The juror was brought in to speak with the court and counsel, and reported that earlier that day, while a witness was on the stand, she glanced over towards the defendant,

> And me and Mr. Harris locked eyes. And he glared at me. And then he – he mouthed some words to me and then shook his head.
>
> Q. [by The Court]: Mouthed some words to you and shook his head?
>
> A. (Juror nods head affirmatively.)
>
> Q. Okay. From what he was mouthing, what were you able to determine what he was saying to you?
>
> A. (Juror nods head affirmatively.) I could be wrong. I mean, I could have misunderstood what he was mouthing. But from what he said, I hate you.

> Q. All right. That was the impression that you got out of what he was saying?
>
> A. (Juror nods head affirmatively.) I could be wrong. I could be wrong.
>
> Q. All right. If you misunderstood the words he said, did the visual confrontation, I mean, you know, looking at each other and locking eyes, concern you?
>
> A. I don't know. It was – it was kind of like – it wasn't like – it was just kind of – yes, in a way did. But it could have – the way he was looking could have been took (sic) in different ways, depends. I mean, it looked kind of confrontational. But he could have – he could have not meant to look that way. I mean, I look some ways sometimes and I don't mean to look that way. But it just – that's what I got from it. It was confrontational and kind of a little bit – kind of like anger to look at.
>
> (35 RT 8038-8039.)

The court asked Juror No. 6 whether, given what she experienced, did she feel it would affect her ability to be fair and impartial, and she answered, "No." (35 RT 8039.)

Defense counsel than asked Juror No. 6 whether she had communicated this incident to her fellow jurors, and she responded that she had told them what she had just told the court and counsel. (35 RT 8040.) She reiterated that she couldn't be sure about the words he mouthed, but then that she was sure of them, and that he looked "Not really hostile, but somewhat hostile. And then he shook his head at me." (35 RT 8041.)

Asked again by the court whether she felt comfortable about proceeding as a juror in this matter, she answered "I do, I'm sure that I would be able to do so. But I would perfectly understand if you guys thought otherwise." (35 RT 8042.)

After Juror No. 6 returned to the jury deliberations, the defense asked for a mistrial, on the grounds that Juror No. 6 had communicated what happened to the other jurors. (35 RT 8043.) Whether it happened or not, she believed it did, and "I hate you" is extremely hostile, and was bound to be considered by them. (35 RT 8043-8044.) This tainted the jurors and was prejudicial. (35 RT 8044.)

The court disagreed, noting that the jurors were free to observe what is going on in the courtroom, including the demeanor and attitude of the parties, so if a defendant makes an action perceived to be hostile, that was not grounds for a mistrial. (34 RT 8044.)

The defense asked that the jurors be excused for the rest of the day (it was already 4:35 p.m.) while it pondered possible prophylactic measures over the 4th-of-July weekend. (16 CT 4315; 34 RT 8046.) On the following Tuesday morning, the defense presented law and argument, and a proposed admonition. (16 CT 4319-4321.) During further oral argument, the defense asked that Juror No. 6 be recalled, because her time frame for when the

incident happened (before lunch, with a white man in a suit on the stand) was factually impossible and it was important to ask further questions about what this juror actually saw, if anything. The court denied that request. (35 RT 8050.) After further legal argument, the prosecutor indicated no objection to the admonition requested (35 RT 8054), and the court weighed in with its own proposed instruction, which, after further discussion and modification, was agreed on as to form. (35 RT 8063.)

The defense also asked the Juror No. 6 be excused, which, after argument, the court also denied. (35 RT 8064-8065.)

The court then brought the jury in and gave them the following admonition:

> Ladies and gentlemen of he jury, as you know, you went out to deliberate on the penalty phase of the trial at about 3:30 p.m. on Friday afternoon. Thereafter, at about 4:30 p.m., actually it was 4:27 p.m., you sent out a note indicating that one of your number felt a threat, the defendant was trying to intimidate that juror. We spoke to the juror individually and the juror rejoined you briefly before we adjourned for the day. The juror told us they had shared with you the basis of their perception which was based on conduct of the defendant they had observed in the courtroom.
>
> Now, as jurors in the penalty phase of a capital trial, you can draw inferences based upon the defendant's demeanor in the courtroom, inasmuch as the defendant's character is at issue in this phase of the trial. However, you can only draw inferences based upon your personal observations, positive or negative, and not on what another juror may have observed. Nor may you speculate upon any

> ambiguous conduct of the defendant you have personally observed.
>
> (35 RT 8066-8067.)

