IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. SOCORRO SUSAN CARO, Defendant-Appellant.	Crim. No. S106274 Ventura County Superior Court Case Number: CR 47813

AUTOMATIC APPEAL

APPELLANT'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

THE HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

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DEATH PENALTY

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INTRODUCTION

This case involves a rush to judgment. Appellant's husband, Xavier, called 9-1-1 and announced he was a doctor and that his wife had overdosed or slit her wrists. After prompting from the 9-1-1 operator, Xavier reported that three of their children were dead. Responding officers were told en route that the mother killed the kids. The officers never viewed nor treated Xavier as a possible suspect. The first officers on scene never handcuffed Xavier despite not knowing the location of the gun(s) used in the shootings, and they left Xavier alone outside the house with the uninjured 15-month-old. The police allowed Xavier to urinate in the backyard and wash his hands under a faucet. The police escorted Xavier's paramour to the mobile command center and allowed her and Xavier an extended and private visit in the hours after the shooting. The police allowed and even assisted Xavier to remove property from the crime scene that night without

inventorying what was taken.

After appellant was airlifted to the hospital with a gunshot wound to the head, the police swooped in on her. Officers seized her clothing without a warrant, photographed her and observed her during emergency brain surgery without her consent, listened in on her interactions with her doctors, and set up a tape-recorder in appellant's private ICU room. In addition, a homicide detective questioned appellant for hours without providing any *Miranda* advisements although law enforcement already believed appellant was the only suspect in the triple homicide.

With these biased beginnings, the prosecution brought appellant to trial with evidence that was far from overwhelming. The prosecution's case rested largely on very small amounts of blood from the kids being present on the clothing that appellant was wearing when she was found; some statements attributed to appellant while she was in the hospital; a bloody palm print of appellant on a door frame, and a belief that there was not enough time for Xavier to return home from his office and shoot everyone before calling 9-1-1.

Careful review of this evidence leaves it wanting. Two paramedics admitted they touched appellant with their gloved hands that were bloody from having touched the three boys. Appellant, who was in intense pain while being questioned and who repeatedly told the detective that she didn't remember what

happened, made one statement only after the detective suggested a possible scenario. Another statement attributed to appellant was inaudible on the tape and came solely from the detective's testimony. The prosecution's time line was premised on Xavier driving close to the speed limit on his drive home, an assumption with no evidentiary support and which doesn't consider how a person in a homicidal rage might drive.

The defense theme was that Xavier shot the kids, not appellant. The defense efforts to show this, however, were often thwarted by the court's rulings, particularly regarding Xavier's cross-examination.

In this brief, appellant raises a host of claims showing that she is entitled to a new trial. These claims include improperly excusing jurors for cause during jury impanelment, several Fourth Amendment violations, a *Miranda* violation, evidentiary errors regarding evidence improperly admitted and evidence wrongly excluded, prosecutorial misconduct during closing arguments, ineffective assistance of counsel, and the erroneous discharge of a juror during guilt phase deliberations. These errors both individually and cumulatively deprived appellant of a constitutionally fair trial and require reversal of her convictions and death sentence, especially given the questionable prosecution case against her.

STATEMENT OF THE CASE

In an information filed on April 4, 2000, appellant, Socorro Caro, was charged with three counts of murder in violation of Penal Code section 187, subdivision (a). (1CT 73-75.) The information also alleged a multiple murder special circumstance (Pen. Code § 190.2(a)(3)), as well as gun use enhancements (Pen. Code §§ 12022.5 & 12022.53(d)). (1CT 73-75.)

On May 9, 2000, the court appointed the Ventura Public Defender's office to represent appellant because her finances could not be evaluated while her divorce was pending. (1CT 76, 78, 79.)

On June 6, 2000, appellant pled not guilty and denied all allegations. (1CT 94.)

On July 19, 2000, appellant changed her plea to not guilty by reason of insanity. (1CT 105-106.)

On July 17, 2001, jury selection began with questions regarding hardship. Actual voir dire began on July 31, with the jury panel sworn on August 3, 2001. (6CT 1032-1034.)

On August 22, 2001, trial began with opening statements. The prosecution presented its case-in-chief for 28 days. The defense put on evidence for 12 days, followed by two days of rebuttal evidence.

On October 30, 2001, jury deliberations began. (10CT 1876.)

On November 5, 2001, on the fifth day of deliberations, the

parties agreed to excuse a juror for cause. An alternate juror replaced the excused juror at 11:13 a.m. and by 5:00 p.m. the newly constituted jury convicted appellant of three counts of murder and found the special circumstance allegation and gun enhancements true. (10CT 1896-1909.)

On November 6, 2001, appellant withdrew her plea of not guilty by reason of insanity. (10CT 1919-1921.)

On November 27, 2001, the penalty phase began. (10CT 2057-2061.) The prosecution case took two court days. The defense case took 5 days.

On December 7, 2001, penalty phase deliberations began. (11CT 2235-2237.)

On December 10, 2001, after two half-days of deliberations, the jury returned verdicts of death. (11CT 2240-2244.)

On April 5, 2002, the court denied a motion for a new trial and denied a motion to modify the sentence. The court sentenced appellant to death for each count of murder, plus a concurrent sentence of 25 years to life for the gun enhancement for each count. The court imposed a restitution fine of $10,000 and awarded appellant 857 days of actual sentence credit. (12CT 2533-2537, 2544-2549.)

On April 12, 2002, the court ordered appellant to reimburse Ventura County $307,250 for her legal expenses. (12CT 2554-2555.)

STATEMENT OF FACTS

OVERVIEW

Appellant, Socorro Caro, and Xavier Caro ("Xavier") were married in July 1986 after dating since 1980.[1/] By November 1999, the Caros had four boys: Joey (age 11), Michael (age 8), Christopher (age 5), and Gabriel (age 1). Xavier was a doctor in Northridge specializing in rheumatology. Appellant was his office manager from 1984 until August 1999 when Xavier fired her claiming she had mismanaged the office finances and was giving her parents too much money. Unbeknownst to appellant, at the time Xavier fired her, he was involved in an inappropriate sexual relationship with another office employee. Around this same time, Xavier, who consummated his affair the same week he fired appellant, told appellant that he would divorce her unless she agreed to take Prozac and attend counseling. Appellant complied with Xavier's demands and their marital problems improved. However, three months later, the three oldest boys were shot dead and appellant was shot in the head and critically injured.

Appellant was charged with three counts of murder for the deaths of her three sons. The prosecution tried the case on a theory that appellant killed her children and then attempted suicide because she feared that Xavier was going to divorce her

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[1/] Because many of the witnesses in this case were members of either the Caro or Leon family, appellant has used first names for family members to avoid confusion.

and leave her with no money and a lower social status. The defense presented evidence casting doubt on appellant's guilt and suggesting that Xavier killed his three children and tried to kill appellant, a loving mother, to rid himself of his family and his related financial obligations and allow him to pursue his love interest.

PROSECUTION CASE-GUILT PHASE

The Day of the Shootings

November 22, 1999, was a Monday, a regular work and school day for the Caro family who lived in a large home in Camarillo. The Caros, along with appellant's parents, Juanita and Greg Leon, were preparing to go to the Caros' vacation home in Waterford in central California for Thanksgiving. (21RT 3782.) The family housekeeper, Maria Hernandez, worked that day as she did every Monday. (39RT 8008, 8010.) According to Hernandez, appellant went out to lunch with her mother and seemed normal and nothing unusual occurred. (39RT 8008.) Appellant asked Hernandez to work the next day to help pack for the trip. (39RT 8009.) At 6:00 p.m., as Hernandez left, appellant told her "I'll see you tomorrow" while holding Gabriel. (39RT 8011, 8012.) Hernandez thought appellant was always loving with her children and saw her playing with them earlier that day. (39RT 8012.)

Xavier came home from work around 6-6:30 p.m., a little earlier than usual, so he could watch a USC basketball game on

TV. (21RT 3782; 25RT 4530.) There were two completed phone calls between Xavier's car phone and the Caro house at 5:17 and 5:23 p.m. (24RT 4331, 4333.) Once home, Xavier followed his regular routine of taking off his bracelet, threading it through his wedding ring, and placing them in his top drawer. He changed into a light shirt, short sweat pants, white socks and flip-flops. Xavier ate dinner with appellant and they drank margaritas that appellant had made earlier.[2/] (21RT 3782-3784.) Appellant was handling her alcohol and seemed normal. (21RT 3784, 3785.)

Juanita, who had spent the day with appellant and who often spent the night in her own room at the Caros' house, remained at the house. She ate dinner in her downstairs room while watching TV. Juanita was in her night clothes because she planned on spending the night. (28RT 5020, 5022, 5037.)

After dinner Xavier got angry at something Joey said about his drinking. (21RT 3785.) Appellant defended Joey and told Xavier that punishing Joey was too harsh. (21RT 3788, 3789.) Xavier went upstairs later and carried Joey's large TV down to the garage as punishment. (21RT 3790, 3791, 3896-3898; Ex. Y.)

When Xavier returned upstairs, he and appellant argued again about whether he should have punished Joey. (21RT 3792.)

[2/] Xavier, for reasons he could not explain, acknowledged that he had recently begun putting a twist tie around his glass so he could distinguish his drink glass from appellant's drink glass. (24RT 4367, 4368.)

Eventually the argument changed to whether Xavier loved appellant. (21RT 3792.) According to Xavier, appellant implied that if Xavier did not do what she asked him to do, then he did not love her. (21RT 3793.) She also talked about how Xavier did not listen to her and did not respect her. (21RT 3793.)

Xavier didn't want to argue so he told appellant he was leaving. His plan was to go to his office to cool off. (21RT 3794.) He didn't say anything about divorcing appellant or about their relationship being over. (21RT 3795.) As Xavier started to walk out of the room, appellant grabbed his shoulders. When Xavier kept walking, appellant slid her hands to his ankles as she dropped to the floor. (21RT 3755, 3796.) While Xavier was trying to free his ankle, Juanita came upstairs and yelled, "Get out, you brute." (21RT 3797.)

Xavier left and drove his 1989 maroon Mercedes 420 SEL to his office. (21RT 3797, 3798, 3800, 3803.) Xavier ignored his ringing car phone because he assumed appellant was calling. (21RT 3805.) After Xavier got to his office, his office phone began ringing. (21RT 3809.) Xavier unplugged two of his office phones but could not disconnect a third phone. (21RT 3808-3809, 3817.) He eventually answered the phone but hung up when he heard appellant. (21RT 3809.) He answered another time and mostly listened while appellant cried and told him she wanted him to come home. (21RT 3818-3819.) They stayed on the phone about 10

minutes. Appellant's last words to him were: "That's the thing I've always admired about you, Xavier. You always know the difference between right and wrong." Appellant then hung up. (21RT 3819.) Xavier felt appellant's voice and demeanor had changed and she became almost robotic towards the end of the call. He was worried and called her back but neither appellant nor the answering machine picked up. (21RT 3820.)

Phone records documented these calls. Unanswered calls were made from the Caro home to Xavier's car phone at 8:47:09 p.m., 8:59:26; 9:09:30; and 9:33:34. Additional calls were made from the Caro home to Xavier's office: 9:34:21 (14-seconds); 9:34:49 (unanswered); 9:54:52 (unanswered); 9:38:46 (7 minutes, 12 seconds); 9:52:25 (unanswered); 9:53:33 (10 seconds). At 9:53:59 p.m. a call from Xavier's office to the Caro house was unanswered. (14RT 2476-2478.)

Xavier tried to work but felt ill at ease because of how appellant sounded and decided to go home. (21RT 3821-3822.) He estimated for the police that he stayed about 10 minutes but at trial said it could have been longer. (21RT 3821.) Xavier believed he left his office about 10:30 p.m. (21RT 3823.) He walked down four flights of stairs and then out to the parking garage. (21RT 3823.) While he was outside, Xavier saw a man and a white tanker-truck outside a closed gate. The man signaled as if he wanted Xavier to open the gate but Xavier ignored him. (21RT

3824-3826.) Xavier drove his usual route home to Camarillo. (21RT 3827-3832.)

Xavier estimated he had driven that route about 500 times over a five year period and told the police it took about 30 minutes to drive home. (21RT 3832.) However, about a month before he testified, Xavier, at the request of the prosecutor, retraced his route six times and found the time ranged from 42-46 minutes.[3/] (21RT 3833, 3904; 22RT 4139, 4141.)

When Xavier got to his driveway he noticed Juanita's car was gone. He was glad because he thought that would make it easier to make up with appellant. (21RT 3835.) Xavier went into the house through the kitchen and noticed it was clean and the dishes were put away. (21RT 3835.) He also noticed the house was quiet. Everything was lit upstairs except the boys' rooms which were dark. (21RT 3836.) Xavier walked into the master bedroom and saw appellant on the carpet on her right side with her hair covering her face. Xavier did not notice any blood and thought appellant was asleep or passed out. He nudged her and moved her hair and she moaned and moved. He saw blood-tinged froth around her mouth

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[3/] Michael Barnes, an investigator for the district attorney's office, later testified that he drove that 32.1 mile route on April 18, 2001 at about 1:00 p.m. and it took 43 minutes, 20 seconds. (40RT 8196-8198.) Barnes repeated the trip on September 5, 2001 starting at 10:36 p.m. and it took 41 minutes, 20 seconds. (40RT 8198, 8200.)

Appellant testified that after 10 p.m. the drive from the office to home took about 30 minutes. (46RT 9281.)

and thought she had overdosed. (21RT 3838-3839.)

Xavier called 9-1-1 and said he had an emergency and needed help fast. (21RT 3840-3841.) He told the operator he was a doctor and said appellant either overdosed or slit her wrists. (21RT 3841-3842.) At the request of the 9-1-1 operator, Xavier rolled appellant onto her back. He found a gun underneath her close to her right hand. (21RT 3843-3845.) He opened the gun and found a single shell. (21RT 3846-3847; 26RT 4667.) He said he threw the gun onto the bed but later learned the gun was found on top of his dresser in his walk-in closet. (21RT 3847.)

When Xavier returned to the phone, the 9-1-1 operator asked if there were any children in the house. Xavier put the call on speaker phone and confirmed that the operator could hear him before checking on his children. (21RT 3850-3851; 24RT 4409.) He went to Joey's room first, turned on the light, and found Joey face up in bed with blood all around him. Xavier didn't feel a carotid pulse and didn't examine Joey further. (21RT 3851-3853.)

Xavier started screaming and went through the connecting bathroom to the other kids' bedroom. (21RT 3855; 24RT 4414.) Xavier turned on that light and saw Christopher and Michael lying face up on the bottom bunk. They were both pale, ashen, and not moving. Xavier did not recall seeing blood. (21RT 3864-3866.)

Xavier thought appellant had done a horrible thing. (21RT 3868.) He ran out of the bedroom and told the 9-1-1 operator that

his babies had been shot. (21RT 3868, 3869.) Xavier kicked appellant in the buttocks and yelled, "You bitch." (21RT 3869; 24RT 4410, 4412.) He told the operator, "She shot my babies." When the operator asked how many kids there were, Xavier went over to Gabriel's crib in the master bedroom and saw Gabriel moving around. He picked up Gabriel and told the operator he had a live one. (21RT 3870-3871.)

Xavier went back to see if any of the boys were still alive. (21RT 3872.) He went to Joey's room but knew Joey was dead because he hadn't moved and there was too much blood. (21RT 3873.) Xavier found Michael doing agonal breathing.[4/] Xavier put Gabriel down to give Michael CPR, but changed his mind when he saw the extent of the head wound. Xavier didn't touch Christopher. He grabbed Gabriel and ran out. (21RT 3874-3876.)

Xavier talked to the 9-1-1 operator again and told her they had to hurry. (21RT 3876.) Xavier went downstairs, opened the front door, and flicked the porch light on and off to assist the emergency vehicles. (21RT 3877.) He then called Juanita from the kitchen.[5/] (21RT 3877.) Xavier was confused about what happened and thought Juanita might know since she had been at the house

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[4/] Agonal breathing is a reflexive breath with no consciousness. It is considered a "last gasp" breath. (36RT 7443.)

[5/] The house had two phone lines so Xavier remained on the phone with 9-1-1 while calling Juanita. (21RT 3878.) That call, at 11:26:55 p.m., lasted 1 minute, 23 seconds. (Stipulation.)

earlier. (21RT 3878.) Xavier told Juanita that appellant shot the babies. (21RT 3878.)

Xavier returned to the front door and was surprised to see two officers approaching the house with their guns drawn. Xavier told them to go upstairs but they grabbed him and asked where the gun was. Xavier said it was upstairs. (21RT 3879.) Xavier testified he remained outside of the house the rest of the night. (21RT 3880, 3881.) At some point, Xavier went into his backyard and urinated and then washed off his hands using a faucet near the garage. (24RT 4339-4341.) According to Xavier, an officer went with him. (24RT 4339.)

Xavier testified that he was never concerned about being a suspect because he knew who had done it, but he did tell Juanita that he was concerned he might be blamed. (24RT 4347.) The police never told Xavier he was a suspect, and he never felt he was even after the police swabbed his hands and took the clothes he was wearing that night. (24RT 4386, 4457.)

The Crime Scene

A dispatcher for the sheriff's department received a 9-1-1 call from Xavier at 11:22 p.m. on November 22, 1999.[6/] (17RT 2990.) When she learned an ambulance was needed, she transferred the call to the fire department and hung up when the fire department picked up the call. (17RT 2993, 2996.)

[6/] That call was played for the jury. (17RT 2994; Ex. 9.)

Vicki Crabtree, a dispatcher for the Ventura County Fire Department, picked up the transferred call.[1/] (17RT 3003.) Crabtree asked a standard question about whether there were any children in the house. About 1-1½ minutes after asking that question Crabtree heard screaming. As Crabtree talked she was typing messages to her partner who could not hear the call. (17RT 3008-3009.) At 11:28 p.m. Crabtree typed, "The wife murdered the three children." (17RT 3012-3013, 3015.) She also typed that the father had just gotten home and walked in on that. (17RT 3014.)

Deputies Fullerton and Tutino were the first officers on the scene. (17RT 3021, 3029, 3045.) While they were en route, the call was changed to a murder and dispatch advised the officers something like "the father said that the mother killed all the kids." (17RT 3100.) When the deputies arrived, Tutino heard screaming from the house. (17RT 3046.) As Tutino approached the partially opened front door, he saw Xavier coming from the back of the house holding Gabriel who was wrapped in a blanket and appeared to have blood on his feet. (17RT 3024, 3033, 3047, 3048, 3091, 3098.) Xavier was yelling: "She killed them all" and "She must've forgot about the little guy." (17RT 3025, 3033, 3049.) Tutino got Xavier out of the house and asked where she was. (17RT 3050, 3092, 3110.) Xavier said, "She's upstairs." Tutino then

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[1/] A complete copy of that 9-1-1 call was not available because of recording problems. (17RT 2975-2977.) The available portions were played for the jury. (17RT 3006; Ex. 10.)

asked where the gun was and Xavier said, "I don't know. I threw it somewhere." (17RT 3050.)

Tutino testified that he did not consider Xavier a suspect when he arrived. (17RT 3104.) One of the deputies directed Xavier to an empty patrol car and told him to wait for responding units. (17RT 3026, 3034, 3036, 3050.) The two officers then entered the house. (17RT 3026, 3034, 3036, 3050.) Tutino noted blood droppings as he went up the stairs. (17RT 3051, 3053, 3110.) He looked into one bedroom and saw two small children in a bottom bunk not moving. (17RT 3053.)

The deputies found appellant on her back gasping for air with her shirt pulled up to her neck. (17RT 3026, 3053. 3054.) There were pools of blood, a pool of vomit, and several shell casings around appellant's body. (17RT 3055.) Tutino could not find the gun. (17RT 3055.)

Deputy Adford arrived next and was met by Fullerton who had returned outside and was with Xavier and Gabriel. (17RT 3167.) Adford described Xavier as disheveled, frantic, and on the verge of a nervous breakdown. (17RT 3168.) Xavier was saying, "She shot my kids. Oh my god, she shot my kids. He was going to be somebody." Adford put his arm around Xavier and gave him a comforting pat. (17RT 3169.)

When Deputy Yoss arrived, he was concerned about officer safety. (18RT 3231, 3246.) He went directly to the master bedroom

where he saw appellant alone on the floor breathing but otherwise unresponsive and not posing a threat. (18RT 3231, 3232, 3246.) Yoss went into the fairly dark bunk bed room and saw two boys in bed that appeared to be dead. (18RT 3235-3236.) Yoss went into Joey's room and saw him lying in a pool of blood. (18RT 3237.) Yoss did not touch the boys or the bedding. (18RT 3233-3237, 3243.) Yoss returned to the master bedroom and found a Smith & Wesson stainless steel .38 special gun on top of a dresser in the closet. (18RT 3241, 3242.) He also found two gun cases in the same closet. (18RT 3242.)

Deputy Wilson arrived after Yoss and found Xavier running around frantically and yelling that his wife killed the kids. (18RT 3296-3297.) Wilson went in the house and took photos. He never touched the boys or the bedding. (18RT 3299, 3305, 3310.)

A fire engine manned by firefighters Ackerman, Jensen, and Sears, and an ambulance staffed by EMT Bowen and paramedic Vuola went to the house after the deputies declared the house safe. (18RT 3200, 3212-3213, 3263, 3265, 3323; 19RT 3422-3425; 39RT 7959, 7961.) As the firefighters approached, they saw Xavier, who seemed very upset, coming from around the dark left side of the house. (18RT 3202, 3265, 3274, 3322.) Xavier was clutching Gabriel tightly and running in circles and screaming and rolling on the grass. (18RT 3204-3207, 3266, 3322, 3323.) The firefighters noticed blood on Gabriel's sock, and Jensen did a

quick assessment of Gabriel who appeared to be uninjured. (18RT 3207, 3265, 3324.) Sears asked a deputy to help Xavier who seemed incapable of caring for a child. (18RT 3266.)

Shortly thereafter, Bowen retrieved Gabriel, examined him, and found no injuries although his socks were saturated with blood. (19RT 3429-3430, 3465, 3508.) Bowen put his arm on Xavier's shoulder and asked him to help console Gabriel but Xavier walked off. (19RT 3462, 3506.) Bowen wrapped Gabriel in a blanket and returned him to Xavier after being told by a deputy that there was not enough personnel for the deputies to keep Gabriel. (19RT 3431, 3464, 3470.) Bowen had to talk to Xavier sternly and tell him to settle down so Xavier could calm Gabriel. (19RT 3507.)

Bowen and Vuola went in the house. Vuola looked in one bedroom and saw a boy with severe head trauma who appeared to be dead. Vuola did not touch the boy or the bed. (39RT 7965, 7966.) Vuola never returned to the kids' rooms and only had contact with appellant when he helped secure her to a backboard for transport. (39RT 7974-7975.)

During this same time, Sears and Jensen entered the house. (18RT 3267, 3268.) Sears stayed with appellant until she was airlifted away. (18RT 3269.) He never went into the other bedrooms and did not have contact with the boys. (18RT 3270.)

Jensen checked the two boys on the bunk bed for carotid and

brachial pulses using his gloved fingers and found no pulses but thought he heard a gasp of air which he reported to Ackerman.[8] (18RT 3329-3331.) Jensen checked for a carotid pulse on Joey and determined he was dead. (18RT 3333.) Jensen returned to the bunk bed room and he and Bowen started to lift Michael to have more room to work, but decided his head wounds were too extensive and he could not be saved. (18RT 3338, 3347.) Jensen, with Bowen still assisting, returned to Joey's room and rolled Joey to assess his wounds and check again for a pulse or breathing. (18RT 3339-3340, 3343.) Bowen pronounced all three boys dead. (19RT 3449, 3486.)

After finishing with the boys, Jensen and Bowen went back to the master bedroom still wearing their same gloves. (18RT 3342; 19RT 3395, 3449, 3468.) Jensen helped put an airway into appellant and helped carry her on a backboard down the stairs. (18RT 3342, 3344.) Bowen pulled away appellant's shirt and shorts to assess her for injuries while she was being rolled onto the backboard.[9] (19RT 3452.)

Bowen did not change his gloves while at the house. (19RT 3468.) He was certain his gloves were bloody from working on the boys because there was copious amounts of blood. (19RT 3451.)

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[8] Ackerman, whose job was to control the scene, did not touch the boys or appellant. (18RT 3209, 3215.)

[9] Bowen noted that appellant's clothes were so loose he could examine her without removing them. (19RT 3498.)

Jensen also wore the same pair of gloves while he assessed all four gunshot victims. (18RT 3373; 19RT 3395.)

Joey, who had no defensive wounds, died from a contact gunshot wound to the head which likely incapacitated him immediately.[10/] (36RT 7387, 7391, 7419, 7420, 7441.)

Michael also died from a contact gunshot wound to the head. (36RT 7394.) The bullet didn't exit and was recovered. (36RT 7395, 7396.) The shot would have been immediately incapacitating although Michael took at least one breath after being shot. (36RT 7396, 7399.)

Christopher was shot twice in the head. At least one of the shots was a contact shot. (36RT 7400, 7401.) One shot tore Christopher's scalp and lifted off a piece of bone. (36RT 7403.) That shot was front to back meaning Christopher was facing the gun. (36RT 7407.) That wound may not have been immediately incapacitating and Christopher could possibly have moved afterwards, but the coroner could not say whether that actually happened. (36RT 7408.) The other shot was immediately incapacitating and there was no evidence Christopher breathed after that shot. (36RT 7409-7410.)

The Later Crime Scene

While at the scene, Tutino asked Xavier about the names and

[10/] The coroner used a metal rod through a Styrofoam head to show the jury the path of each bullet that struck the three boys. (36RT 7390, 7397, 7410.)

birth dates of his children. Xavier looked visibly upset and asked if the kids were dead. When Tutino told him they were, Xavier expressed disbelief, got more upset and said something like, "She killed my best friends." (17RT 3069-3071.)

When Xavier learned that Juanita had arrived, he told Tutino that he wanted to talk to her. (17RT 3073, 3133.) Xavier and Juanita had a brief conversation outside. Xavier's speech was high-pitched and angry. Juanita kept falling to the ground and was visibly distraught. Tutino brought them both into the garage. For the next 1-1½ hours, Tutino listened to their conversation and secretly recorded it. (17RT 3074, 3079, 3080.)

Xavier told Juanita he had been at his office and returned home to find appellant on the ground with blood on her. (17RT 3136.) Juanita, at times, seemed angry at Xavier who was pacing around and hitting the walls. He alternated between being upset and being calm. He said things like, "Why did she do this? She killed my best friend. She killed my Joey. She wasn't messing around. She shot them all in the head." (17RT 3077.) Juanita eventually took Gabriel home with her. (21RT 3928, 3929, 3931.)

At 5:30 a.m., Danny Thompson, a homicide detective for the Ventura County sheriff's department,[11/] interviewed Xavier at the command post trailer that was set up on the property. (19RT 3541-

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[11/] Three weeks after the shooting, Thomson began working as an investigator for the Ventura County District Attorney's Office. (41RT 8295.)

3543.) Xavier vacillated from being calm, composed, and professional to crying and shaking. (19RT 3544.) Xavier tended to lose his composure when asked about his children. (19RT 3546.) When the interview ended 1½ hours later, Thompson left Xavier in the command post. (19RT 3546.)

Later that day, at about 5:45 p.m., Thompson escorted Xavier into the house so Xavier could get some clothes. (19RT 3554, 3559.) Thompson watched Xavier go into the master bedroom. (19RT 3554.) When Xavier opened the top drawer of his dresser, his hands began trembling and he started to cry. (19RT 3556;21RT 3888.) Xavier was holding his bracelet that was clasped and laced with three rings --Xavier's wedding ring and appellant's engagement and wedding rings. (19RT 3557, 3564, 3568; 20RT 3580; 21RT 3889.) Although Xavier removed property from the house, Thompson did not inventory what Xavier took. (19RT 3565.)

The Caros' Family History

Xavier lived in an orphanage and a foster home before being adopted at age 4½. (20RT 3574.) According to Xavier, this upbringing made family important to him. (20RT 3574.) He went to medical school and after completing a residency and a fellowship in rheumatology, he opened his own practice in Northridge in 1979. (20RT 3575-3576.) Xavier met appellant in late 1979 or early 1980 when she worked as an extern in his office. (20RT 3577.) They began dating in 1980. (20RT 3577.) Shortly

thereafter, appellant, with Xavier's encouragement, left the office and went back to school and did some traveling. (20RT 3577-3578.) Appellant became Xavier's office manager in 1984. (20RT 3578.)

Appellant and Xavier continued dating, got engaged in 1985, and married on July 5, 1986.[12/] (20RT 3579, 3587; 22RT 3984.) Xavier and appellant discussed Xavier's desire for a family before their marriage and ultimately had four boys. (20RT 3581, 3582.) Xavier and appellant both actively participated in all aspects of child-rearing. (20RT 3583-3585.)

After their marriage, Xavier and appellant lived in a home that Xavier had bought in 1977 in Granada Hills. (20RT 3587; 22RT 3984.) Xavier also owned 2½ acres of vacation property in Waterford on the Tuolumne River which included a double-wide and a single-wide trailer and a small barn. (20RT 3606, 3607.) When the family vacationed there 6-7 times each year, the Caros stayed in the larger trailer and Juanita and Greg stayed in the smaller one. (20RT 3607.)

In 1992 or 1993, Xavier, who was 5'6" and weighed 152 pounds, bought two guns --a Sig Sauer .228 for himself and a .38

[12/] Xavier had been married once before and was divorced. (22RT 4092.) Xavier and his first wife had no children and no assets. (26RT 4674.)

Smith & Wesson for appellant- for home protection.[13] (20RT 3611-3612, 3615; 22RT 3949.) Appellant didn't really want to learn how to use a gun but did so because Xavier wanted her to. (21RT 3927.) Xavier had appellant's gun modified for her: the trigger was filed to make it more comfortable, the pull resistance was decreased, and the handle was made more attractive. (20RT 3612-3613; 21RT 3913.) Xavier also bought appellant a floral-print gun box for transporting her gun. (20RT 3616.) Xavier arranged for personalized firearm training for both of them and purchased membership at a gun range so they could take target practice.[14] (20RT 3613-3614.)

Xavier kept the guns at home in a locked safe that had a five-button combination that had to be programmed correctly to open. (20RT 3617.) Although Xavier got the guns for appellant's safety when he was out of town, he never gave her the combination to the gun safe. (20RT 3618; 21RT 3197.) The safe was kept on a shelf in Xavier's closet with the extra ammunition and gun cleaning supplies kept on the shelf above. (20RT 3619, 3620.) Prior to the shooting, Xavier last had the guns out on Memorial Day weekend. (20RT 3620.) He put the loaded guns back in the gun

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[13] Xavier also kept a .22 rifle in Waterford for shooting woodpeckers. (21RT 3915, 3917-3918.)

[14] The membership expired in May 1993. (21RT 3912, 3914.) Xavier and appellant last shot at a gun club in Modesto in 1996 or 1997. (21RT 3918.)

safe after that. (20RT 3621.)

Xavier testified about an incident he claimed took place after he left their Camarillo house following an argument in 1994 or 1995. (20RT 3621.) When Xavier returned home, he started up the stairs and saw appellant holding her gun at the top of the stairs. (20RT 3622-3623.) Xavier grabbed Joey and left. (20RT 3624.) Appellant called his car phone and asked him to come back. Xavier agreed to do so if appellant put the guns out in plain view. (20RT 3625.) Appellant complied and put the gun safe in the driveway. (20RT 3626.) Xavier examined the safe and determined that the lid had been broken open. (20RT 3627.) Xavier never reported the incident to the police, and he continued living with appellant with guns in the house. (20RT 3635.)

Appellant's Work as Officer Manager, Her Parents, and Finances

Although appellant had no formal training as an office manager, she began supervising Xavier's office in 1984. This included writing checks and hiring people. (20RT 3578-3579.) Appellant worked longer hours before she had children. (20RT 3635-3637.) By August 1999, appellant was working 2-4 days per week and was assisted by Lisa VanEssen. (20RT 3637, 3645.) In Xavier's opinion, appellant was not an effective office manager in 1998-1999. (20RT 3644.) They argued at work causing Xavier to be distracted. (20RT 3644.)

Appellant did not get paid for work as the office manager.

After the Northridge earthquake in January 1994, the Caros made a decision to stop paying appellant a salary so they would have money for other expenses including earthquake repairs. (20RT 3594-3595.) The Caros had bought their Camarillo home two weeks before the earthquake. (20RT 3588.) Both that house and Xavier's Granada Hills house suffered earthquake damage. (20RT 3062; 22RT 3985.)

After Xavier and appellant moved to Camarillo, Juanita and Greg moved into Xavier's Granada Hills home. (20RT 3599.) Xavier did not want to sell the Granada Hills house because of the depressed real estate market after the earthquake so he suggested the Leons move in because their Canoga Park home had also been damaged in the earthquake. (20RT 3599-3600; 22RT 3985, 3986.) Xavier continued to pay the mortgage for his Granada Hills house after Greg and Juanita moved in. Xavier did not expect Juanita and Greg to do anything in exchange for this arrangement. (20RT 3605-3606.)

Juanita and Greg sold their home when they moved to Granada Hills and put the proceeds from the sale into an account selected by Xavier's long-time financial advisor. Xavier had power of attorney over that money.[15/] He made all of the Leons' investment decisions and did not discuss the decisions with them. (20RT

[15/] Before testify, Xavier had never told the prosecution that he had power of attorney over the Leons' investment account. (22RT 4046.)

3600-3602; 22RT 4012-4014.) When the Leons received their monthly statement, they gave it to appellant who kept their financial records. (22RT 4014-4015.)

Xavier didn't have a strong relationship with appellant's parents but he considered them family. (22RT 3984, 3987.) Juanita had her own bedroom in the Camarillo house because appellant wanted it and Xavier wanted appellant to be happy. (20RT 3598; 22RT 3988.) Juanita stayed there 3-5 days each week, including some weekends. She took care of the kids and cooked. (20RT 3598-3599.) Xavier was Juanita's arthritis doctor since 1986 although he stopped treating her after the shootings. (22RT 3973-3974.)

Greg, a brick mason by trade, worked for Xavier doing gardening, landscaping, pipe laying, and repairs at the Camarillo, Granada Hills, and Waterford properties.[16/] (20RT 3602-3604, 3608.) Greg also ran errands such as going to Costco, putting gas in the cars, and driving the kids to school. (20RT 3605.) Xavier was always pleased with Greg's work and said Greg always gave 110%. (22RT 3990.) Xavier occasionally treated Greg for medical issues. (22RT 3988.)

While appellant was the office manager, she paid both the Caros' household expenses and Xavier's office expenses using a stamp of Xavier's signature. (20RT 3608-3609, 3639.) Xavier was

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[16/] The Caros also employed a gardener and a pool man. (20RT 3604.)

aware that appellant also gave her parents money. (20RT 3609.) Xavier didn't keep track of any expenses and payments because that was appellant's responsibility. (20RT 3611.)

Between June and August 1999, VanEssen expressed concern to Xavier about expenses and the money appellant was giving her parents. (25RT 4533-4535.) On August 10, 1999, Xavier received a 3-day notice to pay his office rent or move out and learned that the rent was in arrears for $44,530.54. (20RT 3666.) Xavier also owed $1750 to his employee health insurance carrier and $2118 to a leasing company for some office equipment. (20RT 3667-3668.) Xavier looked through the office checkbook and learned that appellant was paying her parents more money than he thought. He saw that appellant paid for their car insurance, gas, health insurance, telephone, electricity, Oakland Raider football tickets, and traffic ticket fines using the Caro family's personal checking account. (20RT 3647, 3659-3661.)

Xavier decided to close his office to patients for a week in August so he and VanEssen could look into his office expenses. (20RT 3646; 22RT 4089, 4090.) Xavier opted not to accompany his family to a planned week in Waterford to do this. (22RT 4090.) While appellant was in Waterford with the kids and her family, Xavier fired her over the phone from her office manager position, took away her check-writing privileges, credit cards, and office keys, and changed his office locks. (20RT 3665; 23RT 4133-4134.)

According to Xavier, appellant was pleased about not having to work at the office any more. (23RT 4134.)

After Xavier fired appellant, he allowed the Leons to continue living in his Granada Hills house, and he continued paying basic house expenses but told appellant that her parents would need to start paying their personal expenses. (20RT 3665.) Xavier made VanEssen his office manager and had her take over paying the bills although he took away his signature stamp so that he would personally sign every check. (20RT 3670.)

At the request of the prosecution, Xavier provided checks and a ledger that appellant kept at the office.[17/] (22RT 3993, 4016; 26RT 4681.) Appellant used the ledger to record her parents' expenses which were paid by the Caros between January 1993 and April 1998.[18/] (25RT 4586, 4591; 26RT 4654, 4683); Ex. 98.) There were 111 checks made out to Greg Leon between February 1998 and November 1999 totaling $32,410 and 54 checks made out to Juanita from March 1998 through August 1999 totaling $8,255. (20RT 3649, 3653-3655.) Juanita and Greg were not employed for pay by anyone else during 1998-1999. (20RT 3608; 22RT 4052.) In

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[17/] Xavier asked VanEssen to provide the documents and never verified if she did it. (22RT 4016, 4030.) VanEssen said she gave the prosecution an accordion folder of checks separated by months and by account. (27RT 4835, 4844, 4845.)

[18/] Xavier believed the ledger ended because appellant began tracking office and personal accounts on Quicken. (22RT 4019-4020; 26RT 4684, 4769.)

addition, there were 57 checks issued during 1998 to pay expenses which benefitted the Leons totaling $10,312.54 and 134 checks issued in 1999 totaling $53,159.04. (20RT 3656-3660.) The total for all payments involving the Leons was $105,550.58. (20RT 3663.) Xavier testified he knew that the total was just a fraction of what was actually being paid to the Leons during that time. (25RT 4577.)

Xavier didn't know whether some checks were to reimburse Juanita or Greg for money they had paid out for family expenses. For example, it was possible that checks made out to Greg but containing the notation "Costco" could have been used to pay for Costco purchases made for the family. (22RT 4055; Ex. 25.) Xavier also acknowledged appellant might reimburse Greg for paying Arturo Udave, the handyman and pool guy, as evidenced by a check made out to Greg but bearing the notation "six days Arturo Udave." (22RT 4056-4057, 4059; Ex. 25.) Another check made out to Greg had the notation "pool supplies." (22RT 4063; Ex. 25.) Similarly, instead of using an ATM, appellant would get cash by writing checks to herself or to cash and might also write checks to her parents for them to get cash for family use. (22RT 4005, 4006.)

Xavier authorized transfers of money from the Leon investment account to the Caro family checking account during 1998 and 1999. (22RT 4017.) After refreshing his memory, Xavier

finally recalled transferring $7500 from the Leon account on August 13, 1999. (22RT 4031, 4032, 4035.) Xavier also transferred money from the Leon account to the Caro account in September and November 1999 to reimburse himself for the Leons' personal expenses that he had paid. Xavier was vague about the details saying he had VanEssen figure out the Leons' expenses. (22RT 4037-4043.) Xavier also claimed he talked to appellant about every transfer. (22RT 4036.)

The Caros' Marital Problems and Xavier's Affair

According to Xavier, the financial situation and his firing of appellant affected their marriage. (20RT 3671.) In July-August 1999, Xavier began an affair with Laura Gillard, a biofeedback technician Xavier employed in his office. (20RT 3671; 23RT 4209.) Xavier had known Gillard for two years and described her as a person who treated him nicely and respectfully and made him feel good about himself. (20RT 3672.) Gillard first expressed a romantic interest in Xavier in May 1999, and she was his first extra-marital affair. (23RT 4209, 4210.) Xavier and Gillard emailed almost daily from May to August 1999. (20RT 3673-3674; 23RT 4214, 4243-4244.) Xavier set up a secret email account to hide his communications from appellant. (20RT 3674; 23RT 4214.)

Just prior to Xavier firing appellant, ostensibly over financial issues, Gillard had expressed concern to Xavier about appellant working in the office. Specifically, Gillard would not

have sex with Xavier if appellant was in the vicinity. Xavier responded, "You are wise to be concerned about that and I have ideas, perhaps you do too." (20RT 3675; 23RT 4216; Ex. QQ.)

Xavier testified that he was never concerned about appellant finding out about him and Gillard. (23RT 4237) Yet, he wrote in an email to Gillard on July 27, 1999, before he fired appellant: "I believe in my brain that you are wise in worrying about being 'caught' in the office." (23RT 4267-4272; Ex. QQ.) Xavier also wrote that he loved Gillard, missed her, and wanted to be with her and referenced a fantasy about them having sex on his desk in the office. (23RT 4271-4274; Ex. QQ.)

Xavier had sex with Gillard for the first time during the week that appellant and their kids were on vacation in Waterford, the same week that Xavier fired appellant. (20RT 3676; 23RT 4133, 4231.) Xavier stayed home from Waterford and missed Gabriel's first birthday celebration because he was working on office finances, but he found time to consummate his affair. (20RT 3677.) Xavier admitted that before he canceled his trip to Waterford he told Gillard he could skip the trip and they could have sex. (24RT 4328-4240.)

According to Xavier, his marriage to appellant was not good in August 1999 and he gave appellant an ultimatum: either things had to change or Xavier would leave. (20RT 3695.) They both agreed to get counseling, and appellant acquiesced to Xavier's

request that she start taking Prozac. (21RT 3766.) Appellant rejected his advice to consult with some other doctor and told Xavier that he could treat her.[19/] (21RT 3773.)

Xavier believed appellant was responding well to Prozac and their marriage was much improved between August and November 1999. (21RT 3777, 3779.) During this same time, however, Xavier continued wanting to have sex with Gillard. (23RT 4277.) At the time of the shootings, Gillard was still working in Xavier's office, they were still talking on the phone, and Xavier was still in love with her. (23RT 4284; 26RT 4662.)

Once appellant was no longer working at Xavier's office, she spent time with the kids, at the kids' school, and with family and friends. Xavier would see appellant in the evenings and on the weekend. (21RT 3778.) Xavier recalled only one argument between August and November. (21RT 3779-3780.) In mid-September 1999, they were both yelling when Juanita interceded. Juanita then suffered chest pain and was brought to the hospital where she was kept overnight. (21RT 3780.)

Xavier and appellant discussed divorce several times during their marriage. According to Xavier, appellant was always the one who brought it up. (20RT 3695.) Xavier claimed that he told

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[19/] Before Xavier prescribed Prozac to his patients, he had them complete a Personality Assessment Inventory to confirm his clinical intuition that the patient was depressed. (22RT 3952, 3956-3957.) Xavier, however, did not test appellant before prescribing Prozac for her. (21RT 3768, 3774.)

appellant that if they divorced, she would be well taken care of. He further claimed that he explained community property law to her and told her she would get at least half of their joint assets and he would support the kids. (20RT 3696.)

Although Xavier testified that he did not really want a divorce, he went to see a divorce lawyer, Henry Friedman, on August 27, 1999. (20RT 3697; 21RT 3769.) He did not tell appellant about this appointment. (22RT 4099.) At Friedman's request, Xavier wrote a list of his major assets and how they would be divided in case of a divorce. Xavier estimated values for their Camarillo house ($350,000), their Waterford property ($100,000), his pension ($1.2 million), his practice ($250,000), and their liquid assets ($100,000). (20RT 3699-3701.) Xavier and Friedman discussed various ways of dividing the assets and different ways of structuring alimony and child support ranging from $3900 to $5300 per month. (20RT 3703-3705.) Xavier put his notes, the estimates, and Friedman's business card in his briefcase. (20RT 3706.) Sometime later appellant came to him with the notes and asked him if he was planning to divorce her. (20RT 3706.) Xavier had planned to discuss the appointment with appellant but had not done so when she found his papers. (20RT 3707.) Xavier claimed he was not trying to hide what he did and after appellant found the papers, they discussed them. (22RT 4100-4101.)

Xavier did not consider appellant a person who would kill herself, and she never threatened to overdose or slit her wrists. (24RT 4397, 4399.) Months earlier someone in his office told him that appellant said something about a gun and made a vague reference to suicide but he didn't recall that conversation when he was first questioned by the police. (24RT 4397, 4398.)

After the shootings, Xavier filed for divorce and sued appellant for wrongful death on behalf of Gabriel. (24RT 4432, 4481; 26RT 4675.) Xavier also continued seeing Gillard after the death of his children, and they had sex at least twice more. (21RT 3863.) They kissed while Xavier was still living in a hotel after the shooting, and their last sexual encounter was on February 15, 2001. (21RT 3863; 24RT 3863.) Xavier admitted that he never told the prosecution about the continued affair until after appellant's trial began despite talking with the prosecution about 25-30 times before trial. (20RT 3681-3683.) Xavier claimed he didn't think it was something he needed to reveal. (20RT 3684.) At the time of trial, Xavier was dating another woman. (20RT 3685; 24RT 4392.)

Xavier's Contrived Evidence and His Testimony Preparation

Xavier stopped living at the Camarillo house after the shootings. (20RT 3692.) When he returned later he noticed that the grandfather clock had stopped running at 10:59 and saw that a key that was normally kept inside the clock outside of the reach

of the kids was hanging from the front door of the clock. (20RT 3693; 21RT 3940.) Xavier could not remember when he noticed that the clock had stopped, but no one lived at the house between the deaths and his seeing the clock stopped. (20RT 3694; 21RT 3938-3939.) During a law enforcement interview on December 9, 1999, Xavier said the clock was certainly working when he left to go to his office on November 22. (24RT 4478; 25RT 4592.)

Xavier called the clock the "heart" of the house because of its deep ticking and said it was a significant part of the family. (213RT 3941; 25RT 4544.) He realized the clock was stopped when he went into the house and it was eerily silent. (23RT 4195.) Xavier thought the clock stopping and the key placement might be important so he contacted the police. (20RT 3693) He explained that he thought the clock stopping about a ½-hour before he called 9-1-1 was significant. (25RT 4545-4546.) Xavier specifically thought apellant might have stopped the clock as a symbolic act similar to leaving her rings with his wedding ring on his bracelet. (23RT 4191-4192, 4194, 4200.)

Xavier later learned that a video taken in the house after the shootings showed the clock running. (20RT 3694.) Xavier denied that he stopped the clock. (23RT 4200.)

Xavier also testified that a handwritten note found in appellant's inner closet looked like appellant's handwriting. (24RT 4464, 4470; Ex. YY.) According to Xavier, Thompson found

the note crumpled in appellant's suitcase and gave the note to Xavier to look at. (243RT 4467, 4468.) It was the first time Xavier had ever seen the note and he took plenty of time to read it. (24RT 4470.) The note talked about money problems, being dependent on parents, and being depressed. It also made a reference to Christopher. (Ex. YY.) Xavier told Thompson it looked like appellant's handwriting. At trial, Xavier acknowledged learning later that appellant had provided a handwriting sample and there was a question about whether she wrote it. (24RT 4471.)

During the defense case, appellant's cousin, Lorie Leon, identified her handwriting on the note. (51RT 10062.) Based on the content, Lorie believed she had to have written the note when she was in college as she was in the summer of 1999 when she also worked in Xavier's office. (51RT 10063, 10074.) Lorie didn't know when she last saw the note and didn't know how it came to be in appellant's closet. (51RT 10075.)

Although Xavier said he was always willing to talk to the police and the prosecution, he would not speak with anyone working for the defense and would only communicate with the defense in writing. (21RT 3889-3890.)

Prior to Xavier testifying, he reviewed a binder of 25-30 interviews totaling about 1000 pages provided to him by the prosecution. (22RT 4114; 24RT 4383.) Xavier made notes as he read

the transcripts. (24RT 4380, 4393, 4399-4401.) He organized his notes into a chronology numbered 1 through 8. (24RT 4396, 4402, 4403.) Number 1 had an arrow indicating he went into the master bedroom. (24RT 4399.) Number 2 said "speak with 9-1-1" and "back to Cora." (24RT 4399.) He then indicated he found the gun and wrote "open chamber" but crossed it out and wrote "open cylinder." (24RT 4399.) He wrote "one bullet only. Shells under her. Go to closet. Safe in usual place." (24RT 4401.) Number 3 said "Are there children in the house?" (24RT 4401.) He made an arrow indicating he went into Joey's room and wrote "Joey's room. Turn on light. Joey, touch Joey's neck." (24RT 4403.) Number 4 was going into Christopher and Michael's room. (24RT 4404.) He wrote "strip blanket" and exit via mezzanine. (24RT 4405.) Number 5 was master bedroom and 9-1-1 and he wrote "Find quiet Gabriel. Pick him up in a blanket. I have one alive." (24RT 4405-4406.) Number 6 said "retrace my steps through boys' rooms" and "CPR breaths." (24RT 4412, 4417.) Number 7 said "Exit Michael and Christopher's room" and "9-1-1." (24RT 4419, 4421.) Number 8 was when he went to look for the rescue. (24RT 4421.) He wrote "Descend stairs. Open front door." (24RT 4422.)

Appellant in the Hospital

Deputy Miller saw appellant at 12:27 a.m. on November 23, 1999 at Los Robles Hospital. (15RT 2633-2634.) He saw an open wound to the right side of appellant's head as well as a bruise

on her right biceps, bruising on the inside of both her thighs, and swelling and bruising to the top of her left foot. (15RT 2635- 2636.) Miller collected pajama pants (Exhibit 7), a white T-shirt (Exhibit 8), and underwear that were on the backboard used to transport appellant to the hospital. (15RT 2637.) Miller also had plastic bags placed on appellant's hands. (15RT 2639, 2648.) The police seized three vials of blood and one vial of urine that were obtained upon appellant's admission to the hospital. (30RT 6343, 6344.)

Dr. Pryor, a neurosurgeon, operated on appellant's head at 2:30 a.m. on November 23. (20RT 3712, 3715.) Appellant had a large stellate explosion-type injury to her right parietal area. (20RT 3715.) A gun was held closely against her scalp causing the gases from the firing of the gun to explode her scalp. (20RT 3716, 3734.) The bullet traveled upwards blowing appellant's skull apart and driving bone and bullet fragments into her brain. (20RT 3716-3718.) Pryor had to remove a damaged piece of appellant's skull and a small amount of brain. (20RT 3748-3749.) Pryor, who had seen about 30 self-inflicted gun shot wounds in his career, did not see anything inconsistent with appellant's injury being self-inflicted. (20RT 3714, 3751.)

Pryor testified appellant's surgery could lead to retrograde amnesia which is the loss of knowledge of events at or before the time of injury. (20RT 3737, 3741-3742.) Retrograde amnesia is

also associated with concussive head injury and loss of consciousness. (20RT 3742.) Appellant's orientation to name and place one day after surgery was not inconsistent with retrograde amnesia. (20RT 3728, 3737.)

On December 1, 1999, appellant had surgery on her fractured foot. (26RT 4616.) Appellant had a rotational injury that required dislocated joints and broken bones to be put back together. (26RT 4616.) It was a severe, high level trauma injury; the front part of appellant's foot was broken away from the arch. (26RT 4617, 4620.) This type of fracture typically happens in one of two ways: a crushing injury such as concrete falling on the foot or landing on the foot in a way that it twists and breaks. (26RT 4617.) The latter generally occurs when the foot is pointed straight down like a ballerina. (26RT 4619.) A fall downstairs could cause that type of injury as could twisting your body as your foot was being held in place. (26RT 4619, 4628.) It was possible but not likely that appellant suffered the injury from falling on her foot after shooting herself in the head. (26RT 4627.)

