SUPREME COURT COPY

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA.	)	
Plaintiff and Respondent,	)	Los Angeles County
vs.	)	Superior Court No.
ANGELINA RODRIGUEZ,	)	BA213120
Defendant and Appellant	)	Supreme Court No.
	)	S122123
	)	
	)	
	)	
	)	

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of Los Angeles County
Honorable William Pounders, Judge Presiding

Karen Kelly
State Bar No. 118105
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Attorney for Appellant
Angelina Rodriguez

DEATH PENALTY

IN THE SUPREME COURT OF THE

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code section 1239.)[1] The appeal is taken from a judgment which finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On February 1, 2001, the Los Angeles County District Attorney filed a felony complaint charging appellant Angelina Rodriguez, with the September 9, 2000, murder of her husband José Francisco (Frank) Rodriguez. (Penal Code section

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

187(a).) The complaint further alleged the special circumstances that the murder was carried out for financial gain (Pen. Code § 190.2(a)(1), and that the murder was committed by the administration of poison. (Pen. Code § 190.2(a)(19).) (CT 1-2.) Appellant was arrested on February 7, 2001. (RT 192.)

On July 11, 2001 a first amended felony complaint was filed against appellant. In addition to recharging appellant with the murder of Frank Rodriguez with special circumstances (Count 1), the complaint alleged that on or about March 27, 2001 appellant committed the crime of dissuading a witness (Palmira Gorham) by force or threat. (Count 2: Pen. Code §§ 136.1(c)(1)(a) and(b).) (CT 33-34.)

Appellant's preliminary examination on this first amended complaint was held on September 10, 2001 and September 12, 2001. (CT 46-176.)

On September 26, 2001, a two count felony Information was filed charging appellant with the September 9, 2000, capital murder of José Francisco Rodriguez. (Count 1; Pen. Code § 187(a), and with the March 27, 2001, crime of dissuading a witness (Palmira Gorham) by force or threat. (Pen. Code § 136.1(c)(1).) (CT 179-181.)[2]

[2] Case number BA213120

On November 6, 2001, having been advised that the prosecution would **not** seek the death penalty, appellant executed a waiver and agreement form which stated that, in the event she be found guilty of first-degree murder and the special circumstances found true, appellant would waive her right to a penalty trial. (RT 186.)

On March 13, 2002, the prosecution advised the court and counsel that based on investigation into the death of appellant's daughter Alicia, who had died eight years earlier, it would be resubmitting the case to the district attorney's death penalty committee for reconsideration of whether or not to seek the death penalty. (RT 200.)

On July 23, 2002, the prosecution filed its notice of evidence in aggravation. (Pen. Code § 190.3.) The prosecution advised the court and counsel that in the event the case should reach a penalty phase it intended to offer evidence in aggravation consisting of (1) the facts and circumstances of the underlying offense "including but not limited to the impact of the victim's death upon family members and friends, the defendant's attempts to implicate innocent persons in the murder during the Sheriff's investigation of the murder, and the defendant's post-arrest attempt to prevent People's witness Palmira Gorham from testifying truthfully by threatening to implicate her in the murder"; (2) "defendant's post

arrest solicitation of the murder of and/or assault upon People's witnesses Erlinda Allen and Palmira Gorham;" and "defendant's murder of her daughter, Alicia Fuller." (CT 218-219.)

On August 1, 2002, the prosecution advised the court and counsel that the penalty committee had decided the death penalty would be sought in this case. (CT 229.)

On April 29, 2003, a three count felony complaint was filed alleging appellant committed the crime of solicitation of another (Gwendolyn Hall) to commit the murder of Palmira Gorham on May 8, 2002 (Count 1), May 9, 2002 (Count 2) and May 10, 2002 (Count 3). Pen. Code § 653(b).)(CT 273-276.)[3] Preliminary examination on the new charges took place on May 16, 2003. (CT 283.)

On May 30, 2003, in a one count Information, appellant was charged with the crime of solicitation of murder occurring "on and between April 27, 2002 and May 10, 2002. (Pen. Code § 653f(b).) It was specifically alleged that appellant solicited Gwendolyn Hall "to commit and join in the commission of the murder of Palmira Gorham." (CT 330-331.) On that same day, the prosecution filed a formal

[3] Case no. BA246675

motion to consolidate the solicitation case (BA246675) with the capital murder case (BA213120). (CT 332-346.)

On September 26, 2003 a three count amended information was filed charging appellant murder with malice aforethought for the purposes of financial gain and by the administration of poison. (Count 1: Pen. Code § 187(a), Pen. Code § 190.2(a)(1), Pen. Code § 190.2(a)(19)), attempting to dissuade witness Palmira Gorham (Count 2: Pen. Code § 136.1(a)(2), and solicitation of Gwendolyn Hall to commit the murder of Palmira Gorham. (Count 3: Pen. Code § 653(f)(b); CT 488-490.)

Jury selection began on September 29, 2003. A jury was sworn on October 15, 2003. (CT 493-505.) On that same date the prosecution made its opening statement. Counsel for defendant reserved his right to make an opening statement. The prosecution called its first witness. (CT 652-653.)

On October 23, 2003, the prosecution rested. Defense counsel waived opening statement and, other than entering into a stipulation with the prosecution regarding the dates of some telephone calls, at the guilt phase, offered no evidence for appellant. (CT 820-821.)

The jury began its guilt phase deliberations on October 24, 2003. (CT 824-825.)

On October 27, 2003, the jury asked the court to define "at what exact moment did Palmira Gorham become a witness?" (CT 826.) On that same date, the jury also informed the court that it was deadlocked on the special circumstance of financial gain and on count three -- solicitation of murder. (CT 827.)

In response to the jury's question and indication of being deadlocked, the court informed the jury that it had the option of requesting additional read back of specific testimony, the option of requesting further explanation of the law, or the option of requesting additional argument by counsel. (CT 830.) The court sent the jury back to the jury room to decide which if any of the options offered would be helpful to them in their deliberations. (CT 830.) The jury asked for additional argument by counsel on its question of when Palmira Gorham became a witness, returned a verdict form, and was released for the day. (CT 830-831.)

On October 28, 2003, the jury informed the court that it would like to continue deliberations on the special circumstance allegation of financial gain and on the charge of solicitation of murder. The jury also requested a read back of Gorham's October 21, 2003, testimony. (CT 832-834.) That same day the people and the defense presented additional argument on the question of when Gorham

became a witness. (RT 834.) Prior to the read back of Gorham's testimony, the jury returned another verdict form. (CT 834-835.) [4]

On October 29, 2003 the jury informed the court that it remained deadlocked on count three, solicitation of murder. On the same day, the court declared a mistrial on that charge. (CT 871, 873-874.)

The jury returned guilty verdicts to the remaining counts and found the special circumstances true. (CT 863-866.)

Penalty phase opening statements and evidence commenced on October 31, 2003. (CT 875.) With the exception of one defense witness who was called out of order, the prosecution presented its penalty phase evidence through November 7, 2003. The defense concluded its penalty phase presentation on November 10, 2003. The parties argued the same day. (CT 968-972.) The jury deliberated for less than 2 ½ hours before returning a verdict of death. (CT 995.)

On January 12, 2004, the court denied the appellant's motion for a new trial and appellant's application for modification of the verdict under section 190.4(e). (CT 1069-1083.) The court pronounced judgment, sentencing appellant

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[4] The jury returned a guilty verdict for Count 1, murder and a true finding on the special circumstance of use of poison on October 24, 2003. The jury returned a guilty verdict for Count 2, attempting to dissuade a witness and a true finding on the special circumstance of use of poison on October 28, 2003. (CT 863-870.)

to death for the special circumstance murder and to serve a consecutive term of three years in state prison for the intimidation of a witness charge. (CT 1030, 1069-1083.)

STATEMENT OF THE FACTS

A. Guilt Phase

1. Murder with Special Circumstances

On the morning of September 9, 2000, Montebello police officer, Steven Sharpe was on routine patrol. At approximately 3:00 a.m., Officer Sharpe was dispatched to appellant's home at 837 Marconi St., in Montebello, California. Officer Sharpe arrived at the residence within two minutes of the dispatch. (RT 1772-1773.) At the residence were appellant, Angelina Rodriguez, and her daughter Autumn, who was a small child at the time. In the bedroom, Officer Sharpe discovered appellant's husband, Jose (Frank) Rodriguez. Mr. Rodriguez was lying face down on the carpet near his bed. Officer Sharpe checked for vital signs and found none. Officer Sharpe observed blood on the carpet which appeared to be coming from Mr. Rodriguez' nose. Paramedics who later arrived at the scene pronounced Mr. Rodriguez dead. (RT 1774-1776.)

Officer Sharpe called for a coroner. After coroner investigator Brenda Schafer arrived on the scene, Officer Sharpe transferred the investigation to her. (RT 1776.)

Prior to the arrival of the coroner investigator, Officer Sharpe spent approximately 2 1/2 hours with appellant. Over objection, Officer Sharpe testified appellant's demeanor was unusual in that the way she was crying "seemed rehearsed or kind of forced." (RT 1782-1783.) Sharpe explained "although it was audible, the crying noise, there was a lack of tears, and as soon as I would talk to her, ask her a question, she would immediately kind of snap out of it and answer the questions real quick, and in my experience usually someone who just lost their husband, they're difficult to speak with and communicate to." (RT 1783.)

Prior to his contact with appellant, Officer Sharpe had spoken to approximately a dozen family members who had a family member killed or who had died. At the time of trial, that number had risen to approximately 20. (RT 1784.) When asked to describe the things that he noticed on those prior occasions about how those individuals related to police, over objection Officer Sharpe responded: "when you deal with someone like that, they're very upset and they really don't want to talk to you. The little information you get from

them, it's hard to understand because they're crying, they have a lump in their throat, so to say, and it's just very awkward and very hard to talk with them. You have to keep repeating yourself and you have to really try to calm them down and constantly tell them to take a deep breath and everything is going to be all right, and then you finally get a question in." (RT 1784-1785.)

Sharpe saw none of this with appellant and found her easier to talk to. (RT 1785.) "I mean as soon as I began speaking with her, it was as if she forgotten about what was going on, and she immediately drew her attention right to me and the question that I was asking." (RT 1785.) When asked whether he saw tears in speaking to appellant, Officer Sharpe responded "I may have seen some tears, but there was a great lack of them." Officer Sharpe never had any prior contact with appellant and acknowledged that he did not document any of the information about appellant's demeanor in his report. (RT 1785-1787, 1790-1972.)

Two days later, on September 11, 2000, Sergeant Gregory Wisely of the Montebello Police Department received a telephone call from appellant. At the time of the telephone call, Wisely was aware Frank Rodriguez was dead and had reviewed Sharpe's report. Appellant's first question to Wisely had to do with how the coroner's office was going to dispose of Frank's body. Wisely was under the

impression that appellant had spoken to the coroner and had inquired as to their procedure for releasing the body. Wisely told appellant that he had spoken to the Dr. Chinwah, the medical examiner who performed the autopsy on Frank earlier that day. Wisely told appellant that Chinwah had told him that the autopsy results were inconclusive and that he was unable to determine the cause of death. Wisely asked appellant whether they could come to her house to look around and see whether or not there was anything there he might have ingested which may have poisoned him. The department suspected poisoning based on information appellant had given Sharpe at his interview (RT 1902-1910.)

During the same telephone conversation, appellant told Wisley that she thought that Frank may have been poisoned by somebody associated with Angel Gate Academy, where Frank sometimes worked and where appellant had once been employed. Appellant speculated that someone at the Academy had blown the whistle on a suspected child abuser, that some people had been fired or reassigned and that there may have been some animosity toward her husband because of this. (RT 1915-1916.) Wisely testified as to his impressions about the "oddness" of this conversation with appellant. (RT 1916-1917.)

In July, 2000, Mickey Marracino, a life insurance agent, solicited business by placing a postcard in the newspaper bill of subscribers to local newspapers in

Montebello, California. (RT 1833-1835.) Marracino received a response from appellant and her husband. Marracino went to appellant's home, met with appellant and Frank and gave them a pitch about life insurance. At the end of the sales presentation, Frank asked appellant why she thought they needed life insurance. Frank told appellant that he had coverage at work and also through the National Guard. According to Marracino, appellant responded that they needed insurance so that if anything were to happen to him she would not be left destitute. (RT 1841-1845.) Under the policy Marracino wrote, appellant was the primary beneficiary of $250,000. The couple also applied for a policy on appellant for $50,000. Marracino did not think the conversation between appellant and Frank was unusual. Neither was it unusual that there was a disparity between the amounts of each spouse's policy. (RT 1871-1872.)

Frank underwent a physical examination on July 18, 2000. Based on information related to him by the company which performed a physical examination on Frank, Marracino placed a call to appellant. Marracino had been told by the medical examiners that appellant told them she had been out of town and that is why she did not undergo a physical examination. Marracino confirmed this with appellant, who said she had been very busy but would make another appointment. Appellant never took a physical examination for the purpose of her

own life insurance policy. The effective date of the insurance policy on Frank was July 26, 2000. (RT 1836-1859.)

On September 9, 2000, Marracino learned of Frank's death by a message left on his answering machine by appellant. Appellant inquired about payment on the policy. Marracino informed her they would need a death certificate as well as a cause of death. Marracino also informed appellant that there were provisions under which the insurance company would not pay, such as, suicide or fraud committed in the application process. (RT 1861- 1863.)

When asked to describe appellant's demeanor during the September 9, 2000 telephone call, Marracino testified that what struck him as unusual was there was no emotion at all. (RT 1864.)

Marracino had a number of other conversations with appellant in which appellant asked when she was going to get paid and explained to him that the coroner did not have an official cause of death so no death certificate had been issued. (RT 1866-1867.)

Elaine Nash, was employed with Midland National Life Insurance in the claims department. In September of 2000, she oversaw the claim related to Frank Rodriguez's death. (RT 1892-1894.)

Nash had several telephone conversations with appellant. During the first conversation, appellant told Nash that she had a deferred death certificate and wanted to know if that would be sufficient. Nash explained that they needed a final death certificate that had a cause of death. Appellant explained that the coroner was doing an autopsy but that toxicology reports had not come in. (RT 1894-1896.)

Nash received another telephone call from appellant on October 3, 2000. Appellant wanted Nash to fax a claim form to her. Although Nash had told her she would mail her the form, appellant wanted to expedite the process so that Nash would send a letter to her realtor verifying funds. Nash told appellant that in contested claims they did not fax forms. Nash thought that appellant's request was unusual. (RT 1899-1890.) No benefits were ever paid under the policy. (RT 1901.)

Rebecca Perkins, Frank Rodriguez's sister, was notified of Frank's death by their mother. When asked to describe her mother's emotional state, Ms. Perkins said her mother was hysterical and she was not able to get any information from her. (RT 1805-1807.) For that reason Ms. Perkins called appellant. Ms. Perkins had never met appellant. Their first face-to-face contact was at the funeral. (RT 1807.) Ms. Perkins described her own emotional state as very upset. (RT 1807.)