The court asked the jury as a whole whether they could decide the issue "now before you" fairly based upon this instruction, and got affirmative nods of the head. It followed with a poll of the individual jurors on the following question:

> Is there anybody who has any concern that anything that you have shared with the observation of that juror, as opposed to their ability to depend upon what they observed, versus your ability to depend on what you observed is going to keep you in any way from being a fair and impartial juror?
>
> (35 RT 8067.)

The jurors each answered "no," and returned to deliberate (35 RT 8067-8068).

Whether or not the admonition was sufficient, the jury-polling question was completely incomprehensible, making the jurors' answers meaningless. At minimum, the failure to excuse Juror No. 6 was prejudicial error.

B. WHILE THE COURT CONSIDERED THE DEFENDANT'S ALLEGED CONDUCT AS A MATTER OF HIS COURTROOM DEMEANOR, IT WAS MORE ANALOGOUS TO OUT-OF-COURT INFORMATION BROUGHT INTO THE DELIBERATION ROOM

The trial court considered the incident to have been an example of courtroom demeanor. Unless it was observed by all the jurors, however, it was more akin to extra-judicial information brought into the deliberation room. Under either rubric, the court's refusal, at minimum, to dismiss Juror No. 6 deprived appellant of his rights to confront witnesses against him and to a fair and impartial jury.

In a series of cases, this court has approved of a prosecutor's comment, in closing argument, about a defendant's courtroom demeanor, in particular when he has testified or otherwise put his character in issue. (*See*, *People v. Valencia* (2008) 43 Cal. 4th 268, 307-309, and cases there cited.) In *People v. Cunningham*, *supra*, 25 Cal.4th 926, 1023, the court explained, "It is proper for a prosecutor, at the penalty phase at which the defendant has placed his or her character in issue as a mitigating factor, to make references to the defendant's facial demeanor *apparent during the court proceedings*." (Emphasis added.) That is the crucial difference here: the incident was (1) noticed only by one juror, rather than being a general aspect of defendant's demeanor during trial; (2) involved an observation

about which the juror displayed some ambivalence, in particular as to what words the defendant might have mouthed to her; and (3) was conveyed by her to the rest of the jurors, making her a witness not subject to cross-examination.

Accordingly, this violated appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution to a fair trial by an unbiased jury, as well as his right to confront his accuser in open court.

The cases cited by both parties below all involved prosecutorial comment upon a defendant's behavior or demeanor during the course of the trial. (*E.g.*, *People v. Adcox*, *supra*, 47 Cal. 3d 207, 258 [approving prosecutor's characterization of defendant's demeanor as "cold"]; *People v. Heishman* (1988) 45 Cal. 3d 147, 197 [reference to defendant's facial demeanor during trial]; *People v. Williams* (1988) 44 Cal.3d 883, 971-972 [judge's use of defendant's calm demeanor during trial as a reason for denying automatic motion to modify death sentence].)

In *People v. Williams*, *supra*, 44 Cal.3d 883, the court approved a trial court's comment on the defendant's demeanor during trial in denying a motion to modify the sentence of death:

> We do not agree that the court's reference to defendant's calm demeanor during the trial was improper. A defendant's demeanor may reflect remorse, or otherwise arouse sympathy in either jury or judge. Because the jury, and the judge in

> deciding whether to modify a verdict of death, must be permitted to consider any evidence that is relevant and potentially mitigating (*People v. Lanphear* [1984] 36 Cal.3d 163, 167), this is relevant to appropriate consideration.
>
> (44 Cal.3d at pp. 971-972.)

Both *Williams* and *Lanphear*, however, refer to evidence observable by all in the courtroom over the course of the trial. Here, the demeanor or behavior at issue was observed by only one juror. That juror's communication of what she saw to the rest of the jurors is more closely analogous to the misconduct that the court has found when a juror has brought extra-judicial information into the jury room. "It is misconduct for a juror to consider material extraneous to the record. Such conduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred." (*People v. Mincey* (1992) 2 Cal.4th 408, 467 [citations omitted].) In addition, it was information conveyed to the jury in complete disregard of the defendant's right to confront and cross-examine the juror who had become a witness against him.