Deborah Anderson, a critical care nurse, took care of appellant on November 23 and 24 from 6:45 a.m. to 7:25 p.m. (28RT 6057-6058.) Appellant had a tube in her throat that prevented her from talking until late in the shift on November 23 when the tube was removed. (28RT 6062, 6063, 6069.) Anderson

testified that sometime on November 24, appellant calmly asked Anderson if her husband had called. Anderson never documented anywhere that appellant asked this question. (28RT 6060-6061.)

Ventura County sheriff detective Cheryl Wade first had contact with appellant about 1:00 p.m. on November 23 in appellant's private hospital room in the intensive care unit. (30RT 6346, 6347; 31RT 6542.) Wade was sent to the hospital to get a statement from appellant. (31RT 6541, 6544.) Wade, who was dressed in civilian clothing, introduced herself as being from the sheriff's department. (310RT 6557.) Wade stayed in appellant's room for 2½-3 hours. During that time, Wade tape-recorded what went on, listened to appellant's interactions with hospital personnel, talked to appellant's nurses, and questioned appellant. (31RT 6529, 6548, 6549, 6552.)

Appellant was in pain when Wade first saw her. She was touching her head and requesting pain medication. (30RT 6347; 31RT 6552, 6562.) Wade tried to make appellant feel comfortable by covering her with a blanket, helping her move in bed, and giving her ice chips. (31RT 6557, 6561.)

Wade saw that appellant had bruises on her wrist and legs and knew appellant had a broken foot. (31RT 6526, 6550, 6551.) She asked appellant how she got those injuries. (31RT 6526, 6551.) Appellant said several times that she didn't remember. (31RT 6526, 6558.) At one point, while appellant's foot was being

x-rayed, Wade told appellant she had a bullet in her head. (31RT 6559.) Appellant complained about shoulder pain, and Wade asked her if she had a fall. (31RT 6564.) Appellant said she was not sure and asked Wade what they suspected. (31RT 6565.) Wade said they didn't know, they needed to find out from her. (31RT 6565.) Appellant said again that she did not remember. (31RT 6566.) Later, appellant said she might have fallen down the stairs.[20] (31RT 6528, 6567, 6570.) When asked about how she got the bruises, appellant said "wrestling with a boy."[21] (31RT 6527.)

Appellant asked several times about what happened. (31RT 6575.) Wade listed appellant's injuries and asked appellant where she last remembered being. (31RT 6575.) Appellant replied she had been home and related what she had for dinner. (31RT 6576, 6605, 6608.)

About 1¾ hours after Wade arrived, appellant was moving around the bed and moaning repeatedly that she hurt. (31RT 6574, 6578.) Appellant finally received a pain shot and seemed to calm down. (31RT 6579.) After the shot, appellant again told Wade in response to questioning that she didn't know how she hurt her

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[20] Wade repeated, "You might have fallen down the stairs?" as a question. Appellant's response was inaudible. Wade said "You can't remember?" and appellant's response was again inaudible. (31RT 6571.)

[21] The transcript said "[inaudible] with a boy" but Wade testified she remembered appellant saying "wrestling." (31RT 6585.) Wade didn't ask which boy. (31RT 6585.)

head or her foot. (31RT 6580.) Wade asked appellant to name her children and appellant did so correctly and without any inappropriate demeanor. (31RT 6563.) Wade eventually told appellant her children had been hurt and that she was suspected of hurting them. (31RT 6604.) Appellant asked what Xavier had said. (31RT 6605.) Appellant also asked, "Where is Gabriel? Where is Gabriel? The baby, is he okay?" (31RT 6606, 6608.) About 30 minutes after appellant received a pain shot, Wade finally told appellant that her children were dead. (31RT 6572, 6538.) Appellant said, "Oh, God" and began crying. (31RT 6586-6587, 6610.)

Wade later brought Juanita into the room and stayed there while Juanita and appellant talked. (31RT 6528.) Appellant told Juanita she was concerned about Xavier being alone and said someone should be with him. (31RT 6529.) Juanita asked appellant, "Why did you do this?" and said a prayer over appellant. (31RT 6531.) During the prayer, appellant said, "My babies. My babies. I'm sorry. I'm sorry" and clutched the front of her nightgown. (31RT 6531.)

Ventura County sheriff deputy Jose Rivera also went to the hospital the night appellant was admitted. (39RT 7854.) He took photos of appellant during her surgery and noted bruising on her arms and legs. (39RT 7855, 7867-7868, 7890-7891.) Rivera later asked appellant what happened but appellant, who had a tube in

her throat, did not respond. (39RT 7872, 7879.) There was no question in Rivera's mind that appellant understood what was going on even though she could not talk. (39RT 7881.)

Rivera was in appellant's ICU room several hours later when the surgeon asked appellant to squeeze his hand, raise her leg, and recall the date. (39RT 7859-7860, 7878, 7893.) Rivera was also present when Wade talked to appellant about being suspected of hurting her boys. (39RT 7860.) He heard appellant ask about Gabriel whom she referred to as her "baby." (39RT 7861.)

Juanita's Testimony

Juanita began staying at the Camarillo house about three weeks after the Northridge earthquake. (28RT 5028.) She would take care of the boys 5-7 days each week and would often stay overnight in her room at the house. (28RT 5018, 5024, 5028.)

According to Juanita, appellant was shocked when Xavier fired her but did not seem depressed about it and never indicated she was suicidal. (28RT 5027, 5031, 6016.) Xavier told Juanita that appellant was taking Prozac but Juanita did not notice any emotional changes in appellant after that because appellant always seemed happy. (28RT 5031.) Xavier prescribed Xanax for Juanita and would sometimes tell Juanita to give appellant some. Juanita testified she would do so.[22/] (28RT 5032, 5033, 5034.)

[22/] In a pretrial interview with the prosecution, Juanita said Xavier told her not to give appellant Xanax, but Juanita would do (continued...)

Juanita testified that Xavier showered appellant with gifts but said appellant was not "spoiled." (28RT 5030.) Juanita, however, acknowledged she might have told the police that Xavier spoiled appellant and then took it all away. (28RT 5031.) About a week before the shooting, appellant told Juanita that she had found papers from Xavier's divorce lawyer. (28RT 5052.)

Juanita and appellant spent the day of the shootings together preparing for their Thanksgiving trip to Waterford. (28RT 5026, 5073-5074.) Everything seemed normal and perfect. Appellant was in a good mood and had begun packing. (28RT 5074.) At about 6:00 p.m. that day, Juanita was planning to spend the night at the Camarillo house. (28RT 5020, 5022.) Xavier came home from work about 6:30-7:00 p.m. (28RT 5035.) When Xavier and appellant started to eat dinner, Juanita brought her own dinner into her room to watch TV.[23/] (28RT 5037.) Around 7:30 p.m., Juanita changed into her nightclothes. (28RT 5022.)

When Juanita went to the kitchen later, Xavier, who had been in the kitchen with the appellant, walked out. Appellant had tears in her eyes. While Xavier worked out in the playroom,

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[22/](...continued)
so if appellant asked her for some. (54RT 10583.)

[23/] Juanita saw appellant drink one margarita with dinner that night. (28RT 5023, 5084.) It didn't appear to affect her. (28RT 5024.) Juanita had never seen appellant drink to excess but noted that appellant and Xavier drank Tott's champagne every night with dinner. (28RT 5085, 6049.)

Juanita cleaned the refrigerator and appellant loaded the dishwasher. (28RT 5038-5039.) Juanita returned to her room but soon heard hollering. She went to the kitchen and saw Xavier hollering at Joey and pushing him. She didn't want to get involved and went back to her room. (28RT 5041, 5046.)

Juanita heard Xavier hollering again later, this time from upstairs. (28RT 5047, 5081.) Xavier was loud and sounded upset. (28RT 5047.) Juanita went upstairs and saw appellant on the bedroom floor wearing pajama shorts and a long t-shirt.[24/] Xavier was kicking appellant's legs.[25/] (28RT 5087, 5089, 5091, 6033, 6042-6043.) Juanita told Xavier she was sick and tired of his hollering and to get the hell out of the house. (28RT 5049.) Juanita ran into Joey's room and talked to him while Xavier got his jacket. (28RT 5049, 5093-5094.) Juanita then followed Xavier to the garage to make sure he left. (28RT 5049-5050, 5086, 6000.) At that time appellant was not crying and seemed fine and did not appear to be in any pain. (28RT 5050, 6047.)

Juanita had been thinking all evening about going home for a

[24/] Appellant had been wearing those same shorts and t-shirt in the kitchen that night and Juanita did not see any bruises on appellant's legs. (28RT 5088-5090.)

[25/] An investigator for the district attorney's office later testified that he witnessed an interview the prosecutors did with Juanita on February 25, 2000. (39RT 7939.) At the prosecutor's request, Juanita demonstrated what she saw that night. She showed appellant on the floor with her arms wrapped around Xavier's right leg. (39RT 7942-7944.) Juanita never said anything about Xavier kicking appellant. (39RT 7945.)

hair appointment the next morning. (28RT 5076, 6030.) Around 9 p.m., after witnessing the argument between Xavier and appellant, Juanita decided to go home and return the next day to go to Waterford. (28RT 5022, 5056, 6030, 6031.) Juanita left wearing her nightgown and robe, but came back after a few minutes because she forgot her glasses. Juanita kissed appellant when she left again. Appellant made a joke and seemed normal. She stood at the door while Juanita drove away. (28RT 5057, 6002-6007.)

Xavier called Juanita a little after the 11:00 p.m. news had started. (28RT 5057.) She didn't recall all that Xavier said on the phone but based on the call she believed that appellant had been shot and three of her grandkids were dead. (28RT 6009.) Juanita drove back to the house and she and Xavier spent about an hour in the garage. (28RT 6008, 6009, 6011.) Xavier handed Gabriel to her right away. A male officer questioned Juanita for about 30 minutes and told her appellant and the three boys were dead. (28RT 6011, 6012, 6014, 6030.)

Juanita went to the hospital to see appellant the evening of November 23. (28RT 5058.) She saw a woman she later learned was Wade sitting behind appellant's bed. (28RT 6018, 6019.) Juanita didn't know at that time that Wade was a detective. (28RT 6023.) Wade did not question Juanita then and let her talk to appellant who was in and out of consciousness. (28RT 6020.) Juanita could not recall what she said to appellant during her five-minute

visit except she asked appellant what happened. (28RT 6020, 6021, 6022.) Appellant never answered "why she did it." (28RT 6026.)

Juanita's Earlier Statements

Ventura County sheriff deputy Ernest Montagna interviewed Juanita at 2:00 a.m. on November 23 in a patrol car parked at the house. (30RT 6327, 6332, 6333.) Juanita was crying and hysterical. (30RT 6332.) The interview, which lasted 20-30 minutes, was tape-recorded. (30RT 6328, 6333.) Juanita never said she saw Xavier kick appellant or push Joey. (30RT 6328-6329.) Juanita described the argument that night as loud enough that it caused her to go upstairs and ask what was going on. (30RT 6329, 6335.) Juanita said appellant was not the type to let Xavier abuse her. (30RT 6329.) Regarding Xavier, Juanita said, "He provided --she had everything but, um, he spoiled her, and then he took everything away." (30RT 6330.) When Xavier left that night, appellant said, "Oh, he's going, huh? Now, Mom, I have no money now. I don't know what I'm going to do." (30RT 6330.) Appellant also said, "Well, I guess I'm crazy like he says I am. Mom, he says I'm crazy." (30RT 6331.) When Xavier called Juanita, "He was crying. He was hysterical." (30RT 6332.)

Wade tape-recorded an interview with Juanita the day after Juanita saw appellant in the hospital. (31RT 6532, 6590, 6611.) Wade asked Juanita if she knew what appellant was saying she was sorry for the previous day. Juanita said it was for what happened

to her babies. (31RT 6533.) When Wade asked Juanita what happened the night of November 22, Juanita didn't say anything about Xavier kicking appellant or pushing Joey. (31RT 6534.) Juanita said there was an argument between appellant and Xavier and also some wrestling. (31RT 6534, 6598.) Juanita demonstrated that appellant was holding onto Xavier's leg as he dragged it behind him and said nothing about Xavier kicking appellant. (31RT 6535-6536.) Juanita said that Xavier was wearing blue sweats and a green windbreaker when he left the house. (31RT 6540.) Juanita also said that appellant liked to wear shorts and Juanita never saw appellant with bruises. (31RT 6539.) Juanita described appellant as initially feeling low and restless after she was fired but said that changed over time. (31RT 6540, 6601.)

VanEssen's Testimony

Lisa VanEssen began working as Xavier's assistant office manager in early 1995. (26RT 4699.) Between 1995 and 1999, she and appellant shared hours and tried not to take vacation at the same time. (26RT 4762.) She replaced appellant as office manager in August 1999 and quit working for Xavier in March 2000. (26RT 4700.) VanEssen got along well with appellant whom she considered a friend. (26RT 4704-4705, 4758.) According to VanEssen, appellant had a good work ethic and was very organized. (26RT 4710.) Appellant supervised the other employees and reprimanded them when necessary. (26RT 4706.) Both appellant and Xavier could

hire and fire employees, but Xavier generally did the firing at appellant's request. (26RT 4709, 4710.) Xavier and appellant sometimes argued at work. (26RT 4714.)

The Caro children came to the office occasionally and Xavier would hug and kiss them. (26RT 4703.) He would also rearrange his work schedule to attend the kids' sports and school activities. (26RT 4703.) VanEssen thought appellant was also a good and loving parent based on seeing appellant interact with her children both at the office and a few times at home. (26RT 4764, 4765.) Appellant had photos of her boys in the office and spoke of them lovingly. (26RT 4766, 4779.)

Appellant paid her personal bills and her parents' bills at the office along with the office bills. (26RT 4717, 4718.) Appellant decided which bills to pay. VanEssen helped her write checks. (26RT 4716, 4717.) Appellant also decided how much money to transfer between the corporate money market account and both the corporate and personal checking accounts. (26RT 4717.)

In early 1999 VanEssen noticed problems with the office finances. (26RT 4715.) The landlord called about the office rent. (26RT 4715.) At one point, the overdue rent was about $70,000. (26RT 4716.) VanEssen believed that by early 1999 there was not enough money coming in to pay the expenses for the office, the Leon family, and the Caro family. (26RT 4723.) VanEssen didn't discuss this with Xavier because she believed Xavier and

appellant should work it out. (26RT 4724.)

Xavier found out about the rent being in arrears when appellant and VanEssen were both off work in late July 1999 and he received some calls about the rent. (26RT 4724.) When Xavier asked VanEssen if the office was behind in rent, she told him that account and others were in arrears. At Xavier's request, she showed him the financial records. (26RT 4724-4726.)

According to VanEssen, Xavier seemed shocked when he looked at the financials. (26RT 4728.) VanEssen thought Xavier knew about the payments appellant made to her parents because appellant never tried to hide what she was paying. (26RT 4728, 4771.) Xavier said he knew they had been helping the Leons but he didn't realize the magnitude. (26RT 4728, 4772.)

Xavier decided not to have appellant run the office any longer, and VanEssen became his office manager although she worked only part time. (26RT 4729-4730, 4774.) VanEssen took over paying all the bills including the Caros' personal bills and the Leons' bills. (26RT 4731, 4867.) Because VanEssen found appellant to be organized about finances, she followed appellant's bookkeeping methods. (26RT 4813.) If bills went to the Caros' house, appellant would send them to the office with Xavier. (26RT 4732.) Xavier asked VanEssen to keep track of the Leons' expenses because he was going to start having the Leons reimburse him. (26RT 4732-4735.) He subsequently made monthly transfers from the

Leons' account to the Caros' personal account. (26RT 4735-4737.)

VanEssen viewed Xavier as both a boss and a friend. (26RT 4738.) They had numerous personal conversations in 1999, including discussions about Xavier being unhappy in his marriage and going to see a divorce lawyer. (26RT 4738, 4739.) VanEssen recalled that Xavier first talked about being unhappy in either June or July 1999. (26RT 4763.) VanEssen advised Xavier to divorce appellant. (25RT 4537.)

Appellant did not appear to have any issues with VanEssen taking over as office manager. (26RT 4760, 4777.) VanEssen would call appellant at home if she had questions, and Xavier did not limit VanEssen's contact with appellant. (26RT 4760.) One Saturday when VanEssen was meeting with Xavier to plan a budget, appellant called to see if VanEssen was really meeting with Xavier because appellant feared that Xavier was going to meet Gillard. (26RT 4741, 4784-4785.) VanEssen told appellant that there was nothing going on because, at that time, VanEssen didn't know that Xavier and Gillard were having an affair. (26RT 4742.)

VanEssen also had several conversations with appellant about the state of the Caros' marriage. (26RT 4743.) Appellant never said she was considering a divorce but did say she didn't think Xavier loved her and she worried Xavier would leave her and the boys with nothing. (26RT 4743, 4786.) Sometime in September or October 1999, appellant told VanEssen she was upset about finding

papers that Xavier had gotten from a divorce lawyer. (26RT 4743.)

Around that same time, appellant called VanEssen at work. When VanEssen asked her how she was, appellant replied, "Not good. Sometimes I think it would just be better if I wasn't here." VanEssen told appellant to stop it. Appellant said she was serious and was sitting on the bed holding a gun and thinking about it. (26RT 4744.) VanEssen told appellant she was scaring her and said, "You have four boys that need you." Appellant replied, "What would it matter."[26/] (26RT 4745.)

VanEssen didn't really think appellant would kill herself but told Xavier about the call because she thought he should know if his wife was having serious mental problems. (26RT 4745; 27RT 4827.) Xavier said maybe he should take the guns out of the house. (26RT 4746; 27RT 4828.) Appellant never mentioned suicide again to VanEssen. (26RT 4746.)

VanEssen saw Xavier and appellant socially. (26RT 4746.) Appellant would have 1-2 margaritas with dinner and would seem happy and relaxed and giddy. (26RT 4746-4747.) VanEssen never saw appellant falling down drunk. (26RT 4747.) In early November 1999, appellant took VanEssen out to lunch for VanEssen's

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[26/] During an overnight break in her testimony, VanEssen listened to her November 23, 1999 interview with Thompson and refreshed her memory that the call was in September 1999. (27RT 4829.) VanEssen admitted she was more clear and detailed at trial about what appellant said during the call than she was in November 1999, but explained she was very emotional when she was being interviewed on November 23. (27RT 4830.)

birthday. (26RT 4747.) Appellant seemed fine and had one margarita with lunch. (26RT 4747.) Appellant told VanEssen that she was taking Prozac and it made her feel less volatile and more on an even keel. (26RT 4748.)

Appellant and VanEssen talked on November 22 when appellant called VanEssen at the office to ask about the registration tags for Juanita's car. (26RT 4752.) VanEssen faxed over Juanita's registration material. (26RT 4754.) Appellant wished VanEssen a happy Thanksgiving and sounded normal. (26RT 4756.)

Xavier called VanEssen the morning after the shootings at about 8:50 a.m. and told her what happened and asked her to take care of the office. (27RT 4831, 4854.) Xavier was hysterical, crying and yelling, "She killed my babies" and "She shot my babies." (27RT 4850, 4855-4856.) Xavier also said that appellant shot herself and was in the hospital. (27RT 4855.) That made VanEssen think about appellant's suicide call but she didn't say anything to Xavier about it. (27RT 4855.)

VanEssen was not supposed to work the day after the shootings but went to the office right away. (27RT 4831, 4856.) Gillard was at the office when VanEssen arrived. (27RT 4857.) VanEssen thought about going to the house to see if she could help but was nervous. (27RT 4854, 4857.) Gillard offered to go with her so they went together. (27RT 4857, 4858.) Thompson interviewed VanEssen first before she saw Xavier. (27RT 4858.)

VanEssen and Gillard spent 2-3 hours with Xavier in the command post. (27RT 4861, 4862.)

Forensics

A bullet found on the carpet in Joey's room, a bullet fragment found on the top bunk, bullet pieces recovered during the autopsies, and the cartridges found on the floor of the master bedroom were all fired from appellant's gun that was found on Xavier's dresser. (39RT 8034-8047.) That gun had a modified trigger pull of 8-3/4 pounds rather than the minimum 10 pound pull recommended by the manufacturer, and it could be fired without being cocked. (40RT 8129-8130, 8187.)

Based on an examination of eight lead fragments found in the master bedroom as well as a depression noted in the master bedroom ceiling, a firearm analyst opined that a fragment of the bullet fired in the master bedroom had hit the ceiling. (40RT 8094-8103.) Lead fragments found on a wall ledge suggested the bullet was traveling upward rather than downward. (40RT 8109-8114.)

The front edge of the gun safe showed pry marks which could not be dated. (40RT 8114-8115, 8123.) When the forensic examiner first saw the gun safe, the combination lock did not work; that is, the door would close but it could be opened without putting in the combination. (40RT 8116-8117, 8125-8126.)

Neither the gun, the bullet casings, nor the gun safe had

usable fingerprints. (32RT 6641, 6647.) A criminalist who examined the gun on May 22, 2000 opined it had not been washed or wiped off because there were stains on it. (35RT 7262, 7266.)

Both appellant and Xavier had gun shot residue on their right hands. (40RT 8074-8076.) Their left hand swabs were not tested. (40RT 8076.) Blood particles were also found on appellant's right palm swab but not on Xavier's swab. (35RT 7227, 7229-7230.) The presence of GSR could mean the person fired a gun, handled a recently fired gun, had been in the vicinity of a fired gun or had contact with someone or something that had GSR particles on it. (40RT 8077.)

DNA from fingernail scrapings from appellant's right hand had a mixture of contributors that could be Joey, Christopher, or appellant but not Michael. (29RT 6182.) Fingernail scrapings from appellant's left hand also had a mixture of contributors that could be Joey or appellant but not Christopher or Michael.[27/] (29RT 6184.) Appellant's blood was on the soles of both of her feet. (30RT 6259, 6279.)

A fingerprint analyst determined that two partial bloody latent palm prints from the door frame between Joey's bedroom and the bathroom were made by appellant. (27RT 4901.) One print was a right hand with the thumb facing up and the fingers at a 45

[27/] The evidence technician who scraped appellant's fingernails used one stick per hand, not one stick per finger. (34RT 6945.)

degree angle towards the corner. (27RT 4906.) The other print was a right hand with the fingers straight up.[28] (27RT 4908.) Based on the coloring of the ridges, the analyst determined the blood was on appellant's hand, not on the door frame. (27RT 4911, 4943.)

Stains from the pajama shorts and t-shirt that appellant was wearing when she was found on the floor were sent to the Santa Clara crime lab for DNA testing.[29] (29RT 6075, 6096.) All of the stains tested presumptively positive for blood. (29RT 6220.) Three stains on the shorts and two stains on the t-shirt matched the DNA profile for Joey.[30] (29RT 6104, 6106, 6114, 6117, 6126, 6148; 34RT 7067.) Five stains on the shorts and one stain on the t-shirt matched Christopher's profile.[31] (29RT 6119, 6129, 6132,

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[28] There were also some unidentifiable smudged fingerprints on the door frame. (27RT 4955, 4965.) The analyst assumed the fingers belonged to the same hand as the palm for purposes of orienting the palm but could not conclude that for sure. (27RT 4956, 4957, 4972.) The palm was not moving when it left the print but the fingers were moving. (27RT 4960.) The palm print and fingerprints could not have been laid down at the exact same time. (27RT 4967.)

[29] When a criminalist collected appellant's shorts and t-shirt from deputies at the hospital, they were packaged together in the same paper bag. (33RT 6853-6855, 6858; 34RT 6975.)

[30] Christopher, Michael, and appellant could have been a minor contributor to one of the stains. (29RT 6150.) A minor contributor can be from a source other than blood. (29RT 6250.)

[31] One stain had a minor contribution possibly from Joey and another had a minor contribution possibly from appellant. (29RT 6119, 6138.)

6135, 6138, 6166; 34RT 7050.) Eighteen stains on the t-shirt matched appellant.[32] (29RT 6140, 6142, 6143, 6144, 6145, 6155, 6157, 6158, 6159, 6161, 6167, 6168, 6169, 6170, 6171, 6172.)

Ed Jones, a forensic scientist, spent three days examining the stains before they were sent to the lab. (34RT 7045, 7050; 35RT 7253.) He was looking for projected stains because he was concerned there might have been blood transferred by personnel at the scene.[33] (35RT 7243.) Jones found projected blood on the shorts but no high velocity impact spatter.[34] (35RT 7247.)

Jones also examined the underpants appellant was wearing for soak-through stains. He found two spots of blood on the crotch and one above the right leg, but he didn't send any stains for DNA testing. (36RT 7308, 7310, 7311, 7371, 7374.) He opined that the blood spot on the crotch soaked through to the outside.[35]

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[32] One stain had a minor contribution possibly from Christopher. (29RT 6155.) Six additional stains had incomplete profiles that indicated appellant could be the source but which could not be from any of the three boys. (29RT 6173-6176.)

[33] A projected stain results from some force other than gravity operating on blood and causing it to break apart and travel. (31RT 6436-6437, 6469.) In contrast, a smeared stain results from a bloody surface and a nonbloody surface coming into contact. (31RT 6436.)

[34] High-velocity impact spatter is a type of projected stain that reveals a specific pattern. (31RT 6446.) A high velocity event such as a gunshot will not always leave a high velocity pattern. (31RT 6494,6496.)

[35] At a sidebar, the prosecutor revealed he was at the crime scene the morning after the shooting and initially requested a (continued...)

(36RT 7374.) The blood spot above the right leg of the underpants was a transfer stain. (36RT 7375.)

Jones opined that one stain on the shorts that matched Christopher's profile contained brain matter and another stain that matched Joey's profile was caused by a piece of scalp with bloody hair hitting the shorts. (34RT 7064, 7065.)

Two blood stains from the master bathroom matched Joey with the one from the sink having a possible minor contribution from Christopher. (29RT 6200-6202.) A stain from Xavier's sweat pants, stained carpet fibers, and a stain on the stair railing could all have been from Michael. (29RT 6204, 6206-6208, 6215; 32RT 6643.) A stain from Gabriel's sock matched Michael. (29RT 6217.) No stain contained Xavier's profile. (30RT 6294.)

Xavier's sweat pants contained one projected blood stain just below the right knee, a projected white substance covering a 3" area on the right inner thigh, and presumptively positive blood stains on the back of the pants. (31RT 6437, 6438, 6455, 6468.) There were also presumptively positive stains on the front left sleeve and inside front bottom of the shirt that did not appear to be projected and a projected white stain on the front of the shirt. (31RT 6474, 6475, 6476, 6492.) There were also four white stains on the front of the jacket. (31RT 6488.)

[35/](...continued)
rape kit but later decided not to have the test done because he thought there was no indication of a sexual assault. (32RT 6695.)

There were no high velocity stains on Xavier's shirt, pants, or jacket; however, fifteen stains on Xavier's jacket tested presumptively positive for blood. (31RT 6493; 32RT 6678, 6679, 6699.) The stains all appeared to be transfer stains and none appeared to have soaked through. (33RT 6708, 6787.) Xavier's left sock had blood stains but the examiner couldn't determine if they were projected or transferred. (32RT 6679; 33RT 6748, 6749, 6750.) The left strap of Xavier's left flip flop had a projected blood stain that was not high velocity. (32RT 6681; 33RT 6736.)

The prosecution hired Rod Englert, a retired law enforcement officer who worked in crime scene reconstructionist and bloodstain interpretation, to opine on the evidence. (37RT 7468, 7470.) Englert, who performed 80% of his work for prosecutors, billed at a rate of $325 per hour plus expenses and had received about $20,000 in this case by the time he testified at trial with more time yet to be billed. (37RT 7474; 38RT 7737, 7738.) The court accepted Englert as an expert in both crime scene reconstruction and blood stain interpretation. (37RT 7507.)

Englert explained that blood stains can be low, medium, or high velocity. (37RT 7483.) Low velocity stains include swipes, transfers, and drops. (37RT 7483.) Medium velocity stains occur when energy is impacted into a source of blood. (37RT 7486.) High velocity stains result from gunshots and create an aerosol or very fine mist or spatter pattern. (37RT 7487.)

Englert reviewed 25 reports and about 750 photos from this case. He also examined the physical evidence and went to the house although the bunk beds were not there and no other evidence was in place. (37RT 7508; 38RT 7666.) He examined Joey's bedding and placed it in the same way it was depicted in the crime scene photos which enabled him to determine Joey's position when he was shot. (37RT 7513.) There was high velocity mist on the pillow to the left of Joey's head and pieces of tissue and hair in the bedding. (37RT 7514.) The bullet went through the pillow. (37RT 7514.) There were two different bleeding activities on Joey's pillows, one on the left pillow and one on the right. (37RT 7516.) In Englert's opinion, Joey was face down on the pillow when he was shot but was then repositioned to his right side, facing up. (37RT 7520-7521.) Blood drops on the pillow were consistent with a rollover. (37RT 7521.)

Englert also examined the bedding from the bunk bed, including four pillows, a sheet, a comforter, and some dolls. (37RT 7529-7531.) In front of an audience that included the prosecutors, a criminalist, and a firearms expert, Englert reconstructed the scene in the bunk bed room using the same bedding and mannequins. (37RT 7531, 7532.) The prosecution had someone create a criminal animation depicting Englert's opinion as to how Michael and Christopher were shot given the blood patterns observed. (37RT 7534.) That videotape of the animation -

-divided into 8 scenes-- was shown to the jury. (37RT 7536, 7543, 7552, 7558, 7564, 7583, 7608, 7609.)

In Englert's opinion, Michael was face up when he was shot and the shooter was on his left side. (37RT 7538.) There was no disturbance in the blood pattern under Michael to indicate Michael either moved himself or was moved after he was shot. (37RT 7540; 38RT 7792.) He also believed that Michael was shot before Christopher because Michael's arm was found under Christopher. (37RT 7540.) Englert found no high velocity blood spatter from Michael's shot, a finding consist with a contact shot with no exit wound. (37RT 7541; 38RT 7741.)

Englert noted that the firing of a .38 gun is loud and would hurt the ears of someone next to the gun when it was fired. (37RT 7546.) Englert opined that Christopher sat up after Michael was shot and was facing the shooter to his left when he was hit with the shallow shot. (37RT 7547, 7553.) That shot resulted in a bone fragment that was found underneath Christopher. (37RT 7548.) To Englert, that meant that the shallow shot came first and Christopher was sitting up or just getting to a sitting position in bed when that shot was fired and then he fell over onto the bone fragment. (37RT 7548, 7557.) Also because there was no bullet damage on any bed pillows, this meant Christopher must have been off the pillow when he was shot or the exit bullet would have hit the pillow or bedding. (37RT 7551.)

Low velocity blood drips on the left side of Christopher's t-shirt and shorts suggested that Christopher was sitting up and his heart was still pumping after the first shot. (37RT 7559, 7560.) Blood stains on Christopher's thigh and calf suggested that Christopher's bleeding head had to have passed over his leg. (37RT 7570.) In addition, there was a pattern of blood drips on the blankets, Christopher's leg, and a doll on the floor that supported that Christopher moved his head out over the bed after being shot. (37RT 7571, 7576.) Christopher would have had to get up far enough on one knee to lean over the side of the bed to cause the drips. (37RT 7582.)

Englert opined that the second shot was fired into the initial bullet hole in Christopher's head. This would have produced an enormous amount of high velocity mist, blowback, and blood spatter because the shot went into a large hole without skull protection. (37RT 7558, 7585.) Christopher either moved back to the pillow or was placed back on the pillow before the second shot based on the large amount of high velocity mist that went across the pillow and also hit the bedpost and wall. (37RT 7584, 7585.) Christopher's tissue and hair were on the right side of Michael's face meaning Michael's position did not change after Christopher was shot. (37RT 7585, 7588.) The blood on Michael's face was mist and not a transfer stain. (38RT 7820.)

Englert examined the shorts appellant was wearing. Based on

appellant's height and weight, those shorts would have been baggy on her. (37RT 7593.) Englert testified that the shorts had blood stains and biological material on the front and back and high velocity spatter and a hair transfer on the sides and inner crotch.[36/] (37RT 7592.) High velocity spatter on the inner left crotch came from Christopher.[37/] (37RT 7593, 7594.) There was also a transfer stain in the crotch area. (38RT 7777, 7778.) Based on the appearance of the stains, Englert opined that the projected stain happened before the transfer stain. (38RT 7818.)

There was less spatter on the shorts than on Michael's face suggesting the shorts were further away from the blood source. (37RT 7600.) Englert explained that he did an experiment with a mannequin wearing the shorts and said if the mannequin was bent over in a certain position that aspect of the inner crotch of the shorts would be exposed. (37RT 7595.) Englert did not bring the mannequin to court nor did he bring the photos he took of his experiment to court. (38RT 7671.) The person wearing the shorts

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[36/] Englert acknowledged that transfer stains on the shorts could have been made by emergency personnel working on appellant with bloody gloves. (38RT 7727-7729.)

[37/] Englert actually gave conflicting testimony on whether high velocity spatter was present on the inner crotch of the shorts. He later testified that based just on examination without considering other evidence, the spatter could have been medium velocity but was definitely projected and not a transfer stain (37RT 7595-7596.) Englert labeled a photo caption in his report as "high velocity mist pattern inside crotch area" (38RT 7722, 7773), but then testified that there was no high velocity mist on the shorts. (38RT 7720)

had to stand with his legs about 18 inches apart and lean in to expose the inner crotch area. (37RT 7605, 7606.) The splatter would not have landed there if the shooter stood straight and/or kept his legs together. (38RT 7675.)

Englert examined the stains under magnification and he saw no indication they were smears. (37RT 7598.) Englert believed the person wearing the shorts came into direct contact with Joey's blood. (37RT 7634) Englert further believed beyond a reasonable degree of certainty that the person wearing the shorts killed Christopher. (38RT 7803.)

Englert also examined the t-shirt appellant was wearing. (37RT 7615.) There was high velocity spatter from appellant's blood on the right shoulder, top of the right sleeve, and back right side. (37RT 7615, 7617.) The mist was from up to down.[38/] (37RT 7616.) The blood mist on the sleeve was consistent with the arm being held over the right shoulder and angled up. (37RT 7617.) If appellant had her arm down, her shoulder would have blocked the blood spray. (37RT 7618.)

Englert examined Xavier's jacket, pants, socks and flip flops. (37RT 7618, 7621, 7622.) There were transfer stains on the jacket and pants. (37RT 7619, 7622.) There was one projected

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[38/] Englert initially reported that the mist was down to up but changed his report after learning that the high velocity mist on the shoulder of the t-shirt was appellant's blood. (38RT 7736-7737.)

blood stain on the pants but Englert found no evidence of spatter from a gunshot. (37RT 7619, 7622.) The night before he testified, Englert found three faint projected-type stains on Xavier's flip flops that he missed on his first examination. (37RT 7625, 7640-7641.) Englert concluded that the shooter could not have been wearing the jacket. (37RT 7629.)

There was a transfer stain on the carpeting on the stairs and already coagulated blood on the bannister. (37RT 7629-7631.) The blood on the bannister came from Michael and could have come from Gabriel's socks. (37RT 7632, 7633.)

Other Evidence

In November 1999 there were security cameras around the parking structures at Northridge Hospital where Xavier worked. The cameras provided a live video feed with digital recording of a date-time-location-stamped, black-and-white photo every three seconds. (16RT 2907-2912.) The tapes were changed once per day. The time on the tape was checked against the computer clock each day and logged in a book. If there was a problem with the time, the vendor came out and made adjustments. (16RT 2913-2915.) There were no entries in the log for November 22, 1999 indicating that the times on the videos were inaccurate. (16RT 2913-2915.)

The investigators obtained the security system parking videos for the west parking structure for November 22, 1999. (16RT 2915-2916.) Exhibit 6-B was a still photo from that video

that was time stamped 2124:50 (9:24 p.m.) and showed a car entering the parking structure. Exhibit 6-C, another photo from that video, was time stamped 2236:31 (10:36 p.m.) and showed a car leaving the parking structure. (16RT 2917-2919, 2961, 2963.) Those two photos were the only ones from the video that showed cars that resembled Xavier's car.[39/] (16RT 2966.)

Ernest Summen, a Mercedes-Benz service and parts director, examined exhibits 6-B and 6-C and concluded the cars in the photos were S-class, Mercedes-Benzes that was manufactured during the years 1986 to 1991. (16RT 2933, 2935, 2938.) Summen opined that Xavier's Mercedes-Benz shown in exhibit 6-A was consistent with the cars shown in exhibits 6-B and 6-C but he could not say whether they were the same cars. (16RT 2939-2940.)

The Northridge Hospital security guard log for November 22, 1999 contained an entry at 2225 (10:25 p.m.) indicating that a guard unlocked the gate between the family practice building and the medical office building. (16RT 2949, 2955.) The guard who unlocked the gate didn't actually make the entry into the log but reported it to somebody else who made the entry. (16RT 2951.)

Tim Yang, an employee at Xavier's office, closed up the office and turned off the lights at about 5:45 p.m. on November 22, 1999. (15RT 2652-2653.) When Yang arrived at the office the

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[39/] Xavier had told the police in his initial interview that there were loop cameras around the hospital and they would have captured his presence. (24RT 4428, 4430-4431.)

next morning he found the lights on and two of the three phones disconnected. (15RT 2654 - 2655.)

Appellant's 24-year-old cousin, Lorie Leon, knew appellant all of her life and worked for a time at Xavier's office. (27RT 4998.) Lorie described the Leon family as big and fairly close-knit. (27RT 5000.) Family was important to them, and Lorie knew that appellant did not want a divorce. (27RT 5004-5005.) Appellant advised Lorie that she should marry a stable educated Mexican man with money for security, but also said she wanted whatever was best for Lorie and made her happy. (27RT 5001-5002, 5004.)

At the conclusion of the prosecution's case-in-chief, the jury went on a jury view to the Camarillo house. (40RT 8220.)

DEFENSE CASE-GUILT PHASE

Impeachment of Xavier and Testimony about Xavier

Charles Foote delivered a mostly white, 50-foot trailer to Northridge Hospital on November 22, 1999. (41RT 8256, 8257, 8273.) He arrived sometime between 9-10:00 p.m. and had to wait 15-20 minutes for the gate to be unlocked. (41RT 8256-8258, 8260, 8263, 8268, 8272.) He told the police at the time that he backed his trailer in after the gate was unlocked at about 10:00 p.m. (41RT 8265.)

Xavier's biofeedback technician, Edward Babakhanian, saw Xavier leave at 4:30 p.m. on November 22. Babakhanian, who left

about 5:45-6:00 p.m., was sure about the times. (41RT 8279-8280.)

Crabtree, the fire dispatcher, received Xavier's transferred 9-1-1 call at 11:21:39 p.m. (53RT 10335-10337.) Crabtree typed information into her console as she received it. At 11:26:28 p.m., Crabtree typed that the wife murdered three children. (53RT 10353.) Crabtree typed "one child possibly breathing" at 11:32:24 p.m. (53RT 10339.) Crabtree also typed a note that the 9-1-1 caller was a doctor to explain why she was not telling the caller to give CPR. (53RT 10345.)

Using body temperature and room temperature, a coroner's investigator estimated that Joey and Michael died at 10 p.m. or later.[40] (43RT 8672, 8674, 8680.)

Ventura County sheriff deputy Timothy Lorenzen was in charge of the crime scene investigation.[41] (43RT 8710.) He arrived at about 12:30 a.m. on November 23. (43RT 8711.) A video of the crime scene was shot beginning at 9:14 a.m. (43RT 8714.) Lorenzen unlocked the inner closet before the video was shot, and he believed he was the only person who went into the inner closet before the video was shot. (45RT 9005.)

Lorenzen testified that he cleared the scene at 10:15 p.m. on November 23. At that time, he contacted Xavier to return to

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[40] The investigator did not take Christopher's temperature because it would have disturbed the crime scene. (43RT 8689.)

[41] Although Lorenzen was in charge, the prosecution never called him as a witness in its case-in-chief.

the house which Xavier did. Xavier was alone in the house when Lorenzen left. (43RT 8728; 45RT 8993, 8994, 8996.) Lorenzen didn't know if Xavier took a suitcase from the house prior to that. (43RT 8730.)

During an interview on November 29, Xavier told Lorenzen about security cameras in the parking structure at work as well as in the elevator and stairwell at his office. (43RT 8728, 8732, 8733, 8734; 45RT 8991.) Xavier drew a diagram of where he parked and the route he took to his office and noted where the cameras would be. (45RT 8991, 8992.)

By the time of trial, Deputy Tutino had no independent recollection of what Xavier said when he was in the garage with Juanita that night. Tutino listened to the parts of the tape that were decipherable and heard Xavier say, "When I came back, she'd killed herself and the three children. For some reason she didn't kill the baby Gabriel. They're all dead." (49RT 9798-9799.) Xavier also told Juanita that if appellant was alive, Juanita would want to go be with her. (49RT 9802.) Tutino heard Xavier and Juanita talking about going somewhere and Xavier said, "I believe we had one talk that I might not go." (49RT 9800.)

Lorenzen and Thompson interviewed Xavier at 5:30 a.m. in the conference room of the mobile command unit. Thompson did not consider Xavier a suspect. (41RT 8296-8297.) Although the interview lasted 1½ hours, Xavier never mentioned his affair.

(41RT 8302, 8301.)

During that interview, Xavier said that appellant was depressed and had attention deficit disorder.[42/] (42RT 8480.) Xavier noted that appellant mixed a second pitcher of margaritas and dinner was not that heavy. (42RT 8481.) He opined that alcohol and Prozac might have a synergistic effect and concluded that it must have been the alcohol and Prozac. (42RT 8481.)

Xavier said he went to his office that night and talked on the phone with appellant, who was tearful, dreadful and incoherent, for about 10 minutes. (42RT 8482-8483, 8602.) When appellant didn't respond to later phone calls, Xavier finished up at work for about 10 minutes and went home. (42RT 8482, 8483.) Xavier estimated that it took about 30 minutes to get home. (42RT 8484.)

Xavier said all of the lights were off when he got home. (42RT 8491.) He described appellant as floppy with blood around her and froth and blood in her mouth. He thought she vomited or bit her tongue. (42RT 8485, 8603.) He volunteered that he picked up the gun with his right hand. (42RT 8485, 8604.) He could not recall what he did with the gun but he immediately ejected the bullet he saw in the chamber. (42RT 8492, 8604, 8605, 8608.) Xavier had seen cartridges on the floor near appellant and

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[42/] The court instructed the jury that Xavier's statements about appellant's mental health were not admitted for their truth but just to show Xavier made the statements. (42RT 8490.)

theorized that maybe appellant was playing Russian roulette. (42RT 8494, 8608.) Xavier said that appellant pulled a gun on him five years earlier and chased him around the room. (42RT 8497.)

Xavier asked if appellant shot herself, and Thompson told him that she shot herself in the head. (42RT 8498.) Thompson also described the location of appellant's bruises. (42RT 8507.) Xavier never asked about appellant's condition. (41RT 8305.)

Xavier said he gave artificial respirations to Michael without putting Gabriel down. (42RT 8490.)

Xavier told Thompson that appellant put her parents on salary because she felt they needed an income. (42RT 8505.)

Xavier occasionally asked Thompson why he was asking certain questions. Thompson said he was trying to figure out what happened. (42RT 8497.)

After the interview, at 7-7:30 a.m., Xavier asked for his reading glasses and phone numbers so Thompson obtained a satchel from the kitchen counter for him. (41RT 8306, 8307, 8311, 8517.)

At about 10:49 a.m., Xavier asked to speak to Thompson. (41RT 8311.) Xavier told Thompson about his affair during that untaped conversation but did not identify the woman. (41RT 8312, 8319-8320.) Xavier claimed the affair was brief, discrete, and only took place in August 1999. (41RT 8320.)

At 1:00 p.m., Thompson tape-recorded an interview with VanEssen. (41RT 8313-8314.) Before the interview, VanEssen was

with Gillard at the top of the driveway. (41RT 8314, 8316;42RT 8509.) Thompson didn't know who Gillard was at the time nor did he know where Gillard was during his 30 minute interview with VanEssen. (41RT 8315, 8316; 42RT 8514.) Thompson later took the two women to the command post where they spent time with Xavier in the conference room. (41RT 8319; 42RT 8515-8516.)

Thompson returned to the house on January 7, 2000, after he was already working for the prosecutor's office, and found a small black belt holster on the floor in appellant's walk-in closet. (41RT 8323-8324; 42RT 8439, 8519.) The holster was not photographed before it was seized. (42RT 8436.)

Thompson denied showing Xavier any papers he found in appellant's closet on November 23, 1999, but he did describe the documents to Xavier who said that appellant wrote them. (41RT 8326, 8331; 42RT 8447, 8462, 8470, 8473, 8613.) The papers were later photographed on top of a box although Thompson said he found them underneath other items in the lidded box. (42RT 8464, 8617.) Thompson did not tape record his conversation with Xavier about the papers nor did he make any notes about the conversation. (42RT 8466.)

On November 23, Thompson also showed Xavier a small suitcase containing woman's jewelry that was in appellant's inner closet. (42RT 8457, 8458.) The suitcase was closed but not locked. (42RT 8458.) Thompson did not recall seeing Xavier with that suitcase

that night although the suitcase was visible in photos taken of Xavier that night. (41RT 8329-8330; 42RT 8446; Ex. 61; Ex. OOOO.) Thompson could not recall if the suitcase was in appellant's inner closet on November 23 nor could he recall what Xavier put his toiletries into on November 23. (42RT 8452.) He did see Xavier put a red USC bag into the trunk of his Mercedes and leave in that car at 7:00 p.m. that night. (42RT 8456.) Thompson didn't document or have anyone else document what Xavier took with him when he left. (42RT 8457.)

DA investigator Barnes talked to Xavier numerous times. (51RT 9997, 10020.) He taped some conversations but not all of them. (51RT 9997.) On February 1, 2000, Xavier said a police officer was with him right away and pretty much stayed with him the whole time. Xavier specifically said, "I don't believe they ever left me alone" and added he "didn't set foot in the house again until they took the boys away." (51RT 10014.)

On March 27, 2000, Barnes asked Xavier to explain what he meant in his email to Gillard where he said, "I have ideas, perhaps you do to." Xavier said he could not recall what he meant. (51RT 10005-10006.)

On April 18, 2001, Xavier told Barnes he did not recall ever telling Juanita "wait til you hear the 9-1-1 tape." (51RT 10047.)

On May 1, 2001, Xavier told Barnes he did not believe the Leons had retirement money or any income other than the money

from the sale of their home. (51RT 10048, 10049.)

Forensic Evidence

Barnes spoke numerous times with Englert. (51RT 10021.) On May 5, 2000, in an unrecorded phone conversation, Englert told Barnes that there was high velocity impact spatter mist on the crotch of appellant's pajama shorts. (51RT 10054; 52RT 10223). Englert used the word "mist," which Barnes put in his notes, and also used the word "spatter." (51RT 10049, 10054; 52RT 10223.)

Criminalist Jones found no high velocity impact spatter on the bunk bed bedding or the bunk bed railing although a soak stain on top of a high velocity impact stain could mask a high velocity stain. (49RT 9813, 9814, 9825, 9828, 9836; 50RT 9881, 9894, 9896.)

Jones examined carpeting from the master bedroom and found 46 hairs consistent with appellant's hair that appeared to have been pulled out or forcibly removed.[43/] (49RT 9838, 9841, 9853.) Jones also opined that although some of the hairs from two clumps of hair found at the scene were removed by the force of the gunshot, others appeared to have been pulled out. (49RT 9841, 9844, 9845, 9848, 9855, 9856, 9857; 50RT 9884.)

Herbert MacDonell, an expert in blood stain analysis,

[43/] Jones assumed that the hair belonged to appellant rather than any of the males in the family because most of the strands were longer than 5 inches. (49RT 9854; 50RT 9888.)

reviewed Englert's photos and reports as well as the evidence.[44] (44RT 8772-8782, 8785.) After reading Englert's report, MacDonell examined the shorts under a microscope expecting to find high velocity mist on the crotch but didn't find any high velocity impact spatter or mist anywhere on the shorts. (44RT 8793, 8794, 8910.) MacDonell did see eight spots of projected blood on the inner crotch of the shorts that came from some type of impact spatter.[45] (44RT 8794, 8797, 8910, 8921.) The remaining crotch spots were transfer stains. (44RT 8917.) MacDonell could not tell what caused the projected stains but opined it was unlikely to be fallout from the shooting because it was a small amount of blood in a small, confined area of the shorts. (44RT 8842, 8843.) There was no way to determine which stains -- projected or transfer- came first, but they had to come from separate events. (44RT 8798, 8800, 8843.)

MacDonell explained that the second shot into Christopher's head would generate back spatter even if it was a contact shot; thus MacDonell would expect blood spatter on the gun and in the gun muzzle as well as on the shooter's hand if the hand was not covered. (44RT 8922-8923.)

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[44] Englert took a 40-hour basic blood stain course from MacDonell in 1978 and was a guest speaker in MacDonell's advanced course in 1983. (44RT 8784-8785.)

[45] MacDonell defined projected blood as blood that travels through the air. (44RT 8788.)

MacDonell examined Xavier's jacket and found only transfer stains but there were stains already cut out from that jacket that he never saw. (44RT 8940, 8941, 8960.) He also found transfer stains on Xavier's socks and pants but no projected stains. (44RT 8943-8945.)

Dr. Frederick Lovell, who was the chief medical examiner for Ventura County from 1981-1993, examined photos of appellant's head wound, as well as pre-operative x-rays of the wound, post-operative CAT scans, and other radiologist reports. (51RT 8340, 8347, 8355-8356, 8361.) He opined that the gun was held tightly against appellant's head at a right angle to the parietal bone above the ear. (51RT 8356-8357.) The gun was pointed slightly downward (less than a 10 degree angle) but was mostly straight. (41RT 8357, 8363, 8419.) Appellant would have lost consciousness almost immediately. (42RT 8551, 8552.)

Lovell explained that a bullet hitting a hard skull will generally fragment. (41RT 8365.) He believed that some bullet fragments came back out the entrance wound although he also believed some remained in her brain. (41RT 8366, 8388, 8419.) Lovell could not explain how a bullet fragment from a shot angled slightly downward could hit the ceiling but said there were a lot of things he didn't understand about the case. (41RT 8422.)

Lovell reviewed photos of appellant's bruises, but noted that dating bruises based solely on photographs is dependent on

the accuracy of the printing of the colors on the photo. (41RT 8388; 42RT 8557.) Appellant's arm bruises appeared to be finger grab marks that looked to be less than three days old. (41RT 8388, 8390, 8547.) Appellant's leg and inner thigh bruising appeared to be less than a day old. (41RT 8389.)

Based on all that Lovell reviewed, he opined it "highly unlikely" that appellant's gunshot wound was self-inflicted. (41RT 8390.) According to Lovell, the classic location for a self-inflicted gunshot wound is the temple. (41RT 8391.) The area where appellant was shot was technically difficult to reach and not a typical location for a suicide shot to the head. (41RT 8390, 8395.) In his view, it would be difficult to hold the gun at that angle and shoot. (41RT 8406.) If the wound had been fatal and he had been the coroner, he would have said the case needed further investigation because of the unusual gunshot location. (42RT 8556.)