During the telephone conversation Ms. Perkins asked appellant what had happened to Frank. According to Ms. Perkins, appellant responded "He drank too much." Ms. Perkins thought this odd because Frank did not drink alcohol. When Ms. Perkins mentioned to appellant that Frank did not drink alcohol, appellant responded that he had been sick on the Wednesday and Thursday[5] before and that she had taken him to the hospital. Appellant told Ms. Perkins that Frank had a stomach infection.[6] Appellant told Ms. Perkins that she had gone to sleep on the couch and when she woke at approximately 3:30 a.m., he was already dead. Ms. Perkins testified that she never knew Frank to be sick. (RT 1808.) The telephone conversation was interrupted. According to Ms. Perkins, when appellant returned to the line she said someone from Frank's reserve unit wanted to know why Frank didn't come into work. (RT 1808-1812.)

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[5] September 9, 2000 fell on a Saturday.

[6] On September 7, 2000, accompanied by appellant, Frank went to the emergency room of Kaiser Hospital in Baldwin Park, California. Frank complained of extensive vomiting and three episodes of diarrhea. He was diagnosed with food poisoning. Neither appellant nor Frank told the attending doctor, Dr. Chao, that they suspected he had been poisoned. If the doctor had been given information that either suspected Frank had been poisoned, he would have run toxicology screens. Instead Frank was discharged. The doctor ordered blood work including tests designed to measure Frank's kidney function. Frank was sent home with instructions to drink Gatorade so as to rehydrate. (RT 1958-1960, 1963-1964.)

Because she wanted to telephone individuals at Frank's reserve unit to determine if they knew that he had been sick, a couple hours later Ms. Perkins called appellant back. During this telephone conversation, according to Ms. Perkins, appellant said that people in his unit gave him cookies and Gatorade which could have killed him. According to Ms. Perkins, appellant said that this time she thought it was individuals at Angel Gate Academy, the reserve unit Frank was assigned to, who had killed him and that months earlier, students at his middle school tried to poison him. According to Ms. Perkins, appellant said that she had been terminated from Angel Gate Academy and left on a bad note. For that reason they didn't like Frank and wanted to kill him. (RT 1812-1814.)

A couple hours later, Ms. Perkins contacted Officer Sharpe. Perkins told Sharpe about the conversation she had with appellant and that appellant's stories seemed suspicious to her. (RT 1815.)

Asked whether or not she found anything about appellant's demeanor during the two telephone conversations odd, Ms. Perkins responded "She had no emotion. She didn't cry, she wasn't upset, she was just a matter of fact. She was not indifferent (sic), she didn't -- for her husband dying, she had no emotion." When asked to describe appellant's demeanor during the visitation and the

funeral Ms. Perkins stated "she wasn't upset for losing her husband." [7] (RT 1816-1817, 1825.)

On cross examination, Ms. Perkins agreed that she was not present at appellant's wedding to her brother Frank and she had never spoken to appellant before these telephone calls. Ms. Perkins had last spoken to Frank a couple of months prior to his death. The last time she had seen Frank was approximately 3 years earlier. The total time she spent on the phone with appellant during the two telephone calls with approximately 25 to 30 minutes. (RT 1817-1819.)

Frank's sister, Shirley Coers, also learned about her brother's death through their mother. Ms. Coers and her brother Frank did not really keep in touch; they probably only spoke a couple times a year. (RT 1876-1877, 1888.)

Ms. Coers met appellant for the first time at Frank's visitation. Prior to the ceremony, Ms. Coers had a number of telephone conversations with appellant. Mainly the two talked about Frank's funeral arrangements. According to Ms. Coers, appellant wanted to cremate Frank and spread his ashes on a beach which she explained was one of their favorite places. Ms. Coers found this to be a bit odd or cold because they had not been able to come out and pay respects. At a

[7] At this point trial counsel's objection as speculation was sustained. However, trial counsel did not move to strike the answer. (RT 1816-1817, 1825.)

later conversation appellant allegedly told the Ms. Coers that because of Frank's military service he would be entitled to be buried free of charge at Riverside Cemetery. (RT 1878-1780.)

According to Ms. Coers, appellant told her that another officer at the military base had killed Frank by putting poison in his cookies and Gatorade. Ms. Coers was confused by that and asked if someone wanted to poison somebody how would they even go about doing that, to which appellant allegedly responded that there were many ways to poison somebody including using Oleander. Appellant allegedly told Ms. Coers that you could poison somebody with Oleander by making a tea out of it. (RT 1881-1883.)

During the limousine ride to the funeral, Frank's mother asked a similar question about how someone would go about poisoning somebody else. When she mentioned what appellant had said to Ms. Coers that you could use Oleander, appellant pointed to some Oleander growing at the side of the road. (RT 1886-1887.)

On September 14, 2000, Los Angeles County Sheriff's Detective Brian Steinwand and his partner Sergeant Joe Holmes of the Los Angeles County Sheriff's Department were assigned to investigate the homicide of appellant's husband. (RT 1918, 1930-1931.) Although from the very beginning of their

investigation appellant was the prime suspect, Steinwand did not let appellant know this and let her believe that he and his partner agreed with her assessment of who was responsible for her husband's death. (RT 1934.) "We befriended her. We basically led her on, so to speak, throughout the investigation, and she subsequently provided to us a whole lot of information which first of all helped us to determine the cause of death. She supplied us with two poisons that were found in the victim's body that I don't think that we would have found out otherwise, and several other pieces of information which helped in the investigation." (RT 1935.)

Throughout the investigation, the officers had a number of telephone interviews with appellant. These were recorded as often as possible. "We wanted to preserve everything she was telling us, first of all, and again she was our prime suspect, so everything that we could get on recording we wanted to do so." For the telephone conversations which were recorded, appellant was unaware that the officers were recording. The only notion that appellant would have known she was being tape-recorded was the "interview" where she was already under arrest and the tape recorder was in front of them in a face-to-face interrogation room. (RT 1936.)

Steinwand's first interview with appellant took place on September 14, 2000, at the Montebello Police Department. (RT 1939, 1943.) Appellant gave Steinwand some background information about her relationship with her husband including that the two had met in February, 2000, when they were assigned to the Angel Gate Academy; a boot camp for trouble youth where the youth spent four weeks learning military regiments and taking some college courses. By April of 2000, appellant and Frank Rodriguez were married. (RT 1940-1941.)

According to Steinwand, appellant told him that she suspected Charles (Chad) Holloway killed her husband because appellant and Frank were responsible for blowing the whistle on Holloway for some inappropriate behavior with children at Angel Gate. Appellant also stated that on September 5, 2000 Frank chaperoned children from the Los Angeles County area by bus to the academy. When he stopped in the office of the academy, appellant suspected someone had poisoned him with Gatorade and cookies. (RT 1942-1943.) After the interview appellant was permitted to go home. (RT 1971-1974.)

On September 26, 2000, Detective Holmes spoke to Frank's mother, Janet Baker. Based on the information that Holmes was given by Baker, Steinwand contacted Los Angeles County coroner's office and advised them that it was

possible Frank may have ingested Oleander. It took several months before the officers were "able to get Oleander tests sent out and results back from them." (RT 1978, 1984-1985.)

On September 27, 2000, officers Holmes and Steinwand interviewed appellant at her home. The entire content of this conversation was surreptitiously recorded. (RT 1985.) Another conversation was taped on September 28, 2000. (RT 1993-1995.)

On October 4, 2000, Holmes and Steinwand went to Angel Gate Academy to interview several individuals including Chad Holloway. They had been there several times before. Holloway was not considered a suspect. The only suspect in the homicide was appellant. Holmes made comments about Holloway as a ruse to endear himself to appellant so she would communicate with the officers. Specifically, they needed appellant to reveal any information she had as to the poison she used to kill her husband. To that end, Holmes lied to appellant saying they had a search warrant for Holloway's house. (RT 2026-2029.)

On October 5, 2000 Sergeant Holmes had a couple of phone conversations with appellant. The first conversation was initiated by Holmes because they wanted to interview her. That telephone call was recorded. Holmes called appellant back that same day to tell her that they couldn't make the interview in

the afternoon and wanted to make arrangements for the interview to take place on the following day. That telephone call was recorded as well. During the second telephone call there was a discussion between appellant and Holmes about the difficulties the coroner was having in determining cause of death. Appellant suggested that possibly poison may have been used to kill her husband. (RT 2022-2024.)

Los Angeles County Department of Coroner Supervising Criminalist Dan Anderson performed toxicology analysis on samples obtained from Frank Rodriguez. Typically this would include a general screening to eliminate common drugs of abuse such as cocaine, methamphetamine, barbiturates, opiates and alcohol. If those common tests come back negative, the coroners would rely on investigative work in order to narrow down the direction of the search for a cause of death. (RT 2078-2079, 2081-2083.) Anderson explained "there's no such thing as a general screening for everything." (RT 2084.) In the case of both ethylene-glycol, the primary chemical component of antifreeze, and Oleander, specific tests would be required. (RT 2085-2087.)

In the case of Frank Rodriguez, there was an initial screening for common drugs of abuse such as opiates, methamphetamine and alcohol. Those tests came back negative except for hydrocodone and Benadryl. Anderson described the

amounts found to be within the therapeutic range. (RT 2087-2089.) On November 9, 2000, after receiving a call from one of the detectives indicating there was reason to test for ethylene-glycol, a sample was sent to Medtox Laboratories in Minnesota to test for that substance. Those test results indicated that the level of ethylene-glycol was consistent with a fatal amount. (RT 2089-2090, 2095, 2097.) After receiving the test results from Medtox, using a gaschromatograph, flame ionization tester, Anderson tested the heart blood, the femoral blood, the gastric and vitreous fluid for the presence of ethylene-glycol. Ethylene-glycol was present in each sample. (RT 2100-2102.)

On December 26, 2000, Anderson sent out samples to the University of California at Davis to be tested for Oleander (RT 2107-2108.) Birgit Puschner, a toxicologist at UC Davis, in the animal health and food safety lab, received blood samples, stomach contents and a liver sample from which it was requested she perform Oleander testing. Oleander was present in all four samples. The amount in the stomach contents was deemed to be significant and would indicate recent exposure through ingestion. (RT 2112-2119.)

Physician Richard Franklin Clark, Jr., specialized in emergency medicine and medical toxicology. Dr. Clarke was the medical director of the poison center at the University of California at San Diego. (RT 2120-2122.)

In the course of this practice, Dr. Clark treated patients poisoned with antifreeze as well as with Oleander. (RT 2123-2125.) Dr. Clark described anti-freeze as sweet tasting. Ethylene-glycol poisoning was described as having three phases of toxicity. The first stage is similar to how people feel when they're under the influence of alcohol, because like alcohol, ethylene-glycol can make you drunk.

In the second phase individuals begin to feel sick and may experience nausea and vomiting. The damage from the compound occurs when the body begins breaking down the ethylene-glycol. At the third phase specific organs in the body become affected. Crystals begin to form and can concentrate in the kidneys. Within hours the individual will go into renal failure, although death can occur from a number of consequences of ingesting ethylene-glycol. (RT 2125-2129.)

Dr. Clark described Oleander poisoning primarily affecting the heart. It can also be very irritating to the stomach and could cause vomiting. (RT 2131, 2133.)

It was Dr. Clark's opinion that Frank Rodriguez died from ethylene-glycol poisoning. (RT 2138.) It was Dr. Clark's opinion that Frank Rodriguez received fatal doses of the ethylene-glycol that killed him within 24 hours of the time of death, and most likely within six or seven hours of the time of death. Dr. Clark

based this opinion on autopsy results indicating very small amounts of ethylene-glycol in the stomach -- meaning it had been absorbed into the body -- a process that would take five to six hours -- and the finding of crystals in the kidneys. (RT 2140-2142.) In Dr. Clark's opinion, Frank Rodriguez would have had to have taken four to five shot glasses of ethylene-glycol. (RT 2151.)

Dr. Clark also reviewed medical records from Kaiser Permanente generated by Frank Rodriguez's September 7, 2000, visit. According to the medical records, doctors at Kaiser did not measure for ethylene-glycol. Nevertheless, Dr. Clark found it interesting that the hospital had performed tests which indicated Frank Rodriguez's kidneys were functioning within the normal range and the acidity level of his blood was also within normal ranges. Additionally, Frank wasn't given any therapy for ethylene-glycol. It was Dr. Clark's opinion that either he was not suffering from ethylene-glycol poisoning or he had taken ethylene-glycol within an hour of coming in to the hospital. (RT 2146-2148.)

Dr. Clark found it difficult to say what if any part the Oleander played in Frank's death. He hypothesized it would certainly have caused him to become nauseated and to vomit. He could not predict how the levels of Oleander would correlate with the chance that he may have died of an irregular heartbeat although that could have been possible. (RT 2152.)

The symptomatology noted in the Kaiser medical records was, for the most part, consistent with Oleander poisoning. The addition of diarrhea was something Dr. Clark could not say with certainty would have occurred from Oleander poisoning. (RT 2153.)

Los Angeles County Deputy Medical Examiner at the Department of Coroner, Ogbonna Chinwah, was assigned to performed the autopsy on Frank Rodriguez. The autopsy was performed on September 10, 2000. In the course of the autopsy Dr. Chinwah took various tissue and blood samples as well as samples from the stomach contents for future analysis and examination. Dr. Chinwah 's autopsy revealed no obvious signs of trauma. Initially, Dr. Chinwah was unable to make a determination as to cause of death. (RT 2161, 2163-2165.)

On November 28, 2000, after receiving a toxicology report which indicated ethylene-glycol, Dr. Chinwah reviewed kidney tissues for crystals associated with the ingestion of ethylene-glycol. Dr. Chinwah formed the opinion that the kidney tissues were consistent with the ingestion of ethylene-glycol. (RT 2166-2169.) Dr. Chinwah formed the opinion that Frank Rodriguez had died from ethylene-glycol and Oleander toxicity. (RT 2170.)

On October 9, 2000, Steinwand and Holmes went to appellant's home again. It appeared to be vacated. Appellant had told them she was moving back

to the Paso Robles area. The officers went through the trash, went into the back yard and found an Oleander plant growing from the house behind over the wall. Five months later in March, 2001, they took samples from the plant. (RT 1997-2001.)

On October 19, 2000, appellant called Steinwand. In order to record the conversation, Steinwand told her he would call her back which he did later that afternoon. Appellant mentioned that she received a telephone call from an anonymous male who said he had talked to Chad Holloway who told the anonymous person they would never be able to track him and to look for anti-freeze. (RT 2037-2041.) The coroner's office was contacted and told to search for antifreeze. (RT 2046.) In response to the telephone call, a search warrant was prepared for appellant's phone records. (RT 2047.)

According to Steinwand, the telephone records seized pursuant to the search warrant did not indicate an incoming telephone call which would correspond to the anonymous call appellant said she received. (RT 2050-2054.)

Regional security manager for AT&T wireless, Brad Hooper, agreed. (RT 2057-2062.) Prior to the telephone call with appellant, where she claimed to have received an anonymous call the detectives had no idea that anti-freeze was a possible poison used to kill Frank. (RT 2402.)

In September, 2000, Los Angeles Unified School District administrator, Wanda Moats, was the assistant coordinator for the Angel Gate Academy program. In partnership with the California National Guard, the Los Angeles County Unified School District would send students to Camp San Luis Obispo for a month at a time. There, supervised primarily by the National Guard and also teachers from the district, the students went to school. Moats was responsible for scheduling the teachers. (RT 2066-2067.)