People v. Nesler (1997) 16 Cal.4th 561 dealt with a juror who had both concealed a bias she had concerning defendant and conveyed to the jury during deliberations information she acquired outside the courtroom on the subject of defendant's sanity. The information included hearsay about the defendant from her babysitter and from others who knew her, about her

parenting and her use of methamphetamines. (*Id.* at pp. 570-575.) At issue on appeal was not whether the remaining jurors were substantially influenced, but rather whether the offending juror's bias required reversal. The court ruled that it did, and explained its analysis as follows:

> We assess the effect of out-of-court information upon the jury 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. (*In re Carpenter* [1995] 9 Cal. 4th at p. 653.) 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. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we 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. (*Id.* at pp. 653-654.)
>
> (16 Cal.4th at pp. 578-579.)

In this case, the information received was not in the strictest sense received from an extraneous source, but, to the extent that it was neither evidence presented at trial nor perceived by all the jurors, it was the same as if it had been brought in from outside the courtroom. Judged objectively, the juror's belief that the defendant conveyed to her that he hated her was so

prejudicial that it was substantially likely to have prejudiced her. At minimum, it is substantially likely that she was "actually biased" because of the very fact that the incident was both conveyed to the other jurors and reported by the foreman, who was obviously concerned. Put another way, there is no evidence upon which the state could rebut the presumption of prejudice which arises from "the receipt of information about a party or the case that was not part of the evidence received at trial." (*People v. Marshall* (1990) 50 Cal. 3d 907, 949-951 []; *In re Carpenter*, *supra*, 9 Cal. 4th 634, 650-655 [].) As this court explained in *Nesler*, "A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors," and "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, it is settled that a conviction cannot stand if even a single juror has been improperly influenced." '" (16 Cal.4th at p. 578 [internal citations omitted].)

Regarding the question of whether or not Juror No. 6 was actually biased, one of the factors cited by this court in *Nesler* is present here: she told her fellow jurors about the incident. (16 Cal. 4th at p. 587.) While there was insufficient evidence adduced in this case regarding what, exactly, Juror No. 6 said during deliberations, it was sufficient for the jury

foreman to report her distress to the court. Moreover, defense counsel specifically asked to bring Juror No. 6 back to discuss the matter further, but the court denied the request; appellant should be not be burdened by both the trial court's error in ruling against him and its error in preventing him from further making his case. In any case, as this court has indicated, the fact that a juror has conveyed extraneous information to his or her fellow jurors tends to demonstrate that the juror intended the information to influence the verdict and strengthens the likelihood of bias. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 657 [facts that juror did not tell other jurors tends to negate bias or that juror intended to influence others], citing for the converse *In re Stankewitz*, *supra*, 40 Cal. 3d 391, 398; *People v. Honeycutt* (1977) 20 Cal. 3d 150, 156-157 [even where juror did not convey information obtained out of court to other jurors, the presumption of prejudice was not rebutted].)

This case presents somewhat of a hybrid: the information, or Juror No. 6's interpretation of what happened, occurred in court, but outside of the evidence admitted; while it might be considered "demeanor" evidence because it involved the defendant and occurred in the courtroom, it actually involved alleged conduct, the reporting of which to the other jurors the defendant had no opportunity to confront or rebut. It is these aspects which

give rise to the presumption of prejudice and the constitutional violations of appellant's right to due process and confrontation.

Regarding prejudice, it surpasses both the constitutional and state standards. Given that there was no physical evidence tying appellant to the murder other than the presence of his semen, which he contended was the result of consensual sex, and given the testimony of witnesses who saw white men carrying the TV set from the apartment and apparently having set fire to the car, lingering doubt might well have led to a non-death verdict, absent the presumed prejudice. Most important, because the information was conveyed to the other jurors out of the presence of the judge, the defendant, and counsel, there is no way to know what was actually said by Juror No. 6, and no way to truly assess the resulting prejudice. "[J]ury misconduct raises a presumption of prejudice; and unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial." (*People v. Pierce* (1979) 24 Cal. 3d 199, 207, and cases there cited; accord: *In re Stankwitz*, *supra*, 40 Cal.3d at p. 402; see also *People v. Hogan* ((1982) 31 Cal.3d 815, 848 [presumption of prejudice even stronger in context of capital case].)