Hospital Evidence

An operating room nurse testified that there was a police officer and a person taking photos in the operating room during appellant's surgery. (51RT 10108.)

A police officer was in appellant's ICU room the whole time. (43RT 8660.) Appellant received codeine injections at 11:15 a.m. and 3:45 p.m. and Tylenol at 2:45 p.m. on November 23. (43RT 8664-8667.)

Appellant's Taped Statements

Gregg Stutchman, who ran a lab that analyzed and enhanced audio recordings, enhanced the original 90-minute audio tape Wade recorded of appellant in the hospital using filters to amplify the human voices over the hospital noises that were present on the tape. (53RT 10265-10269, 10272.) Stutchman isolated and enhanced the section where appellant purportedly said something about "wrestling" with her boys and made a loop--where the same snippet was repeated eight times with a 2-second pause in between each segment. (53RT 10272-10273.) Both the isolated portion and the loop (Ex. CCCCC) were played for the jury. (53RT 10276; SCT 97.) Stutchman believed that appellant said, "You have to ask the boys." (53RT 10291.)

Cheryl Wade listened to additional enhanced portions of the tape (Ex. DDDDD) and, with a couple of minor corrections, agreed that the transcript of DDDDD was accurate. (53RT 10297-10299; SCT 98-101.) According to Wade, between two of the segments on the enhanced tape, appellant said, "What do you guys suspect?" (53RT 10305.) Regarding the looped tape, Wade never heard appellant say, "You have to ask the boys." (53RT 10306.) Rather, what Wade could hear on the tape was unintelligible and she didn't know what appellant said. (53RT 10307.) But, Wade said that when she responded by saying to appellant "wrestling with a boy," she was most likely following her practice of repeating what she heard

appellant say. (53RT 10306, 10307, 10308.) Wade was sure appellant said "wrestling with a boy" not "wrestling with the boys." (53RT 10308, 10313.)

Character Evidence and Other Evidence About Appellant

Bette Kochsiek knew appellant since 1984 when her husband, an orthopedic surgeon, had an office in the same medical building as Xavier. (42RT 8566.) The two couples were friendly and socialized together. (42RT 8566-8567.) Kochsiek had been to Waterford with the Caro family a couple of times and the two couples went on a cruise together in 1996. (42RT 8567.) Kochsiek saw appellant with her children many times. (42RT 8568.) She admired appellant and viewed appellant as the mother that Kochsiek always wished she'd had. (42RT 8570.) Kochsiek and appellant spoke in the summer of 1999 and again in November 1999 and appellant did not seem depressed. (42RT 8570, 8572.) They last spoke the week before Thanksgiving and made plans to get together with their husbands after Thanksgiving. (42RT 8572, 8577, 8579.)

The family housekeeper, Maria Hernandez, saw appellant with her children and found appellant to be friendly, nice, and a good mother. (42RT 8622, 8623.)

The family gardener, Arturo Udave, knew appellant for about 16 years and often saw appellant with her kids. (42RT 8630, 8634.) When Udave last saw them two days before the shootings,

appellant was fine and nice with the kids. (42RT 8635, 8637.)

Jodi Atkinson taught Joey from September 1999 until his death. (43RT 8740, 8741.) Appellant volunteered in her classroom once or twice each week to lead a reading group and xerox papers. (43RT 8742.) Appellant seemed like a good, loving mother. When Atkinson saw appellant and Joey on November 22, they were affectionate. (43RT 8743, 8744.)

Sandra Tischler taught Christopher in kindergarten and Michael in first grade. (43RT 8748.) Appellant volunteered in the classroom both years. (43RT 8749.) Appellant was an affectionate, caring, wonderful mother whose children loved her in return. (43RT 8750-8751.) Tischler saw appellant twice on November 22 -- before school with Christopher and after school with Joey-- and saw nothing unusual in appellant's behavior with her children. (43RT 8753.)

Appellant's Parents

Greg Leon worked as a brick mason and retired in the mid-80s. (45RT 9008.) He owned a home with a swimming pool in Canoga Park for 48 years before appellant was married. (45RT 9009.) He also owned several properties in Waterford before appellant was married and collected rents from those properties. (45RT 9010-9011.) He also owned his own truck and had been a football season ticket holder. (45RT 9025, 9033.)

The 1994 earthquake damaged his home, Xavier's Granada Hills

home, Xavier's office, and the Camarillo home. (45RT 9012, 9027.) Greg, with help from Udave, repaired all four locations using subcontractors for work that he could not do himself. (45RT 9013, 9027.) Greg did not charge Xavier or appellant for any of the work. (45RT 9015.) Greg also took the children to school and to sports practices, assisted Udave with gardening and pool work, purchased supplies for Udave, went with Udave to Waterford twice a month to do the gardening, did odd jobs around the houses, and bought groceries twice a week --once at Costco and once at the local market. (45RT 9011, 9016, 9022, 9024, 9041-9042.)

Greg would pay for purchases with a check or with a credit card belonging to the Caros. He'd give appellant receipts and she would pay him back with checks. (45RT 9016-9018, 9050, 9052.) Sometimes Greg would cash a check for appellant and give her the cash. (45RT 9027, 9032.) For example, in March 1999, Greg cashed a check from appellant for $1000 and gave that money to her. (45RT 9032.) Other times, Greg would buy groceries and materials for the house with cash from checks made out to him. (45RT 9072.) Appellant and Xavier would also write checks to Juanita so she could get cash for them at the bank in Waterford.[46/] (45RT 9085.)

When the Leons sold their Canoga Park house, Xavier put the $147,000 proceeds into a trust fund for the Leons with Xavier

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[46/] The Leons had a bank account in Waterford in addition to the investment account managed by Xavier. (45RT 9030, 9084.)

serving as their power of attorney. (45RT 9014, 9029, 9030.) In 1999, the Leons were collecting $1100 in monthly rent from their Waterford property plus Greg was receiving social security and a pension from the brick mason's union totaling $1100 per month. (45RT 9029, 9030, 9049, 9056, 9084.)

Greg went to Waterford to prepare for Thanksgiving on the Sunday before the shooting. (45RT 9040.) Xavier had given Greg a check to pay for the Thanksgiving groceries. (45RT 9039.) Greg last saw appellant and the children on Saturday. (45RT 9040.) Appellant, who was a good and loving mother, was not acting any differently. (45RT 9040-9041.)

Appellant and Juanita spent the day together on November 22, and were both looking forward to going to Waterford. (45RT 9092, 9094.) That evening the four boys ate before Xavier and appellant. (45RT 9100, 9102.) When Juanita went to her room that night, Gabriel was with Xavier who was exercising in the playroom. (45RT 9100.) Juanita later got Gabriel ready for bed. (45RT 9101.) Xavier had already sent the other three boys to bed. (45RT 9101.)

After the shootings, Xavier told Juanita, "Wait til you hear the 9-1-1 call, Juanita. You're gonna blow your mind." (45RT 9120.) Later, when Juanita went back to the house to pick out clothes for the boys' funeral, Xavier brought Juanita to the boys' rooms and described in a step-by-step manner how appellant

killed them. (45RT 9117-9119.)

After the shooting but before Xavier started talking badly about appellant, Juanita invited Xavier to live with her and Greg and offered to take care of Gabriel. (45RT 9133, 9140.) Instead, Xavier had the Leons served with legal papers to move out of the Granada Hills house while Juanita was still taking care of Gabriel. (45RT 9131.) At the time of trial, Xavier no longer had any contact with Juanita (45RT 9130.) Juanita denied ever threatening to beat up Xavier for complaining about appellant but she did tell him not to call her and badmouth appellant after the shootings.[47/] (45RT 9123, 9124.)

Grandfather Clock

An experienced grandfather clock salesman explained that the Caros' Hamilton clock would run out in 8 days after being fully wound if it was not rewound. (50RT 9926-9928, 9939.) The pendulum weight shown in photo Ex. E would have run for another 12 hours.[48/] (50RT 9948.) The clock could also be stopped by physically stopping the pendulum but it would not just stop randomly. (50RT 9939, 9959.)

[47/] During rebuttal, Wade testified that Juanita told her that when Xavier complained to her about appellant, Juanita told him she would beat him up if he complained again. (53RT 10430.) Juanita also said she asked Xavier, "Don't you have eggs? Aren't you a man?" (53RT 10430.)

[48/] In 1999, appellant wound the clock every Sundays (46RT 9326-9328.)

Appellant's Testimony

Appellant testified on her own behalf. She married Xavier on July 5, 1986. (45RT 9157.) Prior to that, in 1984, Xavier trained her to be his office manager after his office manager quit. (45RT 9145, 9146.) Appellant stopped going to nursing school to become his office manager. (45RT 9147; 48RT 9584.)

Appellant was responsible for paying both the office bills and family bills using money from both corporate and personal bank accounts. (45RT 9151, 9153.) Appellant supervised the corporate account but Xavier controlled it. (45RT 9155.) She began keeping records and paying bills with Quicken starting sometime between 1995 and 1997. (45RT 9152.) Both appellant and VanEssen made entries in Quicken in 1999. (46RT 9183, 9207.)

Neither appellant nor Xavier received a paycheck. (45RT 9154.) After the earthquake, appellant had trouble paying the office rent because of reductions in insurance payments. (46RT 9264.) Appellant told Xavier about this. (46RT 9265.) The rent was in arrears beginning in 1997 and continuing into 1999. (46RT 9266, 9267.) Appellant was working with the management company on a plan to make extra payments to catch up, but it was complicated because there were several different leasing companies during that time. (46RT 9266-9267.) In February 1999, they owed $50,126 in office rent and appellant talked to Xavier about it. (46RT 9267.) They decided to have the office participate in a drug

study program to bring in extra money. (46RT 9269.)

Appellant's other financial duties included making sure they had enough cash when they were in Waterford. Appellant would get cash by writing a check to Juanita for her to cash at the Waterford bank. (46RT 9188, 9189.) Appellant typically wrote in the check margins what a check was for. (46RT 9192.) For example, she wrote "San Diego" on a check she wrote for $1000 to her father for cash for a family Legoland trip in March 1999. (46RT 9192-9193.) Appellant and Xavier didn't always agree on expenditures but they discussed them. (46RT 9193.)

Appellant and Xavier never specifically discussed what expenses appellant was paying for her parents but Xavier was aware of the ledger appellant kept of her expenditures and never disputed anything appellant paid. (46RT 9196.) That changed, however, in late summer/fall of 1999 when Xavier accused appellant of writing too many checks to her parents. (46RT 9222.) When they started to disagree about the checks, appellant or Xavier would just walk away because she could not communicate with him when he was angry. (46RT 9223; 48RT 9621.)

In 1998 and 1999, appellant worked 30-35 hours per week along with VanEssen. (45RT 9147.) Appellant worked less in the summer of 1999 because both Christopher and Michael had foot surgeries. (45RT 9149, 9150; 446RT 9207.) The surgeries coincided with VanEssen having to take time off unexpectedly, leaving the

office without a manager. (45RT 9148-9149.)

On August 11, 1999, Xavier called appellant while she was vacationing with the kids and her family in Waterford and fired her as office manager. (46RT 9185.) Xavier also took her checkbooks and left her with just a couple of checks. (46RT 9185.) If appellant needed a check after that, she had to ask Xavier for one and tell him what it was for. (46RT 9215.) She then gave Xavier the duplicate check and receipt. (48RT 9526, 9527.) Xavier also took appellant's credit cards but later returned a gas credit card when she asked for it. (48RT 9530.)

Xavier's actions made appellant sad but not angry. (48RT 9666.) Although her feelings were hurt, appellant got used to being home with her children and thought she should have done that sooner, in part because it enabled her to increase the time she volunteered at the kids' school. (46RT 9239-9240.)

Appellant did not have hard feelings towards VanEssen about taking over her job. (46RT 9210, 9211.) At that time, appellant considered VanEssen a friend. (46RT 9236; 48RT 9644.) They talked on the phone after appellant was fired and appellant took VanEssen out for her birthday in November 1999. (46RT 9236; 48RT 9645-9646.) Appellant had no memory of ever talking to VanEssen about killing herself or being depressed, and Xavier never said anything to appellant about her being suicidal. (46RT 9236, 9237; 48RT 9645, 9647, 9650, 9674, 9682.)

Appellant talked to VanEssen about taking Prozac both before and after she started taking it at Xavier's urging in July 1999. (46RT 9237-9238; 48RT 9640, 9673.) Xavier got the Prozac for appellant and increased her dosage in September or October. (46RT 9238, 9239; 48RT 9640.) Appellant felt better while taking it. (48RT 9642.) Appellant also took a diet pill (Tenuate) that she had been taking since she was a teenager. Since Gabriel's birth, appellant had taken three Tenuate daily.[49/] (46RT 9617, 9644.)

While appellant generally took care of the Caro family finances before August 1999, Xavier took on responsibility for her parents' finances and decided how her parents should invest the money in their trust account from the sale of their house. (46RT 9195.) Xavier used his power of attorney over the Leon trust to reimburse himself periodically for expenses he paid for the Leons.[50/] (46RT 9197, 9199, 9204, 9341.) According to the Quicken record, on March 4, 1999, $10,000 was transferred from the Leon account to the Caro personal account. (46RT 9270, 9271; Ex. FFF.) Once Xavier fired appellant he didn't tell her when he made transfers. (46RT 9280.) He also cut off appellant's access to the financial records from her home computer. (46RT 9335.)

[49/] Appellant's Tenuate usage was a secret. She recorded her checks to the doctor who prescribed the Tenuate as checks to a dry cleaner. (48RT 9612-9617.)

[50/] The power of attorney forms had to be re-signed by the Leons and Xavier every year. The last signed papers were in March 1999. (48RT 9572.)

Appellant continued to write checks to her parents and checks to herself for cash after she was fired. (48RT 9589.)

Xavier left the family a couple times during 1999. (46RT 9223.) The first time, in June, Xavier went to a hotel for three days. (46RT 9225, 9229.) Appellant communicated with him twice while he was gone -once by email and once by calling the office. (46RT 9225.) They had dinner together and discussed the email before Xavier returned home. (46RT 9226, 9227, 9229; 48RT 9623.) The June 24, 1999 email said that they needed to talk if only for the kids' sake. Appellant discussed feeling unneeded and insignificant because Xavier no longer needed her advice and had decreased her presence in the office without discussing it with her. (48RT 9623; Ex. WW.) She discussed how they both had issues and needed to make changes to make their relationship work. (Ex. WW.) She said she felt lost and expressed her disappointment that Xavier left instead of staying and trying to work it out. She noted it was one more thing that hurt the boys. She ended by saying she would always love Xavier.[51/] (48RT 9624; Ex. WW.)

In August 1999, the night before the family was planning to leave for the annual Leon family reunion in Waterford, Xavier said he was not going. (46RT 9312-9313.) Appellant went with the

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[51/] Appellant sent the email from home using Xavier's AOL account. (48RT 9625.) She resorted to email because it was the only way she could communicate with Xavier without an argument. (48RT 9671.)

kids and was glad her family was not going to see the bad state of her marriage. (46RT 9313-9314.) Appellant and Xavier talked by phone and Xavier said he would come up at the end of the week, but he never came. (46RT 9315.) During a phone call that week, after firing appellant as office manager, Xavier told appellant for the first time that they should separate. Xavier said he would move back into his Granada Hills house and appellant's parents could move into the Camarillo house with appellant and the kids. (48RT 9565, 9671-9672.)

That same month, Xavier told appellant that he was going to see a divorce lawyer after she found the lawyer's business card in Xavier's appointment book. (46RT 9245; 48RT 9563, 9680.) Appellant wrote the date of the appointment (August 27) in her appointment book. (48RT 9564, 9627, 9628.) They subsequently discussed divorce and the division of their assets. (48RT 9566, 9567.) Based on something Xavier told her, appellant didn't believe Xavier actually kept his appointment with the divorce lawyer. (46RT 9249.) However, she later found notes about dividing community assets while getting something in Xavier's briefcase and felt betrayed. They never discussed those notes. (46RT 9250; 48RT 9629-9630.) Appellant didn't want a divorce and was committed to working out their problems. (46RT 9251.)

Appellant didn't suspect that Xavier was having an affair

that summer and was unaware of Xavier's affair with Gillard.[52] (46RT 9252; 48RT 9652.) Appellant had worked with Gillard in the office and had told VanEssen at one point that if Xavier was having an affair, it would be with Gillard. (46RT 9252; 48RT 9654, 9655.) Appellant wondered whether Xavier still loved her, and she was unhappy that things felt different in their marriage. (46RT 9253; 48RT 9656-9658.) By 1999, Xavier had stopped telling her he loved her and was critical of everything making it difficult to communicate. (46RT 9253.)

On September 17, 1999, appellant and Xavier argued because Xavier was leaving and appellant had no cash or credit cards. (46RT 9241, 9242.) Appellant grabbed Xavier's money clip and he grabbed it back. (46RT 9241.) The fight ended when Juanita called from downstairs and said she was having chest pain. (46RT 9242.) Xavier called the paramedics, and Juanita was hospitalized for two days. (46RT 9242-9243.)

After another argument, appellant sent Xavier an email on October 11, 1999, that said: "I've got nowhere to go or a career to fall back on;" "I don't have anyone to talk to;" and "I'm isolated."[53] (46RT 9285; 48RT 9624, Ex. XX.) Appellant also

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[52] During rebuttal, the prosecution played a tape of an interview in which Juanita said that appellant discussed with her a suspicion that Xavier was having an affair. That contradicted Juanita's trial testimony. (53RT 10425.)

[53] Xavier claimed he never saw this email either. (24RT 4664.)

expressed puzzlement over Xavier thinking she was a liar, corrected what she believed to be Xavier's assumptions about her, and encouraged him to work on trust, loyalty, accountability and compromise and to give up blame, fault, and pride. (Ex. XX.) Those statements were all true and conveyed her feelings at the time. (48RT 9623-9625.)

Before they moved to Camarillo, Xavier bought appellant a .38 gun for home protection. (46RT 9166, 9172.) Appellant didn't want a gun but didn't fight Xavier about it. (46RT 9236.) She had no experience with guns prior to that. (46RT 9167.) At Xavier's insistence, she took lessons and learned how to load the gun and shoot it. (46RT 9167, 9168; 48RT 9580.) She knew where Xavier kept the ammunition. (46RT 9167.) Appellant also knew how to open the gun safe, but she did not know the combination. (46RT 9170; 48RT 9582.) Appellant denied damaging the front of the gun safe or causing the scratches. (48RT 9586.)

When Xavier went out of town, he would get appellant's gun out of the safe for her and give it to her in its holster. (46RT 9171, 9172; 48RT 9570.) She or Xavier would put her gun on the shelf above their bed overnight. (46RT 9232; 48RT 9542, 9553.) She never took the gun out of its holster, and she never put the holster in her closet. (48RT 9542.) She would return the gun to the safe the next morning by popping the safe open with the prong end of a hammer. (48RT 9546, 9547, 9552, 9582.) She would then

close the lid without using the combination. (48RT 9548.) In Augst 1998, appellant removed her gun from the safe when Xavier was away at a conference. (48RT 9549.) Xavier told appellant to use a hammer to open the safe rather than giving her the combination. (48RT 9683, 9688.)

Appellant last had the gun out on the bed shelf in June 1999. (48RT 9551.) Appellant last fired the gun at Waterford before Christopher was born. (46RT 9235.) Appellant believed she last touched the gun safe in July 1999 when they brought it to Waterford. (48RT 9550.) Appellant denied ever brandishing a gun at Xavier and testified that she never heard Xavier make that accusation until she was charged in this case. (46RT 9231, 9233, 9235; 48RT 9553.)

Appellant regularly wore three rings --a wedding band, an engagement ring, and an eternity ring that Xavier gave her for their 10th anniversary. Appellant always wore her wedding band but generally removed the other two rings when she was home and put them in a jewelry box on her dresser. She never returned her wedding band or engagement ring to Xavier. (48RT 9576-9578.) Appellant kept her jewelry, which appraised for insurance purposes at about $200,000, in a locking Samsonite suitcase in her inner closet.[54/] (46RT 9179, 9181.)

[54/] Her jewelry suitcase was visible in the photo of Xavier taken the night of the shootings. (46RT 9182, 9213; Ex. 61.)

Appellant generally kept her inner closet door locked, but Xavier knew where she kept the key. (46RT 9180.) After appellant was fired, she packed up some work boxes which she stored in her closet. (46RT 9210.) To appellant's knowledge, those work boxes didn't contain a copy of her October 11 email to Xavier or the note written by Lorie Leon. Appellant had never seen Lorie's note until her attorney showed it to her. (46RT 9317, 9324-9325.)

In November 1999 appellant believed Xavier was still working on their marriage as they had agreed to do. (46RT 9253, 9254.) Appellant only had partial memories of what took place on November 22, 1999. (46RT 9258, 9288.) It was a typical work day for Xavier and school day for the kids. (46RT 9288.) Appellant packed suitcases for the upcoming Waterford trip. (46RT 9215.) Joey had basketball practice and Xavier was supposed to take him. (46RT 9255, 9256.) Appellant and Xavier talked on the phone that day about how hard it was to get everything ready to leave for Waterford. (46RT 9256.) Appellant called Joey's coach to say Joey could not attend practice. (46RT 9257.) Appellant was not sure what time Xavier came home from work but believed he got ho,e too late to take Joey to practice. (46RT 9257.)

Appellant remembered that the kids ate dinner at the kitchen counter with Gabriel in his high chair. (46RT 9289.) The kids had already eaten but were still awake when Xavier came home. (46RT 9292.) Appellant and Xavier ate salad together. (46RT 9292.)

Appellant had made a pitcher of margaritas and they each drank some.[55/] (46RT 9293.) Appellant had 2-4 drinks during and after dinner and also drank in her bedroom while getting ready for bed but didn't feel drunk that night.[56/] (48RT 9632-9633.)

After dinner, Xavier was making another batch of margaritas in the kitchen when Joey came in and wanted Xavier to go upstairs to see something on his Nintendo game. When Xavier said he would do it later, Joey made a comment about Xavier having a drink. (46RT 9294.) Xavier was not happy about what Joey said and got into Joey's face while walking Joey backwards out of the kitchen. Appellant told Joey to go upstairs and said she would talk to him later. Xavier got mad at appellant for interfering and not backing him up. (46RT 9295.)

The three older boys had an evening routine. They generally showered around 6 p.m. and started getting ready for bed around 8 p.m. (46RT 9289, 9533.) While the kids brushed their teeth, appellant would get their beds ready. (48RT 9535.) Appellant would talk with Joey and sometimes rub his head and back if he was not sleepy. (48RT 9535.) She would hug and kiss Christopher

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[55/] Sometime that spring, Xavier began putting a twist-tie on appellant's glass. (48RT 9696, 9697.)

[56/] During 1998-1999, appellant regularly drank alcohol with dinner except for when she was pregnant. (48RT 9651.) She drank 1-2 glasses of wine (or occasionally margaritas) every night and 3-4 glasses throughout the day on Sundays. (48RT 9652.) Appellant blacked out only once, in 1997, after she and Xavier shared three bottles of wine in Waterford. (48RT 9690, 9694.)

and Michael. (48RT 9537.) Appellant said prayers with all three kids and put a Bible under their pillows. (48RT 9536.)

Appellant had no specific memory of putting any of her kids to bed that night. (46RT 9290; 48RT 9539.) After the incident with Joey, appellant next remembered Xavier getting up and running upstairs. Appellant assumed one of the kids had yelled for them so she followed him. (46RT 9296.) She found Xavier unplugging Joey's large TV which he then carried downstairs. (46RT 9266-9297.) Joey was lying face up in bed with his eyes closed and appeared to be asleep. (46RT 9300.) Appellant turned out the lights and went to see what Xavier was doing downstairs. (46RT 9300.)

Xavier said he took the TV because Joey had been disrespectful. (46RT 9301.) They began arguing because appellant didn't think Xavier was being reasonable. (46RT 9301.) The loud argument continued as they went from the garage to the kitchen to their bedroom. (46RT 9302.) When appellant followed Xavier into the bathroom, he told her he was not going to Waterford with the family and he was leaving. When appellant asked him what he meant, he replied, "You know what I mean." Appellant assumed he meant he was leaving the family forever. (46RT 9302-9303; 48RT 9634, 9635.)

Appellant next remembered Xavier coming out of his closet dressed in blue Docker pants, a white, short sleeve, button-down

shirt with a collar, white Rockport tennis shoes, and a Maroon USC windbreaker. (46RT 9304-9305.) Appellant had no memory of her mother arriving, Xavier leaving, or calling Xavier after he left. (46RT 9305.) Appellant remembered trying to call Xavier's car phone and his not answering. (48RT 9636.) She didn't recall Xavier hanging up on her or talking to her. (48RT 9636.)

Appellant could not remember what she was wearing that night. (46RT 9306; 48RT 9636.) Appellant usually wore pajama shorts and a t-shirt to bed but the shorts that she was found in were maternity shorts and she wouldn't have been wearing them because they were too big on her. (46RT 9306; 48RT 9636, 9637.) Appellant had never seen the t-shirt she was found in. Appellant could not remember if she got into bed that night but photos from the scene showed her side of the bed turned down and her socks on the floor next to the bed.[57/] (46RT 9307, 9308.) Appellant's last memory in the house was being upstairs in her closet and looking at the pitcher of margaritas that she had brought upstairs. (48RT 9638.) She would usually rinse out the pitcher and put it in the dishwasher but didn't recall if she did it that night.[58/] (48RT

[57/] Appellant wore socks and sneakers with her pajamas and usually took her socks off before going to bed and put them on the floor next to her. (46RT 9259.)

[58/] A photo taken that night showed a blender pitcher in the dishwasher. (16RT 2995; Ex. 47-A&B.) Photos from that night also showed a glass in the kitchen sink, something appellant said she would never do because the glass could fall and break. (16RT

(continued...)

9691.)

Appellant did not have bruising on her hands and wrists or any injuries to her feet before she woke up in the hospital. (48RT 9579.) Appellant didn't know how her bloody palm print got on Joey's doorframe. (48RT 9695.) Appellant remembered parts of being at Los Robles Hospital. (46RT 9349.) She remembered a woman in white talking to her about what happened while appellant had a tube down her throat. (46RT 9350.) Appellant was told she had a gunshot wound to her head and had surgery. (46RT 9351.) At trial she remembered what she was told only because she heard the tapes played in court. (46RT 9352.) Appellant independently remembered Wade telling her that her kids were hurt. (48RT 9515.)

Appellant had no memory of hurting her children.[59/] (46RT 9351.) Appellant believed they had been in a car accident and was concerned about Gabriel. (48RT 9516, 9522.) Appellant thought it was a car accident because Wade said the boys were hurt and she had a broken foot and a head injury. (48RT 9522.) Appellant had no memory of how she got hurt or how her boys were hurt. (48RT 9523, 9524.) When Wade told appellant that her boys were dead, appellant didn't know how they died. (48RT 9524.) Appellant did

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[58/](...continued)
2799; 48RT 9692; Ex. 4-A.)

[59/] Appellant also had no memory of asking whether Xavier had come to visit her but it sounded like something she would have said. (46RT 9352.)

not kill her kids. (48RT 9692.) Although appellant had no memory of what happened, there was no question in her mind that she did not kill her children. (48RT 9692.)

REBUTTAL CASE-GUILT PHASE[60/]

Impeachment

Xavier's divorce lawyer deposed Juanita under oath in April 2000. (54RT 10442, 10443.) When he asked Juanita if appellant had given her any money in the six years since the earthquake, Juanita said, "No," but also said that appellant would give her checks for $100 whenever she could but not on a regular schedule. (54RT 10443, 10448, 10450.) Juanita added that Xavier could provide the exact amount that appellant had given her because Xavier had the check stubs. (54RT 10449.)

Grandfather Clock

Herschel Schultze, Xavier's childhood friend, received a call from Xavier on the morning of November 23. Xavier, who had not seen Schultze in seven years, asked him to come to his house.[61/] Schultze was at the house the next morning with Xavier

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[60/] Some parts of the rebuttal case were discussed earlier and are not repeated here.

[61/] Schultze testified that after Xavier called him, he called VanEssen and suggested that she and another person from the office go be with Xavier so he would not be alone. (54RT 10542, 10543.) Schultze didn't know VanEssen but he called Xavier's office and VanEssen answered the phone. (54RT 10553.) Schultze told VanEssen what happened and said Xavier needed someone with him. He told her to take someone from the office, close the

(continued...)

and Xavier's brother and a cleaning crew when he noticed right away that the grandfather clock had stopped. (54RT 10526-10528, 10544, 10550.) Schultze had not seen anyone near the clock and didn't tell anyone that the clock had stopped. (54RT 10529.) No police were at the house that day. (54RT 10534.)

Schultze was at the house again on November 25. That time the police were there and interviewed him. (54RT 10533.) Schultze didn't mention the clock at that time. (54RT 10534.) Before the police left, however, he and Xavier were standing near the clock and Xavier said, "Dang, did that clock stop again? I just had it fixed." (54RT 10535, 10548, 10550.) Schultze pointed to the time, which he recalled as being 10:59, and said that it was creepy. Xavier said maybe they better tell the police so they called the officer over. (54RT 10535.) Schultze acknowledged he might have told a defense investigator it was Xavier who drew his attention to the clock but he was sure that he noticed it before Xavier mentioned it. (54RT 10536, 10537.)

James Bultema, a clock repairman who had been an LAPD officer for 25 years, testified that grandfather clocks "most definitely" stop at random times. (54RT 10564, 10568.) Bultema never examined the Caros' clock but opined from photos that the clock pendulum was full of dust which is a clock's worst enemy.

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[61]/(...continued)
office, and go stay with Xavier. (54RT 10553.)

(54RT 10566, 10567.) Bultema acknowledged that the "dust" could have been powder from fingerprinting. (54RT 10569-10570.)

Xavier's Access to the House

Xavier's brother, Raul, testified that when he and Xavier left together from the command center the night of November 23, the police were still at the house. (54RT 10479-10480.) Xavier and Raul spent the night in the same room at a hotel, and to the best of Raul's recollection, Xavier never left the hotel that night. (54RT 10480, 10483, 10490.) They returned to the house the next morning and stayed there while a cleaning crew was there. (54RT 10488, 10492.)

The officer who deployed the mobile command center logged out at 10:15 p.m. on November 23 and Xavier had already left. (54RT 10497, 10499, 10500.)

The officer stationed at the top of the driveway saw a dark Mercedes leave around sundown. When the officer left around 10:30 p.m., no one identifying himself as Xavier had arrived. (54RT 10507-10508.)

Lorenzen testified that his earlier testimony about turning the house over to Xavier at 10:15 p.m. on November 23, 1999 was based on a report he wrote on December 6, 1999 that was based on his November 23 notes. (54RT 10511.) His notes did not say that Xavier came back the night of November 23. (54RT 10512.) Lorenzen had time to think about it since he testified and Xavier did not

come back the night of November 23. (54RT 10512.)

On cross examination, Lorenzen admitted his notes for November 23 said, "Secured residence, turned over to Dr. Caro." (54RT 10513.) Lorenzen further admitted that when Barnes contacted him after his earlier testimony to ask whether Xavier really came back, Lorenzen told Barnes he remembered Xavier coming back and he remembered Xavier being in the driveway when Lorenzen left. Barnes asked Lorenzen to give it some more thought over the weekend. (54RT 10514.) Only then, after being contacted by the prosecution, did Lorenzen suddenly realize his memory was not accurate. (54RT 10517.)

PROSECUTION CASE-PENALTY PHASE

Parking Lot Altercation

On June 10, 1992, Jeanine Milner looked for a parking spot at the Topanga Mall which was crowded because of a Nordstrom's sale. (60RT 11646, 11647, 11665.) Milner stopped behind a Suburban but then drove around the driver's side when it didn't move. (60RT 11648.) After driving about a 100 feet, Milner saw a person leaving so she put on her turn signal and waited. (60RT 11649.) The Suburban angled in front of Milner on the driver's side and the driver (appellant) said through her open passenger window that it was her parking space. (60RT 11649, 11654.) Milner replied that it was her space. (60RT 11654.) After the two women engaged in a minute or two of profanity-laced name calling,

appellant got out of her car and continued arguing while she grabbed Milner by the hair and pulled Milner's head toward her. (60RT 11656, 11657.) Milner hit her head on her open driver's window causing a bump between her eyebrow and hairline. (60RT 11658.) Appellant got back in her car and drove away as Milner got out of her car to get appellant's license plate number.[62/] (60RT 11659.)

Bridgette Bierend, who was in the car behind Milner, witnessed the incident. (60RT 11693.) Bierend saw the female driver of the Suburban get out of her car and approach the driver's window of Milner's car while shaking her finger. The driver started to walk away and then turned back and pulled Milner's head into the partially open driver's window causing a red bump. (60RT 11695, 11696.)

Milner went to the emergency room where she was examined and released. (60RT 11662.) She didn't suffer any residual effects or stress from the incident nor did she seek counseling. (60RT 11662, 11664.) Nevertheless, she wrote a letter to appellant asking for $4000 for what had happened, falsely stating that she had been stressed and injured and had received counseling to relieve the stress. (60RT 11663, 11664, 11670, 11671.) Milner also falsely stated that her therapist had told her she needed

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[62/] Appellant once told VanEssen that she had gotten into an altercation in a parking lot and bopped a woman. (61RT 11853-11854.)

closure of the incident to restore her self-image and self-confidence. (60RT 11670, 11671.) Although the letter also asked for a written apology, Milner admitted that she was really hoping for a quick settlement from appellant. (60RT 11664, 11689.) When that didn't happen, Milner hired a lawyer and filed a lawsuit against appellant for battery. (60RT 11665.) The complaint falsely stated that appellant bashed Milner's head against the steering wheel or dashboard and that the injury left a scar. (60RT 11674.) Milner claimed she told her attorney the truth about what happened but was not sure if she read the complaint before it was filed. (60RT 11675, 11676, 11683.)

Fights Between Xavier and Appellant

Xavier testified that in August 1988, he and appellant had an argument in their Granada Hills house. (60RT 11704, 11705.) When the argument escalated, appellant hit Xavier in his left jaw with her right hand or fist.[63/] (60RT 11706.) The next day appellant complained of pain in her hand. (60RT 11707.) Xavier x-rayed appellant's hand and found a fracture of the knuckle on appellant's little finger. (60RT 11709-11711.) Xavier's orthopedist friend, Dr. Kochsiek, set appellant's finger.[64/] (60RT

[63/] Xavier earlier told prosecution investigator Barnes that this injury occurred in 1994 and then changed it and said it was 1996 or 1997. (63RT 12303.)

[64/] Kochsiek, who also knew appellant, never saw the two of them fight and never knew them to have marital troubles. (62RT 11911.) (continued...)

11712.) Xavier didn't tell anyone how the injury occurred because he was ashamed and embarrassed. (60RT 11713.)

According to Xavier, on another occasion, appellant gave him a black eye. (60RT 11713.) Xavier could not remember when that occurred or any details about the incident other than a belief that it took place in the Camarillo house when the children were not present. (60RT 11713, 11714.) The next morning, at appellant's suggestion, Xavier covered the bruise with her make-up, but VanEssen asked him about his eye when he went to work. (60RT 11716, 11717.)

VanEssen testified that on a Monday in 1996 or 1997, appellant called her in the morning and said that she would not be in to work and Xavier would be in but with a black eye. (61RT 11855, 11871.) Appellant told VanEssen that she threw a jewelry box in Xavier's direction. (61RT 11856, 11860.) Xavier told VanEssen the same thing when he got to work.[65] (61RT 11856.)

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[64](...continued)
Sometime before 1991 and probably before March 1989, he treated appellant for a "boxer's fracture" of her right hand. (62RT 11913.) He believed appellant told him how she injured herself but could not recall what was said. He would have remembered if she said she hit someone. (62RT 11914.)

[65] On March 28, 2001, Xavier told Barnes that appellant gave him a black eye in 1997. (63RT 12298.) Xavier said that appellant was yelling at him and he pushed her or held her away and she hit him. He put makeup on his eye and told VanEssen what happened when she saw his eye. (63RT 12299.) Xavier did not say anything about a jewelry box. (63RT 12300.)

Xavier testified about another incident in the late 90's when he and appellant were arguing in their bedroom. (60RT 11718, 11719.) Xavier could provide few details about what took place but claimed that appellant said something like "This is yours. I won't need it anymore," and threw a jewelry box at him, hitting him in the right eye. (60RT 11720, 11722.) The box contained a pearl necklace that Xavier had recently given appellant. (60RT 11721.) When appellant went to his regular ophthalmology appointment in February 1998, his doctor diagnosed him with a corneal condition in his right eye that required laser surgery.[66/] (60RT 11723, 11724.) Xavier told the doctor that he probably got the injury from wrestling with one of his boys and didn't mention being hit with the box because he was ashamed and embarrassed. (60RT 11725.)

Xavier recalled another incident in the late 90's when he and appellant were arguing in the Camarillo house and appellant threw a "C" battery at him but missed and tore a hole in their screen door. (60RT 11726-11731.)

Xavier described another incident in the late 1990's when he and appellant got into an argument in the bathroom as he was getting ready for work. (60RT 11732.) Appellant threw a 3 pound

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[66/] Dr. Yook saw Xavier in February 1998 and noticed a retinal tear that was not present when he last examined Xavier in April 1997. Yook testified that a retinal tear can happen spontaneously or from trauma or infection. Yook gave Xavier a laser treatment to seal the hole. (62RT 11920-11925.)

box of hot rollers at him. (60RT 11736.) The rollers missed him but broke the bathroom mirror. (60RT 11737.) VanEssen testified that appellant called the office in the summer of 1999 and said she had thrown something at a mirror and the mirror broke so there would be a bill coming in for a replacement mirror. (61RT 11856-11857.)

Another time in the late 90's, appellant got angry during an argument at dinner and threw pizza, dishes, and silverware on the floor before approaching Xavier with a butter knife. (60RT 11741-11743.)

Xavier testified that he did not hit or shove appellant during these incidents. (60RT 11706, 11712, 11715, 11731, 11736, 11742; 61RT 11768.) But, Xavier admitted that he hit appellant 4-6 times in the early years of their marriage but claimed it was always after appellant hit him first.[67] (61RT 11767, 11768.) According to Xavier, starting in 1988 he would run away from appellant rather than hit her back. (61RT 11768.) By 1999, he claimed he tried not to do anything to upset her and would instead talk quietly or go along with whatever appellant wanted. (61RT 11768.)

On cross-examination, Xavier admitted that one time during the 1990s he and appellant attended a concert with VanEssen and

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[67] VanEssen testified that appellant never complained about Xavier hitting her and she never saw bruises on appellant. (61RT 11859.)

her husband. Xavier became angry at a restaurant before the concert because he thought appellant was receiving too much attention from the bartender. When they got home, Xavier continued yelling at appellant for talking to the bartender rather than him. Xavier went outside and yelled "my wife likes bartender cock" loud enough for appellant to hear him inside the house. (61RT 11796.) Xavier went back in the house and he and appellant slept together that night. (61RT 11798.) The incident with the thrown jewelry box might have occurred the next day.[68/] (61RT 11798.)

Xavier also acknowledged on cross examination another incident where he and appellant fought in the garage after an argument that began in the kitchen. Xavier said he went into the garage to get away but appellant followed him and started yelling. (61RT 11822.) When appellant got too close to him, Xavier pushed her back and appellant kicked him in the groin. Appellant and her mother got into the car to leave, but Xavier bent the antenna of the car and hit the hood of the car with his fist before they could drive away. (61RT 11799-11802, 11822-11824.)

Within a month or two of the garage incident, Xavier punched

[68/] VanEssen believed the concert was on a Saturday in 1997. (61RT 11862, 11871.) VanEssen knew that Xavier and appellant had a fight the weekend of the concert but she couldn't recall if the black eye incident was the same weekend. (61RT 11862.)

appellant so that she "flattened like a sack of potatoes." (61RT 11805.) Xavier explained that appellant started punching him in a hotel room in San Diego in 1986 so he punched her in the face and hit her in the jaw causing her to fall like a sack of potatoes. Appellant got up and came towards him but a bellman knocked and asked them to be quiet. (61RT 11825-11827.)

In September 1995, Xavier forced himself on appellant by getting on top of her and not letting her move because appellant was not having sex with him often enough. (61RT 11803-11804.) Xavier also admitted that on at least three or four occasions he grabbed appellant and left bruises on her arms. (61RT 11805.)

The Children

Xavier narrated a video showing three scenes: Joey playing in a t-ball game, Christopher as a baby crawling up the stairs while Joey and Michael encouraged him and goofed off, and Xavier kicking a soccer ball with Joey and Michael while holding Christopher. (61RT 11788-11789; Ex. 6.)

Xavier also testified about the boys. Joey had attention deficit disorder and had a hard time fitting in with other kids. (61RT 11770.) He was an excellent student who started reading at age 3 and had a great memory. (61RT 11771.) Xavier liked to take Joey to the movies, especially Star Wars movies. (61RT 11772, 11773.) Michael was a gentle, loving boy and the most athletic of the kids. Michael and Christopher were best friends who slept

together. (61RT 11776-11779.) Christopher was a lively child who liked to joke and laugh. (61RT 11779-11782.) Gabriel was the baby who followed his brothers around like a puppy. (61RT 11784.) He called his brothers, "the guys." (61RT 11785.) When Xavier brought Gabriel back to the house a week or two after the shootings, he walked around saying "Guys? Guys?" (61RT 11786.)

Xavier acknowledged that appellant was present for the activities he engaged in with the children. (61RT 11814.) Appellant would arrange Xavier's schedule at work so he would have time to spend with the kids. Appellant would also change her schedule so the kids could participate in activities. Appellant often came home from activities with the kids and would tell Xavier about funny happenings that took place. (61RT 11815-11816.) Appellant always seemed genuinely happy when she talked about the kids, and the kids appeared to love appellant very much. (61RT 11817.) Appellant had hundreds of the kids' school projects and papers around the house. (61RT 11849.)

The Caros' housekeeper during 1999 often saw the four boys playing together. Michael seemed to enjoy Gabriel the most, always holding him and paying attention to him. When Gabriel saw pictures of his brothers after their death, he would say "Hi guys." (61RT 11846-11848.)

DEFENSE CASE-PENALTY PHASE

Appellant's Early Life, Parenting, and Character[69/]

Appellant was a happy, loving, obedient child who was full of energy and had no history of behavioral problems or health problems. (62RT 11931-11932; 63RT 12186, 12192-12193; 65RT 12514.) Her parents never used physical punishment to discipline her. (62RT 11931.) The family had a swimming pool and a boat and season tickets to professional football. (62RT 11932-11933.) Appellant collected dolls and her father bought and restored antiques for her to store her dolls in. (62RT 11933-11934.) The Leon side of the family was large (Greg had 10 brothers and 1 sister) and close and appellant was close to and protective of her many younger cousins. (62RT 12133, 12137; 65RT 12512-12515.)

When appellant was about 10, her older brother fathered a child, Francisco, who lived with appellant and her parents. Francisco was diagnosed with brain cancer when he was six weeks old and died after a long hospitalization. Appellant was quite upset about Francisco's death. (62RT 11957-11958.)

Appellant graduated from Canoga High School in 1975 with a "C" average. (62RT 11934, 11939.) She played basketball and volleyball and was a cheerleader. (62RT 11934.)

69/ Numerous people in appellant's life testified on her behalf including her father, her maternal aunt, her paternal aunt, her cousin, Joey's godparents, her former boyfriend, her former employer, her chaplain at the jail, and six of her children's teachers.

Appellant had only two boyfriends: Armando Valencia, whom she began dating in high school, and Xavier. (62RT 11936.) Appellant lived with her parents until she married Xavier when she was 28 and maintained a close relationship with them even after her marriage. (62RT 11939, 11965.)

Appellant was loving and protective of her boys. She taught thm how to swim, took care of their health needs, clothed them well, and had parties to celebrate their many events.[70] (62RT 11953-11955.) Sally Guzman, appellant's maternal aunt, described appellant as a good, patient mother with happy children. (63RT 12194.) Denice Leon, appellant's paternal aunt by marriage who was also Gabriel's godmother, described appellant as a loving and caring mother who disciplined her children with time outs. (65RT 12512, 12515-12516.) David Leon, appellant's younger cousin, described appellant as a "genuine" mother. (62RT 12133.)

Family members had never seen or heard of appellant acting violently and were unaware of physical violence between appellant and Xavier. (62RT 11939-11940; 65RT 12514.) Likewise, Valencia, a captain with LA City Fire Department and appellant's boyfriend from high school until she met Xavier in her late 20's, found appellant to be an easy person to get along with and who was never violent to him or anyone else. (62RT 12115-12118.) Dr.

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[70] Greg identified various photos of appellant and the boys and other family members at Joey's baptism and Christopher's baptism. (62RT 11952-11953.)

Albert Campaign, an internist who once shared a practice with Xavier, employed appellant as his back office nurse for two years in the early 80's. Campaign found appellant to be a sweet, caring, compassionate woman who never displayed a temper and was an 11 on a scale of 1 to 10 as a back room nurse. (63RT 12175-12179.)

Guzman loved appellant unconditionally and did not want appellant to get sentenced to death. She planned to maintain her close relationship with appellant no matter what. (63RT 12200.) Denice also loved appellant, remained close with her, and did not believe appellant should be put to death. (65RT 12516.)

Appellant's cousin, David, was also a pastor who ministered to appellant and her family from the night of the shootings until the summer of 2001 when he went on a mission to Nigeria. (62RT 12135.) Based on his knowledge of appellant's Christian background, David believed she had a genuine understanding of the Lord and was not simply a "jailhouse conversion." (62RT 12141, 12142, 12144.) Although their sessions were confidential, appellant never confessed that she killed her children, and she cried every time they talked about her boys. (62RT 12151, 12157.)

Margaret Oberon, a chaplain for the Ventura County jail, ministered to appellant about an hour each week for the two years appellant was in jail. (65RT 12503-12505.) Their communication was confidential but appellant never confessed to killing her

children. (65RT 12505.) In Oberon's opinion, appellant was a faith-filled person with a lot of compassion, caring, inner strength and courage. (65RT 12506.) She described appellant as having a strong and unwavering faith in God. (65RT 12508.) Appellant encouraged others in jail and was a positive influence. (65RT 12507.) Oberon had been ministering in the jail for 16 years and appellant was only the second inmate for whom she provided testimony because she only testified when she felt strongly. (65RT 12509-12510.)

The children's teachers talked about the many hours appellant spend volunteering in the kids' classrooms and their observations of appellant as a friendly, caring, affectionate, and loving mother who was attentive to the needs of each of her children. (62RT 12074-12081, 12085-12091, 12098-12101, 12110-12111; 63RT 12208-12215; 65RT 12495-12500.) Two of the teachers saw appellant with Joey after school on the day he was killed and observed that they were happy and affectionate together, as usual. (62RT 12103; 65RT 12498.) Appellant's convictions for murdering her children did not change their view that appellant was an outstanding mother. (62RT 12082, 12093; 63RT 12216.)

The parties stipulated that appellant had no prior convictions. (62RT 12130.)

Appellant's Mental Health

The night of the shootings appellant had a blood alcohol

level of .13 obtained using blood drawn from appellant at 12:30 a.m. on November 23, 1999. (61RT 11881-11883.) For a woman weighing 125-140 pounds, that correlated to having had three drinks that evening. (61RT 11893.) At that blood alcohol level, appellant might feel sedated and be staggering and would not be processing information as well as if she had not ingested alcohol. (61RT 11887-11888.)

Appellant's urine was positive for Prozac and benzodiazepines.[71] (62RT 12027, 12034, 12036-12038.) There was an additional compound present which the toxicologist could not definitively identify but which she believed to be a metabolite of Tenuate.[72] (62RT 12044-12048, 12062-12064.)

Kady Nygren, a marriage and family therapist, started seeing appellant on September 23, 1999. (62RT 11966-11968.) Appellant had been referred by Lynn Allen, Xavier's therapist. (62RT 11969, 11978-11979.) Appellant was 40 minutes late for her first appointment and explained that her husband was supposed to come home early to babysit but forgot. Appellant didn't want to call Xavier at his office and ask him to come home because she didn't

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[71] The parties later stipulated that appellant had 10 nanograms/milliliter of Xanax in her blood. (65RT 12620.)

[72] Appellant's toxicology screen was also positive for Lidocaine and Metazolam, two drugs often administered by emergency personnel. (62RT 12034.) The toxicologist could not quantify the amount of Prozac because Prozac and Lidocaine are structurally similar compound. (62RT 12041-12044.)

want to be controlling. Appellant was very fidgety and anxious and kept apologizing for being late. (62RT 11970.)

When they met a week later, appellant discussed marital problems and financial issues. (62RT 11973.) Appellant reported having unstable moods, depression, and marital problems dating back to the birth of her third child. (62RT 11992.) Nygren detected anger issues based on appellant talking about verbal outbursts and pushing and shoving with her husband. (62RT 11974.) Appellant mentioned being fired in August 1999 without even receiving a note of appreciation or a gold watch. (62RT 11975, 11992, 11997.) Nygren thought appellant seemed angry about that. (62RT 11997.) Based on those two sessions, Nygren provisionally diagnosed appellant with major depression, recurrent with the first episode being after the birth of her third child and the second being the current episode. (62RT 11972, 11998-12000.)

After their second meeting, Nygren asked appellant to start writing down her angry feelings and what triggered them. She also advised appellant not to do any touching while angry. (62RT 12005-12006.) Appellant missed her next session on October 7 after expressing concern about the two therapists talking to each other.[73/] (62RT 12006.)

Appellant and Nygren did not meet again until November 4.

[73/] Appellant and Xavier had consented to their therapists sharing information with one another. (62RT 11977-11979.)

(62RT 11975.) Appellant wanted to talk about Joey at that session which Nygren tried to discourage since they were supposed to be working on marital issues. (62RT 11976, 12008.) Nygren found appellant to be somewhat grandiose about her family in that session, especially concerning her children. (62RT 12007-12008, 12013.) In Nygren's view, appellant had a poor sense of self meaning appellant did not really understand where her feelings began and ended and where someone else's feelings began and ended. (62RT 11979.) She found appellant hesitant to talk about certain issues such as her anger. (62RT 11980.) Nygren knew appellant was taking Prozac prescribed by Xavier and advised appellant to get a neutral prescriber, but appellant said she was comfortable with Xavier. (62RT 11982-11983.)

At their session on November 17, five days before the shootings, appellant was concerned about Xavier's loyalty to the family. (62RT 12010.) Nygren felt that appellant was not really interested in counseling. (62RT 12010.) Nygren had no concerns about appellant being suicidal nor had Xavier's therapist conveyed any concerns. (62RT 11981, 12010, 12011.) Nygren last spoke with appellant on November 20. She believed appellant had not had any angry outbursts and was being helped by Prozac. (62RT 11985, 12012.)

Dr. Daryl Matthews, a forensic psychiatrist, was retained by the prosecution in January 2000. At that time he reviewed

documents including police reports and taped statements and gave the prosecution an opinion about whether appellant suffered from a diagnosable mental condition when her children were killed. (63RT 12231.) Matthews didn't interview appellant then but interviewed appellant at the request of the defense two days before he testifed. (63RT 12231, 12263, 12269.) His basic opinion did not change between the two evaluations.