Some time between 1996 and 1998, Moats met Frank Rodriguez. At the time he was a soldier on duty with the Angel Gate Academy which meant that he was one of the military personnel who supervised the kids who went up to the program. In spring of 2000, after Frank had completed his teaching credential, he was employed with the Los Angeles County Unified School District as a teacher at Mount Vernon Middle School. (RT 2068.)

Moats met appellant in either February or March of 2000. At the time appellant was working for the Angel Gate Academy. (RT 2069-2070.)

On September 5, 2000 Frank Rodriguez was one of the chaperones assigned to accompany a bus load of students to begin their session at Angel Gate Academy. Under the normal schedule the bus would leave the LA area at about 8:30 in the morning and arrive at the Academy between 1:00 and 2:30 in the

afternoon. After dropping off the students, the chaperones would return to Los Angeles by bus. Moats made the arrangements for Frank to travel as a chaperone on September 5, 2000. Those arrangements were made the week before because of a last-minute cancellation by another teacher. Moats telephoned Frank and was told by his stepdaughter that Frank was ill and asleep. Later that week, Frank called Moats and accepted the chaperone opportunity. (RT 2070-2072.)

On February 5, 2001, the detectives received a fax consisting of three pages from an anonymous person. The fax had been sent from Staples. It read "Urgent. Detective Holmes, I mailed this to you. Why is Chad still free? Thought maybe you did not get it. Here it is again." Attached was a document pertaining to Angel Gate Academy with the handwritten entry on the document indicating "F. Rodriguez" and a circle around it. (RT 2406-2408, 2411.) [8] Typically, the names of the teachers who would be staying at the Academy would be provided in writing, however, the names of the chaperones were not. (RT 2073.)

After the District Attorney had made the decision to file the case against appellant, and the day before she was arrested, Holmes had a conversation with appellant informing her that they got a fax but didn't know who had sent it.

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[8] People's Exh. 18 identified the teachers who were going to be at the September 5, 2000 session and also contained a hand written entry of "F. Rodriguez." (RT 2074-2076.)

Appellant stated she didn't know who sent the fax but wanted to know if Holloway was going to be arrested. Appellant stated that she would like to be present when Holloway was arrested so that she could see the expression on his face. (RT 2415-2421.)

Pursuant to a search warrant, the detectives searched appellant's purse at the time of her arrest. (RT 2415-2421.) In appellant's purse was a napkin with the fax number for the homicide bureau of the Los Angeles County Sheriff's Department detectives' office, a note which had the amount of $250,000 and a final amount of $285,378, a document showing deductions such as funeral and bills, a fax confirmation sheet from Staples and the original fax'ed document with "F. Rodriguez" which was written in red ink. (RT 2432-2439.)

On February 9, 2001, two days after appellant's arrest, Sergeant Holmes received a letter in his mailbox at work which stated "I found this in second platoon's locker in Sergeant Holloway's papers. I figured this is how he knew Sergeant Rodriguez was coming to S L O, I hope this helps fry the bastard." (RT 2440-2443.)

At the time of his testimony, Matt Morones, who is Palmira Gorham's nephew, had known appellant for at least eight years. On the date of her arrest, appellant and her daughter were living with Morones. (RT 2454-2456.)

Sometime between July 17, 2000, and September 5, 2000, the date of Frank's death, Morones and appellant began a relationship. The relationship became a sexual relationship in late August, 2000. Shortly before Frank died, appellant told Morones that she had left the gas on in the garage. Either there would be an explosion or Frank would go into the garage; but either way he would die. Because Morones had just been released from jail on domestic violence charges he did not want to get involved; so he didn't call police and he didn't try to convince appellant not go through with it. Even when interviewed by police in February, 2001, after Frank's death, Morones did not mention the incident with the gas leak. It was not until July, 2001 that Morones told the officers about the incident. (RT 2457-2462.) Morones had his fair share of contact with law enforcement. He had been incarcerated more than once and did not like cooperating with law enforcement. (RT 2463.)

In September 2000, Luis Aguilar, a service technician for Southern California gas company, was dispatched to an emergency call at appellant's home. Aguilar identified Frank as he individual he spoke to at the residence. Frank told Aguilar there was a gas leak behind the dryer which Aguilar could smell and hear. Aguilar found a gas leak behind the dryer. The leak was from the area around a fitting attached to a hose. Aguilar tightened the fitting, which he described in his

paperwork as "very loose," with a wrench. Aguilar also found a gas leak in the water heater. (RT 2533-2539, 2543.) Aguilar testified that the loosening he found in the dryer could not have happened on its own. As the property was a rental property, Aguilar could not say how many different dryers had been in the area and whether or not they had been moved. (RT 2533-2539, 2543-2547.)

At the time her testimony, Palmira Gorham had known appellant for approximately 6 years. The two went to beauty school together. Gorham characterized the relationship as really good friends for the first couple of years. After appellant married Don Combs, whom Gorham did not like, the two stop talking. After appellant divorced Combs and approximately a month or two before appellant married Frank Rodriguez, Gorham and appellant became friends again. Gorham attended appellant's wedding to Frank. (RT 2292-2294.)

After appellant married Frank, Gorham and appellant remained in touch. They spoke over the telephone and after a while appellant began visiting Gorham in Paso Robles. When she visited, appellant came alone or with her daughter. Appellant would generally visit every other weekend and stay for the entire weekend. Appellant would stay with Gorham or with Gorham's sister Georgia Morones. (RT 2296-2297.)

Appellant told Gorham that she did not like living in Los Angeles. Appellant told her she was not happy with her church and that she missed being around Gorham and her family. By late June, appellant's trips to Paso Robles became more frequent and she would come up every weekend. (RT 2298.)

As appellant's visits increased she explained that she was not happy in her marriage to Frank. According to Gorham, appellant complained that Frank was very strict with her daughter and that he just wasn't the man she thought he was. (RT 2299.)

Sometime between mid-June in mid-July of the year 2000, Gorham had two conversations with appellant which involved the discussion of poison. During the first conversation, Gorham recalled she and appellant were talking about how unhappy she was with Frank. Gorham asked appellant why she didn't just divorce him like she divorced her other husbands. According to Gorham, appellant responded "No, this one has got a life insurance policy." According to Gorham appellant also said "if I were to kill him, at least I might end up with a little bit of money." (RT 2299-2300.) Gorham did not take appellant seriously, and began to tell a story that her mother had told Gorham and her sisters since they were very young.

It was at this point that Gorham's mother entered the room. Together Gorham and her mother told appellant a story that her mom had seen on TV or had read, about a woman who used Oleander tea to kill her husband. The husband in the story had gone to the doctor who ran blood tests and discovered the poison. The woman in the story was put in jail. Gorham recalled appellant laughing and that this was not a serious conversation. (RT 2300-2302.)

Sometime during the next day or next weekend, Gorham, her boyfriend, Conrado Apodaca, and appellant had a conversation which involved anti-freeze. Gorham had told Apodaca that one of the dogs in the apartment complex next to her house had gotten out and tried to attack her son. Although Gorham called the police nothing was done about the dogs. Apodaca explained that the dogs could easily be taken care of by soaking hot dogs in anti-freeze and then throwing them over the fence. According to Gorham she responded that they had seen something on TV about anti-freeze being sweet and bright colored so that children and animals were likely to drink it. (RT 2302-2305.)

A couple of weeks later, Gorham and appellant spoke on the telephone. In the background Gorham some very loud noise which she compared to a jackhammer. When Gorham asked appellant what she was doing, according to Gorham appellant responded she was making Frank a special milkshake. At that

point Gorham realized what she had been hearing was a blender. Because in the past appellant had told Gorham that Frank liked shakes when he was sick, Gorham asked whether or not Frank was sick. According to Gorham, appellant responded "Not yet," to which Gorham responded "whatever you're doing, don't tell me about it. I don't want to know. Just don't tell me." Gorham explained she did not really think that appellant was trying to kill her husband, but because appellant was always making weird comments about killing Frank the conversation "had gotten kind of old." (RT 2306-2308.)

On the date of appellant's arrest, detectives interviewed Gorham. Gorham was asked whether or not appellant might have been involved in killing Frank. During the first of two interviews that day, Gorham did not tell the detectives about the Oleander and anti-freeze conversations which appellant had been involved in. At trial, Gorham explained that she did not want to get her mother involved. When they returned later that day Gorham told the officers about the conversations with appellant involving Oleander and antifreeze as well as the conversation Gorham had with appellant when she was making a milkshake. (RT 2312-2315.)

Gorham overheard a number of conversations appellant had with either the coroner or the detectives on the case. According to Gorham, appellant's

conversations centered around whether or not a cause of death had been found and her need for a death certificate so that she could buy a home for herself and her daughter to live in and that if she did not have a death certificate she could not get the insurance money. (RT 2328.)

During a December 12, 2000 interview with appellant, Holmes and Steinwand conveyed to her that they were going to question Charles Holloway after they left appellant. The officers met Holloway on the freeway and followed him to his apartment. They did not interrogate him about the circumstances surrounding Frank's death, rather, they asked if he would be willing to make a three-way telephone call to appellant which they could record and listen in on. The detectives wanted Holloway to convey to appellant that he was questioned and blamed for killing Frank. The next day the officers arranged the three-way call. Shortly after the call ended, Sergeant Holmes received a page from appellant to her phone. Holmes's returned call to appellant was recorded. (RT 2382-2385, 2387.)

2. Dissuading a Witness

In March, 2001, Gorham became aware that appellant was trying to get hold of her from jail. Gorham agreed with the leading questions of the prosecutor that she was concerned that appellant might try to convince Gorham to recant

some of the things she told police. Based on those concerns, Gorham spoke to Steinwand who asked her to record any telephone conversation she had with appellant. Gorham was specifically instructed by Steinwand not to ask appellant any questions about the murder she was charged with but only to talk about her attempts to have Gorham change her statement. (RT 2316, 2319-2321.)

On March 27, 2001, according to Gorham, appellant called a Gorham's niece Angela who arranged a three-way call to Gorham. Following her instructions from Steinwand, Gorham recorded the call and focused the conversation on appellant's alleged desire to have her change her statement. (RT 2322.) During the recorded conversation appellant could be heard suggesting Palmira recant her statements to the detectives and suggesting Palmira's actions could result in her being charged as an accomplice. (CT 759-780; Peo. Exh. 30.)

3. Solicitation to Commit Murder

In May, 2002, Gwendolyn Hall was incarcerated in module 211 at the Twin Towers Jail of Los Angeles County. (RT 2214.)

In May of 2002, Deputy Nick Zabokrtsky was the classification deputy for females housed in the Los Angeles County Jail. Module 211 was the discipline module and also known as "administrative segregation." Inmates were placed in 211 either when the jail staff did not want them to have contact with other

inmates or for disciplinary reasons --such as being in violation of jail rules. (RT 2225-2228.)

Zabokrtsky was familiar with appellant because she fell within his responsibility to oversee classifications. Appellant was in module 211 for segregation purposes. In other words, not for a jail rules violation. Zabokrtsky was also familiar with Gwendolyn Hall. Hall and appellant were housed next door to each other. Ms. Hall was housed in the module for disciplinary reasons, specifically being in possession of narcotics within the jail. (RT 2236-2238.)

On May 9, 2002, Zabokrtsky and his partner deputy Rachel Jimenez, had a conversation with Gwendolyn Hall after Hall had initiated contact with them. Based on information given to them by Hall, Zabokrtsky had concerns about Palmira Gorham's safety. Zabokrtsky contacted Detective Steinwand who he knew was handling appellant's case. A meeting was arranged between Zabokrtsky, Jiminez, Steinwand, and Hall for the next day, May 10, 2002. The meeting and subsequent conversations between Hall and appellant were tape-recorded. (RT 2238-2242.)

During the May 10, 2002, meeting Hall gave the deputies handwritten notes. Steinwand testified Gorham's telephone number corresponded to

information that on the note given to him by Zabokrtsky and that the note contained the dollar amounts Hall was to be paid if she killed Gorham. (RT 2268.)

In the recorded conversations between Hall and appellant it could be understood that appellant was giving Hall directions to Palmira's home with the suggestion that Palmira could be killed by a gas leak, shooting her in the head, a drug overdose, or a robbery gone bad. Hall could let appellant know the job had been done by sending her a birthday card in code. (CT 880-896; Peo. Exh. 52; CT 897-914; Peo. Exh. 56; CT 915-925; Peo. Exh. 67.)

The defense did not call any witnesses at the guilt phase. (RT 2573)

B. Penalty Phase

1. Evidence in Aggravation

a. Death of Appellant's Daughter Alicia

On September 18, 1993, Santa Barbara County Fire Engineer David Mandeville – who was retired at the time of appellant's capital trial -- responded to an emergency dispatch at 3912 Mesa Circle in Lompoc. He and his fellow firefighters were the first to arrive at the scene. When they arrived appellant was outside. Mandeville thought that was odd because "normally I guess all other calls where a child or infant is choking, the parents are with the child." (RT 2842.)

When the firefighters arrived appellant was outside waving her arms.

Mandeville and Fire Captain Hoard entered the home. Captain Hoard escorted appellant into the living room and Mandeville went down the hallway to where the baby was. The baby was in a crib, lying on her back and not responsive. Mandeville picked up the baby, tilted back her head and started CPR. When he attempted mouth-to-mouth resuscitation he could feel an obstruction. No matter how he placed the child's head, air was not getting in. Mandeville turned the baby over and swept her mouth with his little finger. Mandeville found a piece of pliable plastic in her throat. He was able to get his finger around it and after a few tries popped it out. The plastic was approximately half the length of his little finger down her throat. (RT 2840-2846.)

The pacifier nipple fell to the floor. Mandeville continued mouth to mouth and started chest compressions. Within a couple of minutes the County Fire Department paramedics' ambulance arrived at the scene. Mandeville gave the paramedics the baby. He drove the baby with the paramedics to the hospital. In route, the ambulance broke down. The paramedics intubated the baby and continued CPR. A replacement ambulance arrived approximately 10 minutes later; picked up them all up, and proceeded to the hospital. At the hospital the baby was taken into the emergency room by doctors and nurses. (RT 2847-2852.)

On September 18, 1993, Santa Barbara County Deputy Sheriff Ralph Ginter -- also retired at the time of appellant's capital trial -- was assigned to the Lompoc substation as a sergeant. Shortly before noon Ginter and his partner Ted Teote were dispatched to 3912 Mesa Circle. The officers arrived on the scene within three or four minutes. The fire department was there on the officer's arrival. When Ginter entered the residence he observed that fire personnel had taken a baby out of its crib. There was a plastic backing of a pacifier lying in the crib. Ginter took the pacifier with him to the hospital and eventually released it to appellant. According to Ginter appellant was adamant about getting the pacifier back because she didn't want this to happen to another child. According to his report the nipple portion was left on the bedroom floor. Ginter escorted appellant to another room. (RT 2819-2820, 2828, 2831-2833.)

The parties stipulated that appellant and her husband Tom Fuller delivered the pacifier consisting of the nipple and the backing to Richard Brenneman, an attorney in Santa Maria, and then Barry Novak, the lawyer that appellant and her husband hired to file a lawsuit and obtain a settlement from Gerber. (RT 2855-2856.)[9]

[9] The matter did not go to trial.