XIII. THE TRIAL COURT FAILED TO ADMONISH THE JURY FOLLOWING THE PROSECUTOR'S SUBSTITUTION OF "WILLIE HORTON" FOR DEFENDANT'S NAME

As fully set forth *ante*, at pages 221-222, footnote 76, the prosecutor during his penalty-phase argument referred to defendant three times as "Willie Horton," the infamous Massachusetts murderer who had been paroled by Governor Dukakis and subsequently became a major issue in the 1988 presidential campaign.

While the court corrected the prosecutor, it did not admonish the jury. This was both prosecutorial misconduct and judicial error.

The prosecutorial misconduct, whether or not accidental, was prejudicially improper argument, a subtle and pernicious version of an appeal to prejudice. (*E.g., People v. Talle* (1952) 111 Cal.App.2d 650, 676 [referring to defendant as "despicable beast"]; *People v. Bolton* (1979) 23 Cal.3d 208, 213 [misconduct need not be intentional to constitute reversible error]. Worse, it played directly into the racial aspects of the case.

To the court's credit, it interrupted and corrected the prosecutor (thereby rendering a defense objection redundant). The correction, however, should have been followed by an admonition that the jury not consider the Willie Horton matter in any way in deciding this case. Nor should the usual rule apply, requiring a defense objection (*e.g., People v.*

Jenkins, *supra*, 2 Cal.4th 900, 1000), because the trial court itself was aware of the offending argument. "The trial judge has the primary duty to curb prosecution misconduct, either by admonition or, where the damage is too great for cure, by ordering a mistrial." (Witkin & Epstein, *Cal. Crim. Law* (3rd Ed. 2000) Criminal Trial § 571(4).)

The prejudice lies in the persistency of the underlying racial aspects of the case – making explicit what was, at least implicitly, a constant in this trial. While this trial took place eleven years later, and the ages of the jurors are not in the record, it is safe to assume that all or most of them would have been aware of the 1988 election campaign and the Willie Horton controversy. Moreover, while George H. W. Bush won 51.13 percent of the total vote in California, he won 61.48 percent in Kern County, suggesting an even higher percentage of those who may have been affected by the Willie Horton ads. (http://en.wikipedia.org/wiki/United_States_presidential_election_in_California,_1988.) Both the Horton crime and this one involved black defendants accused of murdering white victims with multiple stab wounds, increasing the chances of certain, yet hidden, bias. To the extent that such bias goes to the heart of due process and a fair trial, it cannot, in concert with the other errors, be considered harmless beyond a reasonable doubt.

XIV. THE COURT ERRED IN REFUSING DEFENSE-PROFFERED PENALTY PHASE INSTRUCTION FAVORING LIFE IN CASE OF DOUBT

The defense sought an instruction regarding the necessity for jurors to choose life if they had any doubts about imposing death. The prosecution did not object, but the court refused the instruction.

Proposed Penalty Phase Instruction No. 33 read as follows:

> If you have a doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole."
>
> (16 CT 4375, citing *People v. Cancino* (1937) 10 Cal.3d 230, 330.)[91]

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[91] The *Cancino* court's comment, as relevant here, was as follows:

> We agree that it would be more satisfactory in death penalty cases if the court would instruct the jurors that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser. This rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment. We feel, however, that the jury was fully informed as to its discretion by the last instruction given in the case, as follows: ". . . It is entirely for the jury to determine which of the two penalties is to be inflicted in case of murder in the first degree, the death penalty or confinement in the state prison for life . . . ." The foregoing language clearly informed the jury that it had the discretion of relieving the defendant of the death penalty.
>
> (10 Cal.3d at p. 330.)

After the prosecutor indicated that he was not opposed to the giving of the instruction, the court still refused it, "as I think it harks back to burden of proof instructions that could be confusing in that regard." (34 RT 7841.) The court's asserted reason has no basis in logic or the law, and is yet another example of its determination to hamper the defense.

A review of the instructions given yields the following indications regarding burden of proof:

> –With regard to factors in mitigation, or aggravation, each juror must make his or her own individual assessment of the weight to be given to such evidence. (16 CT 4402.)
>
> –Before you may consider any of the alleged [other] crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant Willie Leo Harris was in fact convicted of the prior crime[s]. . . . (16 CT 4404.)
>
> –[Defining robbery as an aggravation and that] [b]efore a juror may consider any criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal act. . . . (16 CT 4406.)
>
> –[Concluding instruction] . . . 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. (16 CT 4418-4419.)