In Matthew's opinion, appellant was suffering from a non-psychotic depression at the time of the shootings. (63RT 12234, 12258, 12260, 12277.) Matthews explained that depression can cause a deterioration in a person's functioning without the depressed person even recognizing it. (63RT 12237.) Matthews also believed appellant was intoxicated that night. (63RT 12247, 12258, 12282, 12292.) He explained that Xanax can cause drowsiness and a state similar to intoxication. When Xanax is taken with alcohol, it can heighten the effects of the alcohol.[74/] (63RT 12241.) Matthews believed the homicides and suicide attempt were more attributable to appellant's depression than the effects of alcohol and medication. (63RT 12247.)

Matthews studied mothers who killed their children. (63RT 12248.) He explained the three types of motivations generally attributed to such women: (1) the mother is suicidal and believes

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[74/] Matthews could not opine on what effect the addition of Prozac to the alcohol and Xanax might have had. (63RT 12244.)

her children are better off dead than without her; (2) the mother feels that her children do not exist independent of her and cannot distinguish where she stops and her children start; and (3) the mother is seeking revenge on the children's father. (63RT 12250.) Revenge is the least common motive and is not typically associated with a suicide or suicide attempt. (63RT 12251.) In Matthews' opinion, appellant fell into the first group: depressed and suicidal women who kill their children whom they love to prevent something bad from happening to them. (63RT 12254, 12257.) Matthews was confident of this assessment even though appellant didn't consider herself suicidal. (63RT 12258.)

Dr. Ines Monguio, a clinical neurologist, assessed appellant in the summer of 2000. (64RT 12313, 12316.) Monguio interviewed appellant, administered a battery of tests, and read police reports, witness statements, appellant's testimony, and appellant's medical records. (64RT 12318-12321, 12391.) Monguio noted it was very difficult to reconstruct appellant's mental state from before appellant suffered her traumatic brain injury. (64RT 12321.)

Monguio spent five hours with appellant over the course of three days and administered 12 tests. (64RT 12378-12380.) Several of the tests showed that appellant was still experiencing residual brain effects from the shooting seven months later. (64RT 12324-12328.) Appellant's IQ was 100 with some sub-tests

showing below normal scores. (64RT 12321.) Monguio estimated that appellant's IQ was closer to 110 before the injury. (64RT 12323, 12411.)

Monguio assessed appellant for faking or malingering throughout her testing. (64RT 12333-12336.) The scoring on appellant's MMPI indicated that appellant answered questions favorably in an intentional effort to look good. (64RT 12414.) Monguio wrote in her report that appellant "minimized or outright denied any problems in the marriage, faults in her husband and herself and any dysfunction in the family dynamics even in the face of strong confrontation." (64RT 12413.) Monguio noted that appellant tended to present everything in glowing terms: her husband, her lifestyle, her husband's parenting, her husband's treatment of her, her entire marriage, and her entire life. (64RT 12479.) Some of appellant's descriptions were out of touch with reality as shown by evidence that appellant's marriage was abusive. (64RT 12480.) Monguio explained that making oneself look better is part of a dependent personality. (64RT 12413.)

The computer-generated MMPI report stated that appellant's profile indicated appellant had:

> [a] moderate level of emotional instability, over controlled much of the time. She is apt to be described as impatient, narcissistic, moody, and excitable in transitory episodes.

> The pattern is predictive of aggressiveness towards family members and in some similar cases the patients made dissociative assaults on their husbands and children. (64RT 12433.)

The MMPI scoring also supported a diagnosis of depression. (64RT 12465.)

Based on her assessments, Monguio diagnosed appellant with chronic depression with mood congruent psychotic features, alcohol dependence without physiological dependence, alcohol abuse,[75/] and dependent personality.[76/] (64RT 12340, 12341.) Appellant consistently denied to Monguio that she was depressed, but she admitted symptoms of depression including experiencing feelings of sadness and preoccupation about having lost her job as well as feelings of worthlessness and guilt, gaining 61 pounds after Gabriel's birth, waking up often during the night, and feeling tired because she had so much to do. (64RT 12415, 12454-12459.) Monguio diagnosed a psychotic component to the depression

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[75/] Appellant answered true to the question whether she had ever gotten angry and broken furniture or dishes when she was drinking, but she never acknowledged to Monguio any alcohol problems. (64RT 12423, 12448, 12451.) Appellant did state that she had been drinking more at the time of the shootings to accompany Xavier's drinking. (64RT 12449, 12468.)

[76/] Dependent personality disorder is a long-term pattern of adaptation in functioning that results in a person having difficulty behaving on their own without deferring to others. People with this disorder have a fear of abandonment or being left alone. (64RT 12342.)

based on appellant's purported belief that she would be left destitute if Xavier left that night. (64RT 12354.)

According to Monguio, Prozac decreases depression and irritability; therefore, if appellant was not depressed then taking Prozac would have left her feeling uncomfortable. (64RT 12356, 12455.) Alcohol is contraindicated for both Prozac and Xanax and when alcohol and Xanax are taken together, they can cause diminished consciousness including blackouts where a person is not aware of her environment. (64RT 12362.) Monguio believed appellant blacked out the night of the shooting based on her consistent last memory of putting a pitcher of margaritas on the bathroom counter and then getting tunnel vision. (64RT 12363.) Monguio thought appellant's amnesia could be a result of her brain trauma but noted that both alcohol and Xanax can interfere with effectively storing memory. (64RT 12364, 12366.) Monguio concluded that appellant's amnesia was genuine and had both a physiological and psychological component. (64RT 12436.)

In Monguio's view, on the night of the shootings, appellant was under the influence of central nervous system depressants and high levels of stress. She also had a deep belief that she was vulnerable to abandonment by Xavier. These factors rendered her incapable of appreciating the nature and consequences of her actions. (64RT 12440.)

QUESTIONS RAISED ABOUT XAVIER

The evidence at trial raised a litany of questions about Xavier's involvement. These questions cast doubt both on Xavier's credibility and on appellant's guilt and are important to consider when assessing the prejudice from the errors raised in this brief. These questions include:

- ✓ Why did Xavier stay on the phone with appellant for over 7 minutes if he did not want to talk to her and she was dreadful and incoherent?
- ✓ Why could Xavier, who had a tremendous memory for certain topics, remember almost nothing about this conversation?
- ✓ Why did Xavier not plug the phones back in and turn off the lights at his office if he had time to work for at least 10 minutes after he talked to appellant?
- ✓ Why did an experienced doctor see appellant with a bullet wound to her head and tell the 9-1-1 operator she overdosed or slit her wrists?
- ✓ Why did Xavier need to be asked by the 9-1-1 operator about children in the house before checking on his children?
- ✓ Why didn't Xavier look for Gabriel who was in his crib in the same bedroom as appellant until after he checked on his other children?
- ✓ Why did Xavier put the phone on speaker phone and make sure the 9-1-1 operator could hear him before he went to check on his children?
- ✓ Why weren't Xavier's fingerprints on the gun when he claims to have picked it up, opened it, and moved it?
- ✓ Why did Xavier have virtually no blood on his clothing and no blood on his hands when he claimed to have checked his children for pulses and started CPR on Michael?

- ✓ Why was appellant's shirt pulled up over her breasts when the paramedics arrived?

- ✓ Why did appellant have bruising on her inner thighs?

- ✓ Why did Xavier call Juanita 6 minutes before the 9-1-1 operated documented that a child was still breathing?

- ✓ Why did Xavier tell Juanita "Wait til you hear the 9-1-1 call" and later describe for Juanita how the children were killed?

- ✓ Why did Xavier have the suitcase containing $200,000 worth of appellant's jewelry the night of the shootings?

- ✓ What did Xavier remove from the house that night in his bag?

- ✓ How did the note written by Lorie Leon which Xavier falsely attributed to appellant and appellant's emails get in appellant's work boxes?

- ✓ Why did Xavier falsely accuse appellant of stopping the grandfather clock at a suspicious time?

- ✓ How did the grandfather clock stop when the pendulum had not run out?

- ✓ Why didn't Xavier ever give appellant the combination to the gun safe if he bought the guns for home protection?

- ✓ Why had Xavier begun marking appellant's drink glass with a twist tie?

Appellant incorporates this list of questions into the prejudice section of each claim raised in this brief.

ARGUMENT

JURY SELECTION ISSUES

I.

APPELLANT'S RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDINGS WAS VIOLATED WHEN THE COURT, THE PROSECUTION, AND THE DEFENSE AGREED VIA EMAIL TO EXCUSE 62 PROSPECTIVE JURORS WHO HAD ALREADY PASSED THE INITIAL HARDSHIP SCREENING AND FILLED OUT A JURY QUESTIONNAIRE

Jury selection began on July 17, 2001 with the court having prospective jurors fill out a form if they were requesting a hardship. (6RT 785.) The court wanted to conduct the hardship discussions in chambers and asked defense counsel if appellant "would waive her presence for purposes of the discussion on hardship and whatever the parties basically stipulate to?" Defense counsel, without any discussion with appellant, replied, "Yes, your honor." (6RT 768.) The court and counsel subsequently discussed the hardship forms in chambers.

By the end of the court day on July 23, twelve jury panels had been sworn and 221 questionnaires had been filled out. (9RT 1373, 1425.) On July 27, when court next convened, the court announced that the court and the parties had agreed via email exchanges to excuse 62 jurors. (9RT 1432-1433.) The emails, which

the court made part of the record, included stipulated excusals for both hardship and cause. (3rd Supp.Ct 109-128.) One lengthy email listed the 62 names for excusal with a notation that 14 of the 62 were for hardship. No reasons were provided for the other 48 excusals. (3rd Supp.Ct 114-115.) Nothing in the record shows that appellant had any role in these email exchanges or that appellant consented to such a process.

Under the Fourteenth Amendment, a criminal defendant has a due process right to be present at any stage of the trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and "to the extent that a fair and just hearing would be thwarted by his absence." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106, 108 [overruled in part on other grounds *Malloy v. Hogan* (1964) 378 U.S. 1, 17].) "A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.) Jury selection is a critical stage of trial at which a defendant has a constitutional right to be present. (*Gomez v. United States* (1989) 490 U.S. 858, 873.) The United States Supreme Court has specifically noted that "defense may be made easier if the accused is permitted to be present at the examination of jurors ..., for it will be in his power, if

present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." (*Snyder*, 291 U.S. at p. 106.)

Although constitutional rights can be waived, that waiver must be knowing and intelligent (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 237-238), and a waiver of constitutional rights will not be presumed or lightly inferred. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

In addition to being protected by the federal constitution, the right to be present at trial is also mandated by the state constitution[77] and a state statute which requires that any waiver of presence be done in writing.[78]

Appellant never waived her presence at jury selection. While

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[77] Cal. Const., Art. I, § 15 provides, "The defendant in a criminal cause has the right . . . to be personally present with counsel, and to be confronted with the witnesses against the defendant."

[78] Penal Code section 977, subdivision (b), states in relevant part:

> (1) In all cases in which a felony is charged, the accused shall be present . . . during those portions of the trial when evidence is taken before the trier of fact . . . .., and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2).

appellant's counsel purported to waive appellant's presence for hardship discussions in chambers, counsel neither discussed that waiver with appellant nor secured appellant's consent either orally or in writing. Moreover, no one, including counsel, waived appellant's presence for the post-questionnaire excusals many of which were apparently made for reasons other than hardship, including cause. In fact, appellant later requested to be present when the court and attorneys questioned a juror privately regarding cause and her requested was granted. (12RT 1935.) Appellant's absence for the email excusal decision making was error.

The Supreme Court of Washington recently found the use of email to decide jury excusals outside the courtroom and outside of a defendant's presence to violate a defendant's right to due process. (*State v. Irby* (Wash. 2011) 246 P.3d 796.) In *Irby*, the parties agreed they would mot appear on the first day of jury selection in the murder trial when the prospective jurors would fill out their questionnaire, but they would appear on the second day. But, on the afternoon of the first day, the court sent both the prosecutor and defense counsel an email discussing 10 of the prospective jurors and saying if they were going to dismiss any of those jurors, the court preferred to do it that day. Shortly thereafter the parties agreed to excuse 7 of the 10 jurors referenced in the email (6 for hardship and 1 because a parent

had been murdered). Nothing in the record indicated that the defendant, who was in custody, had been consulted about the dismissals. The rest of jury selection took place in open court. (*Id.* at pp. 877-879.)

The court in *Irby* found that the defendant's absence violated both Washington state law as well as the Fourteenth Amendment right to be present at all critical stages of a trial. The court analogized the email exchange as more like jury selection than like a sidebar conference and noted that the email did not address the general qualifications of the jurors, but rather their fitness to serve in the case. The court emphasized that evaluating a specific juror for fitness as a juror after reviewing a questionnaire is fundamentally different than determining if a juror has a hardship. (*Id.* at pp. 880-884.)

The *Irby* court applied a harmless error analysis and found the state had not met its burden of showing that the excused jurors had no chance to sit on the jury. The court premised its finding on the jurors having been excused without being questioned because questioning might have established that the jurors could have served. Because the presence of one or more of the excused jurors on the jury panel might have affected the verdict, the court reversed the defendant's murder conviction. (*Id.* at pp. 886-887.)

In contrast to *Irby*, this Court has repeatedly rejected

claims that a defendant's absence from some aspect of jury voir dire violated federal or state constitutional law or state statute. (*See e.g. People v. Virgil* (2011) 51 Cal.4th 1210, 1236 [defendant absent from sidebar discussion but allowed to discuss with counsel what took place before the court took any action]; *People v. Kelly* (2007) 42 Cal.4th 763, 781-782 [defendant absent for several excusals for cause]; *People v. Rogers* (2006) 39 Cal.4th 826, 855-856 [defendant absent for chambers conference regarding hardship excusals]; *People v. Benavides* (2005) 35 Cal.4th 69, 89 [defendant absent for a discussion between the attorneys about prospective jurors when the court was not in session].)

In a somewhat related situation, this Court held that a defendant's presence at "counsels' jury screening discussions" would serve little purpose; therefore, the defendant's absence would "bear no reasonable, substantial relation to his opportunity to defend the charges against him." (*People v. Ervin* (2000) 22 Cal.4th 48, 74.) In that case, the parties had agreed to a screening procedure whereby counsel for both sides would jointly review the 600 questionnaires and stipulate to screen out "strong candidates" for excusal: those who would automatically vote for death or who would never vote for death and those with financial or physical hardship. Those prospective jurors for whom a stipulation was entered were then excused without voir dire.

(*Id.* at pp. 72-73.) This Court found no due process or statutory violation because defense counsel stipulated to the process which was just a preliminary screening, and the defendant had not established that his absence prejudiced him or denied him a fair trial. (*Id.* at p. 74.)

The analysis in *Irby* court more fully comports with United States Supreme Court law and should be followed. The United States Supreme Court emphasizes fairness in evaluating a defendant's right to be present. (*See e.g. Snyder*, *supra*, 291 U.S. at pp. 107-108; *Stincer*, *supra*, 482 U.S. at p. 745.) While not all defendants take an active role during their trial, that does not minimize the fairness of defendants being present to see, hear, and understand what is taking place in a proceeding of critical importance to their future. No one can predict what might be said or done that might prompt some important input from the defendant.

In appellant's case, a jury was being selected to sit in judgment of her and potentially determine whether she would live or die. It would be hard to imagine a more compelling reason for appellant to be present for all decisions related to selecting those jurors who would hold her fate in their hands. Even if appellant cannot specifically identify what input she might have given had she been present --a highly speculative endeavor given the absence of information about why the jurors were excused--

her absence from what is arguably the most critical part of a capital trial cannot fairly be deemed harmless.

The very error at issue --that important proceedings took place without appellant's presence- renders it virtually impossible for appellant to make a showing of prejudice. The record reveals little about why 62 jurors were excused after they passed an initial hardship screening and filled out a lengthy questionnaire. The emails did not discuss any criteria for excusal, unlike the *Ervin* case where at least the parameters for excusal were agreed upon in advance. Not only does the record not show appellant's presence, but, as discussed further in Argument II, the record does not reflect the reasons why most of the 62 jurors who filled out a questionnaire were excused.

Had appellant been involved, she might have discouraged hasty excusals without questioning. After filling out a questionnaire and facing the real prospect of serving on a capital jury, many prospective jurors begin an intensive phase of self-reflection to crystalize what are often amorphous and untested views of the death penalty. Given a few days of introspection, a juror may come to voir dire with views markedly different than the ones initially expressed in the questionnaire. (*See e.g.* discussion in Argument III(A)(1)&(2), below.) It is certainly possible that if appellant had been privy to the jury questionnaires and the decisionmaking before the dismissals, she

might have encouraged counsel to question some or all of the jurors before deciding whether the juror should be dismissed.

Appellant had a right to be present for and to know why potential jurors who might sit in judgment of her were excused. The constitution and state statute provide appellant with this right. This Court should carefully reconsider this issue and mandate that defendants, especially defendants in capital cases, be present for all aspects of jury selection unless the defendant has executed a knowing, voluntary, and intelligent written waiver of her right to be present. Because of the importance of jury selection, the state cannot prove beyond a reasonable doubt that appellant's absence did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, appellant is entitled to a new trial where she can be present for all aspects of jury selection.

II.

THE STIPULATED EXCUSAL OF 62 JURORS BASED ON EMAILS EXCHANGED OUTSIDE OF COURT VIOLATED THE STATUTE REQUIRING THAT ALL CAPITAL PROCEEDINGS TAKE PLACE ON THE RECORD

In addition, and as a separate claim of error, the email excusals discussed in Argument I violated Penal Code section 190.9 which requires that all proceedings in a capital case be conducted on the record with a court reporter present. By deciding 62 juror excusals via email, the court and the parties deprived appellant of any meaningful appellate review of these excusals, particularly those for cause. (*People v. Bennett* (2009) 45 Cal.4th 577, 588-589.) A record that does not permit adequate and effective appellate review violates the Fourteenth Amendment. (*Griffin v. Illinois* (1956) 351 U.S. 12, 20.) Likewise, a record must be sufficient to protect a defendant's Eighth Amendment right not to be arbitrarily sentenced to death. (*People v. Howard* (1992) 1 Cal.4th 1132, 1166.)

Cause challenges in a capital cause are fraught with potential for error. For example, this Court recently reversed a death sentence because the court excused a juror for cause based solely on her questionnaire responses without conducting any voir dire. (*People v. Riccardi* (2012) 54 Cal.4th 758, 778.) In appellant's case, because the court and the parties provided no

basis for excusing most of the 62 jurors, appellate counsel and this Court cannot determine whether any of those excusals were erroneous dismissals for cause. The inclusion of the jurors' questionnaires in the record does not satisfy Penal Code section 190.9 because the record does not disclose that any jurors were excused because of specific questionnaire responses, because of their views on the death penalty, or for any other reason.

Similarly, the fact that the parties stipulated to the 62 excusals does not insulate those excusals from meaningful appellate review. Defense counsel are not infallible and do sometimes fail to provide competent representation. Again, appellate counsel and this Court cannot make that determination because there is no record upon which counsel's actions can be scrutinized.

The absence of reasons for the dismissal of 62 jurors who filled out jury questionnaires but were never questioned during voir dire leaves a gaping hole in the appellate record. Jury selection is a critical part of a capital trial. The email process used in this case has deprived appellant of meaningful appellate review of the dismissals, including whether any jurors were wrongly dismissed because of their views concerning the death penalty. The erroneous exclusion of a juror for cause when the record does not support that the juror's decision making is substantially impaired is reversible per se and not subject to

harmless error analysis. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668; *Riccardi, supra*, 54 Cal.4th at p. 783.) Accordingly, because the lack of a record precludes appellant from establishing that any of the jurors were wrongly dismissed because of their views concerning the death penalty, appellant is entitled to a new penalty phase determination.

III.

THE TRIAL COURT ERRED IN DISMISSING TWO JURORS FOR CAUSE OVER DEFENSE OBJECTION WHEN BOTH JURORS SAID THEY COULD IMPOSE DEATH

A. The Court Dismissed Two Jurors For Cause Despite The Jurors Saying That They Could Impose The Death Penalty

1. John Wurdeman

The questionnaire of prospective juror John Wurdeman reflected a thoughtful and analytical man who was highly supportive of the death penalty. (17JQCT[79] 5050-5071.) Wurdeman, a software engineer who had served as a naval officer, was on his second marriage. (17JQCT 5050, 5052, 5054.) He had an earlier, amicable divorce after his first wife had been unfaithful. (17JQCT 5050, 5061.) He was briefly a member of the NRA, kept a M-1 carbine rifle at home for protection, and had an ex-brother-in-law who was an LAPD officer. (17JQCT 5055, 5056.) Wurdeman had served on two prior criminal juries which reached verdicts, and he was the foreman of one of the juries that involved a shooting. (17JQCT 5057, 5071.)

Wurdeman noted that he wanted all of the information he could get when he was on a jury. (17JQCT 5060.) He expressed mild concern about handling photos of murdered children and worried about possible marital issues related to his wife's strong

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[79] JQCT refers to the 18 volumes of Unsworn Juror Questionnaires.

opposition to the death penalty. (17JQCT 5062, 5065, 5067, 5070.) He commented that he would "take a conscious effort" to follow the law and instructions given even if it conflicted with a personal idea or he disagreed with it. (17JQCT 5063.) Wurdeman had heard some basic facts about the case, found it hard to understand how it could happen, and tended to believe appellant had committed the act, but he stated he could still be fair to both sides. (17JQCT 5068-5070.)

Regarding the death penalty, Wurdeman expressed strong support for it where it was clearly warranted. (17JQCT 5064, 5065.) Wurdeman believed that the death penalty served as a deterrent and, although it depended on circumstances, he tended to favor it for the murder of children. (17JQCT 5065.) Wurdeman's gut reaction was against applying the death penalty to a woman, but he acknowledged that it could be clearly warranted. (17JQCT 5065.) Wurdeman opined that the death penalty was sought too seldom and not imposed often enough and said he would have "strongly favored it" had he been a juror in several publicized cases. (17JQCT 5065.)

Two weeks after filling out his questionnaire, Wurdeman said he had not really thought about his position on the death penalty until after he filled out his questionnaire. (10RT 1507-1508.) After that, he thought about it more thoroughly and concluded that based on personal concerns and convictions he thought it

very unlikely, but not impossible, that he could vote for death. (10RT 1508.) Wurdeman absolutely did not want to have to look at the evidence in this case, but recognized that someone had to do it. (10RT 1533.) Wurdeman told the court that despite his current thinking he could be fair to both sides. (10RT 1508.)

When questioned about why he had changed his position on the death penalty after filling out his questionnaire, Wurdeman explained that he had not really changed his position about the death penalty per se, but thought it would be difficult to apply knowing what he knew about this case. (10RT 1509.) He denied having any preconceived notions about the case, but agreed that there were other types of cases where he would have less hesitancy than he was experiencing with this case. (10RT 1510-1511.) Wurdeman absolutely did not want to be involved in the case, but recognized that someone had to do it. (10RT 1532-1533.)

Wurdeman said that his wife was against the death penalty and he had concerns about that but he could abide by the admonition not to discuss the case with her. (10RT 1512.) In addition, while it would be a difficult decision with personal ramifications, he would be able to put aside his wife's opinions while serving as a juror. (10RT 1513-1514.) He acknowledged having concerns about the long-term effects on his relationship if he were to vote to impose death and said he would worry about that. (10RT 1592-1593.) He also thought that might impair his

ability to impose death. (10RT 1593.) On the other hand, he considered himself a death penalty supporter and would vote for it on a ballot. (10RT 1593.) He could easily impose it on "McVeigh" but termed it an "effort" to think about imposing it on a woman. (10RT 1593.) When asked whether he could actually do it after sitting through the trial and hearing the evidence, Wurdeman replied, "Theoretically, yes. I said it wasn't impossible. I do think the probability is low." (10RT 1594.) He opined that he could do it if he "heard enough factors" that led him to "think it was the right thing to do" and he would use his judgment. (10RT 1594, 1595.)

Based on these answers, the prosecution argued to the court that it had established cause under *Wainwright*[80/] for dismissing Wurdeman because of his "gut" opposition to imposing death on a woman and his issues with his wife's opposition to the death penalty. (10RT 1630-1631.) The defense disagreed, arguing that although Wurdeman said he had some hesitation, he also said he could do it. (10RT 1631.) The court stated that the issue was: "Will a juror's position on the issue of capital punishment affect or substantially impair the juror's ability to be neutral on the question of life in prison without the possibility of parole or death and therefore follow the Court's instructions as to which penalty to impose." (10RT 1631.) The court noted that

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[80/] *Wainwright v. Witt* (1985) 469 U.S. 412.

Wurdeman said he could consider imposing the death penalty, but the court concluded that it was "unlikely" he would vote for death in this case because his present mind-set is "one that substantially impairs his ability to reasonably consider both punishments and to reasonably consider both punishments as a reasonable possibility in this case." (10RT 1631-1632.) The court further opined that in light of Wurdeman's indication in his questionnaire that he did not believe in the death penalty for women, "he would be unable to faithfully and impartially apply the law." (10RT 1632.) The court also surmised that Wurdeman had discussed his views of the death penalty with his wife in violation of the court's earlier admonition. (10RT 1632.) For these reasons, the court granted the prosecution's challenge for cause and dismissed Wurdeman from the jury pool. (10RT 1633.)

2. Douglas Spaulding

The questionnaire of prospective juror Douglas Spaulding revealed an educated and contemplative man who did not offer opinions without knowing as much information as possible. (15JQCT 4476-4497.) Spaulding, the divorced father of two adult children, including a 36-year-old man with multiple mental disabilities, worked as a school administrator in Japan for the Department of Defense for 30 years. (15JQCT 4476-4478, 4480, 4485, 4487.) His former spouse had been unfaithful during their marriage. (15JQCT 4487.) Spaulding was a Democrat who thought handguns should be

banned and who supported the ACLU and women's rights. (15JQCT 4481, 4482.) He had never served on a jury before. (15JQCT 4483.)

Spaulding generally opposed the death penalty, believing it should be reserved for the "most extreme cases." (15JQCT 4490.) He could see no reason for committing a second killing as a solution to a first killing unless there was overwhelming evidence of intent free of mental impairments. (15JQCT 4490.) Instead, he supported life without the possibility of parole over a death sentence, and he would start from that position. (15JQCT 4490, 4493.) Spaulding supported the death penalty more when he was younger, but now believed it was sought and imposed too often and was imposed on too many minorities and women and not enough on white men. (15JQCT 4491.) He could impose a death sentence but would require sufficient evidence to convince him that it would serve a purpose beyond retribution. (15JQCT 4492.) Spaulding saw no reason why he could not be a fair and impartial juror. (15JQCT 4489, 4496.)

Eight days after filling out his questionnaire, Spaulding told the court at the outset of voir dire questioning that he could be fair and impartial to both sides. (10RT 1640.) He acknowledged that he had qualms about imposing the death penalty. (10RT 1642-1643, 1690.) While he could follow the law regarding aggravating and mitigating evidence, he had particular concerns about the appropriate punishment, especially for a person with

mental impairments. (10RT 1643-1644.)

Spaulding discussed his view that killing someone for killing someone seemed ridiculous unless there was proof that the second killing protected society. (10RT 1644, 1690.) That is, Spaulding would be looking for evidence at the penalty phase that appellant was a threat to society. (10RT 1646.) He could not say whether there were other justifications for the death penalty because he had not really spent much time thinking about it until the previous weekend. (10RT 1693-1694.) Spaulding agreed that he could follow the law requiring him to weigh aggravating and mitigating circumstances and impose death if the aggravating factors outweighed the mitigating. (10RT 1647.) He could find death to be appropriate even if the only two options were death and life in prison without the possibility of parole, although he agreed that since both sentencing options offered protection to society, the decision would be very difficult. (10RT 1691, 1693.) Spaulding could not say whether he could impose death in this case because he had not heard anything yet about the case. (10RT 1691, 1692, 1693.) The fact that there might be three murder convictions in this case would sway him towards death but he would have to hear all that was presented. (10RT 1692.)

When asked directly if he could actually impose death on another person, Spaulding answered: "Certainly" and "Yes." (10RT 1691, 1694.) Spaulding stressed that it really depended on what

facts were presented during the six-week trial. (10RT 1692, 1693.) When asked whether he could sit through the entire case and hear all about appellant's life and vote for death depending on the facts, Spaulding replied, "[Y]ou're asking a hypothetical that doesn't have enough basis still for me to answer. So the answer is I can't answer that kind of question. That's too ethereal." (10RT 1694.) When pressed again about whether he could impose death when life in prison without the possibility of parole also served to protect society, Spaulding responded that he could not say he would absolutely not impose death but he had some hesitation and it would be very difficult. (10RT 1693, 1695.) Spaulding also acknowledged that he had just begun thinking more about all aspects of the death penalty after his exposure to this case. (10RT 1693.)

The prosecution moved to excuse Spaulding for cause, and the defense opposed it. (10RT 1700, 1702.) The defense argued that Spaulding knew and understood the rules and said that he needed more information before he could make a decision about imposing death. (10RT 1702.) The court said that Spaulding's answer that "it would be very difficult" constituted cause. (10RT 1702.) The court added that Spaulding indicated he would only consider death in a situation involving future dangerousness and that was not a factor in aggravation or a matter that the jury could hear

information about.[81] (10RT 1702-1703.) The court concluded: "[W]ith that mind-set I think that does substantially impair his ability to be neutral and give serious consideration to both potential punishments in the penalty phase." (10RT 1703.) When the defense objected to the court's views, the court said it would let the defense make a record later but it was not going to change its mind, and the court excused Spaulding. (10RT 1703-1704.) Later, the defense put on the record that Spaulding had specifically said that he would weigh aggravating and mitigating factors and that he could impose the death penalty depending on what the facts were. (10RT 1712-1713.)

B. The Record Did Not Support That Either Juror was Biased or Should Be Excused

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy ... [a] public trial, by an impartial jury...." The state constitution provides the same guarantee. (*People v. Clark* (2011) 52 Cal.4th 856, 895.) Impartiality requires a juror who will "conscientiously apply the law to the facts." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

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[81] The court was incorrect. (*See e.g. People v. Medina* (1995) 11 Cal.4th 694, 767 ["[O]ur cases have generally allowed the prosecutor to argue the defendant's future dangerousness in prison, based on the evidence in the case"]; *People v. Avila* (2006) 38 Cal.4th 491, 610 [although the prosecution cannot present expert testimony regarding a defendant's potential for danger in the future, a prosecutor can cross-examine a defense expert who opines that the defendant does not pose a future danger].)

Thus, a juror in a capital trial would not be impartial if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424.) On the other hand, a juror who personally opposes the death penalty could still be impartial if he can temporarily set aside his own beliefs in order to follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

The United States Supreme Court has made clear that it is impermissible to remove a juror who is not substantially impaired. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.) "A prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled —indeed, duty bound— to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart* (2004) 33 Cal.4th 425, 446.) "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) A prospective juror is not substantially impaired just because his ideas about the death penalty are "indefinite, complicated or

subject to qualifications." (*People v. Pearson* (2012) 53 Cal.4th 306, 331.) As this Court recently declared: "To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process." (*Id.* at p. 332.)

Permitting the exclusion of a juror who can follow the law notwithstanding his own views of the death penalty would "stack the deck" against the capital defendant. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658 [quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 523].) This Court will only uphold a trial court's finding of cause if it is fairly supported by the record. (*Clark, supra*, 52 Cal.4th at p. 895.) The erroneous exclusion of a juror for cause when the record does not support that the juror's decision making is substantially impaired is reversible per se and not subject to harmless error analysis. (*Gray, supra*, 481 U.S. at pp. 667-668; *Clark, supra*, 52 Cal.4th at p. 895.)

In finding that Wurdeman should be excused for cause, the court imposed an incorrect legal standard. The court described the *Witt* standard as: "Will a juror's position on the issue of capital punishment affect or substantially impair the juror's ability to be neutral on the question of life in prison without the possibility of parole or death and therefore follow the Court's instructions as to which penalty to impose." (10RT 1631.) *Witt*, however, does not require that a juror be neutral in his

feelings about the death penalty; it simply requires that the juror be able to set his feelings aside in order to follow the law. (*McCree, supra*, 476 U.S. at p. 176.)

Here, the court's speculations about Wurdeman were either not supported by the record or affirmatively rebutted by the record. First, the court relied solely on Wurdeman's jury questionnaire answer that he did not believe in the death penalty for women to find that Wurdeman could not "faithfully and impartially apply the law." (10RT 1632.) Wurdeman, however, addressed that issue during voir dire. He never said he was categorically opposed to women receiving a death sentence; rather, he said it would be "an effort" to think about it, but it was not impossible.[82/] (10RT 1593, 1594.)

This Court recently addressed the need for voir dire to clarify answers to the questionnaire and reversed a death sentence because the court dismissed a juror solely on the basis of her questionnaire responses without having an opportunity to clarify her thoughts during voir dire. (*Riccardi, supra*, 54 Cal.4th at p. 778.) Wurdeman's voir dire answers demonstrate why follow-up questioning is important when a questionnaire is used. Despite what Wurdeman put in his questionnaire, he explained that after giving the death penalty more thought he realized he could

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[82/] Even the prosecutor acknowledged a lot of people felt that way about imposing death on a woman. (10RT 1593.)

impose death in this case with a female defendant and three murders if the aggravating factors outweighed the mitigating factors. That is, Wurdeman said he would engage in the very task that California requires its capital jurors to engage in. (10RT 1594-1595.)

Second, there is no evidence in the record that Wurdeman discussed his views about the death penalty with his wife after he became a potential juror in this case. (10RT 1632.) The court never specifically instructed the potential jurors that they could not tell their spouse that this was a potential capital case. The court told the jurors:

> Until you are excused, it will be your obligation and you are ordered to not discuss with another person any subject or matter connected to this case or form or express any opinions concerning it.
>
> This means in part that while you may tell your family, employer, and others who may need to know that you are a potential juror in a trial and also inform them of the estimated length of the trial, you may say nothing else about this case and must not permit another to speak of it to you. You are ordered to not discuss your views on the death penalty or research that topic in any way from this point forward. (6RT 836-837, 852-853.)

Certainly one would expect that if a potential juror told his spouse he was in a jury pool for a trial estimated to last 16 weeks, the question of whether the case was a capital case would arise. Wurdeman told the court that he told his wife it was a capital case but said he gave her no details and they did not

discuss it. In addition, Wurdeman said he would have no problem abiding by the admonition not to discuss the case with his wife. (10RT 1512-1513.) There is nothing in the record to support that Wurdeman did anything other than acknowledge to his wife that the 16-week trial for which he was a potential juror was a capital case. That does not support cause for excusing Wurdeman especially when other jurors were not questioned about what they told their family and friends about the trial.

Given Wurdeman's support for the death penalty, his belief that he could be fair, and his promise to weigh the aggravating and mitigating factors to arrive at an appropriate penalty determination, there was no basis for the court to find that Wurdeman was substantially impaired in his ability to be a juror in this case. Accordingly, appellant's death sentence must be reversed. (*Pearson*, *supra*, 53 Cal.4th at p. 333.)

Likewise, the record did not support that Spaulding was biased and met the criteria for excusal for cause. Spaulding's responses were exactly what one would hope for in a juror: he refused to commit to any specific path without the relevant information to be obtained at trial. Spaulding had reservations both for and against death depending on certain factors such as the presence of a mental impairment, future dangerousness, and multiple murders. That is not a surprising position given that those would be among the relevant factors for a juror to consider

in penalty deliberations in this case.

Moreover, Spaulding was unequivocal that he could be fair and impartial and could impose death on another person. There was nothing in Spaulding's questionnaire or voir dire that supported that his views in opposition to the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Spaulding's hesitation to embrace death for appellant signaled his thoughtfulness and the need for further information, not his immutable opposition to ever imposing a death sentence.

Indeed, Spaulding provided grounds for which either the prosecution or the defense might validly exercise a peremptory challenge. The court's excusal of Spaulding for cause over strenuous defense opposition was not supported by the record. By excusing Spaulding, the court violated appellant's right to an impartial jury. Such a violation is not susceptible to harmless error. (*Pearson*, *supra*, 53 Cal.4th at p. 333.) Accordingly, appellant's death sentence must be reversed. (*Id.*)

IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT ACCESS TO THE RECORDS OF ANY INVESTIGATION CONDUCTED OF PROSPECTIVE JURORS BY THE PROSECUTION

The defense moved pretrial for access to all records pertaining to any investigation conducted by the prosecution regarding any prospective jurors. Defense counsel cited *People v. Murtishaw* (1981) 29 Cal.3d 733 and declared that the Ventura County Public Defender's office could not conduct such an investigation because of access and budgetary reasons. (3CT 561-565.) The prosecution opposed the request arguing that in June 1990, Proposition 15 amended the penal code to prohibit the prosecution from having to provide its work product such as jury trial reports and cited Penal Code section 1054.6 and Code of Civil Procedure section 2018(c). (3CT 576-580.)

The parties submitted the issue on their papers, and the court ruled: "Based upon what I believe the law is in the state of California, I concur with the points raised by the district attorney, and, therefore, the motion is denied." (4RT 411-412.)

The trial court erred in denying the defense request. In *People v. Murtishaw, supra*, 29 Cal.3d at pp. 766-767, this Court, under its supervisory power to administer California criminal procedure, declared that a trial court has discretionary power to

provide the defense with access to prospective juror investigation reports that are available to the prosecution so as to minimize the inequity in information available to the parties and prevent the prosecution from having an unfair advantage over the indigent defendant. The court strived to prevent "the untoward image of a system in which the opportunity to rationally exercise peremptory challenges is governed by the size of the litigant's bank account or defense fund." (*Murtishaw*, 29 Cal.3d at p. 767 n.28 [quoting *People v. Williams* (1981) 29 Cal.3d 392, 405].)

In 1992, this Court again addressed a trial court's refusal to provide the defense with any records or reports about prospective jurors held by the prosecution. (*People v. Pride* (1992) 3 Cal.4th 195, 227.) The court held that, even assuming error, proof of any harm was too speculative. (*Id.*)

Appellant has not found any case where this Court has repudiated its ruling in *Murtishaw* regarding defense access to the prosecution's reports on prospective jurors. The prosecution's reliance on Penal code section 1054.6[83/] and Code of

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[83/] At the time of appellant's trial, Penal Code section 1054.6 stated:

> Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subsection (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory

(continued...)

Civil Procedure 2018(c)[84] was misplaced, and the trial court erred in relying on those grounds to deny the defense access to the prosecutor's records and reports.

In seeking access to the prosecution's jury records or results of any investigation of prospective jurors, the defense specifically identified prior convictions, voting preferences, political affiliations, and information regarding prior jury service for prospective jurors. (3CT 564.) Nothing in these requests implicated any of the writing defined in section 2018(c). Rather, the defense sought concrete information about prospective jurors (e.g. prospective juror X was convicted in 1995 of Y, is a registered Republican, and served on two prior Ventura County juries both of which returned guilty verdicts). To

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[83](...continued)
provision, or are privileged as provided by the Constitution of the United States.

[84] Former Code of Civil Procedure section 2018(c), stated:

> Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

Former Code of Civil Procedure section 2018(b), stated:

> Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in injustice.

Sections 2018(b) and (c) are now contained in Code of Civil Procedure section 2018.030.

the extent that the prosecution's choice to investigate any particular prospective juror is considered work product, section 2018(b) specifically addressed the concern that prompted this Court in *Murtishaw* to allow such discovery: to prevent the inequality between the resources of the prosecution and the resources of an indigent defendant. The inequity exists because the prosecution tends to have greater financial resources and access to certain private information that is generally unavailable to defense counsel.

The trial court abused its discretion in denying appellant's request because the prosecutor's arguments were not legally sound. An abuse of discretion standard "reflects the trial court's superior ability to consider and weigh the myriad factors that are relevant to the decision at hand." (*People v. Roldan* (2005) 35 Cal.4th 646, 688.) Here the trial court failed to exercise its superior abilities and deprived appellant of her rightful opportunity to exercise her peremptory choices with the same information that was available to the prosecution.

Without access to the information that the prosecution had, appellant cannot prove prejudice. However, the remedy cannot be to simply find the error harmless. Otherwise, a defendant would always be left without recourse when the trial court arbitrarily denies a defense request for access to the results of the prosecution's investigation of prospective jurors. The proper

resolution would be one analogous to the process adopted by this Court in *People v. Gaines* (2009) 46 Cal.4th 172, 176, for when the trial court abuses its discretion in denying a request for a *Pitchess*[85/] review. That is, this Court should remand to the trial court so that court can review the prosecution's information regarding the prospective jurors and provide the defense with any information that does not qualify as undiscoverable work product under former section 2018(c). Appellant can then make a showing that had the prospective juror information been available to her during voir dire, there is a reasonable probability that the outcome of the trial might have been different. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.)

[85/] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

ERRORS RELATED TO THE TRIAL

V.

THE VENTURA COUNTY SHERIFF'S DEPARTMENT UNLAWFULLY SEIZED APPELLANT'S CLOTHING FROM THE HOSPITAL WITHOUT A WARRANT

The prosecution failed to obtain a search warrant before seizing appellant's clothing from the hospital. Typically, this Court would review a trial court's factual findings on a ruling on a motion to suppress evidence under the deferential substantial evidence standard. (*People v. Hoyos* (2007) 41 Ca1.4th 872, 891 [overruled on another point in *People v. McKinnon* (2011) 52 Cal.4th 610, 641].) That is, the trial court's factual findings would be upheld if they were supported by substantial evidence, but this Court would independently review the trial court's determination that the search did not violate the Fourth Amendment. (*People v. Troyer* (2011) 51 Cal.4th 599, 605.) In this case, however, defense counsel never filed a motion to suppress appellant's clothing or otherwise object to the unlawful seizure of her clothing; thus, the trial court made no factual or legal findings on a motion to suppress. In subsection (C), appellant asserts a claim of ineffective assistance of trial counsel for failing to raise this meritorious issue and have appellant's clothing suppressed.

A. Deputy Miller Violated Appellant's Fourth Amendment Rights When He Seized Appellant's Clothing Without a Warrant Shortly After Appellant Arrived at the Hospital

Ventura County Deputy Jeffrey Miller testified that he arrived at Los Robles Hospital at 12:27 a.m. on November 23, 1999. (15RT 2633-2634.) That was approximately one hour after Xavier's 9-1-1 call. (17RT 2990.) Appellant was already at the hospital. (15RT 2634.) While Miller was at the hospital, he and Deputy Jarvis seized pajama pants, a t-shirt, and a pair of underwear which had been removed from appellant and were partially spread out on a backboard. (15RT 2636-2637, 2641-2642, 2644.) Sometime before 4:00 a.m., Miller gave the clothing to a field evidence technician. (33RT 6833, 6853-6855.) A search warrant for appellant's house was not obtained until 7-8:00 a.m., and the police did not reenter appellant's house to conduct a search until about 9:15 a.m. (33RT 6858; 39RT 7899.)

The prosecution later established that those items of clothing were the ones worn by appellant at the time she was found shot in the head. DNA from blood found on the pajama shorts and t-shirt was a critical part of the prosecution's evidence against appellant.

The warrantless seizure of appellant's clothing violated her Fourth Amendment rights. The Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not

> be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Under the Fourth Amendment, "[P]eople have the right to be secure in their persons, houses, automobiles, papers and effects against unreasonable searches and seizures." (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.)

To fall under the umbrella of Fourth Amendment protection, a seizure need not interfere with a person's privacy rights, the interference with a possessory interest suffices. (*Soldal v. Cook County* (1992) 506 U.S. 56, 62-64.) Thus, "a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." (*United States v. Jacobson* (1984) 466 U.S. 109, 113.)

Time and again, the United States Supreme Court has stated "that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 372 [internal quotations omitted, citing and quoting other United States Supreme Court cases].) This Court recognizes that if there is a prima facie showing that the police acted without a warrant, the prosecution has the burden of proving some justification for the

warrantless search or seizure after which the defendant can respond by pointing out any inadequacies in that justification. (*People v. Williams* (1999) 20 Cal.4th 119, 136.)

Numerous jurisdictions have held that law enforcement needs a search warrant to seize clothing from a hospital patient in the absence of evidence that the patient voluntarily abandoned her clothing or otherwise gave up her possessory interest in her clothing. (*See e.g. Commonwealth v. Williams* (Mass. 2010) 923 N.E.2d 556, 557-560; *United States v. Neely* (5th Cir. 2003) 345 F.3d 366, 370; *State v. Lopez* (W. Va. 1996) 476 S.E.2d 227, 232-234; *Jones v. State* (Fla. 1994) 648 So.2d 669, 675-676; *People v. Jordan* (Mich. 1991) 468 N.W.2d 294, 300; *People v. Watt* (1983) 462 N.Y.S.2d 389; *Commonwealth v. Silo* (Pa 1978) 389 A.2d 62; *Morris v. Commonwealth* (Va. 1967) 157 S.E.2d 191, 194.)

A patient in a hospital does not lose possessory interest in her property simply by entering the hospital. Consequently, a hospital patient retains a legitimate and reasonable expectation that the hospital (or paramedics) will not turn over her clothing to the police. (*Williams*, 923 N.E.2d at p. 559; *Neely*, 345 F.3d at pp. 369-370; *Jones*, 648 So.2d at p. 675;) Hospital staff, even if they have access to the patient's property, do not have mutual use such that they can consent to police seizure of the property. (*Neely*, 345 F.3d at p. 370; *Jones*, 648 So.2d at p. 675; *Jordan*, 468 N.W.2d at pp. 300-301.) When the hospital does so,

the police violate the person's Fourth Amendment right not to have her property unlawfully seized and suppression should be granted. (*Williams*, 923 N.E.2d at p. 560; *Neely*, 345 F.3d at pp. 37-371; *Jones*, 648 So.2d at pp. 675-677; *Jordan*, 468 N.W.2d at p. 301.)

Courts examining this issue have focused on various factors supporting that the warrantless seizure of a hospitalized patient's clothing was improper. Many of those factors are present in appellant's case. The Virginia court, for example, noted that the patient was sedated and could not give consent, had not yet been arrested, and had not authorized hospital personnel to give away his clothing. (*Morris*, 157 S.E.2d at p. 194.) The Florida court focused on the ability of the hospital or the police to safeguard property while a warrant was sought even if the property was in plain view. (*Jones*, 648 So.2d at pp. 676-677.)

The circumstances of appellant's case share much similarity with those present in *Silo*, *supra*, 389 A.2d at p. 62. There, the police arrived at the home shared by Silo and his mother and found Silo's mother stabbed to death. Silo had been taken to the hospital with chest pain the day before his mother's body was discovered. Neighbors had reported hearing arguing and screams several hours before Silo was taken to the hospital. (*Silo*, 389 A.2d at pp. 63-64.) Officers went to interview Silo at the ICU

and were told by Silo's nurse that they should speak with his doctor first. While waiting for Silo's doctor, the officers asked the nurse to get all of Silo's personal belongings that he had when he was admitted to the hospital. The nurse returned with Silo's clothing which appeared blood stained, and the police took them. About an hour later, the officers learned that Silo had not actually had a heart attack. The officers Mirandized Silo, interviewed him, and kept his clothing. (*Id.* at p. 64.) The clothing was later tested and found to contain Silo's mother's blood type. That blood evidence was the key evidence against Silo in his subsequent prosecution for his mother's death. No search warrant was ever obtained for Silo's clothing. (*Id.* at p. 64.)

On appeal, Silo argued that the warrantless seizure of his clothing by police from his hospital room without his knowledge or consent violated his Fourth Amendment rights. The Pennsylvania Supreme Court agreed. The court noted that warrantless seizures are generally unreasonable absent specific exceptions. (*Id.* at p. 65.) Because the warrantless seizure of Silo's clothing took place before Silo was arrested, it was not a seizure incident to arrest. And, the presence of probable cause to arrest Silo did not justify the warrantless seizure of his property. (*Id.*) The *Silo* court, citing *United States v. Mattock* (1974) 415 U.S. 164, also held that the nurse did not have mutual use of Silo's clothes so the nurse could not consent to the police taking

Silo's clothing. (*Id.* at p. 66.) The court opined based on its reading of United States Supreme Court case law "that the general reasonableness of a search or seizure cannot alone justify failure to obtain a warrant." (*Id.* at p. 67.) The *Silo* court concluded that given the importance of the blood evidence from Silo's clothing, the warrantless seizure of Silo's clothing was not harmless and reversed Silo's murder conviction. (*Id.*)

In appellant's case, no circumstances justified Miller's warrantless seizure of appellant's clothing. At the time Miller seized the clothing, appellant had not been arrested. She was unconscious and headed to the operating room for neurosurgery. There was no evidence that her clothing was in imminent danger of being taken away, washed, or destroyed by appellant or her family. Given appellant's grave medical condition, appellant was likely to be hospitalized for a significant period of time, certainly enough time to procure a search warrant. Indeed, Miller could have stood guard over the clothing until a lawful warrant was obtained or asked hospital personnel to lock up the clothing until a search warrant could be obtained.[86/] The fact that

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[86/] *See e.g. Segura v. United States* (1984) 468 U.S. 796, 809-810 [no Fourth Amendment violation when the police secure a house to prevent any evidence destruction while obtaining a search warrant to look for evidence believed to be in the house]; *State v. Dean* (Wis. 1975) 227 N.W.2d 712, 724-725 [no unlawful seizure when hospital staff locked up a suspect's clothing at the request of the police pending a search warrant because the clothing was not in the custody of the police].

appellant's clothes might be relevant in the investigation of the death of three children did not justify their warrantless seizure.

B. The Unconstitutional Seizure of Appellant's Clothing was Prejudicial and Requires a Reversal of Appellant's Convictions

The unconstitutional seizure of appellant's clothing was not harmless. A constitutional error is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Harmless error review requires consideration of the bases upon which the jury actually rested its verdict. (*Sullivan v. Louisiana* (1998) 508 U.S. 275, 279.) As the Court explained in *Sullivan*:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. (*Id.*)

The United States Supreme Court has provided specific guidance on how to apply the harmless error test set forth in *Chapman*:

> [A] court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]. It is only when the effect of the [error] is comparatively minimal to this degree that it

> can be said, in *Chapman*'s words, that the presumption did not contribute to the verdict rendered. (*Yates v. Evatt* (1991) 500 U.S. 391, 405.)

Here, the seizure of appellant's clothing led directly to the most critical evidence against appellant --the presence of her children's blood on her clothing. The prosecution referred repeatedly to this evidence in arguing why the jury should convict appellant and reject the defense that Xavier murdered the children. (55RT 10805-10807, 10812-10813, 10816, 10826; 56RT 10881-10882; 57RT 11131-11132.)

C. Trial Counsel Violated Appellant's Sixth Amendment Right to the Effective Assistance of Counsel When She Failed to Move to Suppress Appellant's Clothing Because of the Unconstitutional Warrantless Seizure

Appellant's attorney provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of Article I, Sections 7 and 15 of the California Constitution by failing to move to suppress appellant's clothing, as well as the evidence derived from that clothing, because the clothing was unconstitutionally seized without a warrant.