On September 20, 1993 Santa Barbara County Deputy Sheriff Claude Tuller -- also retired at the time of appellant's capital trial --attended the autopsy of Alicia Fuller. After the autopsy had been completed, Tuller contacted appellant and her husband Tom Fuller, both to inform them of the results of the autopsy and to obtain the pacifier so that it could be photographed. Mr. Fuller indicated to the deputy that the pacifier had been given to his attorney, Mr. Richard Brenneman. Tuller made arrangements with Brenneman to pick up the pacifier. Tuller took the pacifier to the sheriff's substation in Santa Maria and had it photographed by Detective Jim Moore. After having the pacifier photographed, Tuller returned both pieces to Brenneman's office. (RT 2858-2864.)

After autopsy, then deputy medical examiner for Santa Barbara County, Wallace Carroll determined the cause of death to be asphyxiation due to airway obstruction. (RT 2865-2869.)

At the time of his autopsy Dr. Carroll did not have any part of the pacifier or photographs to consult. Approximately a year before appellant's capital trial, Dr. Carroll was provided with some photographs of both the pacifier nipple and the pacifier backing. (RT 2870.)

In late 1993 or early 1994, Barry Novak, an attorney specializing in handling major injury wrongful death matters on behalf of victims, was contacted by

appellant and her husband, Tom Fuller, regarding the death of their 13-month-old child, Alicia Fuller. The basis of the lawsuit was the failure of a Gerber pacifier that had blocked the child's airway causing her death. The agreement reached between Novak and the Fuller's was for costs and 40% to be awarded to Novak and the remaining settlement to be awarded to the Fullers. Named as defendants in the lawsuit were Gerber and Sears Roebuck & Co. (RT 2913-2916.)

The pacifier was delivered to Novak's office is in Los Angeles. Novak testified at the capital trial that he first sent the nipple and backing plate to Dr. Wolfgang Knauss, to have it examined. At the time Dr. Knauss was affiliated with Caltech University in Pasadena. Novak received a written report which included photographs from Dr. Knauss. Dr. Knauss was instructed not to perform any tests which may have involved destruction of any part of the pacifier. (RT 2916-2920.)

After receiving the pacifier pieces and the report back from Dr. Knauss, Novak contacted Dr. Gary Hamed who was then associated with the University of Akron. Novak sent Dr. Hamed the pacifier pieces and exemplar Gerber Gym pacifiers he purchased from stores so that he might perform comparison tests. Dr. Hamed was directed to determine, in their pristine state, what amount of force it would take to separate the nipple from the plastic pieces and to further

analyze the broken pacifier nipple to see if he could determine a location that might have been an initiating stress or weakness point. (RT 2020-2922.)

Ultimately the lawsuit against Gerber was settled for $710,000. the Fuller's amount was prorated pursuant to an agreement they had entered into; 60% to appellant and 40% to Tom Fuller. Appellant received $246,242.37. (RT 2923-2925.)

Prudential financial operations and control manager, Craig Biggs, identified documents relating to life insurance policy no. 98962441, which insured Alicia Fuller. Appellant was the owner/applicant of the policy as well as the agent who sold the policy. Appellant was also named the primary beneficiary. Ana Fuller, the grandmother and Autumn Fuller, Alicia's older sister were named as secondary beneficiaries. The policy was issued on July 8, 1993 for the amount of $50,000. This type of policy was typically sold as an investment for future needs such as college. There was nothing unusual about the $50,000 limit. The policy was paid to appellant on October 22, 1993, approximately one month after Alicia's death on September 18, 1993. (RT 2929-2942, 2945-2946; Exhibit 48.)

Wolfgang Knauss was a professor at the California Institute of technology in Pasadena, California. (RT 2947-2948.)

Knauss testified at the capital trial that in 1994 he was contacted by attorney Barry Novak and asked to analyze a pacifier to see whether he could ascertain how it had broken. Knauss received two pieces of the pacifier. Knauss observed that part of the rubber nipple was still left in the shield. After he examined the pacifier pieces they were returned to the attorney. Knauss photographed at the pacifier and prepared a report with his findings. (RT 2951-2956; Exhibits 43, 46, 50A, 50B.)

According to Knauss, the damage he observed on the pacifier was not consistent with a child chewing through it and also not consistent with a baby sucking the pacifier apart. (RT2958-2959.) According to Knauss, there was "no way in which [the damage] can all occur as one process of a fatigue or of a repeat pulling action." Also, the fracture was not, in Knauss' opinion, consistent with some kind of small crack or tear in the nipple which had been inadvertent and was exacerbated by the child's sucking action. (RT 2962.) According to Knauss, the nipple failed because of some external trauma or application of a tool. "Well, there was some kind of a tool or some kind of a device that imprinted itself, did damage to the rubber with great force locally and left these fractures behind." (RT 2963-2964.) Although Knauss could not reconstruct what the forces were to

generate the fracture, in his report he speculated that something may have rolled over it. (RT 2964-2965.)

Knauss' efforts to explain how the nipple had failed were made without being given information that the incident might have been based on an intentional act. If he factored in that the failure could have been intentionally made, Knauss' opinion was that the damage was consistent with the use of pliers. (RT 2969.)

At the time of his testimony at appellant's capital trial, Gary Hamed was a specialist in the fracture of natural rubber. According to Hamed "maybe a handful of people... work principally with natural rubber." (RT 3183-3184.) In either 1995 or 1996 Hamed tested the natural rubber that was in the nipple that led to the death of Alicia Fuller. Hamed was given the pacifier which Alicia choked on as well as exemplar pacifiers by attorney Barry Novak. Hamed conducted what were called "tensile tests," which were tests in which the sample was pulled apart and the strength and elongation it took to cause the failure was measured. Hamed's tests did in fact cause failures in the nipple samples which occurred by the growth of a crack. Hamed also tested a couple of exemplars by grabbing the nipple with a pliers-like device that clamped onto the nipple and then pulled. In this case, what happened was the nipple pulled away from the face shield. According to Hamed,

"the nipple stayed all in one piece" and extruded through the hole that was holding it in the pacifier face shield. This test did not cause any cracking in the face shield itself. (RT 3190-3192.)

Hamed explained that a test specimen was cut out of a sheet of rubber which was used to measure the strength of rubber. The rubber was grabbed from both ends and pulled apart. One of the purposes of this test was to determine the effect of cuts on the strength of rubber. Hamed explained that the specimen was tested first without cuts and then cuts of different sizes were introduced to the specimen to determine how the strength changed as the cut was introduced. There was a marked decrease in the strength as the cut size grew. (RT 3192-3194.)

Hamed compared the strength of the rubber that was in the exemplar nipple to the strength of the rubber in the nipple that had failed and caused Alicia's death. Hamed concluded that Alicia's pacifier strength was significantly less than the exemplars. It was also noted that there was discoloration which was consistent with degradation. Hamed explained that a darkening of the nipple was consistent with oxidation of the sample. Moreover, the sample nipple that resulted in Alicia death was consistent for an absence of sufficient anti-degradant.

In other words" the rubber was certainly weaker than would be expected." (RT 3198-3199.)

Hamed testified that he was familiar with prosecution expert Dr. Knauss. Hamed explained that the series of photographs taken by Knauss' office represented a cracked pattern on the contour of the cracked path which Hamed explained was "very reminiscent of the way natural rubber fractures in either a fatiguing or a catastrophic mode." (RT 3200.) Unlike the opinions given by Knauss, during his analysis of the pacifier, Hamed did not see anything consistent with the surface trauma testified to by Knauss. Neither did Hamed testify that the fracture line he saw would necessarily have been caused by torsion or a twisting action. (RT 3202.)

In Hamed's opinion, the pacifier that resulted in Alicia's death was on the ground and there may have been something underneath which, when pressure was applied caused cracking. (RT 3206.) In Hamed's opinion, the pacifier probably shouldn't have failed unless it had been degraded in some way. (RT 3215.)

Appellant's ex-husband Thomas Fuller was called by the prosecution at the penalty phase. Appellant and Fuller were married on March 15, 1990. The marriage lasted for just over four years. Appellant and Fuller had two children; Autumn, who was born on November 25, 1990, and Alicia who was born on

August 7, 1992. Alicia had been born prematurely and had episodes with apnea and bradycardia. Alicia spent a couple of months in neonatal intensive care and wasn't sent home until those episodes had stopped. Although Alicia's health improved as she got older she required regular care of doctors. After appellant was arrested, Fuller obtained full custody of Autumn. (RT 3026-3029, 3037-3038, 3047.)

The day of Alicia's death, Fuller was in San Diego on business. He was informed by an officer from the San Diego Police Department that there was an emergency involving his daughter. He called a sergeant in the Santa Barbara County Sheriff's Department and then came home. At the time of Alicia's death, Fuller had no suspicions that his wife had been involved. Both Fuller and appellant sought counseling after Alicia's death. Appellant's sessions continued longer than Fuller's. (RT 3029-3031, 3048.)

Appellant and Fuller decided to sue Gerber. At first they hired an attorney named Brenneman, but after deciding he may not be right for taking on such a big company, they hired Barry Novak. The lawsuit was eventually settled for $710,000. The largest amount went to Barry Novak. The remaining settlement was divided 60/40 between appellant and Fuller respectively. At the time of the settlement appellant and Fuller had already divorced. According to Fuller the two

arrived at the 60/40 split after appellant told him she was entitled to more money because she was the one who found the daughter dead in the crib. (RT 3031-3033.)

Prior to Alicia's death, Fuller was unaware that appellant had obtained a $50,000 life insurance policy for Alicia. Fuller learned about the policy approximately a month after the child's death when appellant brought up the fact that it had lapsed and she was going to try to get reinstated. The proceeds from the insurance policy were used for a down payment on a house which Fuller continued to live in after the divorce. Eventually, Fuller could not sell the house and it was repossessed by the bank. (RT 3033, 3055-3057.)

Fuller recalled an incident some months prior to Alicia's death when the family was visiting family in Michigan for Alicia's baptism. While eating at a restaurant a customer walked by and told the family that she thought that the pacifier Alicia was using was part of a recall. Because they didn't know whether the customer knew what she was talking about, Alicia continued to use a pacifier. Because Alicia seem to prefer the Gerber pacifier, that was the type they always purchased. (RT 3036-3038, 3046. 3052-3053.)

According to Fuller the difficulties in marriage surfaced before Alicia's death. Over objection, on the offer of proof that according to the prosecutor

"[appellant] has a tendency to the center of attention and be the victim, and I think that it's something that might have motivated her of taking-- of killing the child so she can be the grieving mother" Fuller testified regarding appellant's emotional demeanor as very upset when the two discussed the possibility of getting a divorce anywhere from three to six months before Alicia's death. (RT 3039-3042.)

The prosecutor elicited that six months to a year after Alicia died appellant was interviewed by a local news station. When asked to describe whether he noticed anything unusual or what he would consider to be inappropriate about her behavior during the interview Fuller responded: "Well, I do remember that she seemed to have a little smile on her face every once in awhile, and she just seemed to enjoy the attention." (RT 3042-3044.)

Questions and answers that were asked of appellant during a deposition on February 19, 1996 taken in the case of *Fuller versus Gerber* were read to the jury. (RT 3541.) In the deposition, when asked when she last checked the pacifier, appellant stated her best estimate would be the day it came to her house after it spent a few months at her friend's house. (RT 3543.) Appellant stated that she checked it to make sure it wasn't sticky, wasn't overused, wasn't dirty, was intact and there were no cracks or evidence of wearing. Regarding the shield and the

button appellant stated "I physically looked at it, and I kind of put my fingers on it, just to kind of make sure it wasn't loose." (RT 3544.) Appellant stated she would rinse it off every time she gave it to Alicia and look at it to see that it was intact.

Although she might not check the pacifier in detail each time she always looked at it before she gave it to her child. She did not always pull on it. At no time did appellant observed that it was "less than intact." (RT 3547-3549.)

Also, according to deposition testimony, on the day that Alicia died, at about 10:15 a.m., after she fed the children breakfast, Alicia appeared sleepy. She usually lay down for a nap at about 10:30 or 11:00, so appellant put her down in her crib which was in appellant's bedroom. Appellant and Autumn stayed up together. She laid the baby down on her stomach. Alicia did not have any toys in her crib. Appellant gave her the pacifier. Alicia usually went to sleep with a pacifier. Appellant did not put her to sleep with a bottle. At approximately 10:30 a.m. appellant went in to look in on Alicia and make sure she was sleeping, which she was. Appellant could hear her breathing and she knew she was sleeping. Because Alicia had a little bit of a runny nose she had been on a decongestant for a couple of days. Appellant had given her a dose early that morning. When appellant checked on Alicia at 10:30 she still had the pacifier in her mouth. Appellant left the room and continued to play with Autumn. Sometime between

11 a.m. and 11:30 a.m., appellant returned to checked on the baby. At this time appellant noticed that she wasn't moving and she didn't hear her breathing. According to the deposition testimony "she looked really different." Her color didn't look the same. "It was pale blue." Alicia had kicked off her blankets but that was not unusual. Appellant noticed Alicia's eyes were partially open. When she touched her the baby was cold and clammy. Appellant knew right away that she needed help. She ran for the phone and called 911. Until they arrived appellant was on the phone the entire time. It was a cordless phone and she had returned to the bedroom she noticed the broken part of the pacifier. Although appellant had taken in infancy care class at the hospital before she could take Alicia home she did not administer CPR. According to deposition testimony appellant stated "I tried to take it out, but I think I was too frantic and didn't pick her up right." Appellant recalled the fire department arriving first. They pushed her out of the way and began to ask questions they brought her into the living room but she could hear everything that was going on in the bedroom. (RT 3558-3576.)

Gigi Colaiacovo, appellant's sister visited appellant from New York approximately every three months before Alicia's death. The last time she visited was approximately one month before Alicia died. Colaiacovo described appellant

as a great mother. She testified that appellant gave the baby great care and always loved her kids. (RT 3579-3582.) Colaiacovo described Alicia as attached to her pacifiers. She always had to have both of them in her hands and frequently tried to put them both in her mouth and she would take one out and make a popping sound with the top of her gums. (RT 3620-3623.)

On the day Alicia died, appellant called Colaiacovo from the hospital. She was hysterical and crying. Colaiacovo had received many phone calls from appellant reporting that Alicia was sick but she couldn't believe it when appellant told her that the baby had suffocated on a pacifier. Appellant was inconsolable. Colaiacovo returned to California for the baby's funeral (RT 3585-3586.)

The parties stipulate to the following facts: "the pacifier recall mentioned in the testimony of Dr. Wolfgang Knauss and Tom Fuller was voluntarily initiated by the Gerber Co. in March of 1993 based upon five Consumer Reports that the subject pacifiers had separated into three pieces. The three pieces; the pacifier shield, the shield end cap and the rubber baglet. At the time of the recall, no injuries or chokings to infants had been reported." (RT 3576)

On the day of appellant's arrest, February 7, 2001, Sergeant Holmes remained at appellant's house to execute a search warrant while Steinwand went to Autumn's school to interview her. After she was interviewed, Steinwand made

arrangements with her father, Tom Fuller, to come and pick her up from school. (RT 3075-3077.)