In short, there was nothing that resembled a burden-of-proof instruction that would conflict with the proffered instruction, or lead to confusion. Nor did the proffered instruction cover the same ground.

Appellant will not argue that the failure to give the instruction alone satisfies the "reasonable possibility" standard of review. (*People v. Brown* (1988) 46 Cal.3d 432, 446.) Rather, it is yet one more illustration of the court's persistent leaning toward conviction, and death, and part of the cumulative errors which were, taken together, certainly prejudicial and contrary to appellant's constitutional rights to due process and a fair trial. (See *ante*, pp. 283-285.)

XV. CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL

The following argument states briefly the so-called "generic" arguments which this court has consistently rejected. It is included here, despite prior adverse rulings on similar claims in unrelated cases, to preserve the issues raised. If it is not stated quite as briefly as this court suggested in *People v. Schmeck* (2005) 37 Cal.4th 240, 304, that is because of subsequent United States Supreme Court rulings applicable to this case.

A. CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE A MEANINGFUL DISTINCTION BETWEEN CAPITAL AND NON-CAPITAL MURDERS

In order to avoid the Eighth Amendment's proscription against cruel and unusual punishment, the death penalty law must distinguish meaningfully between "the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 US. 238,313 (White, J., conc.); accord, *Godfiey v. Georgia* (1980) 446 US. 420,427; *People v. Edlbacher* (1989) 47 Cal.31d 983, 1023.) In California, this narrowing function is served by the "special circumstances" set forth in Section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) However, the number and sweep of the special circumstances listed in Section 190.2

undermine this very function and render the death penalty law in violation of the Eighth Amendment.

The category of felony-murder for a special circumstance (§ 190.2(a)(17)) includes all first degree felony-murders (§ 189), which in turn includes accidental and unforeseeable deaths, as well as acts committed in panic, under the dominion of mental breakdown, or acts committed by an accomplice. (*People v. Dillon* (1984) 34 Cal.31d 441, 477.) Further, the reach of capital murder has been extended by this Court's construction of the lying-in-wait special circumstance (§ 190.2(a)(15)), which encompasses virtually all intentional murder. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.31d 527, 557-558, 575.) When these two broad categories are conjoined to the numerous other special circumstances listed, the statute virtually renders every murderer death-eligibile. Indeed, the recent final report of the California Commission on the Fair Administration of Justice indicates that fully 87% of the murders in California could be death-eligible. (Cal. Comm. on the Fair Admin. of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf, at p. 18,

citing Steven F. Shatz and Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L. Rev. 1283, 1331.) It follows that the death penalty statute in California fails to avoid the Eighth Amendment proscription by providing a basis for narrowing the class of death-eligible murders, and is unconstitutional. (But see *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029; *People v. Bacigalupo*, *supra*, 6 Cal.4th at pp. 465-468.)

B. CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL IN FAILING TO REQUIRE A FINDING THAT DEATH IS APPROPRIATE BEYOND A REASONABLE DOUBT

The Eighth Amendment requires a heightened standard of reliability at both guilt and penalty phases. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) Proof beyond a reasonable doubt is required for the guilt determination (*In re Winship*, *supra*, 397 U.S. 358); proof beyond a reasonable doubt is constitutionally required to establish a special circumstance (see *Ring v. Arizona* (2002) 536 U.S. 584, 609; see also *Apprendi v. New Jersey* (2000) 530 U.S. 466,489); and proof beyond a reasonable doubt should be required for the determination of death as the penalty under California law for special circumstance murder. Without this standard of certainty, it cannot be said that the law has minimized the risk of

a "wholly arbitrary and capricious" imposition of the death penalty. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

Indeed, given the recent decision in *Cunningham v. California* (2007) 549 U.S. 270, and the argument set forth below, each aggravating factor should be subject both to unanimity and the reasonable doubt standard.

The argument against this is, of course, that the penalty decision is inherently normative and moral, and thus not susceptible to the test of proof beyond a reasonable doubt. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779; *People v. Sanchez* (1995) 12 Cal.4th 1, 81.) However, guilt determinations too sometime rest on the jury's applying normative and moral categories, such as when it must be determined whether murder may be mitigated to voluntary manslaughter. (See *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1478 [whether provocation is sufficient to reduce murder to manslaughter is a determination dependent on "community norms."].)