A criminal defendant is deprived of her Sixth Amendment right to counsel when: (1) trial counsel's representation falls below an objective standard of reasonableness; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

(*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *In re Wilson* (1992) 3 Cal.4th 945, 950.) A "reasonable probability" is a probability sufficient to "undermine confidence in the outcome." (*Strickland*, 466 U.S. at p. 688.)

Appellant recognizes that this Court has expressed a preference for ineffective assistance of counsel claims to be raised in a habeas corpus petition rather than on appeal. (*People v. Michaels* (2002) 28 Cal.4th 486, 526 n.6.) Nevertheless, this Court will entertain an ineffective assistance of counsel claim on appeal if "there simply could be no satisfactory explanation" for counsel's failure. (*People v. Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Pope* (1979) 23 Cal.3d 412, 426.) This is such a circumstance.

An attorney can render ineffective assistance of counsel by failing to move to suppress evidence that should have been suppressed. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 485.) California courts have also found ineffective assistance of counsel when trial counsel failed to bring a motion to suppress when the circumstances suggested that such a motion would have resulted in the suppression of unconstitutionally obtained evidence. (*See e.g. People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437; *People v. Boragno* (1991) 232 Cal.App.3d 378, 393; *People v. Ledesma* (1987) 43 Cal.3d 171, 227.)

As the court noted in *Gonzalez, supra*:

> In the context of a potential pretrial motion counsel has a duty to research the law, investigate the facts and make the motion in circumstances where a diligent and conscientious advocate would do. [Citations omitted.] This does not mean counsel has to be absolutely convinced the motion, if made, would be granted nor that the motion, if granted, would result inexorably in the defendant's acquittal. [Citations omitted.] The motion need only be meritorious. (*Gonzalez*, 64 Cal.App.4th at p. 437.)

In the context of establishing prejudice for an ineffective assistance of counsel claim, appellant must show that the suppression motion would have been successful. (*Id.* at p. 438.)

Appellant has made the requisite showing. Deputy Miller's seizure of appellant's clothing shortly after the 9-1-1 call and long before there would have been time to obtain a search warrant should have raised an immediate red flag for counsel. A little legal research would have revealed a host of cases throughout the country finding that a warrant is necessary to seize a suspect's clothing from the hospital. Given the importance of appellant's clothing to the prosecution's case, any reasonably competent attorney, especially an attorney in a capital case, would have brought a pretrial motion to suppress the clothing as well as the fruits of that illegally obtained evidence.

For the reasons discussed in subsection (B), above, had trial counsel made the proper motion, there is a reasonable probability that the trial court would have granted the motion and suppressed the clothing. And, given the serious questions

raised at trial about Xavier's role in the shootings, had appellant's clothing and the blood and DNA results obtained from that clothing been suppressed, there is a reasonable probability that the outcome of appellant's trial would have been different.

VI.

THE TRIAL COURT ERRED IN ADMITTING STATEMENTS APPELLANT MADE WHILE SHE WAS QUESTIONED IN THE INTENSIVE CARE UNIT FOLLOWING BRAIN SURGERY BECAUSE THEY WERE INVOLUNTARY AND WERE MADE WITHOUT APPELLANT HAVING RECEIVED OR WAIVED HER *MIRANDA* RIGHTS

The prosecution sought to admit two statements appellant made to Detective Wade while Wade was questioning appellant in her hospital room after brain surgery.[87/] Appellant had not been given *Miranda* warnings prior to her questioning. The defense challenged the admission of the statements arguing they were obtained in violation of *Miranda* and were involuntary and coerced. (7CT 1425-1433; 8CT 1476-1478; 25RT 4598.) After a hearing, the trial court erroneously ruled that appellant was not in custody when Wade interrogated her and her statements to Wade were not involuntary. As appellant explains, the admission of her statements to Wade violated her Fifth Amendment right against self-incrimination and her Fourteenth Amendment right to due process.

[87/] The statements were appellant suggesting she might have injured herself falling down the stairs and appellant saying she got injured from "wrestling with a boy."

A. The Police Tape-Recorded Everything That Took Place in Appellant's Private Hospital Room in the Intensive Care Unit and Questioned Her in That Setting Without Advising Her of Her *Miranda* Rights

The court held a hearing on the defense challenges to admitting appellant's statement. As part of the hearing, the court listened to the two audio-tapes that Wade recorded in appellant's hospital room[88/] and heard testimony from Wade and from psychologist Susan Ashley who was also present during part of appellant's questioning.

1. The Tapes in Appellant's ICU Room

The tape-recordings began as hospital personnel were removing appellant's breathing tube in Wade's presence. Wade constantly reassured appellant, helped make sure appellant was covered up, assisted in moving appellant in bed, helped get ice chips for appellant, reminded appellant not to touch her head, and repeatedly told appellant to let her know if she needed anything. (Ex. 1-A, 1-12.)[89/] Wade acknowledged that appellant could not get up, was sleepy, and had received something for pain earlier. (Ex. 1-A, 7-8.)

Wade first questioned appellant about her broken foot and

[88/] The two 90-minute audio tapes were marked as Court Exhibits 1 & 2 and their corresponding transcripts were marked as Court Exhibits 1-A & 2-A. (30RT 6405.) Court Exhibit 1-A is in a supplemental CT containing exhibits at pages 39-73. Court Exhibit 2-A is not in the CT.

her bruises while a technician was in the room x-raying appellant's foot. (Ex. 1-A, 11-12.) Appellant's responses, if any, was inaudible. (Ex. 1-A, 12.) Appellant never said more than a word or two at a time, and when she did speak, it was often a moan or a comment about hurting.

After the x-ray, Wade reintroduced herself to appellant, saying only that she was with the sheriff's department, but not mentioning that she was a detective or that she was investigating a homicide. Instead, Wade told appellant that they needed to find out what happened to her and specifically asked appellant what happened. Although appellant's response was inaudible, Wade's follow-up comment suggested that appellant said she did not remember. Appellant then asked for Tylenol. (Ex. 1-A, 12.)

As the second side of the tape began, Wade continued to assist appellant with her medical needs, including helping appellant get comfortable and getting ice chips for her. Appellant apparently looked or expressed being sleepy, and Wade told her to sleep as much as she needed and then they would try to find out what happened. (Ex. 1-A, 14.) When a bone doctor came to see appellant, Wade participated fully in the doctor's consultation with appellant. (Ex. 1-A, 15-18.) The doctor asked appellant if she had any idea what happened to her foot, and appellant replied that she did not. (Ex. 1-A, 18.)

After the doctor left, appellant moaned and said her

shoulders hurt. Wade asked her if she knew why they hurt, and appellant said she had no idea. Wade asked her if she took a fall or something, and appellant said she was not sure. Appellant asked Wade what they suspected, and Wade said they didn't know and they needed to find out from her. Appellant said again that she didn't remember. (Ex. 1-A, 19.) Over the next few pages, appellant moaned and complained about pain. (Ex. 1-A, 19-22.)

As Wade continued helping appellant to feel comfortable, she asked appellant whether there was anybody else Wade should be worried about. Appellant's response was inaudible, but Wade replied, "Well, since we don't know how you got hurt." Appellant cleared her throat and said, "I might have fallen down the stairs." (Ex. 1-A, 22.) Wade responded: "You might've fallen down the stairs." Appellant's reply was inaudible, but Wade said, "Okay. You can't remember?" Wade then asked appellant if she was still feeling pretty sleepy. As appellant moaned, Wade said they'd like to figure out what happened so they'd know how to help her. (Ex. 1-A, 22-23.)

Appellant continued moaning and asking for something stronger for pain while Wade continued questioning her. Wade asked whether appellant knew what happened to her head, and appellant replied, "No." (Ex. 1-A, 25.) Wade explained to appellant about her surgery and asked appellant whether she had any idea how she hurt her head. Appellant shook her head no. (Ex.

1-A, 25.) Wade asked appellant what she last remembered, and appellant said "Cleaning up the kitchen." Appellant, who was continuously moaning and complaining about pain, was finally given two Tylenols. (Ex. 1-A, 26-28.)

While appellant was still talking about her pain, Wade said again that she was there to find out what happened and asked appellant what she remembered. When appellant indicated she did not remember anything, Wade specifically asked about what appellant had for dinner, how many boys she had, and the names of her boys. Although appellant's responses were inaudible, it appears from Wade's statements that appellant answered those questions. (Ex. 1-A, 31-32.)

When the second tape began, Wade continued to be very involved with appellant's medical care by assisting appellant's nurses, offering advice, and providing comfort. Appellant continued moaning and complaining of pain. (Ex. 2-A, 1-10.)

When appellant indicated that the Tylenol had not helped, appellant's nurse expressed to Wade a desire to give appellant something for pain but told Wade she did not want to interfere with the police action:

> You know, because they give the --sh- hurting and hurting and uncomfortable, I would like to give her something for the pain but I don't want to mess up your thing --. You see, that's what I'm saying. You going to be sitting here all night --all day- so what's right and what's not. You know what I mean. I don't know. Are you getting much? (Ex. 2-A,

9.)

The nurse said she felt like she should be giving appellant something because she usually would give an IV pain injection to someone who'd had a surgery like appellant had. The nurse admitted that even though appellant was in constant pain she had been putting off medicating appellant because she didn't want to "mess up [Wade's] thing." After the nurse asked Wade if she was "getting much" from appellant, the nurse suggested that if Wade was going to be there for awhile, it would not be right to continue to hold off appellant's pain medication. Wade agreed. When the nurse finally asked appellant if she needed a pain shot, appellant readily agreed. (Ex. 2-A, 9-11.)

While the nurse went to get the shot, Wade asked appellant again if she thought anymore about what might have happened to her. Appellant responded by asking Wade what happened. Wade again explained that appellant hurt her head, had a broken foot, and had bruising on her legs and arms. (Ex. 2-A, 11-12.) As the nurse gave appellant a shot of codeine, Wade asked what the shot would do. The nurse said it should take away appellant's pain and might make appellant a bit sleepy and alter her mental status a bit. (Ex. 2-A, 12.)

Shortly after that, appellant asked the nurse why Wade was

there.[97] The nurse responded that she didn't know, she was a nurse and was "not involved with that." Appellant said she understood. (Ex. 2-A, 14.) When Wade returned, she told appellant again that she was there to find out what happened. The third 45-minute tape ran out as Wade was talking about the presence of a man from the prosecutor's office outside appellant's room. (Ex. 2-A, 16.)

The final side of the tape began with Wade explaining that the prosecutor was there because appellant got hurt and they were trying to figure out what happened. Wade asked again if appellant remembered anything and whether she knew how she hurt her head. Appellant answered "no" to both questions. (Ex. 2-A, 17.) Wade asked what appellant last remembered. Although appellant's response was unintelligible, it appears she said something about the boys having a Thanksgiving feast at school. (Ex. 2-A, 17.) Appellant also said something about her boys liking Pokemon. It appears that appellant asked again what happened, and Wade again told appellant that she hurt her head, hurt her foot, and got bruised. Wade asked appellant if she knew how she got it. Appellant replied, "(Unintelligible) with a boy." Wade responded, "Wrestling with a boy." Then, based on Wade's responses, it appears appellant said her boys were at home with grandma. (Ex.

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[97] It appears that Wade was not present at that point because she did not appear for 3 pages of the transcript.

2-A, 18.)

Appellant asked Wade again what happened. Wade replied that appellant got hurt and she was trying to figure out how. When Wade asked again about what appellant remembered, appellant said, "I'm doing my best so I can go to bed." (Ex. 2-A, 19.) With prompting from Wade, appellant said she had made a pitcher of margaritas and probably had two because she normally did not go beyond that. (Ex. 2-A, 19.) Appellant said she and her husband drank the margaritas with dinner. When Wade asked if the boys had dinner with her, appellant asked what was going on. Wade said appellant was hurt and her boys were hurt. Wade asked appellant if she knew that, and appellant said, "No." Wade said again that they were trying to figure out what happened and questioned appellant about putting her boys to bed. Appellant said she did that at 8:00 p.m. (Ex. 2-A, 20.)

At that point, Wade asked appellant if appellant knew who she was. Appellant replied that she thought Wade was with the sheriff's department but did not recall her name. (Ex. 2-A, 21.) Wade said she was trying to find out what happened. When appellant apparently asked if it was about what happened to her, Wade said it was about appellant and the boys. Appellant apparently asked if the boys were there, and Wade replied, "No." Appellant asked where they were. Wade said she thought they were still at the house and asked appellant whether she remembered

what happened. Appellant said she put them to bed. When Wade asked what happened after appellant put them to bed, appellant asked Wade what happened. Wade said that somehow appellant got hurt and the boys got hurt, and Wade was trying to find out what happened after they went to bed. Appellant specifically asked what happened to her boys. Wade replied that they got hurt and asked if appellant remembered how they got hurt. Appellant apparently asked if it was something serious, and Wade said it was serious. (Ex. 2-A, 21-22.)

After an interruption so appellant's blood could be drawn, appellant apparently asked about her mother. Wade said Juanita was out in the lobby and was doing pretty good. She then asked appellant if she was awake so Wade could talk with her. Appellant said she would try. Wade said she was conducting an investigation into the death of appellant's boys and needed to talk to appellant. Appellant, who was breathing loudly, asked if her mom was okay. Wade told appellant she was suspected of hurting her boys and asked her if she understood that. Appellant asked Wade if she had talked to her husband yet and when. At that point, Wade gave appellant her *Miranda* rights, and appellant invoked her right to counsel. (Ex. 2-A, 23-24.)

2. The *Miranda* Hearing Testimony of Detective Wade

On November 23, 1999, Los Robles Hospital staff gave Ventura County Sheriff Detective Cheryl Wade access to appellant's

hospital room in the intensive care unit. (30RT 6401, 6402.) Wade did not have a warrant, but she knew appellant was a suspect in the death of her children. (30RT 6416, 6417, 6418.) Indeed, Wade had testified at appellant's preliminary hearing that she went to appellant's hospital room intending to obtain statements from appellant. (1RT 98; see also 31RT 6544; 8CT 1511-1514, 1515-1521.) To this end, Wade brought a tape-recorder with her to set up in appellant's hospital room.[98/] (30RT 6403.)

When Wade first saw appellant, appellant had a tube down her throat and an IV in her arm. (30RT 6347, 6410.) Although appellant was not restrained in bed, she could not get up because of her broken foot. (30RT 6411, 6412.)

Wade reviewed the transcripts and explained what was taking place at various times. At page 22 of Ex. 1-A, well before appellant was advised of her *Miranda* rights, Wade asked appellant whether there was anybody else she should be worried about. Wade explained that she was trying to elicit information about how appellant's boys had gotten hurt. (30RT 6421.) Later, Wade asked appellant about her injuries and how she got them. (30RT 6415.) On page 18, lines 12-18 of Ex. 2-A, Wade noted that appellant hurt her foot and had bruises and asked appellant whether she

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[98/] Wade noted that she turned the tape recorder off at times, such as when appellant was sleeping or when Wade was out of the room, but she testified that all conversation between her and appellant was recorded. (30RT 6411.)

knew how she got them. According to the transcript, appellant replied, "[Unintelligible] with a boy." Wade then said, "Wrestling with a boy?" Appellant's response was unintelligible.[99/]

Five pages later, Wade told appellant that she was suspected of hurting her boys and that her boys were dead. At that point, Wade gave appellant *Miranda* warnings. (30RT 6409; Ex. 2-A, 24-25.) Prior to that time, Wade never told appellant she was under arrest or that she was a suspect although Wade knew she was a suspect. (30RT 6410-6411, 6418.) According to Wade, she finally Mirandized appellant because she was told to do so by Deputy District Attorney Holmes. Wade testified that nothing had occurred during the time Wade was with appellant that made appellant any more of a suspect than she was when Wade first arrived. (30RT 6418.)

3. The *Miranda* Hearing Testimony of Psychologist Ashley

The hearing further revealed that on November 23, 1999, Deputy District Attorney Holmes contacted psychologist Susan Ashley and asked her to interview appellant and observe her in her room in the intensive care unit at the hospital. (30RT 6357,

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[99/] At a later hearing on another issue related to appellant's statements, Wade testified that shortly after appellant said something about wrestling with a boy, appellant looked sleepy and told Wade she was doing her best to answer questions so she could go to sleep. (35RT 7096-7097.)

6358, 6360, 6361.) Ashley read several police reports about the shootings before sitting inside appellant's ICU room from 1:05-3:45 p.m. and taking notes on what she observed. (30RT 6365, 6389.) Ashley's notes included what took place when appellant interacted with her nurse and her doctors, including notations that appellant appeared to understand and answer questions appropriately. (30RT 6366, 6372, 6373.) Ashley also observed and documented appellant's interactions with Wade. (30RT 6367-6369.) Ashley never heard Wade give appellant her *Miranda* rights, threaten appellant, make promises to appellant, or interfere with appellant's medical treatment. (30RT 6368, 6377.) Appellant verbalized numerous times that she was in pain. (30RT 6371.) Ashley left after appellant received a pain shot. (30RT 6376.)

On cross-examination, Ashley acknowledged that appellant had not requested her services. Rather, Ashley had been hired to provide information to law enforcement. (30RT 6380.) Ashley never asked appellant for permission to sit in her room and observe her. (30RT 6386.) Appellant did ask Wade at one point who Ashley was. (30RT 6392.) Both Wade and deputy Rivera, who was also in appellant's room, were dressed in street clothing. (30RT 6382.) After observing appellant, Ashley provided Holmes with a 4-page, single-spaced report of what she saw. (30RT 6389, 6390.) Ashley reported that at 2:27 p.m., after Wade said she didn't know how appellant got hurt, appellant said "I might have fallen down the

stairs." (30RT 6392, 6398.)

B. The Court Ruled that Appellant was Not in Custody When Wade was Questioning Her and Allowed Wade to Testify About Statements Appellant Made While in the Hospital

The court ruled that appellant was not in law enforcement custody at the time Wade questioned her because a hospital setting is different than the setting contemplated by *Miranda* for custody purposes. (30RT 6423.) Rather than a *Miranda* issue, the court framed the issue as whether Wade's actions led to appellant's statements being involuntary or untrustworthy. (30RT 6423-6424.) The prosecution argued that it met its burden of showing voluntariness through the tapes and the observations of Ashley. (30RT 6425-6426.)

The court concluded that although it did not like the practice in which Wade engaged, the detective's actions did not violate appellant's constitutional rights and found appellant's two statements admissible. (30RT 6427.) The court noted the defense had not supported its allegation that Wade interfered with appellant's medical treatment but said if Wade had done so, the court would have ruled differently. (30RT 6429-6430.)

Wade subsequently testified at trial that she was aware that appellant had bruising and a broken foot, and she asked appellant several times how she had gotten hurt. (31RT 6525-6526, 6564, 6566.) More than once appellant replied that she did not know. (31RT 6526, 6558.) Wade asked appellant if she had taken a fall

or something and appellant replied that she was not sure. (31RT 6564-6565.) Later, however, appellant said she might have fallen down the stairs. (31RT 6527, 6528, 6569-6571.) Appellant also said she might have gotten hurt wrestling with a boy. (31RT 6527, 6528, 6584.) Wade noted that the transcript said, "(unintelligible) with a boy," but Wade repeated back to appellant, "Wrestling with a boy." (31RT 6584-6585.) Appellant's response was unintelligible, and Wade did not recall what appellant said. (31RT 6585-6586.)

C. The Trial Court Erred in Finding That Appellant Was Not in Custody and Was Not Entitled to *Miranda* Warnings Before Being Questioned by Wade

It has long been the rule that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege...." (*Miranda v. Arizona* (1966) 384 U.S. 436, 478-479.) "The warning mandated by *Miranda* was meant to preserve the privilege during 'incommunicado interrogation of individuals in a police-dominated atmosphere.' [Citation omitted.] That atmosphere is said to generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" (*Illinois v. Perkins* (1990) 496 U.S. 292, 296 [quoting *Miranda*, *supra*, 384

U.S. at pp. 445, 467.) *Miranda* safeguards exist, in part, "to ensure that the police do not coerce or trick captive suspects into confessing." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 433.) A constitutional violation occurs when statements taken in violation of a person's Fifth Amendment right against self-incrimination are admitted against her at a criminal trial. (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1128 [citing *Chavez v. Martinez* (2003) 538 U.S. 760, 767 [plur. opn. of Thomas, J.]].)

For purposes of *Miranda* "custody" means "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*People v. Boyer* (1989) 48 Cal.3d 247, 271 [citing *California v. Beheler* (1983) 463 U.S. 1121, 1125].) The relevant inquiry is "whether a reasonable person in defendant's position would have felt he or she was in custody." (*People v. Stansbury* (1995) 9 Cal.4th 824, 830 [citing *Berkemer, supra*, 468 U.S. at 442].) To assess custody, a reviewing court must consider the totality of the circumstances. (*Boyer, supra*, 48 Cal.3d at p. 272.) The test is an objective test; neither the subjective beliefs of the interrogating officer or the person being questioned are relevant. (*Stansbury v. California* (1994) 511 U.S. 318, 325.) This Court applies a deferential substantial evidence standard to the trial court's factual findings, but independently determines whether the interrogation was custodial. (*People v.*

Ochoa (1998) 19 Cal.4th 353, 402.)

Over time, the courts have considered numerous factors in assessing whether a person was "in custody" for *Miranda* purposes at the time he was subjected to law enforcement questioning. These factors include whether the suspect was arrested before or after the interview, the length of the detention, the location, the number of police officers, the demeanor of the officers, whether the suspect agreed to the interview, whether the suspect was told she could end the interview, whether there were restrictions placed on the suspect's movement, whether the police pressured the suspect, whether the suspect was told he was a suspect, and whether the police dominated and controlled the interview. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404 [citing *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) No one factor is dispositive. (*Boyer, supra*, 48 Cal.3d at p. 272.)

The fact that Wade interrogated appellant in the hospital does not categorically rule out that appellant was "in custody." As the Ninth Circuit observed:

> If the police took a criminal suspect to the hospital from the scene of a crime, monitored the patient's stay, stationed themselves outside the door, arranged an extended treatment schedule with the doctors, or some combination of these, law enforcement restraint amounting to custody could result.

(*United States v. Martin* (9th Cir. 1985) 781 F.2d 671, 673; *see*

also People v. Rodriquez (Colo. 1982) 645 P.2d 857, 860 [factors to consider in determining whether a hospitalized person is in custody: "the time of interrogation, the persons present, indicia of formal arrest, length and mood of the interrogation, lack of arrest after interrogation, and the administration of *Miranda* warnings"]; *State v. Grant* (Me. 2008) 939 A.2d 93, 100-104 [factors to consider: the location of the questioning and whether it was familiar to the suspect, who initiated the contact, whether probable cause existed for an arrest, the subjective manifestations of the police, the subjective manifestations of the suspect, the focus of the investigation, the number of officers present, the degree of physical restraint, and the length of the interrogation].)

Appellant acknowledges that there are a number of state and federal court cases holding that a person being questioned in a hospital setting is not necessarily in custody for *Miranda* purposes. Nevertheless, the facts of this case establish a compelling portrait of custody. The balance of factors strongly suggest that appellant was, from an objective standpoint, subject to such a restraint on her freedom that *Miranda* warnings were required prior to, or at least during, Wade's questioning.

While Wade questioned her, appellant was in a private hospital room recovering from brain surgery performed less than 24 hours earlier. She also had a broken foot, was experiencing

agonizing pain, and was encumbered by an array of medical equipment. Wade initiated contact with appellant and did so with the mindset that appellant was the only suspect in the death of her three children. Wade candidly admitted that she went to the hospital armed with a tape-recorder to obtain a statement from appellant. She was dressed in civilian clothing and never revealed her purpose, vaguely identifying herself as being from the sheriff's department. Appellant could neither physically leave nor distance herself from Wade's incessant questions. Indeed, Wade continually cajoled appellant to just tell her what happened despite appellant being sleepy and in pain and repeatedly saying that she couldn't remember.

Appellant was virtually surrounded by law enforcement from the moment she arrived in the ICU with Wade and Rivera in her room along with the prosecution-arranged psychologist and a assistant prosecutor standing just outside appellant's doorway. Yet, no one ever asked appellant if she wanted any of these law enforcement personnel in her room, and no one ever told appellant that she could refuse their presence.

While Wade was not responsible for appellant's medical restraint, the underlying rationale for requiring *Miranda* warnings was still present. A reasonable person in appellant's shoes would not have believed she could leave the hospital without Wade's permission. Had appellant been physically able to

leave, there is no question that with three dead children and appellant as the only suspect under consideration by the police, Wade would not have allowed appellant to do so. That appellant could not leave because of her medical condition did not entitle Wade to exploit that fortuitous fact to avoid apprising appellant of her constitutional rights. Nor should the fact of appellant's medical incapacity overshadow the impact of a continuous police presence at appellant's bedside when evaluating appellant's custody status.

Wade unequivocally stated that she was at the hospital to get information from appellant. Given that the police never handcuffed or detained Xavier, the other likely suspect, the actions of the police at the scene showed that the police had concluded even before they arrived at the house that appellant was the shooter. Wade admitted that nothing had changed in terms of appellant being a suspect from the time Wade first got to the hospital until the time Wade was instructed by a prosecutor to Mirandize appellant.

Other law enforcement actions also supported that appellant was in police custody at the hospital. While appellant was unconscious before and during surgery, the police placed bags over her hands and feet, seized her clothing, took photos of her unclothed body, and had a police officer with her during surgery and in the post-operative period all without appellant's

knowledge or consent. Wade also obtained appellant's blood and urine samples pursuant to a search warrant. (31RT 6343-6344.)

The totality of the circumstances demonstrate that appellant was effectively in custody when Wade was questioning her. Accordingly, appellant should have been advised of her *Miranda* rights before the questioning. Because appellant was not advised of her rights and never knowingly and voluntarily waived her Fifth Amendment rights, appellant's pre-advisement statements should not have been admitted against her. The trial court erred in not suppressing appellant's statements. Significantly, as soon as appellant was Mirandized she invoked her right to counsel. (30RT 6409-6410.)

D. Appellant's Statements were Also Involuntary

In addition to having been obtained in violation of *Miranda*, appellant's hospital statements were also involuntary. An inculpatory statement is voluntary only when it is the product of a rational intellect and a free will. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 208.) Both the Fourteenth Amendment of the United States Constitution and article I, section 15, of the California Constitution prohibit the prosecution from using a defendant's involuntary confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) That is because "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a

civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." (*Miller v. Fenton* (1985) 474 U.S. 104, 109.) This is particularly true for statements induced by psychological coercion because such tactics "offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system ...." (*Rogers v. Richmond* (1961) 365 U.S. 534, 541.) Coercive police conduct is a necessary component of finding statements to be involuntary. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.) Accordingly, the interrogated person's mental condition is a relevant factor. (*Id.* at p. 165.)

The admission at trial of a defendant's involuntary statements violates due process. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) In *Mincey*, the United States Supreme Court opined that it would be hard to imagine a situation "less conducive to the exercise of a rational intellect and a free will" then the interrogation of a seriously wounded and depressed suspect hospitalized in an intensive care unit.[100/] (*Id.*) At the time of the interrogation, Mincey was intubated, in unbearable pain, "encumbered by tubes, needles, and breathing apparatus," and "at

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[100/] Although the police repeatedly ignored Mincey's post-*Miranda* requests for counsel and to end the questioning, the Court analyzed the situation for voluntariness rather than a *Miranda* violation because the prosecution had agreed to use Mincey's statements only as impeachment if Mincey testified at trial. (*Id.* at p. 397 n.12.)

the complete mercy" of the interrogating detective who questioned Mincey for three hours. (*Id.* at pp. 398-399.)

Like Mincey, appellant was questioned by a detective for at least three hours while in the ICU less than 24 hours after undergoing emergency brain surgery that included removing small parts of appellant's brain. Appellant was in extreme pain as evidenced by her moaning and verbalizations of pain throughout the three hours of tape-recordings. Moreover, there was evidence that appellant's nurse purposefully withheld appellant's IV pain medication to assist Wade in obtaining what law enforcement needed from appellant. While the record does not establish that the nurse specifically withheld appellant's pain medication at the request of law enforcement, the presence of law enforcement in appellant's room compelled appellant's nurse to prioritize law enforcement's needs over those of her patient who was continuously moaning in pain.

The statements made by appellant were involuntary under the totality of the circumstances faced by appellant. Specifically, at the time Wade set up her tape-recorder and started questioning appellant, appellant was post-brain surgery after being shot in the head, had a severely broken foot, and was medicated and in pain. Wade's manipulation of and dominance over appellant was readily apparent. Wade largely remained at appellant's bedside pretending to offer appellant comfort while simultaneously and

repeatedly asking appellant questions aimed at getting appellant to provide incriminating information about herself. Appellant could not physically leave. Indeed, because of her physical limitations, appellant relied on Wade's help for various comfort measures. Wade, by pretending to care about appellant during her time of physical need, ingratiated herself to appellant while trying to exploit appellant to appellant's detriment. Gentle trickery is no less coercive than harsh thuggery.

Wade's presence was prolonged --it lasted over three hours as evidenced by the two 90-minute audiotapes recorded in appellant's ICU room. Significantly, as soon as appellant was advised of her *Miranda* rights, she requested counsel. (Ex. 2-A, 25.) This supports that appellant, once fully informed about her options, did not desire to assist Wade. Under the circumstances of this case, the trial court erred in failing to suppress appellant's hospital statements as involuntary.

E. The Improper Admission of Appellant's Statements was Not Harmless

The admission of appellant's statements and Wade's testimony about appellant were not harmless. A constitutional error is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

While the statements themselves did not directly inculpate appellant, they helped the prosecution account for appellant's

otherwise inexplicable injuries --unexplained bruises over much of her body, including her inner thighs, and a badly broken foot. The nature of those injuries suggest that appellant was beaten up by her assailant before being shot, a scenario incompatible with the prosecution's theory that appellant shot her children but fully consistent with the defense that Xavier shot appellant and the children. Appellant's alleged statements about possibly falling down the stairs and wrestling with a boy provided a plausible explanation for those injuries that the prosecution was otherwise lacking.

The statements were important to the prosecution's case and the prosecutors referred to them multiple times in closing arguments. (55RT 10786-10787, 10840-10841, 10853; 57RT 11155-11156.) The prosecution even speculated that appellant not only fell down the stairs while enraged at Xavier but suggested that appellant killed her children because the pain of her broken foot exacerbated her anger at him:

> She did fall down those stairs. When Dr. Caro would not answer that phone and she was furious with him for everything that she had suffered in this marriage, she was probably running through that house quite angry. As she was going up those stairs or down those stairs, storming through that home, she fell down those stairs. That's the only explanation that you have for that broken foot.
>
> And now, on top of all of the anger that she has and the humiliation from everything that had happened in marriage, add the physical pain of a broken foot on top of

> that. And it's all his fault. The defendant decided she'd had enough. He'd hurt her too much. She was going to hurt him back. (55RT 10786-10787.)

Given the significance the prosecution attached to the statements, it cannot be said beyond a reasonable doubt that their erroneous admission did not contribute to the jury's guilty verdicts. Accordingly, appellant's convictions must be reversed.

VII.

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE A TIMELY AND COMPREHENSIVE FOURTH AMENDMENT SUPPRESSION MOTION BASED ON LAW ENFORCEMENT ACQUIRING EVIDENCE AGAINST APPELLANT WHILE SHE WAS IN SURGERY AND THEN INVADING THE SANCTITY OF HER HOSPITAL ROOM

A. Law Enforcement Repeatedly Invaded Appellant's Privacy at the Hospital

The police acquired significant evidence against appellant by repeatedly invading her privacy at the hospital. At the time appellant was airlifted to the hospital with a gunshot wound to her head, she was a suspect in the shooting death of her children. Yet, there had been virtually no investigation done at that point and the police didn't know if appellant was the victim of a shooting or the victim of a suicide attempt. Nevertheless, the Ventura County sheriff's department collected evidence from appellant without her consent and without a search warrant.

As discussed in Argument V, the police seized appellant's clothing from the backboard used to transport appellant to the hospital without a search warrant. In addition, a deputy placed plastic bags over appellant's hands to preserve evidence before appellant went into surgery (15RT 2639, 2648; 39RT 7863); both a sheriff's department evidence technician and a deputy were

present during appellant's surgery and took photographs of appellant which were introduced at trial (33RT 6839-6843; 34RT 6945-6952; 39RT 7855, 7858, 7867-7870); a deputy listened to appellant's interactions with the surgeon in the recovery room and then testified about what he saw and heard (39RT 7859-7860); this same deputy questioned appellant in the recovery room and testified about how she responded and her degree of comprehension (39RT 7872, 7877-7881); and a psychologist who was hired by the prosecution sat in appellant's hospital room and listened to what appellant said, including discussions with the medical staff treating her injuries, and recorded her observations about appellant which she provided to law enforcement (30RT 6356-6400).

Also, as discussed in Argument VI, Detective Wade, who went to the hospital with the express purpose of obtaining statements from appellant, set up a tape-recorder in appellant's room in the intensive care unit of the hospital and recorded several hours of what took place in appellant's room, including appellant's interactions with her doctors and other medical personnel. After Wade finally Mirandized appellant after several hours of questioning and appellant invoked her right to counsel, Wade brought appellant's mother, Juanita, into appellant's room without telling Juanita that she was investigating what happened, kept Juanita and appellant within eyesight, and eavesdropped on appellant's conversation with Juanita in her private ICU room.

(31RT 6530-6531, 6588-6589.)

B. The Defense Raised Only One Privacy Violation Issue and That was Mid-Trial

Although these actions by law enforcement raised seemingly obvious questions about whether appellant's Fourth Amendment right to privacy was violated, the defense never moved to suppress any of the tainted evidence. Indeed, the defense raised a privacy issue just once, during Wade's redirect examination. That privacy objection arose after the prosecutor asked Wade on redirect if appellant ever asked about the well-being of any of her children by name. (31RT 6606.) After the court overruled a relevancy objection, Wade stated that appellant asked about Gabriel but never asked about Michael, Christopher, or Joey by name. (31RT 6606.) Specifically, appellant said, "'Where is Gabriel? Where is Gabriel? Is the baby okay?' or 'The baby, is he okay?'" (31RT 6609.)

The next day the defense brought a motion to strike the statements about Gabriel because Wade had obtained the statements from appellant in violation of *Miranda*. (32RT 6614.) The defense also asserted that if appellant was not in custody and was not detained by law enforcement, then the presence of the police in her room was a violation of her right to privacy. (8CT 1476-1478.)

The prosecution opposed the motion contending that the statements appellant made about Gabriel were not a product of a

custodial interrogation; therefore, there was no *Miranda* violation. As for the privacy/Fourth Amendment issue, the prosecution argued that appellant forfeited her opportunity to bring a suppression motion under Penal Code section 1538.5 by failing to raise it pretrial. (8CT 1482-1487.)

The court noted that the only objection made at the time Wade testified was on relevancy grounds. (32RT 6615.) Counsel explained that she made the "legal" relevancy objection to alert the court that the question about Gabriel took place after appellant was advised of her *Miranda* rights and invoked her right to counsel. Counsel felt she could not say more in her objection without alerting the jury to the invocation. (33RT 6796-6798.) Counsel further explained that she had not previously objected to the admission of anything appellant said after she was Mirandized because the prosecution had never previously indicated an intent to elicit anything that appellant said post-*Miranda*. In fact, counsel noted that the post-*Miranda* transcript was not even proffered to the court during the earlier *Miranda* hearing. (33RT 6798-6799.) Likewise, counsel never put forth evidence that the police thwarted a hospital social worker's attempt to assist appellant after appellant invoked her rights because counsel did not believe the prosecution would attempt to admit any post-*Miranda* statements made by appellant. (33RT 6799.)

The prosecution conceded that appellant invoked her right to

counsel after receiving her *Miranda* warnings. (33RT 6802.) According to the prosecution, appellant was advised of her *Miranda* rights and invoked about 30 minutes before the end of the second recording. (33RT 6802, 6804, 6805.) Wade left the room for about 20 minutes and started a third recording upon her return. The prosecution claimed that Wade didn't question appellant after appellant invoked although Wade remained in appellant's room and talked to her. (33RT 6803.) The prosecution termed this "conversation" and not custodial interrogation. (33RT 6803.) Appellant's statement about Gabriel occurred on the top of the third page of the transcript of the third recording. (33RT 6802.) The prosecution contended that appellant asked about Gabriel on her own, not as a response to custodial interrogation; therefore, appellant's statement was admissible. (33RT 6800.)

The defense countered that once appellant invoked her right to counsel, law enforcement had no right to remain in her room and overhear appellant speaking. (33RT 6804.) In addition, law enforcement prevented appellant's assigned social worker from entering her room to assist her. (33RT 6805-6806.)

The court faulted counsel for failing to make the appropriate objection the first time the prosecution elicited the Gabriel statement and for not making any objection the second time. (33RT 6806-6807.) The court said it had to overrule the relevancy objection because the statement about Gabriel was

relevant. (33RT 6807.) The court noted that the defense had widened the objection to a Fourth Amendment issue. (33RT 6807.) The prosecution argued that the defense should have been aware of the issue and raised it pretrial. (33RT 6807.) The court concluded that the issues raised by the defense could not be resolved without a hearing. (33RT 6808.)

Detective Wade testified at the subsequent hearing. At some point after Wade's questioning about how appellant got bruised and while the second tape was still running, Wade advised appellant of her *Miranda* rights and appellant asked for a lawyer. (33RT 6810.) After appellant invoked, Wade only asked appellant about her mother's phone number, who appellant wanted in the room, and whether appellant was comfortable. (33RT 6811; 35RT 7098.) Appellant responded to those questions. (33RT 6811.) Wade did not ask appellant any questions pertaining to the investigation. (33RT 6811.)

Wade left the room at one point while the second tape was still running, leaving officer Rivera in appellant's room at Wade's request. (33RT 6812, 6816; 34RT 6992.) Wade started a third recording when she returned about 20 minutes later.[101/] (33RT 6812, 6816.) Wade didn't know how long it was after the

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[101/] Wade testified that she listened to the tape and transcript for the third recording, marked as Defense Exhibit A, and agreed that transcript was accurate with the addition of adding the word "oh" to where the transcript said "moans." (35RT 7084-7085.)

second tape ended that she started the third taping nor could she recall if she started the third recording immediately upon returning to appellant's room. (34RT 6896, 6992, 6993.) After the third recording started, appellant asked Wade where Gabriel was. (33RT 6812.) Wade had not asked appellant about Gabriel, and appellant's question about him was not in response to any question that Wade had asked. (33RT 6812-6813.) Prior to that, appellant had asked Wade who had found her and Wade had replied, "Your husband." Appellant first said "Oh" in response, but then said, "Oh, my God, no, no, Mom, no. No. Oh, what." (33RT 6813.) Wade couldn't understand what appellant said at the end and responded, "What?" It was then that Wade said: "Where is Gabriel? Where is Gabriel? The baby is he okay?" (33RT 6813-6814.) Appellant appeared alert at that time. (33RT 6814.)

The defense argued that the statement about Gabriel needed to be excluded because of ambiguity about what took place before appellant asked about Gabriel. Specifically, the defense contended that the prosecution wanted to argue that no one ever disclosed which boys were killed; therefore, appellant's inquiry about Gabriel alone meant she knew without being told which boys were dead. However, because parts of the tape were unintelligible and part of what took place in appellant's room was not taped, there was no certainty that appellant was not told which children had been hurt. (35RT 7105-7106.)

The defense also told the court that Debbie Anderson, appellant's nurse, told Nina Priebe, appellant's assigned social worker, that law enforcement did not want the hospital involved with appellant until after they finished their investigation in appellant's room. (35RT 7107.) To support this, the defense called Priebe to testify at the hearing on the defense motion.

Nina Priebe was a clinical social worker assigned to the intensive care unit at Los Robles Hospital on November 23, 1999. (35RT 7111.) Her job was to provide counseling and assist patients to access community resources. (35RT 7111.) Appellant was one of her top priorities because of the traumatic situation. (35RT 7111.) She started work that day at 9-9:30 a.m. and spent most of her day in the ICU. (35RT 7112, 7114.) Absent a pending emergency, she would have been at appellant's bedside and assessing appellant's need for supportive counseling and meeting with appellant's family. (35RT 7111-7112.) Among other tasks, Priebe would have assisted appellant with obtaining an attorney if appellant wanted one. (35RT 7114.)

At times during that day between 2-4:00 p.m., Priebe heard appellant screaming. (35RT 7114.) She observed appellant through the glass doors to her room and saw that appellant was in bed talking to the police and appeared upset and agitated. (35RT 7115.) Appellant began screaming and a female officer spoke to appellant in a soothing voice. (35RT 7117-7118.) Based on the

officer's voice and body stance, Priebe believed the officer was trying to calm down appellant. (35RT 7118.) Priebe jumped up and headed towards appellant's room but was stopped by Debbie Anderson who told her not to go in. (35RT 7118.) Appellant screamed for about 10 minutes. Priebe didn't stay and wait for the police to leave because she got off work at about 4:15-4:30 p.m. (35RT 7120-7121.)

The court sustained a hearsay objection to what Anderson told Priebe that caused Priebe not to go into appellant's room. (35RT 7116.) The court also sustained on relevancy grounds a question whether Priebe would have gone into appellant's room if Anderson had not stopped her, but said, "I firmly believe she would have gone in there." (35RT 7120.)

The court asked Priebe whether one of her duties was to arrange for a psychiatric evaluation to assess appellant's suicide risk. Priebe said she did not know whether that had been arranged by anyone that day, but she would have allowed a patient who was a possible suicide risk to remain alone in an ICU room because the patients in ICU usually have 1:1 or 1:2 nursing care and are observed frequently. (35RT 7121-7123.)

The defense wanted to call Debbie Anderson as a witness at the hearing but she was not available to come to court that day. The court denied the defense request to continue the hearing to

get Anderson to court.[102/] (35RT 7123-7124.)

The court subsequently denied the defense motion to strike Wade's testimony about Gabriel on both *Miranda* grounds and privacy grounds. The court ruled that appellant's statement about Gabriel was not a result of police questioning. The court also ruled that it was without jurisdiction to consider the Fourth Amendment privacy issue because the defense failed to raise it pretrial. The court added that if it did consider it, it would find that appellant had no expectation of privacy since she was a suspect and a suicide risk. (35RT 7125-7127.)

C. Trial Counsel Fell Below Expected Norms of Representation By Failing to Bring a Pretrial Motion to Suppress All Evidence Acquired by Law Enforcement In Violation of Appellant's Fourth Amendment Right to Privacy

Appellant had a legitimate expectation of privacy in the hospital. Defense counsel not only failed to bring appellant's Fourth Amendment suppression motion in a timely manner, but counsel failed to raise and argue the totality of the privacy violations that took place in the hospital, focusing belatedly only on a snippet of the total violations.

Trial counsel should have filed a pretrial motion to suppress the evidence obtained by law enforcement in violation of appellant's Fourth Amendment rights and in violation of article

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[102/] The court's refusal to grant this brief continuance is discussed in Argument VIII.

1, section 1 of the California Constitution.[103/] The purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (*Camara v. Municipal Court* (1967) 387 U.S. 523, 528.) "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (*California v. Ciraolo* (1986) 476 U.S. 207, 211 [quoting *Katz v. United States* (1967) 389 U.S. 347, 360].) The Fourth Amendment exists to protect a person's privacy and dignity from unwarranted intrusion by the state. (*Schmerber v. California* (1966) 384 U.S. 757, 767.)

Here, appellant had a reasonable expectation of privacy while she was in the operating room unconscious, unprotected, and vulnerable while undergoing neurosurgery. That expectation of privacy continued while she was in a similarly vulnerable and partially incapacitated condition in the recovery room and in the intensive care unit following surgery. Additionally, appellant had an expectation of privacy and confidentiality while discussing her medical condition with her surgeon, her orthopedist, and other health care professionals. (Evid. Code §§

[103/] Article 1, section 1, states:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

992-1007.)

At the time that law enforcement personnel attached themselves to appellant, appellant had not been arrested. Indeed, other than Xavier's claim that appellant shot everyone, law enforcement had no evidence explaining what had occurred and the investigation had just begun. Although law enforcement considered appellant a suspect, the police did not know whether appellant was a suspect or a victim or both.

Thus, at the time appellant was brought to the hospital and extending until appellant was eventually arrested, appellant retained a reasonable expectation that her person, her "house," and her effects would be safe from unreasonable searches and seizures. "[A]lthough by checking himself into a hospital, a patient may well waive his right of privacy as to hospital personnel, it is obvious that he has not turned 'his' room into a public thoroughfare." (*People v. Brown* (1979) 88 Cal.App.3d 283, 290.) The court in *Brown* explained:

> A hospital is, in a sense, sui generis. It is unlike a motel room for instance, which is rented with the implicit right to keep all others out. The patient knows and expects that nurses, doctors, food handlers, and others enter and leave "his" hospital room in accordance with the medical needs of the patient and the hospital routine. On the other hand, a hospital room is clearly not a public hall which anyone in the building is free to use as needed. Thus, at least for certain purposes, a hospital room is fully under the control of the medical staff; yet for other purposes it is "the patient's

> room." For this reason, it is not inappropriate to view a hospital room as one within joint dominion, at least for certain purposes. (*Id.* at pp. 290-291.)

The appellant in *Brown*, a possible suspect in a murder, had checked himself, into a psychiatric hospital. (*Id.* at pp. 287-288.) The police went to the hospital to talk to Brown and possibly take him to the police station for questioning. (*Id.* at p. 288.) When the police arrived, Brown was in a day room. A nurse, after verifying that Brown had visiting privileges, told Brown that officers wanted to see him, brought him back to his room, and motioned for the police to enter. (*Id.* at pp. 288, 292.) The officers introduced themselves to Brown and told him that they wanted to talk to him about the murder. While the police were in Brown's room, they observed a pair of shoes that appeared to be caked in blood. Brown later willingly left with the officers. (*Id.* at p. 288.)

On appeal, Brown, who had pled guilty to second degree murder after losing a suppression motion regarding the shoes, challenged the police observation of the shoes on the ground that the police had no legal right to be in his hospital room. (*Id.* at p. 289.) Although the *Brown* court found no Fourth Amendment violation, the court stressed the narrowness of its holding based on the unique facts of the case, finding no Fourth Amendment violation "when a nurse permits an officer to enter a sentient patient's hospital room for purposes unrelated to a search, the

patient does not object to the visit, and the officer then sees evidence in plain sight." (*Id.* at p. 292.)

This Court, citing *Brown*, has declared, "the police may not intrude into a hospital room simply because hospital personnel routinely go in and out." (*People v. Cook* (1985) 41 Cal.3d 373, 381; *see also In re Deborah C.* (1981) 30 Cal.3d 125, 138 n.10 [citing *Brown* for the proposition that a "patient's consent to presence of hospital employees does not waive expectation of privacy from police intrusion into hospital room"].)

The circumstances of appellant's case are different than in *Brown* and do raise a Fourth Amendment issue. Appellant did not check herself into the hospital since she was unconscious on arrival. The police not only entered the operating room while appellant was undergoing brain surgery but a deputy listened in while appellant's surgeon communicated with appellant in the recovery room. The deputies then followed appellant to her private room in the intensive care unit and set up a tape-recorder to record all that occurred in appellant's hospital room, including appellant's conversations with her medical doctors and other hospital personnel. Appellant never affirmatively consented to the police presence in her hospital room. Indeed, when appellant came to her room post-operatively, she had a breathing tube in place which prevented her from speaking. By the time, the breathing tube was removed, not only

was it difficult for appellant to talk, but she was sleepy and in pain.

Appellant's situation also differs from other cases where courts have found that the defendant did not have a reasonable expectation of privacy in a hospital setting. (*See e.g. United States v. George* (9th Cir. 1993) 987 F.2d 1428, 1432 [police justified in keeping the defendant under surveillance when, ***after the defendant's arrest***, the police brought him to the hospital to await the elimination of balloons of drugs that the defendant had swallowed]; *People v. Washington* (NY 1992) 185 A.D.2d 291 [no Fourth Amendment violation when, after receiving permission from the defendant's doctor, ***the police Mirandize the defendant in his hospital room*** and he makes statements].)

The New Jersey Supreme Court has embraced the central underpinning of *Brown*. In analyzing whether a hospital patient has a reasonable expectation of privacy in his hospital room, the court stated: "[W]e accept as a basic premise that a hospital room is more akin to one's home than to one's car or office. It is a place to shower, dress, rest, and sleep." (*State v. Stott* (N.J. 2002) 794 A.2d 120, 127.) The *Stott* court identified several factors relevant to a privacy analysis, including the length of the stay ("a patient admitted for long-term care may enjoy a greater expectation of privacy than one rushed to an emergency room and released that same day"); and the location in

the hospital ("in a private or semi-private hospital room ... the patient may at least restrict the access of visitors or non-medical personnel. In that way, a patient may control the degree of privacy within the room"). (*Id.*)

In light of *Brown* and this Court's favorable view of the principles underlying *Brown* as well as the extensive law on Fourth Amendment privacy rights, counsel performed incompetently in failing to move to suppress all of the evidence derived from the illegal law enforcement intrusion into appellant's protected area of privacy within the hospital. Appellant was facing three counts of murder and a death sentence. The shocking and invasive actions of law enforcement screamed out for a legal challenge. Counsel raised *Miranda* issues and voluntariness issues regarding appellant's statements recorded in her ICU room, but inexplicably failed to challenge law enforcement on Fourth Amendment grounds.

Belatedly, counsel made a partial Fourth Amendment challenge during the prosecution's case-in-chief, but that motion was too little (it only challenged the police remaining in appellant's room after she invoked her right to counsel) and too late (it was raised for the first time mid-trial rather than pretrial).

In short, the police had no right to invade the operating room, recovery room, and ICU in order to obtain evidence and record appellant's discussions with her treating physicians and hospital staff. Nor did the police have a right to enter

appellant's ICU room unbidden and remain there without appellant's consent while subjecting her to repeated questioning while she was sleepy and in pain following neurosurgery. Once appellant was finally Mirandized and almost immediately invoked her right to counsel, the police did not have a right to remain in appellant's hospital room and eavesdrop while appellant and her mother talked.

Trial counsel's failure to file a timely motion to suppress on Fourth Amendment grounds fell well below the level of competence expected of trial counsel and violated appellant's Sixth Amendment right to the effective assistance of counsel.[104/] For the reasons discussed, had counsel raised the proper motion, there is a reasonable probability that the court would have granted the motion and suppressed the wealth of evidence that law enforcement gathered by trampling on appellant's Fourth Amendment right to privacy. In addition to appellant's clothing discussed in Argument V and her statements made to Wade discussed in Argument VI, the additional evidence includes the scrapings obtained after appellant's hand and feet were bagged, the photos taken of appellant in the operating room, the bullet fragments removed from appellant's head and seized by law enforcement, Rivera's testimony about appellant's interactions with Dr. Pryor

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[104/] Appellant incorporates by reference her legal argument regarding ineffective assistance of counsel in Argument V(C), above.

in the recovery room, all statements made by appellant in her room whether on the tape or reported by Wade, and Wade's testimony about what appellant said to Juanita in her room.