Pursuant to the search warrant the report of Dr.Knauss was seized. (RT 3077.) Steinwand had been aware that appellant's younger daughter had died. After seeing the report Steinwand contacted the sheriff's department in Santa Barbara County and Gerber seeking any reports and other information. At some point during the investigation Steinwand interviewed Dr. Knauss. Eventually all of the information he had accumulated during his investigation of Alicia's death was forwarded to the Santa Barbara Sheriff's Department. (RT 3078-3079.)

b. Solicitation to Commit Murder

i. Palmira Gorham

Although the jury deadlocked on this count and the court declared a mistrial prior to the beginning of the penalty phase, the prosecutor offered evidence of the incident as aggravation.

Additional evidence offered at the penalty phase included that after his initial interview with Gwendolyn Hall, Steinwand asked Hall if she would be willing to take a tape recorder back to her cell and record conversations between her and appellant. Steinwand advised Hall that they were not interested in having her ask any questions regarding the death of her husband and only interested in

hearing any conversations regarding the death of her baby and "the solicitation to commit murder against Palmira Gorham." (RT 3081-3083.) Hall was given a DAT audio device. The device records but cannot be played back. It has to be taken to a machine and downloaded. Steinwand did not "know much about that [process]." (RT 3083-3084.)

Arrangements were made so that Hall could exchange the original tape and receive a new tape and batteries the next day. Deputy Zabokrtsky had the responsibility of obtaining the tapes from Hall and providing her with additional tapes. (RT 3085, 3087-3091.)

Gwendolyn Hall was recalled and excused after responding to all questions with the phrase "I do not recall" (RT 3096), so Steinwand described the various taped conversations between appellant and Gwendolyn Hall. Portions of the audiotape were played for the jury. (RT 3118-3129, 3123, 3124, 3131, 3136-3138.)

Hall had been directed to start taping when solicitation of murder came up and then instructed to leave the recording device on until the tape had run out. (RT 3142-3145, 3147-3149.) Steinwand would've expected that Hall and appellant would have been able to have hours of conversations over the period of time that Hall had the recording device however, only those times Hall chose to

record her conversations with appellant were taped and available for the jury to hear.

In May 2002, Los Angeles County Sheriff's Sergeant Patrick Valadez was assigned as a detective to the department's major crimes section. His assignment was to deal with the investigation of cases of solicitation to commit murders, serial and pattern robberies, kidnapping for ransom, extortions, threats against public officials and celebrity stalkers. In that capacity he became involved in the investigation of solicitation to commit murder involving appellant. Valdez interviewed Gwendolyn Hall on May 10, 2002 and took over the investigation of the charge of solicitation to commit murder.

On May 21, 2002 Valdez had another interview with Hall and directed her to tell appellant that she had obtained a middleman. (RT 3310-3314.) Appellant released $60 from her trust account which Valdez considered as an act of good faith to show that appellant was serious about carrying out the alleged plot to kill Gorham. (RT 3325.)

In May 2002, Los Angeles County Sheriff's Detective Jose Mejia was assigned to the major crimes Bureau, Metro section of the Sheriff's Department. Deputy Valdez asked Mejia to become involved in the investigation of the solicitation to commit murder involving a victim by the name of Palmira Gorham.

Mejia was asked to contact appellant in an undercover capacity and to tell her his name was Antonio Davis and that he was going to be the middleman. Mejia was aware that Gwendolyn Hall was cooperating in this investigation.

On June 8, 2002 Mejia met with appellant at the visiting area of the Twin Towers custodial facility. The two were separated by a plexiglass partition and each spoke on a telephone receiver which was hooked up to an intercom system. Mejia but not appellant was aware that the visit would be secretly monitored and videotaped. During the course of the "interview" Mejia spoke to appellant verbally and also communicated with her by writing notes on paper which he would hold up to the plexiglass for appellant to read. In his opinion this is a common way for visitors to communicate with inmates because inmates are frequently aware that phone visitations can be monitored. (RT 3407-3414.)

In the course of their meeting Mejia showed appellant Polaroid pictures which depicted the murder of Palmira. (RT 3414.)

At the time of her testimony, Keyshanetta Gibson was a Los Angeles County sheriff's deputy assigned to Twin Towers. On June 8, 2002, Gibson was asked by Valdez to escort appellant to the visiting area and search appellant person for any property or items. Immediately following her visit with Mejia, Gibson escorted appellant to the outdoor recreation area to search her. According to Gibson,

appellant appeared nervous. Appellant did not resist the search. Gibson seized some paperwork from inside her pants pocket, an address book, and a photograph of her daughter. Gibson gave these items to Deputy Valdez. Appellant also had a piece of paper in her hands which she said was trash. Shortly thereafter she told Gibson that she had written a prayer on the paper and asked if Gibson would put it with her property. Gibson took the paper out of her hand unraveled it and saw that it was a note. Gibson did not read it. (RT 3460-3470.)

According to Valdez the address book which was taken by Deputy Gibson from appellant after she met with the middleman who represented himself to be Antonio Davis, contained the name of Antonio Davis as well is the address that had been made up for him. (RT 3387-3389.)

ii. Erlinda Allen

At the guilt phase, Steinwand testified that he and Sergeant Holmes interviewed witness Erlinda (Linda) Allen who was also an inmate at Twin Towers jail facility. The interview with Linda Allen took place several months before the interviews with Gwendolyn Hall. Allen told the officers about conversations she had had with appellant. The interviews with Allen were recorded. (RT 2254-2256.) These taped interviews were not played for the jury or entered into evidence and Linda Allen did not testify at appellant's trial.

At the penalty phase, the prosecutor offered evidence that during the May 10, 2002 recorded conversation between appellant and Hall, it was discussed that at Chowchilla, where Allen had been sent to serve time, a code among prisoners could result in Allen being made "accountable " (CT 882), and Steinwand explained that Linda Allen was an inmate at the county jail housed with or near appellant who was interviewed in connection with the case. (RT 3125-3128.)

c. Victim impact and Appellant's Efforts to Implicate Another

The prosecutor's notice aggravation of victim impact and appellant's efforts to implicate another were offered at the guilt phase only.

2. Mitigation

Appellant's daughter, Autumn Fuller was called by the defense. Her entire testimony was as follows:

> Defense Counsel: I explained to you in the hallway that we're at the stage of the trial were the jury will be asked to either sentenced her mother to life without parole or set an execution date. Do you understand that?
>
> Witness: Yes.
>
> Defense Counsel: Okay. And I ask you very briefly is there anything that you'd like to say or ask this jury.
>
> Witness: I would like it for you not to execute her and make it so I can see her.

Appellant's mother, Anita Rivera, testified for the defense. Rivera testified that appellant was born on June 1, 1968. Her nickname was Gina. In addition to appellant, Rivera had had another daughter Gigi Anne. When Angelina was born Rivera lived at 7115 Beach Channel Drive in a project. The project was located in Rockaway Beach, New York. Appellant lived in this project until she was seven or eight years old. Rivera also identified an apartment at 6944 Hessler Avenue, Rockaway Beach, which was her aunt's house where they lived in the bottom apartment. (RT 3501-3504.)

One day when appellant was 9 or 10 years old, Rivera realized that appellant was not home. Rivera called friends and relatives but no one had seen her. Rivera called the police who said they could not do anything until she had been gone for 24 hours. (RT 3505.)

The next day Rivera received a call from a supervisor at a girls' home. The home was run by the city of New York. The supervisor told Rivera that Angelina was there. Appellant told her mother that she didn't want to live there anymore. Rivera believed that appellant felt unwanted. (RT 3507-3508.)

During appellant's childhood Rivera worked as a nurse and she worked a lot of overtime. When she went to work a baby sitter took care of the girls. Rivera began to leave the girls alone when they were "maybe 10, 11, 12." (RT

3505-3507, 3512.) Although Rivera and her husband were not legally separated he was not in the home often and would come and go as he liked. Rivera said her husband was not dependable and that he would be home "maybe two" nights a week. (RT 3506-3507.)

Rivera testified that she did the best she could to provide for her two daughters. There was never a time when they did not have a place to stay. Rivera encouraged appellant to go to school and made sure she attended school. Appellant performed a little bit below average however, Rivera said she had the capability to do better and encouraged appellant to try to apply herself. In high school Rivera described appellant as "quite rebellious." (RT 3508-3511.)

Appellant and her sister Gigi went to a parochial school until high school. Appellant and her sister went to two different high schools. Appellant went to a public school and Gigi went to a Catholic high school. Appellant told her mother she did not want to go to the Catholic school. (RT 3512-3518.)

When she was 13 years old appellant asked if she could go and live with her paternal grandfather. Rivera permitted her to do so. At the time Rivera had no knowledge that appellant was being molested by this grandfather.

When she was 14 years old appellant told her mother that her grandfather and she "were having sex." At the time Angelina was still living with her

grandfather. Her mother removed her from the grandfather's home and contacted Angelina's father. Angelina's father said he would look into it. A few weeks later he came back and said he didn't believe it had happened. (RT 3508-3510.)

Recalling their youth in New York, appellant's sister, Gigi Colaiacovo testified that when their mother and grandmother went to play their weekly game of bingo at the church, she and appellant stayed with their paternal grandfather. Frequently other female cousins all aged between seven and ten years old were also present. The girls' grandfather would sit on the couch with all the girls sitting in front of him to watch television. The room would be dark. Their grandfather would then make a noise to get one of the girl's attention. According to Colaiacovo, who was the oldest, he started with her. Colaiacovo turned to look at him and he would make a motion for one of the granddaughters to go to the back bedroom. Sometimes he would make a sound, other times he would use his foot to tap them. Testifying to her own experiences only, Colaiacovo said that she would get up and go to the back bedroom. Her grandfather would wait a few minutes and then he would follow. At the time Colaiacovo was eight years old. Her grandfather would tell her to pull down her pants and lay down on bed. Her grandfather would then pull his own pants

down. "He wouldn't lay on top of us, he would just stand next to us." He would stand next to the bed and rub his penis up and down on top of the girls. (RT 3586-3593.)

The first time it happened Colaiacovo was confused. But her grandfather said "Don't worry. I love you. You're my best girl, you know. Don't tell anyone. We don't want them to get jealous. There will be a prize for you on the TV the next time that you come over." The molestation would take about 15 minutes. Colaiacovo would pull up her pants and return to the living room. A minute or two later her grandfather returned to the living room. (RT 3593-3595.)

Bingo night was a weekly ritual and the next week Colaiacovo told her mother she didn't want to go stay with her grandfather. She was made to stay anyway. Her grandfather initiated contact the same way, only this time her grandfather ejaculated on her stomach. He cleaned up but in the process made Colaiacovo very nervous. She thought this must not be right. Her grandfather would not explain what had happened. He told Colaiacovo that it was a mistake and that it would not happen again and promised to give Colaiacovo two prizes, although he had never given her the prize from the previous week. (RT 3595-3598.)

The following week Colaiacovo once again told her mother that she did not want to go to stay with her grandfather. When her grandfather attempted to initiate contact Colaiacovo ignored him. After she did this she observed her grandfather attempt to make contact with appellant. Colaiacovo observed appellant get up and go into the back bedroom. She was gone the same amount of time and returned first before her grandfather. (RT 3599-3602.)

These bingo nights continued for approximately one year. Their grandfather attempted to get Colaiacovo's attention and have her go into the bedroom but she continued to ignore him. Nevertheless he would select at least one girl -- sometimes two girls every week. (RT 3603.)

Colaiacovo never discussed the molestations with her mother. Her father was not around enough to discuss it with him. The bingo nights ended when family moved into another apartment where their aunt lived upstairs and she watched the girls. (RT 3604.)

When appellant was 13 years old and she had moved in with her grandfather, Colaiacovo noticed that appellant had a lot of trendy clothes and jewelry. (RT 3605.)

When appellant was 16 years old, in 1984, appellant attempted suicide. Appellant's mother testified appellant was kept at Nassau County hospital for a 24

hour observation, however according to medical records the stay was for over one week. Appellant had taken an overdose of Tylenol. (RT 3520-3523.)

At the time of trial appellant's mother resided in Arizona. She testified that she understood the proceedings were the penalty phase of a death penalty trial and that she and trial counsel had spoken on the phone several times and met in person several times. When asked whether there was anything that she wanted to say or ask the jury, Rivera said "I don't want my child taken from me. I'm here and I haven't been able to touch my child. At least if she's in for life of parole or whatever, I may be able to at least hold onto her a little while as long as God has leave of me to stay on this earth at this point." (RT 3511.)

When asked to comment to the jury about her feelings about appellant facing the death penalty Gigi told the jury that she hoped she would have an opportunity to continue their relationship. (RT 3606.)

Appellant's father was still alive at the time of trial. (RT 3520-3523.) Investigator Lawrence Sanchez and trial counsel traveled to the state of New York in preparation for appellant's trial. They went to Rockaway, New York, to interview appellant's father, Ralph Morales. The two made considerable effort to track him down. After numerous messages he returned their call and agreed to meet them in a New York City taxicab. Morales exited his cab to speak to Sanchez

however, he declined to go to any other location to talk. Sanchez spoke with appellant's father for 10 to 15 minutes at which point he stated he was in a hurry and that he had to go somewhere. Sanchez explained that appellant was in jail and that she was facing a possible death penalty. Morales agreed to continue to talk to Sanchez at a later date. He agreed to make contact the following day. Sanchez gave Morales contact information for himself and for trial counsel. It was arranged that Morales would call Sanchez at about nine o'clock the next morning. He did not call. Sanchez attempted to call him every hour until they were scheduled to leave New York. Sanchez has had no further contact with appellant's father. (RT 3535-3541.)

At the time of his testimony, Dr. William Vicary was a medical doctor specializing in psychiatry. After describing his credentials to the jury in very short detail, Vicary explained that he was asked to interview appellant, review a series of records and prepare a psychiatric evaluation. (RT 3626-3628.)

Vicary interviewed appellant at the Twin Towers correctional facility on four separate occasions. He administered some psychological tests including those to test personality traits and symptoms of mental illness. Dr. Vicary also interviewed appellant's mother by telephone for about an hour and her sister and cousin at his office also for about one hour. Dr. Vicary was given summaries of

the special circumstances evaluations prepared by both the prosecution and the defense, high school grades from the State of New York and prior psychiatric records from the Nassau County Medical Center in New York. These records pertained to an attempted suicide when appellant was 16 and was hospitalized for a week and a half. He was also given records from counseling sessions that she attended after the birth of her premature daughter. (RT 3628-3630.) Vicary was also reviewed what he described as "a big file of her jail medical psychiatric records." These included a psychological report from Dr. Romanoff who was a clinical psychologist who saw appellant several times and administered the MMPI psychological test and wrote what Vicary described as a very thorough and very lengthy psychological evaluation. (RT 3630-3631.)

Appellant's mother told Dr. Vicary that appellant's father was rarely around, that he had many girlfriends, spent most of his time away from home and was not financially supportive of the family. Because of this, appellant's mother had to work double shifts at her job as a nurse. In order to support her two children she was not around much. As a result the children were often in the homes of relatives. (RT 3634.)

Similarly, appellant's sister described the family relationship to Dr. Vicary as "very distant" and a "sad family." "There wasn't really much contact back and

forth between the parents and the kids, and that the kids really didn't have that much of relationship with each other." (RT 3635.)