"Beyond a reasonable doubt" represents not only a level of proof but also a level of certainty, which applies to decisions of various natures. Requiring the jurors to be certain, beyond a reasonable doubt that death is appropriate is necessary to ensure the reliability mandated by the Eighth Amendment. Failure to provide such an instruction invalidates the

current death penalty statute and requires reversal of the death judgment in this case. (*Sullivan v. Louisiana, supra*, 508 U.S. 275,281-282 .)

C. THE FEDERAL CONSTITUTION REQUIRES JURY UNANIMITY AS TO AGGRAVATING FACTORS

It has been held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California* (1998) 524 U.S. 721,732; see also *Johnson v. Mississippi* (1988) 486 U.S. 578,584), the Sixth, Eighth, and Fourteenth Amendments require, a fortiori, jury unanimity on those factors warranting the death penalty. (But see *People v. Taylor* (1990) 52 Cal.3rd 719, 749; *People v. Bolie* (1998) 18 Cal.4th 29, 335-336.)

In the instant case, the defense proposed, and the court refused, an instruction requiring the jurors to find aggravating circumstances unanimously and beyond a reasonable doubt. (16 CT 4376.) Instead, the jurors were instructed that "[t]here is no requirement that all jurors unanimously agree on any matter offered in aggravation or mitigation." (16 CT 4402.)

In *Cunningham v. California*, *supra,* the Supreme Court held that the state's Determinate Sentencing Law could not survive Sixth Amendment scrutiny because it allotted to the judge, acting alone, to find factors in

aggravation. (549 U.S. at p. 293.) Rather, the court held that under Sixth Amendment jurisprudence, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Id.* at p. 281.) While there may be some states in which a jury finding need not be unanimous, California law requires that questions submitted to the jury be decided unanimously. (Cal. Const., art. I, § 16 ["Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict"]; *People v. Collins* (1978) 17 Cal.3d 687, 693 ["Among the essential elements of the right to trial by jury are the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous. (Cal. Const., art. I, § 16 [add'l citations omitted]."].) Thus, at the intersection of the Supreme Court's Sixth Amendment jurisprudence and California law regarding findings by the jury, aggravating circumstances must be found both unanimously and beyond a reasonable doubt. Accordingly, the instruction given, which required neither unanimity nor findings beyond a reasonable doubt, requires reversal of the death verdict. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-281.)

D. THE LACK OF INTERCASE PROPORTIONALITY REVIEW RENDERS THE CALIFORNIA DEATH PENALTY LAW UNCONSTITUTIONAL

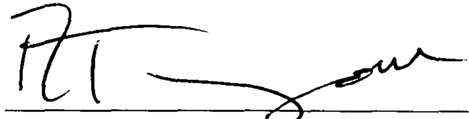
The lack of proportionality review in California's death penalty scheme violates the Eighth Amendment in allowing the imposition of the death penalty in an arbitrary and capricious manner. (*Gregg v. Georgia, supra,* 428 U.S. 153.) In civil cases, uniformity and reliability of monetary awards by juries are subject to modification by the judge in light of experience with compensatory awards in general. (*Consorti v. Armstrong World Industries, Inc.* (2nd Cir. 1995) 72 Fed.3d 1003, 1009, vacated *sub. nom. Consorti v. Owens-Corning Fiberglas Corp.* (1996) 518 U.S. 1031.) The same considerations of uniformity and fairness should apply even more strongly in his context where much more than monetary compensation is at stake, and where the Sixth, Eighth and Fourteenth Amendments bar any arbitrariness or unreliability in the determination. (But see *People v. Clark* (1993) 5 Cal.4th 950, 1039.) The failure of the California law to require such a review vitiates the death judgment in this case.

CONCLUSION

For the foregoing reasons, both the guilt and penalty determinations should be reversed.

DATED: March 5, 2009

Respectfully submitted



RICHARD I. TARGOW
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CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rule of Court 8.630(b)(2), that the length of this brief is 71,487 words, well within the limits for the opening brief set forth in rule 8.630(b)(1)(A).

RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

Re: People v. Willie Leo Harris No. S081700

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S OPENING BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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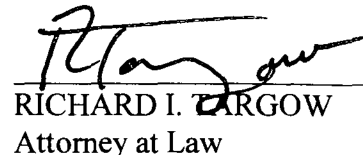
Each said envelope was then, on March 5, 2009, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 5, 2009



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