This evidence constituted almost all of the evidence against appellant. Had the court suppressed this evidence because of the multiple violations of appellant's Fourth Amendment right to privacy in her person and possessions, the prosecution would not have had a case against appellant and there is more than a reasonable probability that the outcome of the trial would have been different. (*Strickland, supra*, 466 U.S. at p. 688.) Accordingly, appellant's convictions must be reversed.

VIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL WHEN IT DENIED THE DEFENSE A CONTINUANCE SO THE DEFENSE COULD BRING IN A WITNESS IT NEEDED FOR THE HEARING ON THE ADMISSION OF APPELLANT'S STATEMENTS FROM THE HOSPITAL

A. The Court Refused to Continue a Hearing on a Defense Motion To Allow the Defense to Get a Key Witness to Court

Wade testified that appellant specifically asked by name about Gabriel, the one child who was not killed. (31RT 6606, 6609.) The next morning, the defense moved to strike that testimony because appellant's statement was obtained in violation of *Miranda* and in violation of appellant's right to privacy. (32RT 6614.) The trial court held a hearing on the objection that took place in several parts over the next few days.

The hearing began the next afternoon with the defense contending that Wade should not have remained in appellant's room once appellant invoked her right to counsel. In addition, the defense asserted that between the time appellant invoked her right to counsel and the time she asked about Gabriel, a hospital social worker who might have assisted appellant with obtaining counsel had been denied entrance to appellant's room. (33RT 6793, 6805.)

The hearing continued briefly the next morning, again that day after lunch, and then resumed the following morning. (34RT 6894, 6986; 35RT 7084.) The defense explained to the court that Debbie Anderson, appellant's nurse, had interfered with social work access to appellant by telling Nina Priebe, appellant's hospital social worker, that the police did not want hospital personnel involved with appellant until after law enforcement finished their investigation in appellant's room. (35RT 7107.) Priebe confirmed this when she testified that she did not go into appellant's room because Anderson told her that the police asked that hospital personnel not comfort appellant. But, the court struck Priebe's testimony on hearsay grounds after the prosecution objected. (35RT 7116.) The court also sustained an objection to Priebe's testimony that she would have gone into appellant's room, despite the presence of law enforcement, if Anderson had not stopped her. (35RT 7121.)

At the end of Priebe's testimony, the defense asked to continue the hearing so it could call Anderson as a witness. The court refused saying the hearing was set for that day. The defense noted that although the prosecution called Anderson as a witness earlier in the trial, counsel could not question Anderson on this subject because it would have been beyond the scope of Anderson's direct testimony. The defense explained that the court placed Anderson on call but the defense only knew how to reach

Anderson at work and Anderson had not been at work the past two days. The court denied the defense request for a continuance of the hearing saying the defense had an opportunity to have its witnesses present, and court has been generous with its time for that hearing and other last minute hearings. (35RT 7123-7125.)

B. The Trial Court's Arbitrary Denial of a Continuance in a Capital Case Violated Appellant's Right to Due Process and a Fair Trial

The court's denial of the defense request for a continuance constituted an abuse of discretion, denied appellant the right to compel the attendance of witnesses on her behalf, and denied her the right to fully present her defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, section 15 of the California Constitution. The denial of the continuance also violated appellant's right to due process under the Fifth and Fourteenth Amendments. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589.)

The granting of a motion for a continuance in the midst of trial rests within the sound discretion of the trial court judge. (*People v. Laursen* (1972) 8 Cal.3d 192, 204.) This Court reviews the denial of a continuance for abuse of discretion. (*People v. Beames* (2007) 40 Cal.4th 907, 920.) The trial court abuses its discretion when, after all circumstances are considered, the court's denial is arbitrary or exceeds the bounds of reason. (*Beames, supra*, 40 Cal.4th at pp. 921-922.)

The trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037; Pen. Code § 1050, subd. (e).) To establish good cause, a defendant must show that she exercised due diligence to secure the witness' attendance, that the witness' expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven. (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.) In addition, the court must consider "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court, and, above all, whether substantial justice will be accomplished or defeated by granting the motion." (*Laursen, supra*, 8 Cal.3d at p. 204.)

Here, appellant established good cause for a continuance; therefore, the denial of her request constituted an abuse of discretion and a denial of due process. First, appellant requested only a continuance of a hearing on a motion, a hearing which had already been spread across several days because the court squeezed it in before and after trial testimony and during breaks in the trial. Appellant's request would not have caused any delay in the trial itself. In fact, when the defense initially filed its motion and the prosecution requested time to

respond, the court noted the lack of prejudice in not dealing with the issue right away:

> What prejudice is inured to either side by just proceeding with other witnesses now, so we stop wasting time with the jury, and deal with this at some point in time in the near future after you've had a chance to research it and we're spending our time, not the jury time. (32RT 6619.)

Second, appellant requested to call Anderson as a witness to prove a critical point --that, at the behest of law enforcement, Anderson interfered with the social worker's attempt to assist appellant. Anderson's testimony would not have been necessary if the court had allowed Priebe to testify about what Anderson said to her. Instead, the court struck that testimony as hearsay, but then prevented appellant from presenting Anderson's testimony directly to avoid the hearsay issue. Evidence that law enforcement had instructed hospital staff not to provide comfort to appellant would have shed substantial light on whether appellant was in custody in her ICU room and whether her statements made to Wade were voluntary under the circumstances.

Third, appellant provided a good explanation for her inability to have Anderson appear at the hearing that day. Although Anderson, a prosecution witness, was placed on-call when she was excused earlier, appellant only knew how to contact her at her job at the hospital and Anderson had not worked the two previous days. Presumably, the prosecution knew how to contact

Anderson and could have either provided appellant with contact information or contacted Anderson directly and arranged to have Anderson appear in court as soon as possible.

Finally, appellant was facing a death sentence. She was embroiled in a lengthy trial. Her request was reasonable and would not have delayed the trial; it would simply have delayed the court's ruling on one aspect of Wade's testimony which the jury had already heard. Given these circumstances, the court's refusal to continue the hearing on what was potentially a pivotal issue regarding the conduct of law enforcement was arbitrary and an abuse of discretion.

C. Appellant was Prejudiced by the Court's Refusal to Grant a Continuance

A denial of a motion for a continuance requires reversal of a conviction if the court abused its discretion and appellant was prejudiced. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) Here, the court abused its discretion and appellant was prejudiced. There is a reasonable probability that had Anderson testified as Priebe and defense counsel indicated she would, the court would have barred the admission of any statements appellant made to Wade because of law enforcement malfeasance. Priebe had already testified to what Anderson said. There is no reason to believe that Priebe was lying or was biased in appellant's favor. If Anderson testified and denied keeping Priebe out, Priebe could have impeached Anderson with her previously barred testimony.

Moreover, the tape made in appellant's hospital room supports that Anderson likely made the statement attributed to her since the tape revealed Anderson discussing with Wade that she had withheld pain medication for appellant in order to assist law enforcement with their efforts to obtain information from appellant. (Ex. 2a, pp. 9-11.)

If law enforcement was interfering with appellant's treatment and her receipt of social services, which could have included assisting appellant with obtaining an attorney (35RT 7114), then it is highly probable that the court would have found that appellant's earlier statements were obtained in violation of *Miranda* and/or found that law enforcement's interference with appellant's ability to contact an attorney between invoking her rights and asking about Gabriel rendered that statement inadmissible. Indeed, the court had previously stated that if it learned Wade did anything to interfere with appellant's medical treatment, it would have ruled differently on appellant's custody/*Miranda* issue. (30RT 6429-6430.)

The admission of appellant's statement about Gabriel was prejudicial.[105/] The state cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.) Because there was

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[105/] Appellant incorporates by reference the prejudice discussion from her *Miranda* claim in Argument VI(E).

no evidence on tape that Wade or anyone else had told appellant about which of her boys were hurt, appellant's question specifically naming Gabriel and not her other three children suggested that appellant already knew Gabriel was her only child that was not shot. The prosecutor elaborated on this point several times during closing arguments, arguing that appellant's question about Gabriel showed she remembered what happened and knew what she had done. (55RT 10842-10843, 10854; 57RT 11159.) The prosecution treated appellant's statement about Gabriel as the equivalent of a confession. Because the evidence against appellant was far from overwhelming, the denial of a continuance to provide evidence demonstrating that appellant's statements should have been suppressed led to the erroneous admission of evidence that had a substantial effect on the jury's guilt verdicts. Accordingly, appellant's convictions must be reversed.

D. If This Court Finds That Appellant Forfeited This Issue By Failing to Make the Proper Objection, Then Counsel's Failure Constituted Ineffective Assistance of Counsel

When the prosecution first asked Wade if appellant ever asked about the well-being of any of her children by name, the defense objected on relevancy grounds and the court overruled the objection. (31RT 6606.) By the next day, the defense had filed a motion arguing that appellant's statement about Gabriel was obtained in violation of *Miranda* and in violation of the Fourth Amendment. (32RT 6614, 6617.) The court subsequently chastised

counsel for failing to make the "proper objections" when the prosecution first questioned Wade about this issue because the topic was relevant. (33RT 6806, 6807.) Despite the court's unhappiness over the wrong objection on relevancy grounds, the court held a hearing that included live witnesses on appellant's *Miranda* and privacy grounds. The court ultimately ruled, in part, that appellant had failed to make a timely Fourth Amendment objection leaving the court "in excess of its jurisdiction to entertain such a motion." (35RT 7127.)

Because the trial court ruled on the merits of appellant's motion, counsel's wrong objection on relevancy grounds did not matter. Nevertheless, if this Court finds that counsel's objection made on the wrong legal grounds provides a basis for procedurally barring this claim from appellate review on the merits, then appellant asserts trial counsel provided ineffective assistance of counsel for making the wrong objection.[106/] Counsel knew the proper grounds but didn't argue them so as not to mention *Miranda* in front of the jury. (33RT 6796-6799.) Counsel, however, could have sought a sidebar conference, as was done numerous times throughout the trial, and made the *Miranda* objection out of the jury's earshot. Had counsel done so, this issue would be properly preserved for appellate review.

[106/] Appellant incorporates by reference her legal argument regarding ineffective assistance of counsel in Argument V(C).

IX.

THE TRIAL COURT MADE A SERIES OF EVIDENTIARY RULINGS THAT INDIVIDUALLY AND CUMULATIVELY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

Appellant's defense focused on attacking the credibility of Xavier, the primary witness against her whose testimony was largely uncorroborated, and presenting evidence suggesting that Xavier was the more likely perpetrator. The trial court, however, thwarted the defense by repeatedly barring defense evidence, erroneously overruling defense objections, and improperly sustaining prosecution objections.

By continually inhibiting the defense presentation, the trial court violated appellant's Sixth and Fourteenth Amendment right to present a complete defense. (*Holmes v. South Carolina* (2009) 547 U.S. 319, 324.) This right is a fundamental element of due process and includes "the right to present the defendant's version of the facts" so that the jury "may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) When a court excludes evidence essential to the defense by limiting either the cross-examination of prosecution witnesses or the presentation of defense evidence, the defendant is denied due process and her right to a fair trial. (*Washington*, 388 U.S. at p. 19; *Chambers*,

410 U.S. at p. 294.)

A. The Trial Court Erred In Not At Least Reviewing Records From Xavier's Therapist In Camera

1. The Court Refused to Conduct an In Camera Review of the Therapy Records Based on *People v. Hammon*

Prior to trial, the defense sought in discovery the therapy records maintained by Xavier's therapist, Lynn Allen, an MFCC. (2RT 90-91.) Allen moved to quash the subpoena. She said she had a therapist/patient relationship with Xavier that began in August 1999 and ended in March 2000, and she asserted a psychotherapist-patient privilege and a right to privacy. (2RT 92; 1CT 181-189.) Allen additionally argued that appellant was not entitled to an in camera review of the therapy records to determine if there was exculpatory material in the records, citing *People v. Hammon* (1997) 15 Cal.4th 1117. (1CT 188.) Xavier also opposed both the release or in-camera review of Allen's records citing his psychotherapist-patient privilege. (1CT 190-192.)

The defense opposed the motion to quash asserting that appellant's constitutional right to confront and cross-examine witnesses against her trumped Xavier's privacy rights. (1CT 195-201.) In addition, appellant argued that Xavier had no privilege because his sessions with Allen were not for his personal therapeutic benefit but were a mechanism for getting appellant to comply with his request that she begin taking Prozac. (1CT 196.)

Appellant further contended that even if Xavier had a privilege, he waived it by disclosing the contents of his sessions to his employee, Lisa VanEssen, and to the police. (1CT 197-198.)

The parties, including Xavier, stipulated that the statements attributed to Xavier in the defense motion (except statements regarding Lisa VanEssen) could be deemed as evidence for the purpose of the hearing. (2RT 155-156.) Those statements which Xavier made to either the police or the prosecution included that Xavier was attending therapy as a tool to get appellant to take Prozac because he agreed to go to counseling if appellant agreed to take Prozac; his psychologist wanted to meet appellant and did; his psychologist was the first person to suggest that appellant had attention deficit disorder; his psychologist once suggested to Xavier that appellant might have taken a notebook he could not locate; his psychologist referred appellant to another therapist after meeting appellant; and his psychologist recommended that appellant's Prozac dosage be increased. (1CT 197-198.)

Xavier responded that his motivation for attending therapy sessions was irrelevant to whether a therapist-patient relationship was established. (1CT 208-209.) Xavier also argued that appellant had not made a sufficient showing that he waived his privilege by discussing his therapy with others. (1CT 210-211.) With respect to disclosures to the police, Xavier argued

those disclosures were inherently coercive because they were made following the murder of his three children. (1CT 212.)

The court held a hearing on the motion to quash and Allen testified about the existence of a therapist/client relationship. (2RT 111-139, 155-165.) According to Allen, when Xavier first met with her on August 4, 1999, he filled out forms that explained that their sessions were confidential barring certain enumerated exceptions, including court order. (2RT 128-129, 132.) Xavier, however, signed a release allowing Allen to discuss their sessions with appellant's therapist, Kady Nguyen.[107/] (2RT 132-133.) Xavier and Allen terminated their relationship on February 23, 2000. (2RT 131.) The court sustained objections to the defense asking Allen if Xavier told her he was seeing her to get appellant to go to therapy. (2RT 134, 139.)

Allen's attorney argued that Xavier had a therapist-client privilege as to his communications with Allen, that Xavier had not waived it by talking generally about his therapy, and Xavier was invoking his privilege. According to Allen, the *Hammon* case

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[107/] Nguyen later testified for the defense at the penalty phase and reported that she began seeing appellant on September 23, 1999 on a referral from Allen. Both therapists had signed releases allowing them to discuss the Caros' marital issues with each other and they did so. The two therapists last spoke on November 20, two days before the shootings. (62RT 11969, 11977-11979, 11983-11984.) According to Nguyen, appellant did not attend their third scheduled meeting because she had concerns about Nguyen and Xavier's therapist talking to each other. (62RT 12006.)

held that under those circumstances appellant was not entitled to the therapy records nor was he entitled to a pretrial in camera review of the records. (2RT 157-159.)

The defense clarified that it was only seeking records up until the date of the shootings and not beyond. (2RT 162.) The defense argued that state statutes cannot trump the federal constitution, especially given that Xavier was a significant prosecution witness, and asked the court to conduct an in camera review. (2RT 163.)

The court found that Xavier and Allen had a psychotherapist-patient relationship and that Xavier had not waived his privilege by making statements to third parties. The court concluded that under *Hammon*, appellant's right to confrontation did not authorize the pretrial disclosure of privileged information. The court also found that appellant had not made a showing of good cause to believe that the records contained favorable and material information that was not obtainable from a non-confidential source. Accordingly, the court granted Allen's motion to quash without prejudice. (2RT 164-165.)

2. *People v. Hammon* Cannot Trump a Defendant's Constitutional Right to Put on a Defense and Challenge the Prosecution's Case

Hammon does not comply with controlling United States Supreme Court law. In *People v. Hammon*, 15 Cal.4th at p. 1117, a defendant in a sex molestation case subpoenaed the therapy

records of the complaining witness (a minor) for use in challenging the witness' credibility at trial. The trial court quashed the subpoena based on the psychotherapist-patient privilege and refused to review the records in camera. (*Hammon*, 15 Cal.4th at pp. 1118-1119.) This Court rejected the argument that a defendant's constitutional rights to confront and cross-examine witnesses gives the defendant pretrial access to privileged material. (*Id.* at p. 1119.) In so doing, the court overruled *People v. Reber* (1986) 177 Cal.App.3d 523, 531, a case that held that the confrontation clause required pretrial access to otherwise privileged information. (*Id.* at p. 1123.) The *Reber* court had set out a process for a trial court to conduct an in camera review of privileged material, weigh the constitutional needs against the relevancy of the material, and provide the defense with material deemed essential to vindicate the defendant's rights. (*Reber*, 177 Cal.App.3d at p. 532.)

In *Hammon*, this Court found that this weighing process did not apply to pretrial discovery. (*Hammon*, 15 Cal.4th at pp. 1123-1124.) According to the *Hammon* court, the case upon which *Reber* relied for its ruling on pretrial discovery --*Davis v. Alaska* (1974) 415 U.S. 308-- was later called into question by *Pennsylvania v. Ritchie* (1987) 480 U.S. 39. Appellant disagrees.

The *Davis* case dealt with a limitation imposed at trial on cross-examining a prosecution witness about bias related to his

juvenile probation status because of confidentiality laws related to juvenile delinquency proceedings. (*Davis*, 415 U.S. at p. 309.) The Court concluded that the interests at stake in confrontation and the importance of cross-examination in testing a witness' story outweighed the state's interest in maintaining the confidentiality of the witness' juvenile case. (*Id.* at pp. 316, 319-320.)

The *Ritchie* case involved a pretrial attempt by a defendant in a child molestation case to obtain confidential investigation records related to the alleged molestation from a state youth services agency. (480 U.S. at p. 43.) The defendant believed the reports might contain information favorable to his defense. (*Id.* at p. 44.) The agency successfully moved to quash the subpoena claiming the records were privileged under state law. (*Id.* at p. 43.) On appeal, the defendant argued that he was entitled to the discovery under the confrontation clause and due process. (*Id.* at p. 45.) The *Ritchie* court viewed the case as raising due process concerns and held that the trial court had to do an in camera review of the reports under *Brady v. Maryland* (1963) 373 U.S. 83, because the reports were in the possession of the government. The Court opined that any information deemed material to the defense trumped whatever privacy concerns might be violated. (*Id.* at pp. 56-58.) The Court specifically noted that under the statutes creating the youth agency, the legislature listed eleven

exceptions to the confidentiality requirement, including a court order for access. (*Id.* at pp. 41-42 & n.2, 57-58.)

Regarding the adequacy of the defendant's showing that the records might contain information relevant to the defense, the Court noted that it would be impossible to make such a determination without access to the material but the defendant must at least make a plausible showing of how the information might be material and favorable. (*Id.* at p. 58 & n.15.) The Court ruled that the interests of all concerned could best be met by having the trial court conduct an in camera review for information deemed material to the defense. (*Id.* at pp. 60-61.

Significantly, the part of the *Ritchie* opinion that narrows the reach of *Davis* and the confrontation clause with respect to ***pretrial*** discovery of information that might be useful in cross-examining a witness is not part of the majority opinion. (*Id.* at pp. 51-54.) That section (part III-A), which said that withholding information that might be useful in cross-examining a witness does not violate the confrontation clause as long as the defendant was allowed to cross-examine the witness, was joined by only four justices. (*Id.* at p. 41.) A four-judge section of an otherwise majority opinion does not constitute a holding of the Court. (*Marks v. United States* (1977) 430 U.S. 188, 193.)

Overall, the *Ritchie* decision again confirmed the importance of a criminal defendant having all available evidence with which

to confront the prosecution's case. A close examination of the cases upon which this Court relied in *Hammon* reveals that the United States Supreme Court has not declared the confrontation clause to be solely a trial right. As Justice Blackmun argued in dissenting from Part III-A of *Ritchie*, the right to cross-examination cannot be divorced from the effectiveness of cross-examination. (*Id.* at p. 62-66 [Blackmun, J., concurring in part]). "I do not believe ... that a State can avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage." (*Id.* at p. 65; *see also id.* at p. 66 [Brennan, J., dissenting] ["the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial"]; *Hammon*, 15 Cal.4th at p. 1131 [Kennard, J., concurring and dissenting] ["I am of the view that the Sixth Amendment affords criminal defendants a right to pretrial discovery of privately held and privileged documents when discovery is necessary to a fair trial"].)

In 2003, the Kentucky Supreme Court canvassed the states and found that a majority of the state courts that have looked at

this issue have held "that a criminal defendant, upon a preliminary showing that the records likely contain exculpatory evidence, is entitled to some form of pretrial discovery of a prosecution witness's mental health treatment records that would otherwise be subject to an 'absolute' privilege." (*Commonwealth v. Barroso* (Ky 2003) 122 S.W.3d 554, 561 [citing cases from 11 other states].) The *Hammon* case was cited as one of four states that were in the minority on this issue. *(Id.)* The cases cited in *Barroso* remain good law on this issue.

Given the importance of Xavier's testimony to the prosecution's case, the trial court should have reviewed the records in camera. Appellant made as good a proffer as she could about what the records might reveal without knowing what actually took place during Xavier's therapy sessions. Significantly, Xavier first had contact with Allen on August 4, the same week that he suddenly fired appellant from her longtime position as his office manager and consummated an affair with his employee for whom he had been lusting for several months. At trial, Xavier attempted to uncouple those two events by claiming he fired appellant because he felt she was mismanaging finances and giving her parents too much money. Xavier's contemporaneous therapy statements might well have shed light on what was really happening at that time. Anything that cast doubt on Xavier's version of events --a version aimed at portraying appellant in a

bad light-- would be material and critical to the defense.

Moreover, Xavier signed a release allowing his therapist and appellant's therapist to talk about the Caros' marital issues. This suggests that Xavier had already waived his privilege regarding transmission of information to appellant, at least as far as marital issues. In addition and similar to the statute in *Ritchie*, Xavier signed a release that explained confidentiality could give way in certain circumstances, including a court order. Thus, Xavier was never guaranteed blanket confidentiality.

Given what was at stake for appellant, and given that much of the prosecution's case was dependent on the largely uncorroborated testimony of Xavier, the court's refusal to review Xavier's therapy records in camera violated appellant's Sixth Amendment right to confront the witnesses against her and her Fourteenth Amendment right to due process. This Court should reconsider its ruling in *Hammon* because it goes further than the United States Supreme Court in restricting a defendant's ability to obtain material information for use at trial to defend against the prosecution's case.

This Court should remand this case for an in camera review of Allen's records of Xavier's therapy from August 4, 1999 through November 22, 1999. If the Court finds material information in the records and provides it to appellant, then appellant can make a showing that had that information been

available for use at trial, there is a reasonable probability that the outcome of the trial might have been different. (*See e.g. People v. Gaines* (2009) 46 Cal.4th 172, 176.)

B. The Trial Court Abused Its Discretion in Admitting Four Autopsy Photos Depicting the Bloody Insides of the Children's Heads Because the Extreme Gruesomeness Outweighed Any Probative Value

1. The Trial Court Admitted Four Autopsy Photos Showing the Inside of Each Boy's Head

The prosecution moved pretrial to admit 14 color autopsy photos of the injuries to the three boys: 4 of Joey (Exhibits 40A-40D), 5 of Michael (Exhibits 42A-E), and 5 of Christopher (Exhibits 44A-E).[108/] The prosecution claimed that each photo was necessary to establish a different fact and the photos also helped establish appellant's intent and corroborated Xavier's testimony as well as the coroner's testimony, (6CT 1071-1082.) The defense countered that the cause of the deaths was not in dispute and the photos were just an appeal to the emotions of the jury. (6CT 1102-1103.)

At a hearing on the motion, the prosecution told the court it was being conservative in selecting only 14 photos out of the 175 autopsy photos that were available and argued the photos were necessary to assist the jury to understand the pathologist's

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[108/] The defense did not object to 44E, a photo of blood on Christopher's leg. The remaining photos showed various aspects of the boys' head wounds.

"complex medical" terminology. The prosecution further argued it needed the photos to prove premeditation and deliberation and intent to kill. The prosecutor said she did not have to trust that the defense was not contesting the nature and extent of the injuries unless the defense was willing to stipulate to premeditation and deliberation and intent to kill. The defense argued that the photos were gruesome and highly inflammatory and did not provide any more information than the pathologist would be conveying with a mannequin and dowels. The court examined each of the contested photos and, after hearing argument, ruled that the prosecution could admit 40B&D (but not 40A&C), 42B, C & E (but not 42A&D), and 44A-E. (13RT 2303-2328.)

At trial, the 10 autopsy photos were admitted (over renewed objection by the defense) during the testimony of the crime lab employee who attended the three autopsies and took the photos.[109/] The photographer testified that exhibit 40A showed the right side of Joey's head, 40B showed the left side of Joey's head, 42A showed blood specks and stains on Michael's face, 42B showed a large wound on the left side of Michael's head, 42C showed a protrusion in Michael's scalp, 44A showed blood on Christopher's face as well as a wound to his head, 44B showed the top of Christopher's head, 44C was a close-up of the top of

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[109/] At trial, the exhibit numbers remained the same but the letters were changed.

Christopher's head, 44D showed the back of Christopher's head, and 44E showed blood on Christopher's right leg. (15RT 2670-2671; 16RT 1802, 2803, 2806-2808.)

The photos were shown again (over defense objection) during the testimony of the medical examiner who conducted the autopsies. The doctor described 40A as showing the entrance wound on the right side of Joey's head and 40B as showing a typical exit wound. She described 42B as showing Michael's gunshot wound, 42C as showing the protrusion of the bullet under Michael's scalp, and 42A as showing Michael's face. She described 44A as showing how Christopher looked at the time of the autopsy but not actually showing the wound, 44B showed a large gaping hole from the front of Christopher's head to the back exposing the inside of his head below his skull, 44C was a close up of the hole seen in 44B, 44D showed the area in the back of Christopher's head from which a bullet was recovered, and 44E showed Christopher's leg. (36RT 7388-7390, 7392-7395, 7397, 7399-7404, 7412-7413.)

The prosecution showed the photos a third time during the computer slide show that accompanied closing arguments. (Court's Special Exhibit 1.)

The trial court erred in admitting Exhibits 40A, 42B, and 44B&C because the prejudice from the jury viewing the vivid color photos of the bloody insides of the boys' heads underneath their scalps and skulls far outweighed their probative value.

2. The Trial Court Abused Its Discretion in Admitting the Four Autopsy Photos

The trial court has discretion to determine whether photographs are probative or unduly gruesome and inflammatory under Evidence Code section 352. (*People v. Heinz* (1997) 15 Cal.4th 997, 1046.) A prosecutor may not use photographs of victims which are relevant only on a nonissue, that are largely cumulative to expert and lay testimony, or are unduly gruesome. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137 [superseded by statue on other grounds as stated in *People v. Letner* (2010) 50 Cal.4th 99, 163 n.20].)

Here, the admission of the four autopsy photographs (exhibits 40A, 42B, and 44B&C) highlighting the bloody internal heads of the children were not only irrelevant to any material issue in the guilt phase, but they were cumulative to the testimony of the medical examiner and the prosecution's blood spatter expert as well as the prosecution's computer animation video. Unnecessary and cumulative photos should not be admitted. (*People v. Smith* (1973) 33 Cal.App.3d 51, 69 [disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 325 n.5, 327 n.7] [finding photographs cumulative to "autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification"].) "The prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." (*People*

v. Cardenas (1982) 31 Cal.3d 897, 905 [quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242].)

There was no dispute that the three boys died from being shot in the head. The disputed issue at trial was the identity of the shooter not the nature of the shooting. The substantial prejudice from the graphic and bloody autopsy photos weighed heavily against the minimally probative value of the photographs. The killing of children is always disturbing. Adding unnecessary visual depictions of such death only exacerbates the likelihood that the jury is unduly swayed by the gruesomeness of the crime rather than focusing on the real factual and legal issues at play during the trial.

The court's exclusion of some of the photos proffered by the prosecution did not make the admission of the remaining photos proper. The photographs "supplied no more than a blatant appeal to the jury's emotions," a form of undue prejudice that outweighed the probative value of the evidence. (*Smith, supra*, 33 Cal.App.3d at p. 69.) Because the evidence of appellant's guilt was far from overwhelming, the unwarranted appeal to the jury's emotions by repeatedly displaying bloody photos of the inside of the children's head was likely to be impermissibly influential. The trial court erred in admitting the gruesome photos which, no doubt, contributed to the jury's guilty verdicts.

C. The Trial Court Repeatedly Interfered with the Defense Case by Sustaining the Prosecution's Objections Which Should Have Been Overruled and Overruling Defense Objections Which Should Have Been Sustained

The trial court made a number of incorrect rulings on objections:

(1) The prosecution asked Xavier: "Now, we've just been talking about a few specific checks here for the years 1998-99. Does this reflect the total amount of money that you believe or have reason to believe the defendant gave her parents during those two years?" The court overruled a defense objection that there was insufficient foundation as to personal knowledge. Xavier then answered: "No, I don't believe this represents the total amount." (20RT 3664.)

That objection should have been sustained. A critical part of the prosecution's case was that Xavier was clueless about the money that appellant was giving her parents. His belief that appellant gave her parents even more than he documented was pure speculation, was not based on any evidence, and served only to portray appellant in a more negative light. Indeed, the prosecutor argued in closing that appellant gave her parents even more money but the prosecution could only prove the amounts for which there was a record. (55RT 10735.)

(2) The prosecution raised this speculation again during its redirect examination of Xavier: "Now, do you believe that those

checks covered all of the expenses that were made on behalf of the Leons during that time period?" The court overruled a defense objection that the question called for speculation and had insufficient foundation if the question included the proviso that Xavier knew. When Xavier answered, "I do know that those checks represent only a fraction of what was paid to the Leons over that period of time for their expenses," the court again overruled an objection that there was insufficient foundation. (26RT 4577-4578.)

The court erred in allowing that answer. There was no foundation established for Xavier to be able to state that the checks represented "only a fraction" of what appellant paid the Leons. The answer simply served to unfairly portray appellant in an even worse light regarding money she gave to her parents, a point the prosecution stressed in closing argument. (55RT 10735.)

(3) The defense sought to cross-examine Xavier about the location where he had sex with Gillard after the shootings. Xavier testified that to the best of his recollection they had sex at his new home, not at a motel. When the defense asked whether it was his testimony that he did not have sex with Gillard at the Marriott Hotel after November 22, 1999, the court sustained a relevancy objection. At a sidebar, counsel explained that when Xavier finally admitted to the prosecution after the trial started that he continued having sex with Gillard after the

shootings, he told them that they had sex at the Marriott. Gillard, however, when she was interviewed by the prosecution, denied that they had sex at the Marriott. Xavier changed his story at trial to be consistent with Gillard. Counsel argued that the defense should be able to impeach Xavier with this change in his story.

The prosecution countered that this was a collateral issue since both Xavier and Gillard were consistent about continuing to have sex. The defense said it sought to prove that Xavier and Gillard got together to make sure their stories jived. The court sustained the objection because the when, where, and how of their continuing relationship was irrelevant. The court denied the defense motion to strike Xavier's direct testimony because the defense was limited in its cross-examination. (23RT 4260-4265.)

The court erred in sustaining the objection. Xavier was the key prosecution witness. His credibility was an issue. The defense had evidence that Xavier, who had withheld that he and Gillard continued their relationship, told different stories about when and where they resumed their sexual relationship. The defense had a right to impeach Xavier's credibility by establishing the changes he made in his story.

(4) During the defense cross-examination of criminalist Jones, counsel asked about when Jones first saw appellant's underpants. Jones replied it was when he was with either Richard

Fox or Herb MacDonnell. (36RT 7312.) On redirect examination, the prosecutor asked Jones who Fox was. The defense objected on relevancy grounds and explained at a sidebar that the prosecution was barred from eliciting information about a defense investigation citing *Coddington*. The prosecutor said he wanted to establish that the underwear was made available to defense experts for examination. The court allowed that testimony but barred any questioning about any requests the defense experts may have made of Jones. The prosecutor then elicited from Jones that he first saw the underpants when the panties were taken out to give access to defense experts. (36RT 7375-7378.)

The trial court erred in allowing in the testimony about Fox. Neither Fox's name nor his role as a defense expert was relevant to establishing when Jones first saw appellant's underpants. The defense had a right not to have the jury learn about its use of an expert who had not testified. (*People v. Coddington* (2003) 23 Cal.4th 529, 606.) Because Fox never testified for the defense, the jury was left to speculate that there was nothing helpful to appellant derived from the defense examination of her underpants. This unnecessary and potentially prejudicial speculation would have been avoided had the trial court properly sustained the defense objection. (*Id.*)

(5) During the direct examination of Thompson during the defense case, the defense wanted to elicit that Xavier told

Thompson that his psychologist advised him to increase appellant's Prozac dosage. The defense said this would show that Xavier was trying to convince the police early on that even a professional agreed with his assessment that appellant was depressed and required Prozac. The defense wanted an instruction that Xavier's statement was not coming in for the truth. The court acknowledged this non-hearsay purpose but ruled, without looking at the proffered transcript of Xavier's testimony, that the statement was not inconsistent with Xavier's testimony and found it inadmissible. (42RT 8486-8488.)

The court erred. Earlier, during the defense cross-examination of Xavier, defense counsel tried to ask Xavier about whether he ever told the police that after meeting appellant, his therapist diagnosed appellant and suggested that Xavier increase appellant's Prozac. The prosecution objected, claiming therapist-patient privilege.[110/] The court said it would allow the defense to ask if Xavier consulted with any MDs about prescribing Prozac for appellant since his therapist was an MFCC who could not prescribe medication. (22RT 3964-3968.) The court repeatedly sustained objections to defense questions about whether Xavier

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[110/] The prosecution's objection was disingenuous since the prosecutor told the jury in her opening statement that Xavier went to a marriage counselor as part of his August 1999 agreement with appellant to work on their marriage. (14RT 2464.) The prosecutor also elicited from Xavier that he and appellant had agreed in August 1999 that they would both get counseling. (21RT 3766.)

was in counseling from August to November 1999. (22RT 3968.) The court finally allowed counsel to ask: "Did you tell the police when you were interviewed initially that your psychologist had prescribed Prozac for Cora?" After the court overruled an objection, Xavier said: "I don't recall if I used those words when I spoke to the sheriff's department." When asked if he discussed Prozac with the police in his initial interview, Xavier replied, "To the best of my recollection, I mentioned to them that Cora had been started on Prozac by me." Xavier denied that he would try to intentionally mislead the police about who prescribed the Prozac. (22RT 3968-3969.)

Because the defense proffer about what Xavier told the police was inconsistent with what Xavier claimed to recall telling the police, the court erred in barring the defense from eliciting what Xavier said about his therapist and the Prozac.

(6) The court sustained the prosecution's objections to the defense asking appellant whether Xavier told her on the day of his scheduled appointment with his divorce lawyer that he changed his mind or that he kept the appointment:

[DEFENSE]: And do you recall whether or not on that same date, the date that your husband was to have the appointment with the divorce attorney, that he had told you that he had changed his mind and had not gone?

[PROSECUTOR]: Objection; calls for hearsay.

THE COURT: Sustained.

[DEFENSE]: Did your husband tell you whether or not he had kept the appointment with the divorce attorney?

[PROSECUTOR]: Objection; hearsay.

THE COURT: Sustained.

[DEFENSE]: It's not offered for the truth, your Honor.

[PROSECUTOR]: Then relevance. (46RT 9246.)

At a sidebar discussion, the court ruled that the questions elicited hearsay and sustained the objections. The court said at appellant could testify about why she was upset but could not testify to statements Xavier made to her unless they were inconsistent with his prior statements. (46RT 9248.)

The court's hearsay ruling was wrong. The defense asked appellant whether Xavier told her whether or not he had gone to the divorce lawyer. That required only a yes or no response. The answer would not reveal whether Xavier kept the appointment. Appellant could then have testified that based on whatever Xavier told her, she did or felt something and that would not violate the hearsay rule but would provide a basis for why appellant did or felt whatever. Although the defense was eventually able to establish this point (46RT 9250), the court's erroneous rulings made the defense look wrong and inept and needlessly prolonged appellant's examination.

(7) Wade testified that when Juanita was in appellant's ICU

room, Wade over heard Juanita ask appellant, "Why did you do this?." Juanita then recited a prayer over appellant. Appellant clutched the front of her nightgown and said "My babies. My babies. I'm sorry. I'm sorry." (31RT 6530-6531.) Wade further testified, over objection, that when she questioned Juanita the next day, she asked Juanita if she knew what appellant had been saying sorry for and Juanita replied, "I'm sorry. So sorry for what happened to my babies, mother" and touched her tummy. (31RT 6533.)

The court erred in overruling the defense objection to eliciting Juanita's opinion about what appellant was referring to. Prior to Wade testifying, the defense objected to the prosecution getting in through Wade Juanita's opinion about what appellant supposedly meant when she said she was sorry to Juanita. The defense argued that Wade's testimony about what Juanita said appellant meant would be hearsay and an improper opinion or conclusion and would lack foundation. (31RT 6518-6519.)

The prosecution contended it was an inconsistent statement that would impeach Juanita's testimony that she didn't remember any of that. (31RT 6519-6520.) When Juanita testified earlier in the trial, she was asked by the prosecution whether appellant said to her, "I'm sorry for what happened to my babies." Juanita responded that she did not recall. Juanita also testified that

she did not recall whether she told the "woman detective" that appellant told her she was sorry for what happened to her babies. (28RT 5060.)

The court agreed that Wade's question to Juanita was seeking an opinion but said Juanita's answer was a statement about what appellant said. The defense objected that appellant never said what Juanita was attributing to her, and it was Juanita's opinion since that was what Wade had asked for. The defense noted that Juanita had a tendency to just blurt things out. (31RT 6521-6522.)

The transcript of Wade's interview with Juanita showed that when Wade asked Juanita what appellant was sorry about, Juanita replied, "She's so sorry what happened. I'm so sorry for what happened to my babies." The court said the second sentence was an inconsistent statement but the first was not and said the prosecution needed to edit the tape and transcript if it wanted to use it. The prosecution said it would just have Wade testify about what Juanita said rather than playing the tape. (31RT 6523.)

Given that background, the court erred in allowing in Wade's testimony about what Juanita said appellant supposedly said because it lacked foundation and was speculative. First, Wade embellished what Juanita said by adding the word "mother" after "I'm sorry for what happened to my babies," thus making it appear

to be more of a quote than it was when Juanita said it. Second, Wade, who was actively listening to the conversation between appellant and Juanita, heard only "I'm sorry." Not only was that the extent of Wade's testimony about what she heard, but she would not have needed to ask Juanita what appellant was sorry for if appellant had explained it was for what happened to her babies. Third, Juanita's statement was elicited in response to a question asking her for her opinion. Juanita's first response was her opinion "She [appellant] is so sorry what happened." Juanita then embellished her opinion by adopting appellant's voice: "I'm so sorry for what happened to my babies." Because the entire answer, when taken in context, was Juanita's speculation about what appellant meant, it should have been barred.

(8) Deputy Tutino testified at a 402 hearing that Xavier told Juanita in the taped conversation in the garage "She shot them in the head. She wasn't messing around." (47RT 9436, 9441; Ex. 5A (Supp.CT (I/I) 78, lines 14-15).) The defense wanted those statements from the transcript to be admitted to impeach Xavier. (47RT 9452-9456.) The parties later debated whether that part of that garage transcript was admissible. (49RT 9732-9736.) The court noted that it seemed obvious from the photos where on the body the kids were shot. (49RT 9733.) The defense argued that Xavier, a doctor, never specifically testified about where he believed the kids, especially Joey, were shot despite describing

the scene generally thus implying he did not know at the time he first saw the children. The defense could reasonably argue that Xavier was telling Juanita where the kids were shot at a time he would not have known for sure where they were shot and that supported third party culpability. The defense did not want the statements admitted for the truth --that appellant shot the kids in the head-- but for Xavier's state of mind. The prosecutor argued the statement was irrelevant. The court ruled it inadmissible. The court found it not to be hearsay but did not find it particularly relevant in its nonhearsay capacity. (49RT 9733-9737, 9739-9740.)

The court erred in not allowing in the statement. The defense wanted it admitted for a non-hearsay purpose and it was relevant to allow the jury to fairly assess whether Xavier knew more when he was talking to Juanita then he should have known based on his version of what he did that night.

D. The Trial Court Erred in Not Admitting as a Past Recollection Recorded a Statement that an Officer Wrote in His Police Report But Could No Longer Remember

The defense wanted to elicit that Tutino wrote in his police report that he overheard Xavier tell Juanita in the garage that night that "Cora said she killed the kids." (17RT 3137; 49RT 9743, 9754, 9768, 9781; Special Exhibit 7.) Xavier had previously testified that appellant never spoke that night and denied ever telling the police or anyone investigating the shootings that

appellant said anything while on the floor that night. (21RT 3842-3843.) When the defense was questioning Xavier, the court sustained a broader question as to whether Xavier ever told anyone that appellant said anything to him that night. (21RT 3842.) The defense wanted Xavier's statement admitted to show that he made the statement that appellant said she killed the kids, not for the truth of what he said. (49RT 9782.)

At the time of trial, Tutino testified at a 402 hearing that he did not specifically recall hearing Xavier talk about anything appellant said when he found her. (49RT 9758.) Tutino did, however, write a report documenting what he overheard Xavier saying. (49RT 9759.) Reading the report did not refresh Tutino's recollection about what he heard Xavier say, but he agreed he documented that he heard Xavier say that. (49RT 9760, 9763.) Tutino wrote his report some time around 6:00 a.m. on November 23. (49RT 9761.) His notation that "Cora said she killed the kids" was in a paragraph recounting what he heard Xavier say. (49RT 9762.)

Tutino testified that to the best of his knowledge his report was accurate and did not include anything false. (49RT 9762-9763, 9765-9766, 9775.) Tutino had previously questioned the correctness of one statement in his report but did not correct

the one about what Xavier said about appellant.[111] (17RT 3146-3147; 49RT 9775-9776.)

The defense tried to establish the foundation to admit Tutino's statement from his police report as a past recollection recorded under Evidence Code section 1237.[112] The court questioned the ability of the defense to establish the requirement that the declarant testify that the past recollection recorded was truthful when he made the statement. (49RT 9770-

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[111] Later, after refreshing his recollection, Tutino testified his report was, in fact, correct as written and he was wrong in thinking it might have been incorrect.(49RT 9776.)

[112] Evidence Code section 1237 states:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
> (4) Is offered after the writing is authenticated as an accurate record of the statement.
>
> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

9771.) Yet, the court sustained every objection to every question counsel asked Tutino to establish that what he wrote in his report was truthful based on the surrounding circumstances of how he wrote reports even though he had no present recollection of that specific statement being made. (49RT 9765-9770, 9773.)

The defense argued that it laid a sufficient foundation to show that Tutino, a sworn police officer tasked with making an accurate report, documented his observations close in time to when they were made, signed his report, and did not make corrections to the statement although given an opportunity to do so. (49RT 9781-9782.) The prosecution contended that the defense did not meet the third requirement for section 1237: that the statement be offered after the witness testifies that the statement he made was a true statement.[113/]

The court concluded that the defense had not established the reliability prong for a past recollection recorded --that the declarant assure the trustworthiness of the statement-- because Tutino has no independent recollection of the statement. The

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[113/] The prosecutor also argued that it was multi-level hearsay and was not supported by the tape of the garage conversation. (49RT 9783.) Neither of those points had merit. The defense, as counsel explained, was only offering one level of hearsay --whether Tutino heard what Xavier said. The defense was not offering what Xavier said for the truth, thus there was no second level of hearsay. The argument about the statement not being on the garage tape was a red herring since much of that tape was inaudible. (*See e.g.* 25RT 4546-4551; 47RT 9431-9450, 49RT 9798.)

court added that it did not hear the statement on the tape of the garage recording, and Xavier did not say he made the statement. Therefore, there was no evidence the statement was ever made. The court found the statement inadmissible under Evidence Code section 1237. (49RT 9784-9785.)

The court erred in not allowing the defense to elicit that Tutino overheard Xavier saying that appellant said she killed the kids. The defense was not concerned with the truth of what Xavier said but simply the fact that Xavier said it. Accordingly the relevant testimony was the accuracy and reliability of what Tutino said he heard not whether Xavier's statement to Juanita was truthful. The past recollection recorded exception to the hearsay rule is intended for just this type of situation where Tutino, the recorder of the statement he heard, no longer recalled hearing the statement.

This Court has held that when a police officer no longer recalls an exact statement but acknowledges the correctness of his police report containing the statement, the statement is properly admitted pursuant to Evidence Code section 1237 as a past recollection recorded. (*People v. Sam* (1969) 71 Cal.2d 194, 208 n.3.) Thus, if the defense established that Tutino typically recorded truthful and accurate statements in his police reports, then the report of what Tutino heard should have been admissible. The defense laid that foundation to the extent it was able to

given that the court repeatedly thwarted the defense questioning on this point.

The trial court's erroneous ruling was prejudicial. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.) The defense put on evidence that Xavier manipulated the crime scene and the evidence to make appellant look guilt. Evidence that Xavier reported to Juanita that appellant told him she killed the kids would be significant information for the jury to consider since appellant was, by all accounts, unconscious and not communicating after she was shot. Had the jury had this evidence in addition to the evidence of Xavier's other manipulations, including the planting of letters in appellant's closet and the stopping of the grandfather clock, there is a reasonable probability that at least one juror would have had a reasonable doubt about Xavier's credibility and appellant's guilt and the outcome of the trial would have been different.

E. The Cumulative Effect of the Evidentiary Errors in this Case Require a Reversal of Appellant's Convictions

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, n.32.) "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.)

Multiple errors can result not only in a miscarriage of justice but the errors can render a trial fundamentally unfair and violate the Due Process Clause. (*Estelle v. McGuire* (1991) 502 U.S. 62.) State court evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *see also Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463 [An erroneous evidentiary ruling which affects the fundamental fairness of the trial violates a criminal defendant's due process rights].)

The harmless error standard requires the prosecution to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.) A miscarriage of justice occurs when it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) For the reasons set forth above, the cumulative effect of these evidentiary errors so prejudiced appellant that she was denied her constitutional right to due process and a fair trial as well as her right to present a complete defense.

X.

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A GRAPHIC COMPUTER ANIMATION DEPICTING THE PROSECUTION'S VIEW OF HOW THE SHOOTING OF MICHAEL AND CHRISTOPHER TOOK PLACE

A. Over Defense Objection, The Court Admitted a Computer Animation Showing How Michael and Christopher were Shot and Where Blood From the Shooting was Deposited

The prosecution moved pretrial to admit a computer animation of the shootings as demonstrative evidence that would, according to the prosecution, assist the jury to understand the testimony of its blood spatter expert, Rod Englert. (3CT 497-506, 604-610; 3RT 287; 4RT 412.) The defense objected to the computer animation as lacking foundation and argued it would create a substantial danger of undue prejudice and mislead the jury. (3CT 599-602.)

The prosecutor described the animation as "a visual depiction of what our expert will testify to." (4RT 413.) The prosecutor noted that the animation, which she explained was based on information from Englert and the coroner as well as the DNA evidence, did not show the "highly emotional" details of the crime such as the kids' belongings in their room or the facial expressions of the kids. (4RT 424, 426.) She described it as extremely probative and not overly prejudicial. (4RT 425.)

At the court's request, the prosecution played and narrated

for the court's review the 2-minute video recording of the computer animation. (4RT 414-424.) While agreeing that the computer animation served as an illustration of a witness' testimony, the court expressed concern that the jury would view the animation as a re-creation of the actual crime rather than an illustration. (4RT 431, 435-436.) The prosecution urged the court to give a cautionary instruction similar to the one given in *People v. Hood* (1997) 53 Cal.App.4th 965. (4RT 437.)

The court agreed that the prosecutor, as the proponent of the evidence, had to convince the court that the animation was accurate. The court ordered the prosecution to make certain changes such as showing Christopher's eyes closed and putting in a longer break between the Michael and Christopher shooting sequences as well as any other changes needed to make the animation illustrative of actual testimony rather than depicting inferences about the evidence. (4RT 449.) The court ordered the prosecutor to secure Englert's declaration attesting that the animation accurately depicted what he believed the evidence to be. (4RT 451.)

The court disagreed with the defense that it was entitled to specific notes or evidence regarding how the prosecutor communicated with the animator regarding modifications made to the animation. (4RT 438-446.) The court also ruled that the defense was not entitled to any computer files used by the

animator to generate the video if the file was not presented to the jury as part of the video. (4RT 450.)

The court ultimately found the computer animation admissible as illustrative of Englert's testimony. The court also said it would instruct the jury about the purpose of the animation before it was played and again as needed. (4RT 446, 449.

During the prosecutor's opening statement, the court overruled a defense objection to the prosecutor telling the jury that the "computer animation pieces together how these children were murdered." (14RT 2488.) The court read the jury a lengthy admonition about the computer animation before the prosecutor played it during her opening statement and read it again before the first break after the prosecutor played.[114] (14RT 2489-

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[114] Ladies and gentlemen, you are about to be shown a video that consists of several computer animated scenes. This is an animation based on an expert's opinion. There are what are called crime scene reconstruction experts who could, without using a computer, get on the stand and testify that based on their analysis of the evidence they have concluded that the crime occurred in a certain manner. And then they can describe to you the manner in which they believe it occurred. They can use charts or diagrams or photographs to illustrate their testimony.

The computer animation we have here is nothing more than that, an illustration of the expert's opinion. You are instructed to treat it no differently than you would any other chart or diagram of the evidence.

The animation is not intended to be a film of what actually occurred, nor is it an exact re-creation. Therefore, there may be facts that are not exactly accurate or not exactly as they occurred, but may be

(continued...)

2490, 2499-2500.)

Rod Englert testified in the prosecution's case-in-chief about the videotape of the computer animation. (37RT 7533.) According to Englert, he did not know who prepared the computer animation; it was sent to him by the prosecutor. (37RT 7533-7534.) He described it as an animated re-creation which accurately showed his "opinion of how this crime, particularly the shooting of Michael and Christopher, had to occur in order to generate the bloodstain patterns." (37RT 7533-7534.)

The eight-scene computer animation was played one scene at a time with Englert testifying in between segments.[115/] The first scene showed two young boys sleeping in the bottom bunk of a bunk bed. (37RT 7536.) The second scene showed the shooter bending forward and leaning in to shoot the closest boy (Michael) in the left side of his head. The animation showed bright red blood

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[114/](...continued)
reasonably close.

It is important to keep in mind that an animated video is not an actual film of what occurred, nor is it intended to be an exact, detailed replication of every detail of every event or every movement. It is only an aid to giving you an overall view of the particular version of the events, based on particular viewpoints or particular interpretations of evidence made by an expert witness. ... (14RT 2489-2490.)