Appellant told Dr. Vicary that her dad was often gone, that her mom was always at work and that she was often in the company of relatives, particularly her paternal grandfather. (RT 3636.)

Regarding the incidents of sexual abuse Dr. Vicary testified that when they were small children, appellant, her sister Gigi and their little female cousins would be left with grandfather so the mothers could go play bingo. During that time the grandfather had a little game he would play with the children where he would offer them special prizes to go back in the bedroom with him. On two occasions he molested Gigi. On the second occasion she was frightened because he ejaculated. Gigi was disgusted and didn't know what to make of it all. Thereafter when he would invite her back, she would try and ignore him and so she escaped him, but appellant being younger and wanting to please and get some kind of affection, was a "willing" participant in going back repeatedly with grandfather. This relationship that she had with the grandfather of a sexual nature went on from the time when she was a little kid until she was 15 or 16 years old. Twice the grandfather made her pregnant and forced her to have a therapeutic abortion. (RT 3637.)

Vicary explained: "Many of the victims and the molesters will tell you this, many of the victims are lonely. They come from troubled families. They crave acceptance, they crave affection, and this is what the abuser provides them. He manipulates them, he gives them gifts, he talks to them, he gives them what their parents are not giving them, and the little kid, as sad as it is, and the FBI experts will confirm this, will trade sex for love. And so that's what the defendant was doing." (RT 3637.)

"They force themselves to believe [that the molestation is in fact, affection]. In the defendant's case, she was more interested in grandfather's attention and affection and the presents he would give her, so that when he was doing sexual things to her, she would actually pretend to be somebody else, this imaginary person called Victoria where she would kind of have a fantasy and go somewhere else while father (sic) was having vaginal intercourse or sodomizing her." (RT 3638.)

According to Vicary appellant tried to say no. She went to her grandmother and told her what her grandfather was doing. This was when she was six or seven years old and a week or two later the grandmother died. At a later time she told an uncle and a week or two later the uncle died. When she told a cousin who was approximately 19 years old and he took advantage of what he knew and began to

molest her too. According to Vicary "she learned that that saying no and asking other people to help her wasn't working. In fact, it was causing disaster. People were dying and people were increasing the sexual abuse against her." (RT 3639.)

When appellant finally told her mother her mother's response was not to contact law enforcement but rather to contact appellant's father and tell him what happened and to bring appellant's back home. (RT 3639.)

Ultimately family members blamed appellant for the grandfather's behavior. Vicary explained: "Many families in which the situation is going on are in what we called denial. They pretend like everything is okay, and they don't pay attention to the warning signs, and when the kids say something is going on, they say no, it can't be true. You must be lying. You know, and furthermore, how could you make such an accusation against her grandfather who loves you and has done all these wonderful things for you. And more than that, it's your fault because you sit on his lap and you kiss him and hug him, and so if he's touching you, it's because you're leading him on." (RT 3640.)

Dr. Vicary explained that this sort of blame is very bad for victim's self image. "Victims and the people at the rape crisis center and at the Children's Protective Institute, Child Protective Services, LA County, district attorneys child sexual abuse unit, all these people will tell you that victims blame themselves.

They say it's my fault, I must've done something wrong, there must be something wrong with me, and that's exactly the way the defendant came to think about herself, that she was defective, that she must be cursed, that she must have a sign on her that says do things to me because I'm bad." 3641.)

Dr. Vicary explained about one third of the victims come through unscarred. These individuals typically are very resilient and have support from extended families, friends, teachers and religious figures and are able to work through the trauma. Another third, of which Gigi is an example, are traumatized and have relationship issues. These are people who don't get in a lot of trouble with authorities but have problems in their relationships. Appellant, Dr. Vicary explained is an example of the other third. "These are the ones that probably are more traumatized over a longer period of time, and their lives wind up being very self-destructive and destructive. Suicide attempts, mental illness, criminal behavior, and in terms of many of the men that have been sexually abused, they turn around and become abusers themselves." (RT 3642.)

Dr. Vicary quoted USC Professor John Briere's findings that the more severe the trauma, the more long-term the trauma, the more likely it is that the person is going to suffer psychiatric damage. (RT 3642-3643.)

Compounding appellant's trauma was the fact that it was her grandfather. "This is a devastating betrayal of your trust, and it can be more damaging psychologically than actually being molested by a stranger." (RT 3643.) "It may also be more difficult to have family members believed that the abuse occurred. If you've been through these kind of experiences, lots of these victims are quite mixed up as to what is love and what is sex and who can you trust and who can't you trust, who is a good person, who is a bad person, so it causes a lot of trouble later in their dating relationships and in their marital relationships." (RT 3645.)

It is also generally true that abuse victims will have multiple partners as opposed to one husband for 30 years. (RT 3646.)

In describing her relationships with men appellant told Dr. Vicary that they were "controlling, possessive, sexually unfaithful." Some used alcohol and drugs, and were dominating, intense, and angry. "Those are the kind of terms that she used, and that was corroborated by her mother, her sister and her cousin, all of whom had known her husbands." (RT 3666-3667.)

In appellant's case Dr. Vicary explained "In this particular case I think what we have is history repeats itself. She picks men for affection, for attention, for companionship that they are like grandfather, like uncle, like cousin that exploit

her and dominate her and control her and use her. It's a trade that she's making." (RT 3646.)

As for the jewelry and gifts Vicary explained: "Well, I think that's going both ways. I mean he's plying her with gifts and makeup and perfume and clothing and so forth so that he can have sexual relationship with her. I think he's also doing what a lot of the monsters do, he's trying to make her mature, make her an adult figure, even though she still just an adolescent. So to do that, he wants her to wear lipstick and wear makeup and dress like a woman." (RT 3646-3647.)

Dr. Vicary explained that many victims of this kind of trauma become depressed. As to appellant or Vicary explained "This defendant when she was a little kid, she would go down to the jetties at the ocean and hope that she be killed by the waves, because she was unhappy and she was depressed. When she was eight years old, she went to the medicine cabinet and she ground of all the pills she could find in there and mixed them with some water and she drank that hoping to kill herself. Didn't work. She got sick and vomited it all up. Then when she was 16, she took an overdose of these over-the-counter sleeping pills that you can get in the drugstore, at the high school she went to a stairway which was very seldom used and passed out. But one of her friends found her there and she

was taken to the emergency room and then to be psychiatric hospital. The tests that were done on her at that time indicated that she was depressed. There was a blood test done called a cortisol suppression test, which was consistent not only with depression, but was someone who had been traumatized." (RT 3647-3648.)

Dr. Vicary explained that each of us has the temperament as a little kid and that as we grow up these factors get modified by our experiences. "Now, I think the defendant in this case learned by her experiences that it was better for her to keep her mouth shut, to what other people told her and go along with what the adults around or wanted, met way she would get some attention, she would get some appreciation and affection. So she developed this kind of passive way of relating to other people and keeping her feelings inside, because if she told, remember when she told, what happened? People died or people hurt her. So she kept her feelings to her self and she became a kind of agreeable individual that other people could exploit and take advantage of her." (RT 3649.)

Many victims numb themselves with drinking or drugs. "And at times the defendant has done that. She has drank too much alcohol, she's taken too much Valium and Vicodin that was prescribed by doctors, psychiatrists and medical doctors, and that's been a problem in the sense that in the short term it's numbed her but in the long term I think that's made things worse, because it's screwed her

up and interfered with her thinking and her judgment and her ability to make wise decisions." (RT 3649-3650.)

In appellant's case there were four adult males who sexually molested appellant over a period of many years. Appellant came from a dysfunctional family. According to Dr. Vicary: "This was a very sad, troubled, almost non-family family." (RT 3650-3651.)

At the age of 16 appellant suffered from what Dr. Vicary characterized as clinical depression. He based this on the fact that she had been given the maximum doses of antidepressant medication called Welbutrin and anti-anxiety medication Buspar and another anti-anxiety medication at significant doses. (RT 3651.)

Dr. Vicary recognized that because much of what a doctor learns is from self-report a subject could tell them anything. Dr. Vicary says this does not mean that he would have to believe it and as a psychiatrist he has means to verify self-reports such as checking with family members, friends, and employers and doing psychological tests. Moreover, in this case Vicary looked at appellant school records and past medical and psychiatric records to determine if they were consistent or not. Another corroborative factor was contained in her jail records; that being a resting heart rate on almost every single occasion was quite high.

One warning sign for someone to have suffered trauma or to be severely traumatized is to have an elevated heart rate. In this case it was also very significant the older sister also suffered abuse. (RT 3652-3654.)

In response to whether or not the psychological conditions suffered by appellant prevented her from being a good mother, Dr. Vicary responded that when he interviewed her he found her to be most emotional and most animated when she was talking about her children. "She said in all her life, none of her relationships had worked, and that she had only too happy experiences, the birth of her two little girls." (RT 3654.)

Dr. Vicary also evaluated appellant for future positive institutional adjustment. Vicary predicted that she would be a model prisoner who would get along with guards and other prisoners in the institution. (RT 36.)

GUILT PHASE ARGUMENTS

I. APPELLANT WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS, A FAIR TRIAL, A REPRESENTATIVE JURY, AND A RELIABLE GUILT AND PENALTY DETERMINATION BY THE ERRONEOUS EXCUSAL OF JURORS NO. 2 AND 8 FOR CAUSE

Prospective jurors may be excused for cause if the juror's position on the death penalty would either prevent or substantially impair the juror's ability to follow the court's instructions, apply the law to the facts, or impose a sentence of death. However, in this case, because further questioning of the

excused jurors revealed that their position on the death penalty would neither prevent nor substantially impair the juror's ability to follow the court's instructions, apply the law to the facts, or impose a sentence of death, the trial court excusal, over defense objection, was improper.

A. Summary of Facts

1. Juror No. 2

During questioning by the court, Juror No. 2 was asked about her questionnaire response that she believed life without parole was a worse punishment than death. The court explained that if a penalty phase was reached, the prosecution would offer evidence in aggravation in hopes of convincing the juror to vote for death and the defense evidence in mitigation in hopes of convincing the juror to vote for life. (RT 945-947.)

The following dialogue between the court and Juror No. 2 took place:

Q: Can you adjust your decision based on the expectation of the parties and the proof of the evidence in the penalty phase?

A: I guess I could.

Q: Do you understand what I was explaining?

A: I understand. I understand.

Q: Okay. To make it rather vivid, if Mr. Houchin produces in you the view that the mitigating circumstances are sufficient to justify the lesser penalty, he would

not be asking for the death sentence. To you the lesser penalty is death rather than life without parole. He's asking for the lesser penalty of life without parole rather than the death sentence. So if he basically succeeds in convincing you, he wants the lesser penalty of life without parole, not the death sentence that you think is less. Can you adjust that final decision based on the expectation of the parties?

A: Yes. (RT 947-948.)

When defense counsel questioned the juror, Juror No. 2 explained she would be able to assign weight to evidence in order to determine the appropriate penalty; would not automatically vote for or against the death penalty; would not necessarily consider any type of crime necessarily deserving of the death penalty; would not disregard the weighing process in favor of or against the death penalty; and that although in her opinion the death penalty was not used enough, she would decide cases on a case by case basis. (RT 949-982.)

Juror No. 2 was then questioned by the prosecutor.

Q: Do you think that personally you could make that decision and sentence the defendant to death?

A: I don't know. (RT 1008.)

The prosecutor established that the juror worked for the district attorney's office but the two did not know each other. In the course of the juror's duties, criminal complaints crossed her desk. One complaint in particular caused the juror to believe the death penalty was appropriate. According to Juror No. 2, this

defendant was violent, committed several murders, caused a disruption at his trial and showed no remorse. This was the only complaint that had crossed the juror's desk in which Juror No. 2 "agreed with what the office had decided to do in a ...death penalty case." (RT 1008-1009.)

When asked:

Q: Do you think in the appropriate circumstances if you found the aggravating substantially outweighed the mitigating and that you felt death was the appropriate punishment under the law, could you personally vote to sentence somebody to death"

A: I'm not sure. (RT 1010.)

When asked if she would be more comfortable sitting on another type of case, Juror No. 2 answered:

A: Yeah, I think I would. You holding somebody's life in your hands, and I mean people do wrong, but I'm not really really really for the death penalty. I understand it and I think there are some circumstances it should be death, but I don't know if personally could say, yeah, this person deserves to die.

Q: As a personal matter you're uncomfortable making that decision?

A: Yes. (RT 1010-1011.)

The prosecutor challenged Juror No. 2 for cause. Defense counsel objected. (RT 1035-1037.)

The court granted the prosecutor's challenge for cause finding there were very few circumstances in which she could impose it and her statement that she

was not sure she could impose the death penalty indicated to the court that she could not do so in this case. (RT 1038.)

COURT: It is not a realistic, practical possibility that she would do that, particularly given the circumstances here. Perhaps on a defendant who has killed 25 people she might be able to do that, so I will allow the challenge for cause on Juror No. 2. (RT 1038-1039.)

2. Juror No. 8

During his questioning by the court, Juror No. 8 indicated he knew some lawyers; had some contact with police; and at least one relative, a cousin, who had been a crime victim. With regard to this fact, the juror expressed some dissatisfaction with how the police handled his cousin's case. (RT 1084-1090.)

Juror No. 8 also expressed some moral conviction against application of the death penalty. He did not feel it was a deterrent. Those feelings would not affect his ability to decide guilt. (RT 1090.)

When questioned further on the issue of penalty, Juror No. 8 agreed with his questionnaire answer that he was "moderately in favor of the death penalty," particularly in the case of premeditated murder. (RT 1091-1092.) Juror No. 8 assured the court that if the evidence was strong, he could impose the death penalty. (RT 1092.)

During questioning by defense counsel, Juror No. 8 reiterated his feelings that he was "moderately in favor of the death penalty" but he believed it did not

have a deterrent effect. (RT 1094-1095.)

The prosecutor challenged the juror on the basis of his feelings that he would judge the credibility of law enforcement more strictly than other witnesses and moral and religious convictions regarding the death penalty. This was based on the juror's answer that his belief in the concept of "vengeance is mine" would not affect his ability to decide guilt but would make him "uncomfortable" with deciding penalty. (RT 1099-1100.) This was in spite of the fact that the juror assured the prosecutor directly that he would be fair to the prosecution in both guilt and penalty. (RT 1100-1101.)

Defense counsel objected to the challenge. (RT 1102.) The court granted the challenge and ruled that he did not accept the juror's answer about being fair to both sides at penalty. (RT 1103.)

B. Because the voir dire of juror nos. 2 and 8 established their position on the death penalty would neither prevent nor substantially impair their ability to follow the court's instructions, apply the law to the facts, or impose a sentence of death, the trial court committed reversible error discharging the jurors for cause.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court held that prospective jurors in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibit the exclusion of

prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.) Instead, the state could properly excuse only those jurors "who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 522-523, n. 21, emphasis omitted.)

The Court modified the *Witherspoon* standard in *Adams v. Texas* (1980) 448 U.S. 38, a capital case involving the murder of a police officer. The Court explained that *Witherspoon* and its progeny "establish[] the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas, supra*, 448 U.S. at p. 45.) Instead, a state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*)

Prospective jurors could not be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id.,* at p. 50.) Instead, a prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (*Id.,* at p. 48.) Moreover, as the Court later made plain in specifically reaffirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

This Court has repeatedly held that it is the *Adams/Witt* standard which reviewing courts should apply in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (See *People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412.)

The erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660 [improper exclusion of a single juror warrants reversal].)

Application of the *Adams/Witt* standard to the voir dire of Jurors Nos. 2 and 8 shows that the trial court plainly erred in discharging these jurors for cause. Under *Gray v. Mississippi*, the conviction must be reversed.

In the instant case, the dialogue between Juror No. 2 and the trial court and parties does not establish that the juror held such views on the death penalty which would *prevent or substantially impair* her performance in this case.

Although Juror No. 2 expressed some reservation in applying the death penalty in all but a serious case, this case was a serious case where there were multiple murders alleged and appellant was alleged to have solicited the murder of another. (RT 949-952, 1008-1011.) The court's finding that the juror might only impose death in a case where there had been 25 people killed was both unsupported by the facts and unreasonable. (RT 1033-1039.)

Likewise, Juror No. 8, while perhaps more comfortable with deciding guilt or innocence, assured all of the parties that he would put aside his emotions and judge the evidence presented by both sides fairly. (RT 1090-1103.)

C. Reversal is Required

Where a trial court erroneously excuses jurors for cause who should have been permitted to sit, the standard of reversal is reversal per se. (*In re Anderson* (1968) 69 Cal.2d 613, 619-620.) *Anderson* rejected the prosecution's argument that the erroneous excusals for cause against scrupled jurors were harmless because the prosecutor would have used peremptory challenges to strike the

jurors in any case, such that the composition of the jury was not adversely affected.

This Court has reaffirmed the reversal per se standard in light of federal constitutional mandate. In *People v. Heard* (2003) 31 Ca1.4th 946 this Court, applying the test of *Wainwright v. Witt, supra*, i.e., whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," reversed a death sentence because of the erroneous for cause excusal of a life-leaning juror, finding that the trial court erred in concluding that the juror's expressions of concern about the death penalty did not substantially impair his ability to follow the law. (*People v. Heard, supra,* 31 Ca1.4th at 966.) Based on analysis above, reversal is required.

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II. IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, ACCESS TO COUNSEL, FAIR TRIAL, EQUAL PROTECTION AND TO A FAIR PENALTY DETERMINATION, APPELLANT WAS SUBJECTED TO UNLAWFUL AND INHUMANE CONDITIONS OF CONFINEMENT [10]

A. Introduction

Subjecting appellant to unlawful and inhumane conditions of confinement by assigning her inappropriate housing, depriving her of medical attention, sleep,

[10] This argument is affected both the guilt and penalty phases of appellant's trial.

sunlight, nutrition, recreation time outside her cell, contact with other inmates and family, and by exposing her to repeated other forms of physical and mental abuse and repeatedly intruding on her right to counsel and to maintain privileged attorney-client documents combined to undermine appellant's constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments at all phases of the proceedings against her.

Jail staff and law enforcement – seemingly with the encouragement and approval of the prosecution and the court -- went to extraordinary measures to ensure appellant implicate herself in the underlying capital charge as well as to encourage her and entrap her to commit other crimes.

Of course, a government may, in accordance with due process, incarcerate an individual charged with a criminal offense prior to conviction. But the conditions of pretrial detention cannot amount to punishment of the pretrial detainee. (*Bell v. Wolfish* (1979) 441 U.S. 520, 535.) Courts have recognized that the conditions of confinement in jail may become so adverse as to substantially impair the ability of an accused to defend herself, or to assist counsel in the preparation of a defense, thereby violating the Sixth and Fourteenth Amendments to the United States constitution and Article I, section 15 of the

California Constitution. (*Milton v. Morris* (1985) 767 F.2d 1443, 1446; *People v. Stansbury, supra,* 4 Cal.4th 1017, 1046.)

The record in this case shows that appellant was singled out for the particularly harsh treatment outlined above.

What follows is a narrative of events during appellant's nearly three years of incarceration, from her arrest through sentencing.

B. Narrative of Events

Appellant was arrested on February 7, 2001. (RT 192.) Initially, appellant was represented by the Office of the Los Angeles County Public Defender. (CT 11.) Although for a number of months she was held in the Medical Services Building, In April, 2001, appellant was abruptly and without explanation transferred to Module 211, located at the Twin Towers facility. (CT 16, 207.)

Module 211 was one of the two disciplinary and administrative segregation units of Twin Towers. (RT 516-517.) The other was Module 231, which was less restrictive. Appellant was housed in 211 for segregation rather than disciplinary reasons. (RT 517.) Module 211 was comprised of 48 cells. For a portion of the time of appellant's confinement, the module housed women only. For some time there was also one male housed in the Module. (RT 515.) None of the cells had outside windows. The only windows were on the door. Three was also a slot for

passage of a food tray. When the male came into the module, the windows were covered so that the cells became totally enclosed. (RT 516.) [11]

From the outset of her confinement, appellant was not permitted "face to face interviews" with her defense counsel or family and her attorney was not permitted to play her tapes of recorded conversations without a court order. (CT 17.) Once transferred to Module 211, the conditions of confinement only got worse.

In April 2001, the prosecution successfully petitioned the court to terminate appellant's telephone privileges. The termination of these privileges extended to appellant's defense team. (Supp. CT 1-6.) [12] Custodial conditions were such that on April 26, 2001 appellant's counsel was required to seek a court order to provide appellant with thermal underwear "in order to help prevent further coughing and colds." (CT 23.) In addition, appellant's visits were monitored without her knowledge. (RT 19.)

On September 26, 2001, the Office of the Public Defender was relieved and private counsel, and M. R. Ward, Jr., substituted in as retained counsel. (CT 182.)

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[11] By contrast Module 231 had a glass door which went from floor to ceiling and an outside window. (RT 517.)

[12] Although appellant applied for an order permitting telephone access to defense counsel on numerous occasions this was not achieved until September 1, 2003, a mere 28 days before trial began. (CT 436-437; 493-505.)

On December 14, 2001, the parties appeared before trial judge, William R. Pounders. At the hearing, appellant advised the court she needed access to the phone to replace Ward and retain new counsel. It was not until that same court appearance that Ward obtained a court order for face-to-face interviews with appellant and to permit the playing of tapes and review of evidence. (CT 185.) Thus, Ward did not have face to face contact with appellant for at the first 3 months of his representation. (RT 23.)

In a January 3, 2002 letter advising the court that Mr. Ward had been fired and that she required new counsel, appellant advised the court that legal mail delivery took approximately two to three weeks and that regular mail was not delivered for a month. Concerned for her personal safety, appellant pleaded to the court:

> [T]o try and ensure my personal safety in relations to the custody staff especially, I would like to ask the court to attempt to keep my position of no council (sic) as confidential as possible. There are facts to substantiate this request. (CT 192-197.)

In an accompanying declaration, appellant asked that any order of the court be sealed.

> No statements on the exact purpose for the order shall be made in any manner, written nor verbal, outside the court, especially to the staff the twin Towers. This is solely so the oppressive treatment I am already being subject to by the senior staff does not increase while I am unprotected. If

> the court requires a full explanation of reasons foundating (sic) this portion I will address them privately. This again is to prevent any further horrific affliction in addition to my current situation. (CT 196.)

Appellant also advised the court that because of the court order restricting telephone access she was isolated from her 11-year-old daughter. (CT 196.)

On January 16, 2002 a hearing was held on the issue of granting limited phone access to appellant following her renewed request to the court that she wanted to seek and secure new counsel. The court denied appellant's request to make unmonitored phone calls to her attorney for the purpose of securing new counsel and did not address any of appellant's concerns about the conditions of her confinement. Although the matter was before Judge Pounders on March 13, 2002, April 25, 2002, and May 29, 2002, the court did not address any of appellant's concerns and against her wishes to discharge retained counsel, she was required to proceed with Ward. (RT 53, 59, 63.)

In June, 2002, appellant once again communicated to the court the problem she was experiencing with her attorney and the custodial staff at the jail. (CT 204-215.)

Appellant advised the court that she believed herself to be "in serious danger." [13] Appellant advised the court that was writing personally because she

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[13] Although later hearings on the matter corroborated appellant's description of

had had no success in convincing her attorney to advocate her concerns to the court. Appellant also advised the court that she was not well.

> Please be patient with me and this letter, for I am not well and my words may not be formal as result along with I may have some emotion as well. (CT 205 .)

Appellant's plea regarding her mental state was plainly conveyed to the court.

> Your honor I will tell you that it is so bad that if I don't get help soon I do not believe I will be sound minded enough for trial. As it is, I count myself lucky to get through each day. Sir the statements I am making are not just words, they are verifiable through medical reports, eyewitnesses including staff and other documentation. I do have intentions on filing a full complaint with the right jurisdictions but I have no doubt the process is very time-consuming and expensive. Which honestly I do not have that luxury of strength or time to spare at this point. I am really in need to be heard in person as a person not seen as an inmate this would allow me to tell the situation in more detail, if I wrote everything you would have a 30 page letter. (CT 205.)

Appellant spoke of intensifying "mental torment" and "vicious and despicable" treatment. Appellant expressed her concern that if the court would not take action she would not be able to make it through trial. (CT 205-206.)

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the restrictive and inhumane conditions appellant was subject to in Module 211, whether or not appellant was actually in serious danger is not really the issue. Even if the danger faced by appellant was not as dire as indicated in appellant's letters, appellant's words manifest she held a sincere fear and concern for her life, her case, and her daughter.

Appellant explained that she had been segregated from the general population and when she was held in the medical service building she was exposed to tuberculosis and other contagious diseases and allowed to shower only once every six days. Appellant stated that she was never given any recreation time, that her medications were "toyed with," and that she was "sexually advanced upon and watched by male senior staff members while showering." (CT 207.)

Appellant advised the court that after an extensive face-to-face visit with her counsel she was abruptly pulled from the medical service building and taken to Twin Towers Module 211. Appellant explained that in 211 she was housed in a small cell surrounded by many "unique" inmates. That there was 25% lighting and the temperature was never over 60°. Appellant stated that the rooms were never cleaned and that they smelled toxic. According to appellant "mites, poisonous spiders and fleas bite, infect and scar me head to toe every day and night." (CT 208 .)

Appellant informed the court that she was forced to wear the same uniform and underpants for a week, the same thermals for four months, and use the same blankets for three to four months. According to appellant no provisions were made for the cold weather and no health care was given for resulting

problems. According to appellant there were no windows and there was no fresh or circulating air. Appellant said she was not allowed to view TV or newspaper or exercise regularly. Appellant was given an opportunity to exercise outdoors "If I am lucky every six weeks." (CT 208.)

Appellant described she was constantly cursed at and subjected to very cruel games. Appellant told the court that it was known by the jail staff that she was an "extreme claustrophobic." Nevertheless, jail staff handcuffed her, placed her in a small room and through the 8" x 8" window which faced to the jail interior, laughed at her as she went into convulsions, threw up and urinated on herself. Appellant was left in vomit and urine overnight then denied a shower and clean clothes for two to three days. Appellant stated that whenever she complained she would be reprimanded. She informed the court that she had been sexually advanced on. When she wrote to the commander of Twin Towers, Ms. Kathy Taylor with her complaints and a request for help, according to appellant, Lt. Brown arrived at her door with "very serious threats and nasty statements." (CT 207-208.)

Appellant informed the court that she had both witnesses and documentation. Appellant also had information that her legal mail was being tampered with. (CT 209 .)

Appellant was tormented and taunted by other inmates who made threats on her life. Appellant believed that information about her case and her daughter was passed down from law enforcement sources to the general inmate population. According to appellant "my suspicions are the detective is intentionally keeping me here to torment me more. I have had full belief for over a year that they don't want me to make it to trial -- and Sir -- they are very critically close!" (CT 210.)

Appellant pleaded with the court to transfer her to some housing which would enable her "to regain some type of sanity and strength to make it to trial" and to protect her from the threats made against her. (CT 211.)

Appellant also asked for rights to use the inmate law library. Appellant requested an evaluation done in regard to her mental state to see if she was "honestly mentally strong enough to continue proceeding at this time." (CT 211-212.)

The parties returned to court on August 1, 2002. There, Ward filed a motion to be relieved. The court granted Ward's request to be relieved and continued the matter to permit appellant to decide whether to retain new private

counsel, utilize the office of the public defender, or proceed in pro per. (CT 220-229; (RT 66-89.)[14]

Appellant's access to the law library was discussed only in so far as it might be made available if appellant proceeded in pro per. [15] None of the other issues brought forward to the court by appellant's letter were addressed. (RT 66-89.)

At the next proceeding, dated August 13, 2002 it was determined (once again) that both the Office of the Public Defender and the alternate public defender had conflicts and that a panel attorney would be appointed to represent appellant. Again, none of appellant's other issues were addressed. (RT 90-97.) At the next proceeding, dated August 16, 2002 panel attorney Yamamoto was appointed. No other issues were addressed. (RT 97-100.)

At the next preceding dated August 28, 2002, the court chastised appellant for conceding to Mr. Yamamoto's request to withdraw. (RT 100-109.)

The Court: Okay. One thing I want to explain to you is that the basis for it is an inability to establish a relationship with you that is going to be effective in representing you. What I cannot let you do is continue to reject attorneys until you find the one that pleases you the most. The county is not required to pay for an attorney that you select. The selection of the attorneys is not my choice; it's

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[14] The trial court's error in failing to replace Mr. Ward, who was a retained counsel, at appellant's request nine months earlier, is discussed in Argument IV.

[15] The court's treatment of appellant as she sought advice about whether or not certain options would be available if she proceeded in pro per can only be described as bullying and heavy-handed and are dealt with in much greater detail in Argument VIII.

not going to be your choice. It is among those, as I mentioned, that have been qualified to handle death penalty cases and do a good job with them, and Mr. Yamamoto has tried a case in this court before and I know he's an excellent attorney. So all I can see is the fault is on your side that you're not allowing the attorney to establish a good relationship with you to be able to represent you effectively. You didn't like the public defender that did your prelim, you didn't like your own attorney that you hired and now you've created the situation in which Mr. Yamamoto feels he cannot adequately represent you. See what I'm saying? This is going to be your last chance of changing an attorney. You cannot continue to change attorneys. At some point you're going to be stuck. It's like being in cement, the cement is hardening. At some point you can't get out of it. Do you see what I'm saying? It's an important decision on your part. You cannot -- one person that's the strongest advocates for you in court is your attorney, and if you're not going to cooperate with your attorney, you're stuck with the result. I can't do anything about it, but I cannot continue to let you change counsel. Do you understand that? (RT 100-101.)

The court then invited comment from the prosecutor.

Sortino: Well, your honor, I understand Mr. Yamamoto's frustration. I understand what the court feels it needs to do. My only observation would be I firmly believe, knowing what I know about Ms. Rodriguez, that she's attempting to manipulate the system to obtain a lawyer that she wants as opposed to what she's entitled to under the law when the county is paying for an attorney, and on the basis of that, for what it's worth, I would object to the withdrawal. (RT 102.)

The Court: I agree with your comments.... (RT 102.)

When appellant attempted to defend herself the court once again blamed her for her attorneys' inability to effectively represent her.