[115/] The defense renewed all of its pretrial objections to the computer animation during Englert's testimony. (37RT 7554.) Before the computer animation was played, the court reread the earlier instruction. (37RT 7535-7536.) The court repeated the admonition a fourth time as part of final jury instructions. (56RT 10869-10870.)

flowing out of the head wound and spreading slowly across the bed before pooling on the floor. (37RT 7543.) The third scene showed the second boy (Christopher) moving from a prone to a sitting position with Michael's blood visible on the bed. (37RT 7552.) The fourth scene showed the shooter and Christopher facing each other as the shooter aimed the gun at Christopher's head and fired a shot. (37RT 7558.) The fifth scene showed Christopher leaning forward while blood dripped on his clothes and on the bed. (37RT 7564.) The sixth scene showed Christopher twice getting up on one knee and moving his head out towards the bed railing to his right and dripping blood on the floor (with a toy visible on the floor) before lying back on the pillow. (37RT 7583.) The seventh scene showed the shooter leaning in and firing a shot into Christopher's head and then blood spraying out. (37RT 7608.) The final scene, titled "Same Gunshot, Different View," showed the front of the crouched shooter as blood sprayed backwards onto the shooter's shorts. It ended with a close up of blood spatter on the inner left crotch of the shooter's shorts. (37RT 7609.)

In between the playing of the scenes, the prosecution had Englert position mannequins as if they were Michael and Christopher on the bottom bunk of a replica bunk bed set up in the courtroom while, at the same time, displaying and discussing bloody photos of Michael and Christopher, the bedding, the

bedroom, and the shorts. (37RT 7540-7634.)

B. The Trial Court Erred in Admitting the Computer Animation Because It was Both Visually Prejudicial and Cumulative to Other Evidence, While Being Only Mildly Probative to Any Disputed Issue

At the time that appellant's case was tried, there was only one published case in California dealing with the admission of computer animation: *People v. Hood* (1997) 53 Cal.App.4th 965. The main issue at the trial in *Hood* was whether the unwitnessed shooting of a former employee by an employer in a work office was deliberate and premeditated or self-defense. (*Hood*, 53 Cal.App. at p. 967.) Both the prosecution and the defense presented computer animations showing their view of how the shooting took place. The defense challenged the foundation for the prosecution's animation. (*Id.* at 968.)

On appeal, the court rejected the argument that the computer animation had to meet the requirements of *People v. Kelly* (1976) 17 Cal.3d 24, finding that computer animation was akin to drawings by experts and did not involve any new scientific technique.[116/] (*Id.* at pp. 969-970.) The court found several evidentiary challenges to the animation waived because the

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[116/] The computer expert who prepared the animation in *Hood* testified at the trial about how the animation was prepared. (*Hood*, 53 Cal.App.4th at pp. 969-970, 971.) In contrast, the animator of the animation played at appellant's trial did not testify, and the court barred the defense from discovery regarding how the animation was created. (4RT 413, 428, 432-433, 441-443.)

defense had not asserted them at trial. (*Id.* at pp. 970.) Regarding prejudice, the court found the admission of the animation was not an abuse of discretion because the animation was "clinical and emotionless" and the trial court gave cautionary instructions regarding how to utilize the animation. (*Id.* at pp. 971-972.)

Earlier this year, this Court addressed computer animations for the first time. (*People v. Duenas* (2012) 55 Cal.4th 1, 17-26.) Like the *Hood* court, this Court also viewed computer animation as demonstrative evidence of an expert's opinion about other evidence rather than being substantive evidence itself. (*Id.* at p. 20.) Thus, the Court found computer animation to be admissible if it fairly and accurately represented the evidence to which it related. (*Id.*) The test is not whether the animation accurately portrays the underlying events, but whether the animation accurately represents the expert's opinion about what took place. (*Id.* at p. 21.) This Court cautioned, however, that computer animation, like other evidence, is subject to evidentiary rules, including Evidence Code section 352. (*Id.* at p. 24.) A trial court's ruling on the admission of computer animation is reviewed for abuse of discretion. (*Id.* at p. 21.)

In appellant's case, the graphic visual depiction of appellant's children being shot was highly prejudicial, cumulative, and unnecessary. Not only was the computer animation

played during the prosecution's opening statement and again during Englert's testimony, but the jury received a triple dose of the shootings during Englert's testimony. The prosecution would play a scene, have Englert describe what took place, and then have Englert discuss each photo that he relied upon to surmise how the shootings took place. The prosecution then replayed scenes from the animation during closing argument. (Court Special Ex. 1.) The computer animation was sufficiently graphic that it had to have lingered in the jury's mind long after it was played.

Contrary to how this Court and the prosecution have portrayed animation clips, they are not really the equivalent of demonstrative evidence, since that term was coined long before the advent of computers. The animation shown to the jury was not the equivalent of Englert sitting on the witness stand drawing pictures of how the shooting happened based on his view of the blood evidence, nor was it analogous to "a 'flip-book' series of sketches." (3CT 504, 605.) Sketches, even flipped sketches, are quite different than real-time depictions of a shooting. A drawing is a one-dimensional representation while computer animation brings a drawing to life. "If a 'picture is worth a thousand words,' then a computer-generated animation says a thousand words, sings a thousand songs, and paints with a thousand colors all at once." (Galves, *Where the Not-So-Wild*

Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance (2000) 13 Harv.J.Law & Tec 161, 190.) There is, in fact, little comparison because computer animation is significantly more dramatic and compelling than traditional demonstrative evidence. Accordingly, there should be a higher degree of probativeness required to admit a computer animation because of the higher likelihood of prejudice from creating realistic looking re-creations of violence.

The probativeness of the computer animation in this case was minimal. This was a who-done-it case rather than a how-was-it-done case such as in *Hood* and *Duenas*.[117/] Visually depicting the shooting of the two boys was not needed in the prosecution's case but was highly likely to engender strong feelings in the jury. No matter how many times the jury was told that the animation was an illustration and not a reenactment, the jury was still left with a vivid and prejudicial image that was much more powerful than anything that Englert said or anything that could have been presented in a different technological age. Just because the technology exists to make realistic looking animations does not mean that they should be admitted automatically under the guise of "illustrating" the testimony of

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[117/] The prosecutor told the jury during closing argument: "The law in this case is going to be very straightforward. This is a whodunit case." (55RT 10721.)

"an expert."

Moreover, the court's instruction to the jury --"The animation is not intended to be a film of what actually occurred, nor is it an exact re-creation. There may be facts that are not exactly accurate or not exactly as they occurred, but may be reasonably close"-- are ambiguous as to the purpose of the computer animation. If it was not "intended to be a film of what actually occurred" than it was irrelevant and should not have been admitted. And if it was intended to portray how the children were shot, then it should have been inadmissible as more prejudicial than probative because of the graphicness of the depiction and its speculative nature.

Indeed, despite the animation's explicit depiction of how the shooter stood to get blood spatter on the shooter's crotch, Englert testified, "There's various positions one may be in that we'll never know, whether stooped over, whether leg on the bed, how close, no one will ever know that information." (38RT 7711.) In reality, the animation simply depicted, in graphic fashion, Englert's speculation about one of many different ways in which the shooting could have occurred. Because Englert could not say how the shooter actually stood, the animation did not represent "real evidence" about how the tiny spots of Christopher's blood ended up on the inner crotch of appellant's shorts. The jury was as free to speculate as Englert was.

The trial court abused its discretion in admitting the computer animation under the circumstances under which it was presented. The bloody depiction of two young boys being shot in the head no doubt left the jurors with a disturbing visceral image. And, with appellant being the only person on trial for their murder, the intense emotions evoked by the depiction of the murders could only inure to appellant's detriment. Appellant is entitled to a fair trial based on real evidence not one predicated on pandering to the jury's emotions through the use of speculative and graphic technology.

XI.

THE PROSECUTOR REPEATEDLY COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS

The prosecutor repeatedly committed misconduct during closing arguments at both phases of the trial. This case turned largely on Xavier's credibility. Consequently, the prosecutor devoted much of her closing and rebuttal arguments to touting Xavier's virtue. In doing so, the prosecutor impermissibly vouched for Xavier by repeatedly referring to him as an honest man. In addition, the prosecutor injected her personal opinions and went outside the evidence to engage in unfounded speculation. The defense objected to some of the misconduct, but inexplicably remained silent during other misconduct.[118/]

The applicable federal and state standards regarding prosecutorial misconduct are well-established. A prosecutor's conduct violates a defendant's right to due process when it infects the trial with unfairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) "To constitute a due process violation, the prosecutorial misconduct must be 'of sufficient significance to result in the denial of the defendant's right to

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[118/] Appellant acknowledges that her attorney did not object to some of the prosecutor's misconduct as required by *People v. Green* (1980) 27 Cal.3d 1, 27. In subclaim (C), below, appellant has raised an ineffective assistance of trial counsel claim based on counsel's failure to object to the prosecutor's blatant and repeated misconduct.

a fair trial.'" (*Greer v. Miller* (1987) 483 U.S. 756, 765 [citations omitted].) Conduct by a prosecutor that does not render the trial fundamentally unfair constitutes prosecutorial misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A prosecutor breaches her duty by "offering unsolicited personal views on the evidence." (*United States v. Young* (1985) 470 U.S. 1, 7.) Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony. (*United States v. Robinson* (1988) 485 U.S. 25, 33 n.5; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1276; *People v. Fierro* (1991) 1 Cal.4th 173, 211.) "It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony ...." (*Young*, 470 U.S. at p. 8 [quoting ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980)].)

A prosecutor may not vouch for the credibility of a witness, bolster the veracity of a witness by referring to evidence outside the record, or imply that she has taken steps to assure a witness' truthfulness at trial. (*People v. Frye* (1998) 8 Cal.4th 894, 969.) A prosecutor also steps over the line of permissible

argument when she argues as fact a contention for which there is no evidence. (*People v. Carrera* (1989) 49 Cal.3d 291, 319-320.) Although prosecutors have "reasonable latitude to fashion closing arguments," including arguing "reasonable inferences based on the evidence," a prosecutor "has no business telling the jury his individual impressions of the evidence." (*Necoechea*, 986 F.2d at p. 1276.) Prosecutors may not "purport to rely on their outside experience or personal beliefs based on facts not in evidence when they argue to the jury." (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

All of these actions constitute impermissible misconduct because "improper suggestions, insinuations and, especially, assertions of personal knowledge [by a prosecutor] are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States* (1975) 295 U.S. 78, 88.)

A. The Prosecutor Made Numerous Improper Arguments

The prosecutor initially primed the jury on Xavier's credibility and honesty during her opening statement when she told them that Xavier's expected testimony was the absolute truth. (14RT 2515.) Then, in closing arguments, the prosecutor told the jury:

> Now, Dr. Caro testified to you about firing the defendant in August and he testified truthfully about it. (55RT 10741--no objection.)

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> Now, like I told you in opening statements you are the judges of how this affair affects Dr. Caro's credibility as a witness. Dr. Caro is just a man with flaws and imperfections like everybody else. One thing about Dr. Caro on this issue is he was honest. He was honest when he testified. That's all you can ask. (55RT 10745-10746--no objection.)

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> After dinner you heard testimony that the defendant asked Dr. Caro how he felt about going to Waterford the next day and you heard him testify that he said to her he had mixed feelings about it, ambivalent feelings. She didn't like hearing that. Probably not many people would. But he was honest. He answered her question honestly. That's what this man does. (55RT 10755-10756--no objection.)

This was all impermissible vouching. There is a significantly higher potential for prejudice in case such as this where the prosecutorial vouching involves the credibility of the key prosecution witness. (*United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1444.)

During her guilt phase closing argument, the prosecutor also repeatedly interjected her personal opinion. For example, while discussing the playing of the tape of Xavier's first police interview, the prosecutor said:

> As most of us were following along in the transcript, trying to listen to the tape and discern the words that were actually being spoken, Dr. Caro was sitting up here and having to listen to that tape, too. And some of you may have noticed what he did as that tape was being played. He stifled sobs as he sat on that witness stand. He bowed his head and crumpled over in pain as he was going to

> listen to that story in his own words again. It wasn't loud. It wasn't meant really for you to see or to hear, but it was a rare glimpse into the emotional side of this man and the depth of the pain that he carries around with him, even though most of the time it's tough to see. (55RT 10731-10732--no objection.)

Significantly, there is no evidence in the record that Xavier stifled sobs, crumpled over in pain, or made any other external signs of pain during the tape playing. Nevertheless, the prosecutor urged the jury to consider these "facts" in assessing Xavier's credibility and perhaps feeling sorry for him at appellant's expense.

The prosecutor also argued:

> You know that Dr. Caro was talking about Joey. Like any father Dr. Caro would want to believe that he loved all of his children equally. I'm sure he did a great job making each child feel loved and feel --

The court sustained the defense objection that the prosecutor was expressing her own opinion; yet, the prosecutor went on to express more of her own opinion:

> But as difficult as it is to say, you can tell from the state of this evidence that Dr. Caro had a special place for Joey. Joey was the one who made Dr. Caro a father for the first time. Joey was the one who was most like a person. He was the oldest at the time. And when Dr. Caro sat there in his family room saying "She killed my best friend," he was talking about Joey. ***That's probably why he was the defendant's first target.*** (57RT 10836-10837, emphasis added --no objection.)

That, too, was the prosecutor's own opinion, not based on

evidence. Indeed, the prosecutor told the jury during her opening statement: "[I]t's impossible to show with absolute certainty which child was killed first." The prosecutor then asserted it was logical and reasonable to believe that Joey was shot first because he was the most likely to get up and investigate news in the house but added, "we can't prove that to you for sure."[119/] (14RT 2484-2485.) By arguing that appellant shot Joey first because he was Xavier's best friend without any evidence to support this, the prosecutor unfairly cast unwarranted aspersion on appellant.

The prosecutor relied on facts not in evidence when she tried to justify to the jury why the prosecution had not called the lead investigator as a prosecution witness:

> You've heard that one of the sergeants who was out on the crime scene, Sergeant Tim Lorenzen, was the lead investigator. Well, it was really the lead investigator on the case in name only because you know that he didn't really do much of the actual work himself.
>
> He was sort or coordinating the arrival and the duties of all the other deputies and all of the other investigators who came and did work on this case.
>
> And you saw him testify in the defense case, and you know why the People didn't put him on in the prosecution's case. Because he didn't really do that much on the case. It was all delegated to other people. (55RT

[119/] The prosecutor embraced this theory again in her closing rebuttal when she suggested that appellant shot Joey first because he was the most likely to get up and investigate the noise from a gunshot. (65RT 12702.)

10838.)

Not only was the prosecutor's alleged reasons for not calling Lorenzen as a witness not based on evidence but it was an untruth aimed at short-circuiting any defense reference to Lorenzen's conspicuous absence from trial. During the defense cross-examination of Lorenzen during the prosecution's rebuttal case, the court barred the defense from asking Lorenzen whether DA investigator Barnes had anything to do with Lorenzen deciding not to become a DA investigator. (54RT 105176.) The prosecution later revealed to the court that Barnes had reported Lorenzen for cheating on the DA investigator oral exams by learning some of the questions in advance. As a result, Lorenzen was transferred out of the detective unit and suspended for 30 days. (54RT 10608-10609; Court Special Ex. 10.) Lorenzen's history of dishonesty was a more likely explanation for his absence from trial.

During rebuttal argument, the prosecutor unfairly impugned the integrity of the defense and of defense counsel:

> The prosecution and the defense have different tasks in a criminal trial. The prosecution has to prove to 12 jurors beyond a reasonable doubt the truth of the allegations against a defendant. The defense attorney just has to confuse one of you. That's all she has to do. That's the tactic that many defense attorneys employ. Confusion. Throw up smoke. Try and mislead jurors. And maybe, by chance, they'll get lucky and get one. (57RT 11103A.)

Later, the prosecutor implored the jurors, "I just ask that you

not be the one that the defense is trying to target for confusion." (57RT 11129.) The defense did not object either time; however, the court sustained later objections after the prosecutor accused defense counsel of being "intentionally false" during her argument and argued that the defense discussion about an abiding conviction "was nothing more than an attempt to confuse you as to what your duties are." (57RT 11144, 11162.)

During the prosecutor's closing argument in the penalty phase, she again engaged in an array of misconduct:

- repeatedly asserted as fact that Christopher moved after being shot in order to "get away from his killer" and that he was "fighting for his life" when, in fact, there was no evidence to support that the 5-year-old was cognitively functioning rather just moving reflexively after being shot, nor was there evidence that Christopher's movements were an attempt to get away from the shooter (65RT 12592, 12601, 12635, 12712--no objections);
- unfairly appealed to the emotions of the jury by inviting them to cry for each of the boys (65RT 12593--objection sustained);
- speculated with no basis in fact that appellant planned on killing Gabriel also but had to use Gabriel's bullet to shoot Christopher a second time (65RT 12594--no objection);
- misstated the law by telling the jury that every factor in

the penalty phase had to be proven beyond a reasonable doubt (65RT 12596--objection sustained);

- improperly relied on facts not in evidence to compare appellant to other women facing marital problems (65RT 12600--objection overruled);
- improperly argued that the defense changed its story from appellant didn't do it to appellant did it for altruistic reasons (65RT 12605--objection sustained);
- improperly impugned the integrity and credibility of the defense psychologist (65RT 12609--objection sustained);
- relied on facts not in evidence to improperly state: "All murders are committed when people are going through bad times in their lives" (65RT 12611--no objection);
- misstated that there was not conclusive evidence that appellant's toxicology screen was positive for Xanax (65RT 12613--objection overruled);[120/]
- misstated the law that the jury could only consider sympathy for appellant but not her family (65RT 12616--objection

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[120/] When challenged at a break by the defense, the prosecutor acknowledged that the presence of Xanax had been confirmed by an outside lab although that had not been presented at trial. The prosecutor said she had not intentionally misstated the result of the Xanax test. The parties stipulated to the presence of Xanax, and the prosecutor corrected herself when her argument resumed. (65RT 12619-12624.)

overruled);[121]

- repeatedly compared appellant to poor, abused, inner-city kids and said that, in comparison, she deserved no sympathy (65RT 12617--objection sustained but prosecutor continued on);
- impermissibly and repeatedly described Xavier as honest while discussing his testimony about appellant's attacks on him and stated that Xavier was honest in admitting what he had done to appellant (65RT 12627-12629--no objections);
- improperly speculated without any evidence that the deceased children "would have been successful. They would have been wonderful" (65RT 12631--no objection);
- improperly asked the jurors to imagine themselves as Christopher in bed, feeling safe, before he was shot and while appellant was shooting him (65RT 12634, 12635--objections overruled);
- stated that appellant "slaughtered" the three boys, a phrase the court said it would have sustained an objection to had counsel made one[122] (65RT 12632, 12638--no objections.)

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[121] The United States Supreme Court has held that it is reasonable for a defendant in a capital case in California to rely on sympathy for his family as a factor in mitigation at the penalty phase. (*Cullen v. Pinholster* (2011) __ U.S.__ [131 S.Ct. 1388, 1404].)

[122] The defense subsequently asked the court to admonish the jury that the word "slaughter" was improper. The prosecutor argued (continued...)

B. The Misconduct was Prejudicial

The prosecution overreached in its closing arguments. This was not a case of overwhelming guilt; the defense raised many doubts and highlighted lingering questions. The prosecution pandered to the jury by relying on facts not in evidence, speculating about evidence, vouching for Xavier, and denigrating the defense to press its case for guilt. This was not only error but prejudicial error. The United States Supreme Court has warned that the improper suggestion of a prosecutor "carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence." (*Young, supra,* 470 U.S. at p. 18.) This Court has emphasized that "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

The prosecutor's important role in society carries with it equally important responsibilities. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate

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122/(...continued)
that the term was neither prejudicial nor an inaccurate description of what appellant did. The court denied the defense request. (65RT 12639-12640.)

means to bring about a just one." (*Berger, supra*, 295 U.S. at p. 88.) "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*Hill, supra*, 17 Cal.4th at p. 823; *People v. Avena* (1996) 13 Cal.4th 394, 420.) Statements from the prosecutor "may be given undue weight in the eyes of the trier of fact because they emanate from a public official in a responsible position, who is charged with a just determination of the criminal prosecution. [Citations omitted.] [J]uries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247.)

Given the wide-ranging misconduct and the doubt raised by the defense case, the cumulative impact of the prosecutor's misconduct during closing arguments at both the guilt and penalty phases of the trial requires a reversal of appellant's convictions and penalty.

C. Trial Counsel's Failure to Object to Much of The Improper Arguments Constituted Ineffective Assistance of Counsel

Appellant acknowledges that her attorney did not object to many instances of the prosecutor's misconduct. (*Green, supra*, 27 Cal.3d at p. 27.) Counsel's failure to object constituted

ineffective assistance of counsel.[123] A trial attorney's failure to object when an objection is warranted and necessary to preserve the integrity of the trial proceedings can result in reversal in the case where "the record on appeal affirmatively discloses that counsel had no rational tactical purpose" in not objecting." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1052.)

In appellant's case, trial counsel's failure to object or to seek an admonition when an objection was sustained could not have been the result of strategic planning or tactical decision making. The defense was well aware of the prohibition on a prosecutor stating her personal opinion or arguing matters outside the record because the defense filed a motion in limine before the penalty phase asking that the prosecutor be stopped from making such improper arguments at the penalty phase.[124] (10CT 1964-1965.)

Counsel's failure to object in this case was below the level of professional competency expected from a defense attorney, especially in this case where appellant was facing a death sentence. Had trial counsel objected in a timely manner and kept

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[123] Appellant incorporates by reference her legal argument regarding ineffective assistance of counsel in Argument V(C), above.

[124] The prosecution was also aware of the contours of proper argument. The prosecutor not only agreed that the law cited by the defense in its motion was binding on her, but said "the People will not be violating any of the prohibitions or improper argument." (59RT 11449.)

out the torrent of improper argument, there is a reasonable probability that the result of the proceeding would have been different.

XII.

SEVERAL OF THE PENALTY PHASE FACTOR (B) UNADJUDICATED CRIMINAL ACT INCIDENTS PRESENTED BY THE PROSECUTION WERE TOO VAGUE AND NONSPECIFIC TO CONSTITUTE PROOF BEYOND A REASONABLE DOUBT THAT A CRIMINAL OFFENSE OCCURRED, AND THE LACK OF SPECIFICITY IN THE EVIDENCE DEPRIVED APPELLANT OF A FAIR OPPORTUNITY TO DEFEND AGAINST THE ACTS

During the penalty phase, the prosecution introduced evidence under Penal code section 190.3, factor (b), to show that appellant committed three batteries and two assaults on Xavier and also exhibited a deadly weapon and a firearm at Xavier for a total of seven incidents of unadjudicated criminal conduct against her husband. Section 190.3, factor (b), allows the jury to consider in aggravation "the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence."

Much of the prosecution's evidence came from the uncorroborated testimony of Xavier who could not pinpoint when most of these incidents took place:

1) Xavier testified that appellant hit him in the jaw in

August 1988 and broke a bone in her pinkie finger. However, prior to giving that date at trial, Xavier had told the prosecution that the jaw punch was in 1994 and then later said it was in 1996 or 1997.[125/]

2) Xavier testified that on some unknown date, appellant gave him a black eye. He also testified that sometime in the late 90's appellant threw a jewelry box at him and it hit him in the eye. Xavier implied these were two separate incidents. VanEssen testified about a time in 1996 or 1997 when appellant told her that she threw a jewelry box in Xavier's direction and he had a black eye. The prosecution also put on evidence that Xavier was diagnosed with a retinal tear in February 1998 although the opthalmologist could not say what caused the tear, an injury that can occur spontaneously.[126/]

3) Xavier testified that sometime in the late 90's appellant threw what he believed to be a "C" battery at him that missed and tore a hole in their screen door.

4) Xavier testified that sometime in the late 90's appellant threw a box of curlers at him but missed and broke a bathroom

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[125/] An orthopedist testified that appellant suffered a broken pinkie finger sometime before 1991 and probably before March 1989 but did not confirm that appellant injured her finger by hitting Xavier.

[126/] The prosecutor even acknowledged in closing argument that she was unable to determine if this was one or two incidents. (65RT 12626.)

mirror. VanEssen testified that appellant told her in the summer of 1999 that she had thrown something at a mirror and the mirror had broken.

5) Xavier testified that sometime in the late 90's appellant threw pizza and dishes on the floor and then came towards him with a butter knife.

6) Xavier testified in the guilt phase that sometime in 1994 or 1995, appellant held a gun as he came towards her up the stairs so he took Joey and left.[127/]

Here, as the defense argued, evidence regarding most of these allegations was impermissibly vague. The prosecution's initial notice of aggravating evidence listed 13 incidents with only two having dates --one listed as 1988 and the other listed as 1994-5. (2CT 242-244.) The prosecution's later notice listed 10 incidents, none with dates. (4CT 815-817.) The motion referenced in the later notice did contain years for some of the incidents but said nothing about when appellant purportedly gave Xavier a black eye, gave Xavier a detached retina, threw a battery at Xavier, or threw pizza and pointed a butter knife at Xavier. (3CT 543-550.)

Prior to the penalty phase, the defense moved for a

[127/] Appellant testified in the guilt phase that this incident never occurred. Xavier told an investigator before trial that during this alleged incident appellant "chased him around" with a gun. (42RT 8497.)

Phillips[128/] hearing to determine whether the elements of the unadjudicated crimes were supported by substantial evidence. The defense was concerned that the prosecution would introduce other crimes evidence that was not adequately substantiated but would still prejudice appellant in the eyes of the jury.[129/] The defense had particular concern about the alleged acts involving Xavier because they were never reported to law enforcement and were predominately based on the sole testimony of Xavier, who admitted he physically assaulted appellant and forced himself on her sexually. Because these purported incidents were otherwise unwitnessed, appellant was powerless to refute them with any credibility because the jury had just convicted her of the triple murder of her children,. (10CT 1938-1046.)

The prosecution opposed a pre-penalty phase hearing arguing that all of the acts constituted violations of the penal code. The prosecution reduced the incidents involving Xavier to the seven discussed above and claimed that most of them were corroborated. (10CT 1947-1953.)

At a hearing on the defense motion, the court said it did not have discretion to exclude factor (b) evidence under Evidence

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[128/] *People v. Phillips* (1985) 41 Cal.3d 29, 72 n.25.

[129/] The defense also asked that these factor (b) incidents be barred under Evidence Code section 352 because a proper understanding of the incidents would require an extensive look at the dynamics of their entire marriage.

Code section 352. (59RT 11334-11335 [citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1205].) The trial court was incorrect that it could not engage in a 352 analysis of the proffered evidence. (*See e.g. People v. Jablonski* (2006) 37 Cal.4th 774, 835; *People v. Stitely* (2005) 35 Cal.4th 514, 564.) Regarding the need for a *Phillips* hearing, the defense explained it needed to show how Xavier told several different versions of these incidents and that there were defenses to what he alleged. The court said the purpose of a *Phillips* hearing was to ensure that the evidence presented actually constituted a violent criminal act as contemplated by factor (b). Given that purpose, the court did not feel a hearing was needed. The court noted that the defense had more ability to put on evidence to counter Xavier in the penalty phase than it did in the guilt phase and found the prosecution's proffer of factor (b) evidence sufficient to go forward. (59RT 11393-11397.)

During the defense part of the penalty phase, while discussing jury instructions, the defense asked for a hearing analogous to a Penal Code section 1118.1[130/] or 1385[131/] hearing on the sufficiency of the proof of some of the unadjudicated

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[130/] Penal Code section 1118.1 allows a court to determine before a case goes to the jury whether "the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

[131/] Penal Code section 1385 allows a court to dismiss an action in furtherance of justice.

criminal acts presented by the prosecution at the penalty phase. The defense contended that there was inadequate date, place and time evidence to allow appellant a meaningful opportunity to defend against the other crimes evidence. Instead, many of the incidents just blended together. (65RT 12530-12533.) The prosecution said that exact dates were only necessary for statute of limitations and jurisdictional-type issues and the defense had sufficient notice of the various acts. The prosecution added that Xavier did the best he could to recall specific incidents in a 13-year marriage that included numerous acts of violence, and the defense had the opportunity to cross-examine Xavier. (65RT 12533-12535.)

Neither the defense nor the prosecution found any authority for raising a 1118.1 motion during the penalty phase, but the defense noted that it had not found a case where the factor (b) evidence did not have a specific date. (65RT 12534-12535.) The court did not think the motion was applicable and said the defense could have attacked whether the incident ever occurred without knowing the time period but did not do so. The court elected to instruct the jury on the elements of the crimes and to further instruct the jurors they needed to find that the crimes occurred beyond a reasonable doubt. The court offered its personal opinion that the incidents were not sufficiently aggravating "to mean a heck of a lot" to the jury. (65RT 12535-

12536.)

The prosecution's use of these vague allegations of prior unadjudicated crimes violated appellant's rights to due process, to confront and cross-examine witnesses against her, and to a reliable determination of penalty under the Sixth, Eighth and Fourteenth Amendments. Due process protections apply to a capital-sentencing proceeding. (*See e.g. Gardner v. Florida* (1977) 430 U.S. 349, 358.) Because these unadjudicated crime allegations arose in the context of appellant's penalty phase trial, the traditional means of protecting the notice rights of an accused --e.g. a preliminary hearing, pretrial discovery and the opportunity to demurrer to the allegations-- were not available to appellant. (*People v. Jones* (1990) 51 Cal.3d 294, 318 [finding that nonspecific counts of child molestation do not violate a defendant's due process right to fair notice of charges because of these protections].)

The prosecution's use of vague acts to seek appellant's death deprived appellant of a reasonable ability to defend against the accusations. The court should have intervened to prevent the jury from considering "crimes" that could not be dated or corroborated --particularly the "crimes" described in 2, 3, and 5, above. Because the prosecution relied on nonspecific acts that were largely dependent on Xavier's uncorroborated testimony that the acts even took place let alone the

circumstances under which the acts may have taken place, appellant was left with no real means for defending against the accusations without having to testify herself. Without dates, for example, appellant could not look for potential witnesses by consulting her date book.

The trial court also erred in refusing to consider appellant's argument that the evidence was insufficient for certain factor (b) allegations to go to the jury. Evidence of other criminal activity involving force or violence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such conduct beyond a reasonable doubt as well as the essential elements of the uncharged crime beyond a reasonable doubt. (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) The trial court must determine that the evidence proffered by the prosecution meets this high standard of proof. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [citing *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319].) This can be accomplished by ruling on a defense motion to strike the prosecution's aggravating evidence for insufficiency of the evidence. (*Id.*)

This Court has held that unadjudicated crime evidence is not held to the same exactitude as a trial because the evidence is admissible to give the jury a "a true picture of the defendant" and not impose punishment for the conduct. (*People v. Rundle*

(2008) 43 Cal.4th 76, 183.) In *Rundle*, this Court addressed an issue similar to the one presented here. At the penalty phase in *Rundle*, the defendant's ex-wife testified that the defendant repeatedly forced her to engage in sex acts against her will and physically assaulted her, but the ex-wife could not provide specific dates when the acts occurred. (*Id.* at p. 181.) On appeal, the defendant argued that the nonspecific testimony deprived him of notice and an ability to present a defense and constituted insufficient evidence of a factor (b) crime. (*Id.* at p. 182.)

In rejecting these contentions, this Court focused on the difference between standing trial on charges and defending against factor (b) allegations at a penalty phase. The Court found that the state's interest in providing the jury with a complete picture of the defendant at the penalty phase and the defendant's interest in having a reasonable opportunity to defend himself and ensuring that only reliable evidence is used against him could be balanced by taking reasonable steps: ensuring that the defendant receives notice of the evidence to be introduced, providing the defendant the opportunity to confront the available witnesses, and requiring proof beyond a reasonable doubt. (*Id.* at pp. 183-184.) This court concluded, "The absence of testimony associating particular acts with specific dates may have affected the weight of the evidence, but did not render the testimony so

unreliable that as a matter of constitutional due process the jury should not have been permitted to consider it as potential evidence in aggravation." (*Id.* at p. 185.)

Appellant asks that this Court reconsider its ruling in *Rundle* because it did not fully consider the harm from mixing vague acts with more specific acts. Allowing in the evidence regarding the nonspecific acts and then relying on the jury to decide whether the acts actually occurred gave an unfair imprimatur to **all** of the unadjudicated acts. That is, by mixing vague crime allegations with more specific allegations (such as the parking lot incident), the prosecution made it more likely that the jury would find the vague crimes to be true because appellant was a person of bad character whom they had just convicted of murdering her three children and who engaged in other acts of violence.

In addition, Xavier's nonspecific testimony did not meet the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1985) 472 U. S. 320, 340 [quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305].) To be admitted at the penalty phase, evidence must satisfy general reliability standards, and "consideration must be given to the quality, as well as the quantity, of the information on which the [sentencer] may rely " (*Gardner, supra*, 430 U.S. at p. 359.) For a sentencer

to rely on criminal conduct not resulting in a conviction, the evidence should display some minimal indicia of reliability. Here, the bulk of the factor (b) evidence came solely from the mouth of appellant's husband (and chief accuser) who never reported any of these incidents to the police or otherwise established any corroboration for his allegations.

The trial court abused its discretion in allowing the nonspecific unadjudicated crime evidence to be admitted as factor (b) evidence and compounded that error by not entertaining a 1118.1 motion after the prosecution's presentation. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.) Viewed in isolation and given the vagueness of some of the factor (b) evidence, especially in the context of Xavier's role in this case, a rational jury could not have concluded that appellant committed those specified criminal offenses. However, the inclusion of those allegations before the jury that just convicted appellant of triple murder was wrong because it unfairly bolstered the weight of the factor (b) evidence in the jury's weighing process. Without the nonspecific allegations of violence against Xavier, "there is a reasonable (i.e., realistic) possibility" that the jury would not have returned a death verdict against appellant. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

JUROR MISCONDUCT AND RELATED ISSUES

XIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WHEN IT DISMISSED ONE OF TWO JURORS WHO BRIEFLY MENTIONED THE EMOTIONALISM OF DELIBERATIONS WHILE TALKING TOGETHER IN THE COURT PARKING LOT DURING GUILT PHASE DELIBERATIONS

A. The Court Dismissed Juror # 9 Based on What the Court Deemed a "Flagrant Violation" of the Court's Admonition

On a Friday near the end of the fourth full day of guilt phase deliberations, the court received a jury note stating that one juror was not following the court's directions to base a decision on the evidence rather than on speculation and was not engaging in reasonable deliberations. The note requested that an alternate be substituted onto the jury to avoid a hung jury. (10CT 1894; 58RT 11245.)

The court told the attorneys that it had just begun researching the issue and invited counsel to also do some research over the weekend and suggested reconvening Monday morning to discuss what to do. (58RT 11245.) Defense counsel requested that the court admonish the jurors about their duties and opined that the court should substitute in an alternate on Monday. (58RT 11246.) The prosecutor asked the court to wait on a

decision until it had read the case law. (58RT 11247-11248.) The attorneys and the court agreed that the jury would be admonished and then excused for the weekend. (58RT 11249-11252.)

The court had the jurors brought in, told them that their note had been received and discussed, and said they would be excused for the weekend. The court admonished the jury not to "discuss th[e] case outside the presence of the jury room with the other 11 or 12 jurors" and instructed: "You're not to deliberate upon the case any further during the weekend, and the only time you can discuss the case, deliberate the case is when you're back in the jury room Monday and all 12 jurors are present in the jury room." The court also read CALJIC No. 17.4.1 about reporting jury issues to the court.[132/] (58RT 11252-11253.)

When court resumed on Monday, defense counsel told the court that when the defense investigator, Mr. Carlton, was leaving the building about 30 minutes after court ended the previous Friday, he saw two jurors, #9 and #11, talking in the parking lot. As

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[132/] CALJIC No. 17.4.1, as read to the jury, stated:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation. (58RT 11253.)

Carlton approached his car, the two jurors stopped talking and said hello to him. Carlton then left.

Defense counsel voiced her belief based on her observations during trial that Juror #9 was the nondeliberating juror to whom the note on Friday had referenced. Both issues concerned counsel and she asked the court to find out if the two jurors had discussed the case during their talk in the parking lot. (58RT 11256-11258.)

When the court asked what would happen if they were talking about the case, counsel replied:

> Well, if they were discussing that case, that, of course, is an egregious violation of the Court's orders. And I hate to sound like a prosecutor, but, you know, that's a violation of law. And at a minimum ***they*** should be excused and ***alternates*** seated in ***their*** positions. (58RT 11259, emphasis added.)

The prosecutors agreed that the court should inquire about the parking lot conversation but not about the note from Friday. (58RT 11259-11260.) After the defense stated that it would stipulate to excusing the juror from the Friday note, the prosecution agreed with the excusal provided appellant personally joined the stipulation. (58RT 11260.) Appellant then agreed that the court could excuse the juror from the Friday note and replace that juror with Alternate #1. (58RT 112162.) However, when the court brought in the foreman to discuss the note, the foreman

reported that the note was no longer an issue.[133] (58RT 11264.)

Defense counsel expressed suspicion about what happened in the 20 minutes between the jury gathering that morning and the foreman announcing that the note was no longer an issue, especially in light of the conversation that took place between Jurors #9 and #11 after court on Friday. Counsel repeated her request that the court talk to those jurors. The prosecutor didn't oppose that request but also didn't view the change as suspicious given that a weekend had passed since the note was written. (58RT 11265-11266.)

The court questioned Juror #9 first. Juror #9 acknowledged talking to another juror after court on Friday and further acknowledged that they said "one or two lines" about the case. But the juror stressed that their conversation was generally about the weekend and movies. He reported that the only comment about the case was that emotions had been "very highly charged." Juror #9 explained that someone had said appellant had to have been emotional that night and Juror #9 had agreed.[134] That was all that was said about the case --it was about how emotional it

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[133] The parties later put on the record that the stipulation to remove the juror was moot in light of the foreman's retraction of the note. (58RT 11286.)

[134] It was not clear at that time whether Juror #9 was referring to something said during deliberations or whether he was repeating something said between him and Juror #11 in the parking lot.

had been in the jury room the past few days. Juror #9 could not remember who brought up the case but said it could have been him. He acknowledged being aware of the admonition not to discuss the case without all 12 jurors being present in the jury room, and he apologized deeply for what he had done. He also commented that personal attacks and temper flare ups were not productive for logical deliberation.[135/] (58RT 11269-11272.)

[135/] The entire colloquy between the court and Juror #9 was as follows:

THE COURT: (Juror #9), on Friday after the jury recessed for the weekend and recessed about 5:08 p.m., the Court's been told that you were seen about 5:42 or 5:43 engaged in a conversation with another juror in the parking lot Friday evening. Do you recall that?

JUROR NO. 9: Yes, I do.

THE COURT: All right. At any time during your conversation with that fellow juror -- just one; is that correct?

JUROR NO. 9: That's correct, yeah.

THE COURT: At any time during that conversation with that fellow juror was there any discussion concerning this case occurring?

JUROR NO. 9: There was. There was one line, I think. One or two lines. That's correct.

THE COURT: All right.

JUROR NO. 9: And then the rest -- if I -- should I continue?

THE COURT: Go ahead.

JUROR NO. 9: Okay. But actually we were chatting about just the

(continued...)

[135](...continued)
weekend in general and also movies and all that kind of stuff.

THE COURT: All right.

JUROR NO. 9: Anyway --

THE COURT: And what was the substance or subject matter that was discussed concerning this case?

JUROR NO. 9: The comment which was discussed between myself and the one juror only --

THE COURT: Uh-huh.

JUROR NO. 9: -- was in regards to the emotionalism of what was going on in the jury room and the fact that emotions were very highly charged. We were --there was some personal stuff said, which made it difficult for deliberations to take place, and there was also a comment in regards to the personal --or not personal, excuse me, in regards to the emotional state, which sounds really bad, but it was-- in fact, the exact quote was in regards to the defendant. And it would have been "she had to be emotional on that night." And my response to that was that I agree.

THE COURT: All right. And is that all that was discussed about the case?

JUROR NO. 9: That is correct.

THE COURT: And you are aware, are you not, remember the court's admonition, you're not to discuss this case with anybody outside the presence of the 12 jurors in the jury room?

JUROR NO. 9: Yes, sir. I'm aware of that. You stated it many times. And I deeply apologize for the position I've put the Court in on this.

THE COURT: Was the subject matter raised by you or was it

(continued...)

[135/](...continued)
raised by the other juror?

JUROR NO. 9: The comment -- the comment on --

THE COURT: Was the subject matter raised by you or raised by the other juror? Subject matter involving this case.

JUROR NO. 9: It could very well be me, sir. I actually don't -- I actually don't remember.

THE COURT: All right.

JUROR NO. 9: I mean --

THE COURT: Is there anything else about this case that you discussed with that juror Friday night there in the parking lot?

JUROR NO. 9: No.

THE COURT: Was there anything else about your deliberations in the jury room that you discussed with the juror there in the parking lot Friday night?

JUROR NO.9: No. It was -- it was -- pretty much revolved around that it was very emotional in there the past few days.

THE COURT: All right.

JUROR NO. 9: I did comment, I'm sure, as I have commented this morning in there that it kind of made it difficult because when --it's not productive when people's tempers get so flared up they start to use personal attacks and stuff like that. That's not the point of logic --a logical deliberation. But I may say that we're passed that. But that's --that's what that was revolving around --

THE COURT: All right.

JUROR NO. 9: -- about the discussions in the --that were in

(continued...)

The court next questioned Juror #11 who also acknowledged talking to another juror in the parking lot after court. She said they didn't specifically talk about the case but "sort of" talked about deliberations. When asked to explain "sort of," Juror #11 said the other juror thanked her for taking the time to listen and understand his perspective. She didn't believe she made any further response to that.[136] (58RT 11272.)

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[135](...continued)

the jury room --deliberation room. And that was -- that was it.

THE COURT: All right. (Juror #9), thank you very much. I'm going to ask the bailiff to take you back into the jury deliberation room.

JUROR NO. 9: You're welcome, sir.

THE COURT: Appreciate it. (58RT 11268-11271.)

[136] The entire colloquy between the court and Juror #11 was as follows:

THE COURT: (Juror #11), good morning.

JUROR NO. 11: Good morning.

THE COURT: And welcome. (Juror #11), I've been informed that you were seen speaking with a fellow juror in the parking lot Friday night

JUROR NO. 11: Uh-huh.

THE COURT: -- for a period of time after court recessed; is that correct?

JUROR NO. 11: Yes.

(continued...)

[136/](...continued)

THE COURT: And while you were there in the parking lot with that juror discussing things, did the subject matter of this case get included in that discussion?

JUROR NO. 11: Not specifically, no.

THE COURT: All right. Did you discuss anything at all at that time regarding your deliberations involving this case?

JUROR NO. 11: Sort of.

THE COURT: All right. And what does "sort of" mean?

JUROR NO. 11: Basically, he thanked me for taking the time to listen --

THE COURT: All right.

JUROR NO. 11: -- and to understand his perspective of things.

THE COURT: All right. And then in response to that did you discuss with him further about the deliberations?

JUROR NO. 11: I don't believe so.

THE COURT: Did you advocate that he do anything during the deliberations?

JUROR NO. 11: That he do anything?

THE COURT: Yes, uh-huh.

JUROR NO. 11: No.

THE COURT: And was that all of the conversation involving this case?

JUROR NO. 11: Yes.

THE COURT: All right. (Juror #11), thank you. You can go with the bailiff back to deliberations.

(continued...)

Following the hearing with the two jurors, defense counsel challenged Juror #9 for cause for "knowingly and willingly" violating the court's order and engaging another juror in discussions about appellant's emotional state. (58RT 11273.) Counsel opined that Juror #9 attempted to convince Juror #11 of his position and speculated that Juror #11 either did not realize it or it had no impact on her. Counsel reserved a decision on Juror #11 because she wanted to determine how the juror knew Carlton in order to say hello to him in the parking lot since Carlton had not been introduced during trial.[137/]

The prosecution noted that the two jurors actually discussed the emotional state of the deliberations not the content of the case. Nevertheless, the prosecution said that it would agree with excusing Juror #9 if appellant personally agreed. Without any discussion with counsel, appellant consented to excusing Juror #9. The court found good cause for excusing Juror #9 based on his "flagrant violation" of the court's order not to discuss the case outside the jury room. The court excused Juror #9 and replaced him with Alternate #1. (58RT 11274-11276.)

[136/](...continued)
JUROR NO. 11: Thank you. (58RT 11271-11272.)

[137/] The court noted that Juror #11 was a county employee. (58RT 11278.) Defense counsel later stated that Carlton and Juror #11 had both participated in county-related labor negotiations. (58RT 11284.)

After the court dismissed Juror #9, the prosecutor expressed concern about Juror #11 and the court's finding that Juror #9 discussed the case with her: "[T]o me that finding almost entails a two-way participation. And if that is what the court found, then it seems to me that Juror #11 is in the same situation as Juror #9." The prosecutor further noted that unlike Juror #9, Juror #11 did not mention there being any discussion about appellant's emotional state. (58RT 11278-11279.)

Defense counsel again speculated that Juror #11 did not understand that Juror #9 was trying to gain her support and further speculated that Juror #11 did not offer any information back to Juror #9. The court agreed with that assessment and opined that Juror #9 was the initiator and Juror #11 "was kind of stuck and being nice." When the court asked the prosecution whether it was asking for Juror #11 to be excused, the prosecution said no it just wanted a clear record that the court did not find a two-way discussion between the two jurors. (58RT 11279-11280.)

The court said it presumed that if the parties felt there was something inappropriate in what Juror #11 did, they would have said something. When the court asked if either party wanted any further inquiry, both the defense and prosecution said no. (58RT 11280.) Defense counsel went on to speculate about what movies the two jurors discussed and whether there was any

romantic interest between the jurors. The court surmised that any romantic interest was one-sided. (58RT 11280-11281.)

At 11:19 a.m. that morning, the jury, which had been deliberating for 4 days, began deliberations anew with Alternate #1. The jury returned guilty verdicts at 4:55 p.m. that same day. (10CT 1897-11900; 58RT 11292, 11293.)

B. The Record Does Not Support That the Court Had Good Cause to Dismiss Juror #9 Nor Did the Record Support That Juror #9 Was Unable to Perform His Duties as a Juror

1. Misconduct Warranting Dismissal Must Be Serious, Not Trivial

Penal Code section 1089 provides that a trial court may discharge a juror for "good cause" when the juror is shown to be unable to perform his duties. Although juror misconduct can constitute good cause, the misconduct must be "serious and willful" to justify the removal of a sitting juror. (*People v. Daniels* (1991) 52 Cal.3d 815, 864.)

Removing a juror is a serious matter that implicates a criminal defendant's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Accordingly, while a trial court has broad discretion to remove a juror for cause, "it should exercise that discretion with great care." (*Id.*) Great caution is required in deciding to excuse a sitting juror because the court's intervention may upset the delicate balance of

deliberations. (*People v. Allen* (2011) 53 Cal.4th 60, 71.)

Jurors swear to abide by and fulfill certain oaths, duties and admonitions; therefore, when a juror violates an oath, duty, or admonition, misconduct occurs. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) These admonitions include that the jurors are prohibited from discussing the case until all the evidence has been presented, the trial court instructs the jury, and the jury has retired to deliberate. (*People v. Wilson* (2008) 44 Cal.4th 758, 838.) This Court has said that trivial violations of these admonitions that do not prejudice the parties do not require removal of a sitting juror. (*Id.* at p. 839.)

A juror's inability to perform his duties must appear in the record as a demonstrable reality. (*People v. Ledesma* (2006) 39 Cal.4th 641, 743.) This Court will uphold a trial court's decision to discharge a juror under the demonstrable reality test only if "the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Barnwell*, 41 Cal.4th at p. 1053.) In evaluating a dismissal, this Court must consider not only the evidence upon which the trial court relied but also the reasons the trial court provided. (*Id.*) The demonstrable reality test is a "more comprehensive and less deferential" review than the substantial evidence test typically applied in an abuse of discretion analysis. (*People v. Fuiava* (2012) 53 Cal.4th 622, 711-712.)

In assessing the harm from an admonitions violation, the court must consider the nature and seriousness of the misconduct. (*People v. Wilson, supra*, 44 Cal.4th at p. 839 [citing *People v. Loot* (1998) 63 Cal.App.4th 694, 698].) A juror's inability to perform his duties cannot be found by presuming the worst about a juror. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729; *People v. Compton* (1971) 6 Cal.3d 55, 60 [disagreed with on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462 n.19].)

A juror's comments about a pending trial which are made to a fellow juror are less serious than comments made to non-jurors associated with the case such as witnesses and attorneys. (*People v. Wilson, supra*, 44 Cal.4th at p. 840) "The law does not demand that the jury sit with the muteness of the Sphinx, and when jurors are observed to be talking among themselves it will not be presumed that the act involves impropriety, but in order to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the evidence, or the merits of the case." (*People v. Majors* (1998) 18 Cal.4th 385, 425 [quoting *People v. Kramer* (1897) 117 Cal. 647, 649].)

While the willful violation of a court's admonition is misconduct, the seriousness of the misconduct depends on what actually took place. For example, this Court upheld the dismissal of a juror who discussed the case with his wife during penalty phase deliberations and who reported to the court that the

discussion and his wife's opinions helped him sort out the facts and think more clearly. That misconduct was deemed to be serious and willful. (*People v. Ledesma*, *supra*, 39 Cal.4th at pp. 742-743.) Similarly, this Court upheld the dismissal of a juror who had been overheard by others repeatedly discussing the case and expressing a doubt about the defendant's guilt. (*People v. Daniels*, *supra*, 52 Cal.3d at pp. 863-864.)

In contrast, in *Wilson*, *supra*, this Court found that the trial court erred in dismissing a juror during penalty phase deliberations based, in part, on a comment the juror made in passing to a fellow juror during the guilt phase. (*Wilson*, 44 Cal.4th at pp. 1093-1094.) The issue in *Wilson* arose after juror #1 sent a note to the court during penalty phase deliberations complaining that juror #5, the holdout juror for life, was relying on his own experiences as an African-American man to evaluate the role of family in the defendant's life. (*Id.* at pp. 813-814.) During a hearing on the note, juror #1 reported that juror #5 had said to him during a break in the guilt phase: "The whole thing is a problem with authority, and this is what happens when you have no authority figure." (*Id.* at p. 836.) Juror #5 acknowledged he might have said something like that, but denied having asked: "How can you hold someone responsible for their actions." (*Id.* at p. 837.) No other juror reported hearing a statement like that from juror #5, but several jurors noted the

juror did discuss the role of family during penalty phase deliberations. (*Id.* at pp. 836-837.) The trial court found that juror #5 had attempted to communicate with juror #1 about the evidence as part of a prejudgment of the evidence and listed the guilt phase comment made to juror #1 as one of the reasons for removing juror #5 from the jury. (*Id.* at p. 838.)

This Court disagreed that juror 5's comment to the other juror served as a valid basis for dismissing juror #5:

> Juror No. 5's solitary and fleeting comments to a fellow juror, made during a break early in the guilt phase portion of the trial, were a technical violation of both section 1122[138/] and the court's admonition to the jury not to discuss the case. But the violation was a trivial one: one, possibly two sentences, spoken in rhetorical fashion and not in an obvious attempt to persuade anyone. Juror No. 1 averred that he did not respond, and none of the other jurors reported hearing the comments. (*Id.* at pp. 839-840.)

This Court observed that it would not be "humanly possible" for a juror to avoid thinking about the case notwithstanding the admonition not to discuss the case with others. (*Id.* at p. 840.) The Court concluded that there was not a demonstrable reality that juror #5's comments evidenced a prejudgment of the penalty. (*Id.* at pp. 840-841; *see also People v. Avila* (2009) 46 Cal.4th

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[138/] Penal Code section 1122 lists the admonitions that should be given to the jury at each adjournment of court including that "it is their duty not to conduct research, disseminate information, or converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them."

680, 727 [a brief discussion during deliberations in violation of the court's admonition not discuss a defendant's failure to testify was technically misconduct but innocuous and nonprejudicial]; *People v. Majors*, *supra*, 18 Cal.4th at pp. 422-425 [no misconduct where various jurors engaged in conversations about the case during the trial because the discussions focused on the process and not on the evidence or the outcome].)

2. The Record Does Not Support a Demonstrable Reality That Juror #9 Committed Misconduct Warranting Dismissal as a Juror

As was the case in *Wilson*, *supra*, the record in this case does not support a demonstrable reality that Juror #9 committed prejudicial misconduct warranting his dismissal from the jury. This Court must examine both the evidence upon which the trial court relied and the reasons the trial court provided. Here, there was little evidence to support the dismissal.

The trial court did repeatedly admonish the jury at the end of each day with a admonition such as: "You're not to form or express any opinions on the matter until it's submitted to you for your final decision, nor can you discuss it with anybody, even amongst yourselves, and only then when no other persons, only the jurors, are present in the jury room deliberating the case. (*See e.g.* 44RT 8693; 45RT 9159; 48RT 9699; 55RT 10855; 56RT 11011.)

On the Friday afternoon before the defense investigator saw

the two jurors talking in the parking lot, the court specifically admonished the jury:

> [Y]ou cannot discuss this case outside the presence of the jury room with the other 11 or 12 jurors. ... You're not to deliberate upon the case any further during the weekend, and the only time you can discuss the case, deliberate the case is when you're back in the jury room Monday and all 12 jurors are present in the jury room. (58RT 11252-11253.)

Notably, the court did not bar the jurors from talking to one another, it only prohibited any discussion about the case.

Upon inquiry from the court, juror #9 readily admitted that during a discussion about weekend plans and movies, he and another juror had a brief --one or two line-- discussion about emotions running high during deliberations. He could not recall which person initiated the discussion, but acknowledged it could have been him. He was aware of the court's admonition not to discuss the case, and he apologized for his actions.

In explaining what took place, Juror #9 made an ambiguous comment to the court about someone saying that the defendant had to have been emotional on that night and Juror #9 agreeing with that statement. The record at that time did not establish whether Juror #9 was referring to that comment being said during the parking lot discussion or whether Juror #9 was relating what was said during jury deliberations to give context to why emotions were "very highly charged" in the jury room. Unfortunately, the

court did not clarify this point.[139/]

Juror #11 also readily admitted talking with another juror in the parking lot on Friday after court but denied discussing the case. When asked specifically about discussing deliberations, juror #11 said they "sort of" did in the sense that the other juror thanked her for listening to him and understanding his perspective. Juror #11 believed that was the extent of their discussion.

Based on what the two jurors revealed, the trial court elected to dismiss juror #9 after securing appellant's consent. (58RT 11274-11275.) The court found good cause based on juror #9's "flagrant violation" of the order not to discuss matters outside the jury room with another juror. (58RT 11275.) When the court told juror #9 that he was being dismissed, the court erroneously stated that it was ***required*** to dismiss him:

> I thank you very much for your willingness to serve, but I believe you violated the Court's orders regarding discussion of this case outside the presence of the jury room. And therefore I am ***required***, I believe, to excuse you from any further service and to seat an alternate. (58RT 11276, emphasis added.)

Neither the evidence nor the court's reasoning support that there was good cause for excusing juror #9. First, as the

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[139/] As discussed further in subsection (E), below, Juror #11 revealed in a post-trial declaration that in her talk with Juror #9 she commented that the night of the shooting had to have been emotional. (12CT 2432-2434.)

prosecutor noted, the jurors' brief discussion focused on the emotional state of the jury deliberations. The jurors did not directly discuss the evidence or appellant's guilt or innocence. (58RT 11274.) As noted, it is not clear from the evidence the court had whether Juror #9's comment about appellant's emotional state "that night" was referring to something said in the parking lot or during deliberations. Significantly, Juror #11 did not mention anything about appellant's emotional state being discussed in the parking lot. Moreover, what Juror #9 reported was that someone else said it and he agreed.[140/] Therefore, if this remark was made in the parking lot, it had to have been made by Juror #11, not Juror #9.

Second, the timing of the discussion must be considered in context. This was a long trial and a long deliberation. The parties gave opening statements on August 22, 2011. The guilt phase deliberations began on October 30, 2011, on the 56th day of trial. (10CT 1877.) The jury deliberated all day on October 30

[140/] Juror #9 said:

> We were -- there was some personal stuff said, which made it difficult for deliberations to take place, and there was also a comment in regards to the personal -- or not personal, excuse me, in regards to the emotional state, which sounds really bad, but it was -- in fact, the exact quote was in regards to the defendant. And it would have been "she had to be emotional on that night." And my response to that was that I agree. (58RT 11269.)

(10CT 1877), October 31 (10CT 11880), November 1 (10CT 1882), and November 2 (10CT 1889-1893). The two jurors talked after court on November 2. Both jurors described the discussion as brief --one or two lines about the high emotions involved in deliberations. While any mention of the case was a technical violation of the court's admonition, it is no surprise that jurors --human beings and not automatons-- would comment on what appeared to be several days of emotional deliberations following a two-month trial involving a sad and disturbing tale of a disintegrating marriage and the death of three children.[141/]

Finally, juror #9 did not in any manner, by words or deeds, demonstrate an inability to perform his duties as a juror. At worst, Juror #9 expressed an understandable frustration regarding the process of deliberating.

The trial court erred in believing that it was required to excuse juror #9 if it found that the juror violated the court's admonition. As this Court has said in multiple cases: every violation of a court admonition does not warrant removal. Misconduct warranting removal must be serious and willful, not trivial. The brief discussion about the emotions of deliberations after four days of deliberations was on the trivial side of the

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[141/] During a later hearing on a new trial motion, the court discussed the "terrible, terrible burden" placed on jurors who are asked to be "almost subhuman" and sit through evidence and not talk to anyone unlike the trial judge and the attorneys who can talk to co-workers and family during a trial. (67RT 12978.)

misconduct spectrum. Nothing about what either juror described indicated any bias for or against appellant or the prosecution nor did it even hint that either juror could not be fair and impartial. In short, the record does not support a demonstrable reality that the court had good cause to dismiss Juror #9 from the jury panel in the midst of deliberations.

Moreover, the record suggests that Juror #9 may have been kicked off the panel for an additional unsubstantiated and unwarranted reason. The court and the attorneys believed that juror #9 was the subject of the note sent by the foreman on that Friday. However, any belief that juror #9 was a hold out juror should not have factored into the court's decision to remove him. That belief was not verified at that time nor was anyone questioned about what took place in the deliberation room before that note was written.

Even if the court and the attorneys knew Juror #9 was the subject of the note, the description provided in the note did not constitute misconduct. The jury note stated:

> In the view and opinion of a majority of jurors that a particular juror is not following the court's instructions to base their deliberation on the evidence presented and not speculate. Additionally, it is my opinion & that of others that the juror in question will not consider any reasonable explanation of the evidence and therefore engage in a reasonable deliberation. We request that an alternate juror be appointed as we are in the position of having a hung jury. (10CT 1894.)

This Court has held:

> The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. (*Barnwell, supra*, 41 Cal.4th at p. 1051 [quoting *People v. Cleveland* (2001) 25 Cal.4th 466, 485]; *see also People v. Bowers, supra*, 87 Cal.App.4th at pp. 731-737.)

Thus, the law does not support that the note described the actions of a nondeliberating juror subject to dismissal. Furthermore, the record affirmatively establishes that before Juror #9 was dismissed the jury foreman had withdrawn the note and told the court it was no longer an issue. Thus, when Juror #9 was dismissed, the jury was, presumably, deliberating. By dismissing one juror without adequate cause in the midst of deliberations, the court needlessly changed the balance of the jury in violation of appellant's constitutional rights to due process and a fair and impartial jury. (*Crist v. Bretz* (1978) 437 U.S. 28, 36 [the Anglo-American system of criminal justice embraces a strong tradition that a jury, once banded together, should not be discharged until it has completed its solemn task of announcing a verdict]; *Wade v. Hunter* (1949) 336 U.S. 684, 689 [a defendant has a "valued right to have his trial completed by a

particular tribunal"].)

Whether the erroneous dismissal of juror #9 is viewed solely as a statutory violation or whether it is viewed also as a federal constitutional violation, the error requires a reversal of appellant's convictions. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 841 ["Finding none of these grounds have been established to a demonstrable reality [citation], we have no choice but to reverse the penalty verdict"].)

Even if reversal were not automatic, the record demonstrates a reasonable probability that the removal of Juror #9 tilted the jury to convict appellant. On Friday afternoon, the jury indicated that after four days of deliberations, it was hung because of one juror. On Monday morning, the court dismissed Juror #9 and deliberations began anew with Alternate #1. That same afternoon, the jury found appellant guilty. Given this chronology, it cannot be said that juror #9's unjustified dismissal did not contribute to the jury's guilty verdicts. Accordingly, appellant's convictions must be reversed.

C. If This Court Concludes That Juror #9's Role in the Parking Lot Discussion Justified His Dismissal, Then The Trial Court Committed Reversible Error in Not Also Dismissing Juror #11

The record supports that Jurors #9 and #11 communicated about the trial outside of deliberations in direct contravention

of the trial court's frequent admonition.[142/] Yet, the trial court dismissed only Juror #9 and not Juror #11. If this Court views the parking lot discussion as misconduct that warranted the removal of juror #9, then the trial court erred in not removing juror #11 also or at least making further inquiry about what took place.

The trial court's brief questioning of the two jurors did not support treating the two jurors differently. The court, with the consent of the parties, dismissed Juror #9 for violating the court's order and discussing the evidence. However, the only comment about trial evidence (as opposed to comments about the jury's deliberative process) mentioned by either juror was Juror #9's statement about someone having said that appellant must have been emotional that night. Assuming solely for the sake of argument that Juror #9 was referring to that comment having been made in the parking lot, Juror #11 never mentioned that subject when she was questioned, and she said the only discussion was Juror #9 thanking her for listening to his position.

Either the two jurors engaged in a more substantive discussion and Juror #11 not only violated the court's order, but

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[142/] This Court has found that a private meeting during deliberations between a jury foreman and a juror to discuss whether another juror had prejudged the case was misconduct even though both jurors denied discussing the law or the facts of the case during their meeting. (*Allen*, *supra*, 53 Cal.4th at pp. 66, 69 n.7.) However, neither juror in *Allen* was dismissed for engaging in that meeting.

lied about the content of the discussion when questioned, or, the parties and the court misunderstood what Juror #9 said and discharged him erroneously when he merely thanked another juror for listening but did not discuss the substance of the case or deliberations. Given that Juror #9 never disputed violating the court's order and did not say or imply that he engaged in a one way conversation with Juror #11, there was as equal a basis for dismissing Juror #11 as there was for dismissing Juror #9. Indeed, Juror #9 specifically used the phrase "discussed between myself and the one juror." (58RT 11269.)

Juror #11 was under the court's same admonition as Juror #9. There was no evidence that Juror #11 attempted to stop Juror #9 from mentioning the case, walked away during the conversation, or reported the conversation when the jury returned to court Monday morning. If the discussion was so serious that it warranted dismissal, then there was no valid, legal basis for distinguishing between Juror #9 and Juror #11.

The prosecution expressed this concern when the court dismissed Juror #9. The prosecutor specifically invited the court to clarify its implied finding that the two jurors discussed the case. The court and defense counsel proceeded to speculate about what they thought was really going on in the parking lot and made several unsubstantiated assumptions about Juror #9's motives and possible romantic interest in Juror #11. The court, however,

never clarified or retreated from its implied factual finding of a discussion. (58RT 11279-11280.)

Thus, the record remains that either: (1) the only discussion consisted of Juror #9 thanking Juror #11 for listening to him during the emotional deliberations; or (2) there was a substantive discussion about appellant's emotions the night the boys were killed and Juror #9 agreed with what must have been Juror #11's comment that appellant had to have been emotional that night. In the first scenario, the one isolated comment was trivial and did not warrant either juror being dismissed. In the second scenario, both jurors were equally culpable and either both should have been dismissed or neither should have been dismissed. The record does not support any reasonable scenario under which the court was ***legally justified*** in treating the two similarly situated jurors deliberating in the guilt phase of a months-long capital trial in such a disparate manner. Rather, the record supports that both the defense and the prosecution manipulated the handling of the parking lot conversation in order to remove Juror #9, whom each side apparently believed was holding out against their position.

Again, assuming for the sake of this argument that the parking lot discussion constituted such serious misconduct that dismissal of the participating jurors was warranted, then the trial court erred in dismissing only one of the two jurors, and

appellant's right to a fair and impartial juror was violated by keeping Juror #11 on the jury. Jury misconduct raises a rebuttable presumption of prejudice. (*People v. Danks* (2004) 32 Cal.4th 269, 302.) That presumption has not been rebutted. Accordingly, appellant's convictions must be reversed.

D. Trial Counsel's Actions Did Not Forfeit This Claim

Appellant recognizes that her attorney affirmatively sought the dismissal of juror #9 and affirmatively declined to seek the dismissal of juror #11. That, however, does not mean that appellant forfeited her claim of juror misconduct. "The trial court had the duty to conduct a reasonable inquiry into juror misconduct consistent with defendant's right to a fair trial. [Citation omitted.] Such constitutional issues may be reviewed on appeal even where the defendant did not raise them below." (*People v. Barber* (2002) 102 Cal.App.4th 145, 150; *but see People v. Wilson, supra*, 43 Cal.4th at p. 25 [a defendant's failure to object or move for a mistrial when the court discharges a juror forfeits the claim on appeal].)

Here, trial counsel telegraphed her belief that juror #9 was the holdout juror and made clear her intent to get him off the jury on any basis. Notwithstanding counsel's belief, the trial court had a duty to protect appellant's right to due process and a fair trial before an impartial jury. As discussed above, the trial court failed in its duty. There is no provision in the law

for either defense counsel or the prosecutor to arbitrarily kick a juror off the panel because of a belief that the juror was not supportive of their position. Accordingly, the trial court should have recognized counsel's blatant attempt to manipulate the jury composition under the guise of concern about the parking lot discussion and made a fair assessment of whether prejudicial misconduct actually took place and, if so, by which jurors.

In addition, a reasonably competent trial attorney faced with the circumstances of this case with a client facing a potential death sentence would not have bet the farm by assuming that the holdout juror must have been holding out for guilt after 4 days of deliberations. If counsel was wrong, than counsel's gamble virtually assured appellant of a conviction. Rather, reasonably competent counsel would have and should have assessed the situation for real misconduct and acted accordingly.

Appellant's acquiescence in counsel's decision is of no moment. There is nothing in the record that indicates that counsel discussed the legal implications of the dismissal of juror #9 with appellant. Instead, the court simply asked appellant whether she consented to the court excusing juror #9 after having heard the explanations offered by the two jurors. Appellant said, "Yes." (58RT 11275.) Accordingly, the record does not support that appellant knowingly and intelligently gave up her Sixth Amendment right to a fair and impartial jury.

Indeed, the prosecution's insistence on obtaining appellant's personal consent, a consent not needed to dismiss a juror, suggests that the prosecutors knew that the court's dismissal of Juror #9 and not Juror #11 was not legally sound but it wanted to ensure that the court's erroneous discharge was insulated from appellate review by securing appellant's uninformed consent to the court's plan of action. In fact, it is reasonable to assume that the prosecution believed that any holdout juror had to be holding out for an acquittal; therefore, the prosecution had every incentive to get that juror, but no other juror, off of the jury panel. As Justice Werdegar observed in her concurring opinion in *Cleveland*, "[D]ischarge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision." (*People v. Cleveland* (2001) 25 Cal.4th 466, 487 [Werdegar, J., concurring].) The prosecution's role in avidly agreeing to the discharge of Juror #9 who was speculated to be the holdout juror while remaining mute about Juror #11 despite her equivalent "misconduct" demonstrates the prosecution's complicity in the denial of appellant's Sixth Amendment rights.

Neither side should have been allowed to use the jurors' brief parking lot discussion as a smoke screen to cherry-pick which jurors they wanted to remain on the jury. Both the trial

court and counsel failed to protect appellant's right to due process and a fair trial before an impartial jury. Their actions harmed her. Had juror #9 not been erroneously dismissed, there is a reasonable probability that the jury would not have convicted appellant. Accordingly, appellant is entitled to a new trial before a fair and impartial jury either because Juror #9 was wrongly discharged or because Juror #11 was wrongly allowed to remain on the jury.

If this Court finds this claim waived or forfeited because of trial counsel's actions, then counsel's action violated appellant's Sixth Amendment right to the effective assistance of counsel.[143/] Appellant has amply demonstrated why counsel's were incompetent and highly prejudicial.

E. A Post-Trial Declaration By Juror #11 Supports That Juror #11 Lied During Questioning By the Court and Engaged in Conduct That Violated the Court's Admonition Not To Discuss the Case

Prior to appellant's sentencing, the defense filed a new trial motion that included allegations of jury misconduct. In opposing that motion, the prosecution submitted declarations from the 12 jurors who rendered decisions at both phases of the trial, including Juror #11. In her declaration under the penalty of perjury, Juror #11 wrote:

[143/] Appellant incorporates by reference her legal argument regarding ineffective assistance of counsel in Argument V(C), above.

> On the evening of the fourth day of deliberations, Juror #9 and I walked to our cars together in the parking lot. Juror #9 brought up the topic of the deliberations. He made comments about how difficult deliberations were, and that the deliberations had gotten personal. He stated that the deliberations had become too emotional. I said something to the effect of, " Well, it had to be an emotional night, so it's understandable that we're emotional in there."
>
> I did not say, "She had to be emotional that night." I did not make any reference to the defendant's mental state during that conversation.
>
> Neither Juror #9 nor I discussed e-mails, interviews of the defendant, or any other specific item of evidence related to the case during that conversation. (12CT 2432-2434.)

This declaration shows that Juror #11 was not truthful during her questioning by the court. Juror #11 told the court that Juror #9 thanked her for listening to him during deliberations and she did not respond and that was it. (58RT 11272.) After trial, Juror #11 admitted discussing the emotions of the deliberations and acknowledged saying to Juror #9 that it had to have been emotional the night of the shootings so it was understandable that jury deliberations were emotional.

Juror #11's declaration shows that Juror #11 minimized her role in what took place in the parking lot when the court was questioning her. She did not stand mute in the parking lot while Juror #9 violated the admonition. Rather, she engaged in a limited discussion with Juror #9 about deliberations. Moreover,

her declaration supported that Juror #9 gave the court a more accurate recitation of what took place and provided a context for Juror #9's statement to the court that he agreed with a statement that "she had to be emotional on that night."

The declaration supports several of appellant's arguments. First, although both jurors violated the admonition not to discuss the case outside of deliberations, the topic of their discussion was the deliberations themselves and not the evidence or the possible verdict. This supports that the court erred in dismissing Juror #9 because the discussion about the emotional component of deliberations was not serious and willful misconduct and did not establish a demonstrable reality that Juror #9 could not perform his duty as a juror.

Alternatively, if this Court disagrees and finds that the parking lot discussion warranted dismissal, then Juror #11's declaration shows that she was as at least as guilty as Juror #9 for violating the admonition, if not more so. By her own admission, Juror #11 was the person who, at least obliquely, injected evidence from trial into the discussion by mentioning the emotions on the night of the shootings. Beyond that, there is no evidence in the record that the two jurors discussed anything other than the state of deliberations. Thus, if Juror #9 committed misconduct that warranted his dismissal, then Juror #11 equally warranted dismissal.

Finally, Juror #11's failure to fully explain what took place in the parking lot was itself misconduct. By omitting what she said to Juror #9, Juror #11 prevented the court from making an accurate assessment of what took place. In addition, as defense counsel argued at the hearing on appellant's motion for a new trial, Juror #11's false, or at least incomplete, representation about what was said in the parking lot unfairly lulled the defense into believing there was no reason to question Juror #11 any further. (67RT 12926- 12929.)

Appellant was harmed by Juror #11's actions. Had Juror #11 revealed what she said in parking lot when she was questioned, there is a reasonable likelihood that the court would have either not dismissed Juror #9 because there was not serious misconduct or would have found both jurors equally culpable and dismissed both jurors. Either way, the composition of the jury would have differed from the jury that convicted appellant and later sentenced her to death.

F. The Trial Court Erred In Not Granting A New Trial Based on Juror #11's Declaration

The trial court committed further error at the hearing on the new trial motion when it disregarded this new evidence of misconduct which cast a different light on the earlier inquiry into the parking lot misconduct. The trial court was incorrect when it said at the new trial hearing: "the affidavit submitted by Ms. (Juror No. 11) concerning that subject matter and what

transpired in the parking lot is indeed consistent with what the Court heard on the date in question at the time it made its inquiry." (67RT 12928-12929.) Appellant invites this Court to compare Juror #11's answers to the court's questioning at the time of the parking lot incident (58RT 11271-11272) with her post-trial declaration (12CT 2432-2434) and see that Juror #11's statements are not consistent.

The trial court compounded its erroneous factual determination by wrongly insisting that the defense waived any post-trial relitigation of the misconduct issue because it rejected an opportunity to question Juror #11 further at the time of the original hearing. (67RT 12929.) As defense counsel explained, her decision to forgo further questioning of Juror #11 was predicated on the responses Juror #11 gave at the time. (67RT 12296.) Juror #11's post-trial admission that she said to Juror #9 that emotions had to have been high the night of the shooting was new and relevant information that the defense did not have at the time because Juror #11 did not fully answer the court's questions in a forthright manner.

Faced with this new information that both cast doubt on Juror #11's veracity and called into question whether Juror #9 was wrongly dismissed or Juror #11 was wrongly retained, the court maintained its unsupported belief that the misconduct was all due to Juror #9 and concluded:

> The Court does find if it was misconduct --and it was-- the Court finds it was not such as to inherently and substantially likely to have influenced Ms. (Juror No. 11), her conversation in the parking lot with Mr. (Juror No. 9), it is not inherently and substantially likely to have influenced Ms. (Juror No. 11) or substantially likely that Ms. (Juror No. 11) was somehow thereby biased against a party because of the conversation. (67RT 12929.)

To the extent the court was saying that any misconduct in the parking lot was not prejudicial, then how could the court have justified the excusal of Juror #9?

Penal Code section 1181 provides that a new trial may be granted when a juror has "been guilty of any misconduct by which a fair and due consideration of the case has been prevented." This Court independently reviews a trial court's denial of a new trial based on jury misconduct. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262.) Here, the trial court erred in not granting a new trial based on Juror #11's misconduct --both for the discussion in the parking lot and for failing to disclose the full content of the parking lot discussion upon questioning-- or for not at least investigating further about what took place in the parking lot. Juror #11's declaration demonstrates that her role in the parking lot discussion was at least equal to that of Juror #9. Juror #9 provided a full description of what took place and was dismissed from the jury for violating the court's admonition about not discussing the case unless all 12 jurors

were present. Juror #11 did not tell the court the full extent of what the two jurors discussed and she was kept on the jury. If the parking lot discussion was significant enough to show that Juror #9 was unable to fulfill his duties as a juror, then the same is certainly true for Juror #11. Accordingly, for this additional reason, appellant is entitled to a new trial.

XIV.

THE TRIAL COURT VIOLATED STATE STATUTE AND DEPRIVED APPELLANT OF CRITICAL EVIDENCE WHEN IT AUTHORIZED THE POST-TRIAL BUT PRE-SENTENCING DESTRUCTION OF NOTES TAKEN BY THE JUROR WHO WAS DISMISSED DURING GUILT PHASE DELIBERATIONS

When Juror #9 was dismissed for misconduct during guilt phase deliberations, the defense asked that the bailiff (Rachel Ford) take possession of his notebooks. (58RT 11277.) On February 1, 2002, after the trial ended but before appellant was sentenced, the defense filed a motion seeking release of Juror #9's personal notes. The defense explained that the notes would assist the defense in investigating potential jury misconduct. The motion was accompanied by a release and authorization signed by Juror #9. In that release, Juror #9 stated that he had been told by Ford when he was discharged that his notes would be returned to him at the appropriate time. Juror #9 authorized the court to provide the defense investigator with either the original set of notes or a complete copy as soon as possible. (11CT 2247-2248.)

On February 7, 2002, the court announced that there were no notes and asked its bailiff to testify under oath about what happened to the notes. (66RT 12830-12831.) Deputy Ford testified

that when Juror #9 was discharged, he left 3½ notebooks of notes he had taken during the trial. He was told that he could get them after the trial concluded but he would have to pick them up as they were too voluminous to mail.[144/] After the trial ended, Juror #9 called the court twice and said he would come in to get his notes but he never did. As the court prepared to go on a 3-week vacation, Ford didn't think that the notes should be left in the courtroom so she shredded Juror #9's notes as well as the notes of two alternates. The shredding took place in late December or early January.[145/] (65RT 12831-12832, 12834.)

In response to a question by defense counsel, the court said it was the court's standard practice to destroy the personal notes kept by jurors after a trial ends. (65RT 12833.) The court also said that Ford had asked the court for approval before

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[144/] Ford testified that the alternate jurors were told the same thing. But there was also evidence that the court had agreed to mail other notebooks to jurors. Before the trial began, the court promised the jurors to make each of them a notebook containing every newspaper article that was published about the case during the trial. (13 RT 2275) When the alternates were allowed to leave during the penalty phase deliberations, one of the alternates who lived 2½ hours from the courthouse, asked the court if he could have his notebook sent to him rather than having to come back to the courthouse to get them. The court said it would do that and made sure the clerk had the juror's address. (66RT 12811, 12815.) Later, when all of the jurors were discharged after the penalty phases verdicts, the court said it would have the notebooks mailed to the jurors. (66RT 12823-12824.) This shows that the court had the ability to mail notebooks to a juror if it chose to do so.

[145/] Penalty verdicts were returned on December 6.

shredding the notes, and the court authorized it because Juror #9 had not gotten the notes at the time he had said he would. (65RT 12834.)

Defense counsel expressed her displeasure that the notes she had requested to be held by the bailiff had been destroyed and described the destruction of the notes as "a mistake of historic proportions." (65RT 12833.)

The court erred in authorizing the destruction of the juror's notes. The defense specifically asked at the time of Juror #9's dismissal about who would retain custody of his notes. In addition, Juror #9 had made known that he wanted his notes. More importantly, this was a capital case that had not yet concluded at the time the notes were destroyed. Although the penalty verdict had been returned, appellant had not yet been sentenced and post-trial motions had not yet been litigated. It is inconceivable that the court staff could not find a secure location to store Juror #9's notes during the court's three-week vacation.

Finally, Government Code section 68152, subdivision (e)(1), permanently bars a court clerk from destroying court records in a capital case. While it is not clear whether a juror's personal notes fall strictly within the definition of "court records," the statute's emphasis on the permanency of capital case records reflects the importance of capital case proceedings and

documents. Last year this Court expressed no view on whether a juror's personal notes were discoverable but found no error in the trial court's refusal to preserve a juror's notes because the court already knew what the note in question said. (*People v. Clark* (2011) 52 Cal.4th 856, 971 & n.35.)

The court erred in not retaining Juror #9's notes ***at least*** until after the completion of the trial in light of the expressed interest in the notes of a juror dismissed during guilt phase deliberations and given appellant's death sentence. The possible importance was large and the relative harm from retaining them was minimal. And, as the record shows, both Juror #9 and the defense wanted the notes to support the wide-ranging allegations of jury misconduct raised in the defense motion for a retrial. (12CT 2301-2333.) The court's destruction of the notes has prevented appellant from being able to prove prejudice. Because the court's error deprived appellant of potentially valuable information that could have supported appellant's jury misconduct allegations, prejudice should be presumed. Consequently, appellant is entitled to a new trial before a jury free of any taint of misconduct.

XV.

THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENSE TO CALL WITNESSES AT THE HEARING ON THE MOTION FOR A NEW TRIAL ESPECIALLY AFTER THE COURT CALLED ITS BAILIFF AS A WITNESS AT THE HEARING

A. The Defense Presented Evidence That a Juror Asked the Bailiff to View Evidence Projected on the Wall as it Had Been During Trial and That Request Was Denied by the Bailiff and Not Reported to Counsel

The defense filed a new trial motion that alleged, among other claims, that during guilt phase deliberations, Juror #9 (prior to being dismissed for misconduct) asked the bailiff to see a photo projected on the wall. Juror #9 wanted to show the other jurors that the car shown in the photo taken from the hospital parking lot video did not have a sticker on the windshield as Xavier's car did.[146/] According to Juror #9, when the request was made, the bailiff replied that the jurors could only have the evidence they already had in the jury room. (12CT 2325-2326.)

In its reply to the opposition to the new trial motion, the defense stated that a hearing would be needed to determine the credibility of witnesses. (12CT 2466, 2468.) But on the day of

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[146/] Both parties used a projector during trial to project evidence on the wall, including Exhibits 6-B & 6-C --the photos of the cars taken from the parking lot video. (16RT 2917-2919.)

the hearing on the motion, counsel told the court that she didn't wish to call any witnesses. (67RT 12894.)

During the hearing, counsel explained that the issue with the juror's request to view the evidence projected on the wall was that counsel were never informed that the jury had made a request for additional evidence. (67RT 12917.) The court responded that the bailiff reported the request was never made. Counsel asked to take evidence and deputy Ford was sworn in as a witness. (67RT 12917-12918.) Ford testified that she did not recall receiving a jury request for a photo of Xavier's car, to have a photo projected, or to have an additional opportunity to observe evidence. (67RT 12918-12919.)

Counsel then requested to call Juror #3, the jury foreman, who was present in court at the hearing and who could testify that a request to view the photo on the wall was made. The prosecutor opposed the request arguing that it was all irrelevant because Juror #9 did not ultimately serve on the jury that convicted appellant. The court noted that Juror #3 did not say anything on that topic in his declaration submitted to the court.[147/] Counsel explained that she did not know until the hearing that the issue was disputed because the prosecution had

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[147/] The prosecution submitted declarations from all 12 jurors in its opposition to the defense motion. The declaration from Juror #3 was part of the prosecution's submission; it was not a defense proffer. (12CT 2401-2405.)

not addressed it in its opposition. Counsel explicitly requested leave to add additional evidence given the testimony of the bailiff. (67RT 12919-12921.)

The court found the offer of proof insufficient and barred the defense from calling Juror #3 as a witness. Counsel believed the court didn't understand the issue and explained that if the jury asked the bailiff a question regarding evidence, that request should have been communicated to the attorneys. Counsel again voiced her belief that Juror #3, if allowed to testify, would confirm that a request was made of the bailiff regarding the evidence and that the bailiff had responded that the jury had all of the evidence it was going to receive. The court replied that since the matter was set for a hearing that day and the defense had not submitted a declaration from Juror #3, it was finding, based on the current record, that no such request was made of the bailiff. The court added that it would allow counsel to file something more on the issue. (67RT 12921-12922.)

Later in the hearing the defense proffered additional information based on two defense interviews conducted with Jurors #2 and #10. Juror #10 recalled that Juror #9 asked the bailiff to see something but did not remember specifically what it was. Juror #10 also recalled trying to view the tape of the car but it wasn't clear enough and they exchanged machines for clearer viewing. Juror #2 said that Juror #9 asked the bailiff for a

photo and the bailiff said the jury had everything they needed in the jury room. Juror #2 also said that Juror #9 wanted to see some kind of note or paper on the windshield of the car. (67RT 12951, 12954.)

The prosecutor objected that the interview summaries were not affidavits and were inadmissible, but even if they were admissible they did not support the defense contention. The prosecution contended that even if Juror #9 had a private conversation with the bailiff, that did not mean that the jury was requesting evidence; the jury could have sent a note; and Juror #9 didn't deliberate with the jury panel that returned the verdicts. (67RT 12952.)

The defense asked to at least be allowed to establish the factual predicate: that Juror #9 asked to see a photo of the car projected on the board. The court said that it had learned from its bailiff that a request had been made for a VCR to show individual stills and asked the bailiff to explain. The bailiff then stated, not under oath, that she was asked for a VCR that would freeze-frame the videotape of the Mercedes and she told the jury that she didn't believe the equipment had that capability. (67RT 12953-12954.) The bailiff did not explain why she had not offered this information earlier when she essentially denied receiving any requests related to the photo of the car.

Defense counsel again argued that the evidence established

that the jury requested some evidence from the bailiff and any juror request to view evidence should have been reported to counsel. (67RT 12954.) The prosecutor acknowledged that Jurors #2 and #10 recalled that Juror #9 asking about something but contended it was irrelevant since Juror #9 was not part of the deliberating jury. The court agreed and denied the renewed request of the defense either to call jurors as witnesses (including the jury foreman who was present in court) or to submit additional declarations. (67RT 12955-12956.) The court concluded, "I find the incident so insignificant and trivial that it really doesn't warrant much time." (67RT 12956.)

B. The Trial Court Erred in Not Allowing the Defense to Call Other Jurors to Support its Allegation Because it Would Have Been Error for the Bailiff to Deny the Request Without Notifying the Court

The court erred in barring the defense from calling another juror to support Juror #9's allegation, especially since the court apparently engaged in off-the-record factfinding with the bailiff and then called the bailiff as a witness to rebut Juror #9. The court's reliance on the veracity of its courtroom bailiff, particularly after barring the defense from presenting live testimony, is troubling. Because a trial judge and the courtroom bailiff must work together and have a mutual degree of trust, the court is less likely to question what the bailiff says and the bailiff is less likely to admit to any conduct that might

be construed as wrongful, particularly after a trial spanning many months. By barring live testimony by any of the jurors after allowing the bailiff to testify, the court's "factfinding" cannot be accepted as fair or impartial.

If Juror #9's allegation was correct --that he asked the bailiff to see the photo still of the car from the parking lot video projected as it had been during trial and the bailiff had denied that request-- then the defense had a legitimate claim of error. (*People v. York* (1969) 272 Cal.App.2d 463.) In *York*, the court found that a bailiff violated Penal Code section 1138[148/] when he told the jury that the testimony of a witness that they had requested to review was unavailable rather than having the jury brought to the court. (*Id.* at p. 464.) Similarly, another court held that a bailiff "clearly overstepped the bounds of his authority and infringed upon the right of the parties to have their case tried by a jury free from outside influence" when he told the jury, albeit correctly, that the evidence they requested to view was not available. (*Smith v. Shankman* (1962) 208

[148/] Penal Code section 1138 states:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

Cal.App.2d 177, 184.)

Thus, Juror #9's allegation, if true, provided legal grounds for a new trial. Under the circumstances of this case, prejudice should be presumed. The prosecution relied heavily upon the time-stamp shown in the video photo to argue that Xavier did not have time to return home and shoot everyone before he called 9-1-1. Had defense counsel been informed that the jury wished to view the photo evidence under certain conditions, counsel could have advocated for those same conditions to be re-created for the jurors, especially because those conditions had been the ones under which the evidence had been presented in court.

At the time Juror #9 made that request, he was still a deliberating juror. Indeed, the post-trial record establishes that Juror #9 had doubts about appellant's guilt and those doubts were at least partially attributable to his belief that a sticker visible on Xavier's car was not visible on the car the prosecution believed to be Xavier's car in the video photo. If Juror #9 had been allowed to view the photo in the manner requested, it is reasonably possible that he would have confirmed his belief and shown the absence of the sticker to the other jurors. And, under those circumstances, the outcome of the trial might well have been different.

At a minimum, appellant is entitled to a remand for a hearing to be able to prove Juror #9's allegation and to put on

evidence showing that had Juror #9's evidentiary request been transmitted to the court and the attorneys and been granted, the outcome of the trial might have been different.

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND AS APPLIED TO APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. This Court has consistently rejected arguments raising these deficiencies. Accordingly, this Court has stated that "routine" challenges to California's death penalty scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in

which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [White, J., concurring].) To meet this criteria, a state must genuinely narrow the class of murderers eligible for the death penalty using rational and objective criteria. (*Zant v. Stephens* (1983) 462 U.S. 862, 877-878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

At the time of the offense in this case, Penal Code section 190.2 contained 21 special circumstances. (*See* Pen. Code § 190.2(a)(1) through (a)(21).) Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate. Instead, California makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Solomon* (2010) 49 Cal.4th 792, 843.) This Court should reconsider these cases and strike down Penal Code section 190.2 and the current statutory scheme for being so overly inclusive that it guarantees the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (*See* CALJIC No. 8.85; 11CT 2194.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Factor (a) also embraces facts which cover the entire spectrum of circumstances inevitably present in every homicide such as: the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances

surrounding the murders were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (*See Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364; *but see Tuilaepa v. California* (1994) 512 U.S. 967, 975-980 [factor (a) is constitutional].)

This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641 [disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459]; *People v. Brown* (2004) 33 Cal.4th 382, 401; *Solomon, supra*, 49 Cal.4th at p. 843.) Nevertheless, for the reasons stated, appellant urges this Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden of proof quantification"].) In

conformity with this standard, appellant's jury was not told that it had to find that the aggravating factors in this case outweighed the mitigating factors beyond a reasonable doubt before determining whether to impose a death sentence. (CALJIC No. 8.85; 11CT 2194-2195; CALJIC No. 8.88; 11CT 2227-2228.)

This Court has rejected the claim that a beyond a reasonable doubt standard should be a part of this weighing instruction. (*Solomon, supra*, 49 Ca1.4th at pp. 843-844.) However, a number of United States Supreme Court cases require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Ring v. Arizona* (2002) 536 U.S. 584, 604; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305; *Cunningham v. California* (2007) 549 U.S. 270, 280-282.) To impose the death penalty in this case, appellant's jury had to make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 11CT 2227-2228; *see also* CALJIC No. 8.87; 11CT 2199.) Because these additional findings were required **before** the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct appellant's

jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715 [abrogated on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142,140]; *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

This Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589 n.14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has also rejected the argument that *Apprendi, Blakely,* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi, Ring, Blakely,* and *Cunningham.*

Appellant further contends that due process and the prohibition against cruel and unusual punishment require that the sentencer of a person facing the death penalty be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has rejected the claim that either the Eighth or Fourteenth Amendments requires the jury to be instructed that it must decide beyond a reasonable doubt that the aggravating

factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that this Court reconsider this holding.

2. The Statute Unconstitutionally Fails to Require That the Prosecution Bear the Burden of Persuasion at the Penalty Phase

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code § 520.) Because Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of proof regarding the existence of any factors in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. The jury should also have been instructed that it should presume that life in prison without the possibility of parole was the appropriate sentence.

The instructions given to appellant's jury --CALJIC Nos. 8.85 and 8.88 (11CT 2194-2195, 2227-2228)-- failed to provide the jury with the legal guidance required for appellant's capital trial to meet constitutional minimum standards. As a result, the

court's jury instructions violated appellant's Sixth, Eighth, and Fourteenth Amendment rights. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected instruction on the presumption of life in prison without the possibility of parole. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Nevertheless, appellant was entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

The imposition of a death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments when there has been no assurance that the jury, or even a majority of the jury, found a single set of aggravating circumstances that warranted the death penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305.) This Court has held that "unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring*, *supra*. (*Prieto*, *supra*, 30 Cal.4th at p. 275; *Solomon*, *supra*, 49 Cal.4th at p. 844.) Appellant contends *Prieto* was incorrectly decided and *Ring*'s reasoning mandates jury

unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity...is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [Kennedy, J., concurring].)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (*See e.g.* Pen. Code § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (*Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (*see e.g. Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination

whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would, by its inequity, violate the equal protection clause and also would, by its irrationality, violate both the due process and cruel and unusual punishment clauses, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were persuaded that the aggravating circumstances were so substantial in comparison with the mitigating circumstances that they warranted death instead of life in prison without the possibility of parole. (CALJIC No. 8.88; 11CT 2227-2228.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (*See Maynard v. Cartwright*, *supra*, 486 U.S. at pp. 362-364.) This Court has found that the use of the phrase "so substantial" does

not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 315-316.) Appellant asks this Court to reconsider that holding.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson, supra*, 428 U.S. at pp. 304-305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life in prison without the possibility of parole. (11CT 2227-2228.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender; that is, the punishment must be appropriate. (*Zant, supra*, 462 U.S. at p. 879). On the other hand, under California's scheme, jurors find death to be warranted when they find the existence of a special circumstance that authorizes death as a sentencing option. By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court has previously rejected this claim. (*Arias,*

supra, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider this ruling.

6. The Instructions Did Not Tell the Jury it Could Impose a Life Sentence Even If Aggravation Outweighed Mitigation

CALJIC No. 8.88 was also defective because it implied that death was the only appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances...." (11CT 2227-2228.) However, it is clear under California law that a penalty jury may always return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown* (1985) 40 Cal.3d 512, 538-541.) Thus, the instruction improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed that in mitigation. In fact, the jury could impose a life sentence if any one factor in mitigation outweighed all of the factors in aggravation. The jury could also impose a life sentence even if none of the factors in mitigation (even in combination) outweighed the factors in aggravation.

This Court has previously rejected this claim. (*People v. Kipp* (1998) 18 Cal.4th 349, 381.) Appellant urges this Court to reconsider this ruling.

7. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life in prison without the possibility of parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (*Blystone*, *supra*, 494 U.S. at p. 307.) However, CALJIC No. 8.88 does not address this proposition; it only informs the jury of the circumstances permiting the return of a death verdict. (11CT 2227-2228.) By not conforming to the mandate of Penal Code section 190.3, CALJIC No. 8.88 violated appellant's right to due process of law. (*Hicks*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) This holding conflicts with cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (*See e.g. People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014.) It also conflicts with due process principles

because the nonreciprocity involved in explaining how a death verdict may be warranted, while failing to explain when a life in prison without the possibility of parole verdict is required, tilts the balance of the law in favor of the prosecution and against the defendant. (*See Wardius v. Oregon* (1973) 412 U.S. 470, 473-476 & n.6.)

8. The Instructions Failed to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (*Brewer v. Quarterman* (2007) 550 U.S. 286, 291-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson, supra*, 428 U.S. at pp. 304-305.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380.) California's capital jury instructions leave the jury with the impression that the defendant bears some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of

any charge or special circumstance. (CALJIC No. 8.80.1; 9CT 1856.) In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors. An implied requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment. (*McKoy*, *supra*, 494 U.S. at pp. 441-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Id.*; *see also Mills*, *supra*, 486 U.S. at pp. 374-375.) In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since she was deprived of her rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments.

9. The Penalty Phase Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional value that is essential to protect the accused in a criminal case. (*Estelle v. Williams* (1976) 425 U.S. 425, 503.) In the penalty phase of a capital case, the presumption of life is the correlate to the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no

statutory requirement that the jury be instructed on the presumption of life. (*See* Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351, 352-353 & n.7; cf. *Delo v. Lashley* (1983) 507 U.S. 272, 278-280.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law, her right to be free from cruel and unusual punishment and to have her sentence determined in a reliable manner, and her right to the equal protection of the laws in violation of the Eighth and Fourteenth Amendments.

This Court has held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Arias*, *supra*, 13 Cal.4th at p. 190.) However, as the other sections of this claim demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That The Jury Make Written Findings Violated Appellant's Right To Meaningful Appellate Review

Consistent with state law, appellant's jury was not required to make any written findings during the penalty phase of the trial. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) The failure to require written findings by the jury deprived appellant of her rights under the Sixth, Eighth, and Fourteenth Amendments, as well as her right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (*Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has repeatedly rejected this contention. (See e.g. *People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges this Court to reconsider these decisions.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Instructions Used Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85(d) & (g); 11CT 2195-2196; Pen. Code, § 190.3, factors (d) & (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills, supra*, 486 U.S. at p. 384; *Lockett, supra*, 438 U.S. at p. 604.) This Court has rejected this argument (*See e.g. People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges

reconsideration.

2. The Instructions Failed to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 --CALJIC No. 8.85(c), (e), (f), (I) & (j)-- were inapplicable to appellant's case; yet, the trial court failed to omit those factors from the jury instructions. (11CT 2194-2195.) This likely confused the jury and prevented the jurors from making a reliable determination of the appropriate penalty in violation of appellant's constitutional rights. Appellant asks the Court to reconsider its decision in *Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Instructions Failed to Inform the Jury Not to Consider the Deterrent Effect or the Cost of the Death Penalty

The instructions failed to inform the jury not to consider the deterrent or non-deterrent effect of the death penalty or the monetary cost to the state of executing a defendant or maintaining her in prison for life without the possibility of parole. Such factors are wholly irrelevant to a defendant's death worthiness and risk an arbitrary, capricious and unreliable capital sentencing decision in violation of the Eighth and Fourteenth Amendments.

This Court has held that a trial court does not err in

refusing to give such an instruction where "'neither party raise[s] the issue of either the cost or the deterrent effect of the death penalty ... ' [Citation.]." (*People v. Zamudio* (2008) 43 Cal.4th 327, 371.) Appellant asks this Court to reconsider its prior decisions on this point.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed (that is, inter-case proportionality review). (*See e.g. Solomon, supra*, 49 Cal.4th at p. 844.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For these reasons, appellant urges this Court to reconsider its position on not requiring inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in

violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, and the sentencer must articulate reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326; Cal. Rules of Court, rule 4.420, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; *Solomon, supra*, 49 Cal.4th at p. 844), but appellant asks this Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Conflicts With Evolving Standards of Decency and Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *Solomon, supra*, 49 Cal.4th at p. 844; *Cook, supra*, 39 Cal.4th at pp. 618-620.) In light of

evolving standards of decency, the international community's overwhelming rejection of the death penalty as a regular form of punishment, and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 555, 560-579) or who are mentally retarded (*Atkins v. Virginia* (2002) 536 U.S. 304), appellant urges this Court to reconsider its previous decisions.

XVII.

THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS AT APPELLANT'S TRIAL --AT BOTH THE GUILT PHASE AND THE PENALTY PHASE-- UNDERMINED THE RELIABILITY OF APPELLANT'S CONVICTIONS AND SENTENCES AND REQUIRES A REVERSAL--

Appellant has explained in this brief why each of the errors set forth in Arguments I-XVI, above, requires a reversal of either appellant's convictions or sentence or both. However, the cumulative effect of trial errors can also so prejudice a case that reversal is required. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303.) If this Court disagrees that any of the errors in this case are reversible standing alone, then appellant asks the Court to evaluate the cumulative effect of these various errors. These multiple errors combine to undercut confidence in the fairness of appellant's trial and the reliability of the jury's first degree murder verdicts, special circumstance finding, and death sentence. When these errors are viewed cumulatively, they deprived appellant of her right to due process and a fair trial and warrant reversal of her convictions and death sentence.

In assessing this cumulative error claim, this Court must

specifically evaluate the death judgment in light of the cumulative errors occurring at both the guilt and penalty phases of appellant's trial. (*People v. Hayes* (1990) 52 Cal.3d 577, 644.) This Court has long recognized that "a series of trial errors, though independently harmless, may in some instances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [citing additional cumulative error cases].) Therefore, when viewing the claims presented here, this Court cannot simply view the claims individually, but must consider that the cumulative effect of these errors may require relief. (*See e.g. In re Avena* (1996) 12 Cal.4th 694, 772 n.32 ["errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial"]; *Whelchel v. Washington* (9th Cir. 2000) 232 F.3d 1197, 1212 ["Cumulative error applies where, 'although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors [has] still prejudiced a defendant'" [citation omitted]]; *Burns v. Wilson* (1953) 346 U.S. 137, 142 [the cumulative effect of allegations in a habeas corpus petition can depict fundamental unfairness].) "[T]he litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Appellant's trial failed the litmus test.

For a cumulative error claim that includes federal

constitutional error, reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) In this case, without the cumulative effect of these errors, there is a reasonable probability that at least one juror would have harbored a reasonable doubt as to whether the prosecution had proven the case against appellant as to guilt, and the result of the trial would have been different. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 736 [a hung jury resulting in a mistrial is a more favorable result than conviction]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 524 [same].)

For all of the reasons already set forth in this brief, the errors were not harmless. The remedy is a reversal of appellant's convictions and sentence.

CONCLUSION

For all of the reasons set forth in this brief, appellant respectfully urges the Court to reverse her convictions, special circumstance finding, and death sentence and order a new guilt and/or penalty phase trial.

Dated: November 29, 2012

Respectfully submitted,

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Socorro Caro

CERTIFICATE OF COMPLIANCE

I certify pursuant to CA Rules of Court, Rule 8.630, subdivision (b)(1)(A), that this opening brief in a capital case contains 81,918 words according to my word processing program.

Dated: November 29, 2012

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action.

My business address is 3115 Foothill Blvd, Suite M-172, La Crescenta, CA 91214.

On November 30, 2012, I served the foregoing document described as:

APPELLANT'S OPENING BRIEF

on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Chung L. Mar
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013

Jean Farley
Deputy Public Defender
Office of the Public Defender
800 S Victoria Ave #207
Ventura, CA 93009

Gregory D. Totten
District Attorney
800 S. Victoria Ave.
Ventura, CA 93009-0001

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105
Attn: Scott Kauffman

Socorro Caro
(not served per attached declarations)

Clerk of the Court for delivery to
The Honorable Donald D. Coleman
Ventura County Superior Court
800 South Victoria Avenue
Ventura, CA 93009

By MAIL I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at La Crescenta, CA. I am a member of the Bar of the Supreme Court of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 30, 2012, at La Crescenta, CA.

Tracy J. Dressner

TRACY J. DRESSNER

DECLARATION OF SOCORRO CARO

I, SOCORRO CARO, declare:

1. I am the defendant in the automatic appeal case of *People v. Caro*, S106274. My appellate attorney is Tracy J. Dressner.

2. Ms. Dressner visited me recently and explained to me the issues she has raised in my appeal. She has also discussed issues with me over the phone. I have asked that she not send me a copy of the opening brief or any other briefing related to this appeal. I have provided Ms. Dressner with instructions regarding where my copy of the brief should be sent.

3. I understand that I am entitled to a copy of the briefing in my case, including the opening brief in my appeal, and I have made a decision not to have that briefing in my possession. I will inform Ms. Dressner if I change my mind and desire a copy of any briefing.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed this 20th day of November, 2012, at Chowchilla, CA.

Socorro Caro

SOCORRO CARO

DECLARATION OF TRACY J. DRESSNER

I, TRACY J. DRESSNER, declare:

1. I am the attorney appointed on July 16, 2006, to represent appellant, Socorro Caro, on her automatic appeal from a judgment of death imposed by the Ventura County Superior Court.

2. Ms. Caro and I have had many discussions both in person and on the telephone regarding the content of the opening brief and what issues will be raised. Ms. Caro has told me that she does not want to receive a copy of the brief. Instead, she has asked that I send a copy of the opening brief to two people she has identified to me, and I will do so. At Ms. Caro's request, I will send her the Table of Contents to the brief.

I declare, under penalty of perjury under the laws of the State of California , that the foregoing is true and correct.

Executed this 29th day of November, 2012, at La Crescenta, CA

Tracy J. Dressner

TRACY J. DRESSNER