The Court: [W]hat I'm saying is when the problem is between you and a series of attorneys, at the suggestion is the problem is on your side, not their side. This is three attorneys now that you've not -- or that you've had either retained or appointed to represent you and you've not appreciated their work. You wanted them removed. So at some point you've got to understand you're creating the

problem, and if you continue to create the problem that causes the attorney to feel that they cannot effectively represent you, you're going to be stuck with the result, because I cannot continue to change counsel for you. This is an extra time. The reason I'm really doing it is, first of all, I know Mr. Yamamoto. I know he is sincere in his statement that he feels he can't effectively represent you because of the circumstances. And he's tried a case in my court very effectively so I know he's a good attorney. This is the third time around that he's identified something very quickly and a change of counsel loses a couple of weeks at most right now, but at some point I've have got to say that the law does not allow you to select your attorney and have the court pay for that attorney, so you're going to have to accept an attorney is found to be qualified, and Mr. Yamamoto is qualified, he does an excellent job. You didn't want them, you didn't cooperate with him at least enough for him to say he can adequately represent you in a death penalty case. It's a critical decision. You've got to be able to cooperate with your attorney. I'll give you one more chance on that. (RT 108-109.)

Once again none of the underlying concerns appellant had with her custodial status, her lack of access to counsel, manipulation of her medications, manipulations with her legal mail, and the other tormenting and taunting treatment inflicted by both jail staff and inmates was addressed.

On September 9, 2002 appellant's trial counsel David Houchin was appointed. (RT 110.)

At a November, 2002 hearing, appellant brought to the attention of the court that she had just received a letter from Ward which was postmarked August 7, 2002. The letter contained significant facts regarding the case and defense tactics and had been opened before it was delivered to appellant.

With regard to this breach of protocol in both delaying and opening attorney-client correspondence, even given defense counsel's concern that informants may have learned the information contained therein, the court pooh-poohed any concern.

The Court: There is nothing much we can do with it at this point. Obviously, it stayed there far too long before it arrived with Ms. Rodriguez. Mr. Ward was her retained counsel. I would have thought that at some point, he made contact with her and said something along the lines "did you get my letter," but I don't know, can't tell since he's not here, and he was relieved quite some time ago. (RT 118.)

Approximately one month before trial began and after 2 ½ years of incarceration, on August 22, 2003, the trial court faxed to the Sheriff and Medical Services at the Los Angeles County Jail a request for an "emotional state evaluation –medication status" of appellant. The request was prompted by appellant moving the court "for an order requiring a medical examinations (sic) or specific medical treatment." The court requested it be advised of the results of said examination on or before August 28, 2003 when appellant was due back in court. (CT 412, 413.)

On August 27, 2003 a fax was sent to the trial court from S. Sharifa. (CT 430.) An accompanying medical service bureau court order worksheet indicated "client had been receiving MH TX from the Twin Towers jail for the past two

years. She was last evaluated by this clinician on 8-27-03" and was signed by Sh. Sharifa, Ph.D. (CT 432.)

On August 28, 2003 –-- in the presence of the prosecutor, defense counsel raised concerns regarding appellant's mental state and mental health treatment at the jail with the trial court. In response, the court read the contents of the August 27, 2003 response into the record. The court noted that the report didn't say what was currently happening with regard to appellant's medical care but that for the two previous years appellant had been receiving MH TX "whenever that is." (RT 416.)

While still in the presence of the prosecutor, defense counsel advised the court of his concerns:

Houchin: Well, my client, and I should say I have concerns after speaking with my client. I have seen certainly a change in her demeanor, and an onset of that has been within the last two weeks. This is something certainly additional or different than what they believe they've been treating her for the last two years. (RT 417.)

The court asked what it was defense counsel was "asking or recommending."

Houchin: I'd like for someone to sit down and talk to her and see what her mental state is. I'm having a difficult time even when I go down to see her to keep her focused on things. Her emotional state is certainly not conducive to preparing for this trial. (RT 417.)

The court noted the inadequacy of the August 27, 2003 response from the jail staff.

The Court: Okay. It says the request we sent was emotional state evaluation, medications status, and that really –this really isn't much of a reply to that.... (RT 417.)

During the next day's proceedings defense counsel asked for an *in camera* hearing out of the prosecutor's presence so that appellant might address the court with regard to medical issues that were brought up the day before. (RT 477.)

Appellant explained that for the past two years she had been held in isolation in the disciplinary unit of Module 211. Appellant advised that this housing assignment was against doctors' orders. According to appellant, because she was not a disciplinary problem her doctor did not understand why she had been so restrictively housed. Appellant explained that deputies Jimenez and Zabokrtsky had full control of her housing assignment and the treatment she received. (RT 479-480.)

Appellant described for the court some of her psychological disorders, which included eating disorders, claustrophobia, and other physical illnesses such as passing out, throwing up, stomach problems, skin problems, headaches, and "accidents." According to appellant at the time of a mental crisis she was told

that doctors were instructed not to see her. Appellant advised the court that she was not looking to be medicated more than she already was. (RT 491.)

Appellant explained that she could not eat and could not sleep and that she saw her psychiatrist only once every three weeks. Appellant explained that as a result of her exposure to infected inmates she needed to be treated for TB. (RT 480, 481-482, 487, 489.)

Appellant advised the court that Title 15 was not being followed -- that her legal papers were seized and thrown out and that her mail, including legal mail, was delayed, opened or not delivered arrive at all. Appellant informed the court that her cell was frequently "tossed" without justification and Deputy Jimenez frequently removed notes that appellant prepared for her attorney. Appellant believed that Jimenez was responsible for telling other inmates that she killed her daughter, and because this information had been circulated through the jail, appellant was receiving death threats. (RT 481, 483, 484, 499.)

Appellant explained to the court that no one had reviewed her housing assignment and the treatment she endured. When appellant attempted to address her concerns to jail staff she was told she needed to address these concerns directly to Jimenez and Zabokrtsky the two officers appellant maintained were responsible for her treatment. (RT 480-482.)

Appellant expressed to the court that her sanity was in jeopardy and that she needed help and additional counseling so that she could participate in her defense. (RT 483, 490.)

Although appellant explained that she had witnesses and documentation to verify her complaints and concerns, the court did not call for an evidentiary hearing, but rather invited did appellant to talk more about whether or not the conditions of her confinement resulted in an "emotional or mental concern, condition or a physical condition." The court also called upon appellant to describe the difference between the disciplinary unit she's in and the other disciplinary units. (RT 483-484.)

Appellant: I'm a mess, I really am a mess, and I've been that way for a while, but it's to the point now where we're starting to really get into this, and I can't answer simple questions for him, and that makes me even worse, because this is my life were talking about, you know, not 180 days, my life, and I need to be able to help him. I know it's frustrating to him to as I break down more than anything. (RT 491.)

Defense counsel agreed with appellant's characterization of her mental state and its impact on their case preparation. (RT 498.)

Describing the differences between her treatment and that of other inmates appellant told the court:

Appellant: They have windows going outside, they have windows going into the whole area which is the day room... they have things like TVs and newspapers. They won't give me a newspaper. They sit me in this little interrogation room with four white walls and a chair and a table, and that's supposed to be my hour break. There's nowhere to walk around, there's nowhere to do anything, just sit there.... I'm supposed to get three hours in the rec room a week. I don't even get it... it's loud, the lights are on 24/7, they don't clean it.... (RT 486.)

The court seemed to take an interest in the fact that appellant's legal mail was being disrupted and commented "I don't understand why they would have a problem with that." The court also seemed to take an interest in the fact that appellant was being housed in a room with no windows when other inmates had access to windows which faced outside as well as windows which faced into the day room. (RT 484-486.)

According to appellant, Deputy Jimenez went so far as to order that towel be put under her door so that absolutely no outside light work there could enter. (RT 487.)

For the past two years appellant was told:

> "Too bad, deal with it, hang yourself if you want to, you're not going to get help." (RT 486.)

Ultimately the court commented that as far as disciplinary measures that were being used against appellant they seemed appropriate. "Ms. Rodriguez not be treated [sic] as other inmates are, she's not in the standard population." The

court stated that the doctors should deal with the jail staff to provide some opening in appellant's cell so that she could see out. (RT 494.)

The Court: Beyond that whenever the doctors and the doctors are the ones that need to evaluate her both physically and mentally. This court does not have a medical degree or psychiatric degree, so I'm really not qualified to say what's happening is appropriate or inappropriate, and that's why we're talking about doing a better order. (RT 494.)

The parties agreed that appellant should have a psychiatric evaluation and a hearing on the matter. (RT 495.) The court faxed to the Los Angeles County Jail a medical order specifying appellant receive "psychiatric evaluation and report back to the court...." The court requested it be advised of the results of the psychiatric examination on or before September 15, 2003. (CT442-443; RT 417.) No response to the court's request was forthcoming.

On September 15, 2003, approximately 2 weeks before trial began and 2 ½ years after her confinement began, the court held a hearing on the conditions of appellant's custody. Present at the hearing was appellant, her attorney, the District Attorney, and Deputy County Counsel. (RT 503-558.) The court began by stating it's concern that appellant was unable to cooperate with counsel and prepare for trial. The court was also interested in whether appellant's treatment was inappropriately restrictive. (RT 503-504.)

Describing himself as "an interested observer," the prosecutor immediately advised the court "I think the record should be clear that...the reason, my belief that she's in the custodial situation she's in because of these attempts to contact and ultimately solicit the murder of a witness." The court noted "that would be a logical conclusion, Mr. Sortino, but the actual conditions of confinement and the effect on her I think are the real issues, but that is the background certainly." (RT 504-505.) [16]

Psychologist Michael Maloney was called by defense counsel. Dr. Maloney was the program director for women's mental health at Los Angeles County jails. Dr. Maloney described appellant's treatment as seeing a psychiatrist, Dr. Diana DelCarlo once every three weeks and being prescribed Wellbutrin and Buspirone. (RT 505-507.) According to Dr. Maloney -- although at least one doctor disagreed with this finding --appellant was not defined as in need of mental health counseling which would up her visits to at least once a week. According to Dr. Maloney, if the court ordered appellant's mental health visits be increased, the mental health staff would attempt to accommodate that. (RT 507-508, 509.)

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[16] Although the sheriff's department was represented by County Counsel, the prosecuting attorney, Mr. Sortino repeatedly interjected and argued against the positions advanced by appellant. (RT 531, 535, 538, 542, 549.)

Deputy Zabokrtsky was called by defense counsel. Appellant's cell did not have a window which faced outside the jail. All of the cell windows which faced into the jail interior, including appellant's window, were covered. Zabokrtsky explained that even though it was originally designated a female housing because one male was housed among the 30 to 45 female population windows were covered to ensure that there was no visual contact. (RT 514-516.)

Zabokrtsky explained that Module 231 was one other housing area for administratively segregated individuals. In that module the cells were less restrictive. The doors in Module 231 were glass and there is a window which faces outside. Inmates are allowed to see other inmates in the housing area. In Module 231, during their one hour of recreation time, inmates had access to the phone in the day room. Deputies had the ability to turn off the phones and monitor calls in 231. (RT 517, 525-527.)

Regarding appellant's day room privileges, Zabokrtsky explained appellant was placed in an interview room for one hour a day. During that time she could read a book and sometimes take a shower. (RT 519.)

According to Zabokrtsky, "the far majority" of inmates in 211 were there for disciplinary reasons and had no telephone privileges. Appellant had restricted phone access. (RT 525.)

Zabokrtsky erroneously testified that the solicitation charge arose when appellant was housed in Module 231. (RT 521.) And although later in the preceding, the prosecutor corrected the court's belief that the solicitation occurred while appellant was housed in 231, The court concluded that appellant should not be moved back to 231. "That's the source of the problem in the first place, and she has far too much access to other inmates." (RT 528, 531.)

Zabokrtsky testified that it has been an on and off again practice to duct tape or place a towel at the bottom of appellant's door – this occurred even prior to a male being assigned to the module. (RT 524, 541-542.)

The court found it "intolerable" that appellant be kept in a cell where there was no opening to the outside. (RT 528-529.)

The Court: I personally would be affected by that – maybe not one day, maybe not one week. She's been in there for a long time now, and I can understand that would affect her psychologically as well, which may have an effect on her ability to cooperate with counsel and prepare for trial. (RT 530-531.)

The Court: ... and that means that she has no access to the outside of her cell except for one hour a day, and I think that's intolerable. So let's take a break and see if you've got some solution. I don't know whether that is – that you uncover the opening to her cell until and unless the men are walked through or what the solution is, but it does not seem to me to be a fair conclusion that she is subject to being totally isolated visually from the outside in a sealed cell 23 hours a day because the men are there. ... I can't accept that, and in this trial her life is at stake. Something has got to be done. We have to have a solution to it. It can't continue this way. (RT 534.)

The Court: I don't know about the condition of others in that one block 211, but Ms. Rodriguez has been in custody for over two years. Most of those at county jail don't have any comparison with that time in custody. Perhaps something has to be done specifically because of her condition, but I think it is necessary to do something more. Whether that means that temporarily those – the openings are relieved in her cell and then if the men come through, they're closed. It does require additional work, but again with somebody that's been incarcerated for over two years, to put them in those circumstances I think essentially the old phrase was stir crazy. I don't see how you avoid something like that. (RT 546.)

The Court: To me the opening is going to be more of a solution than the conversations or the counseling, but that's just because again the deprivation of sight is a critical thing to me. (RT 549-550.)

When the parties returned, county counsel proposed options which would increase appellant's time out of her cell in another module so that there would be time walking through the corridors, getting off and on elevators, and walking through the outdoor recreation areas. Additionally, Dr. Maloney agreed to reevaluate appellant's mental health status to determine is she should be seen more often. (RT 536-537.)

Ultimately, the court ordered that the window on appellant's door be uncovered two hours a day, that she have increased clinician visits, and that appellant be permitted to shower daily or every other day. None of the other issues, including appellant's limited contact with her attorney, and tampering of legal mail were addressed. (RT 552-553.)

Less than three months later, on December 3, 2003 after the jury returned its penalty phase verdict but before appellant was officially sentenced, appellant wrote to the court. She revisited many of her earlier complaints regarding her custodial conditions and articulated some new ones.

Appellant expressed her continued dissatisfaction with defense counsel and reiterated her complaints that he did not visit her, did not accept her telephone calls and told the court his use of Dr. Vicary postconviction was for the purpose of scaring her. Appellant told the court that she trusted neither Houchin nor Vicary. (CT 1003.)

Appellant expressed her intention to make a statement to the court at the time of her sentencing. In order to not negatively impact her appellate rights, appellant asked to consult with an appellate attorney. (CT 1003.) At the December 12, 2003, hearing which followed, the court denied this request. Appellant reasserted her complaint that legal mail and personal mail were being diverted and improperly screened. (CT 1003.) [17] The court commented that this was inappropriate and told appellant that his bailiff would check into things. (RT 3890-3891.)

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[17] It was known to the court and counsel, and likely known to jail staff as well, that appellant's mother was terminal. Interference with communications between appellant and her mother under the circumstances was particularly cruel.

Appellant asked for a copy of the Los Angeles Times to be delivered daily. According to appellant: "[I]t may seem petty, but it is the only entertainment as well as resource and knowledge of the outside world's current events." (CT 1004-1005.) Although the court ordered appellant receive a newspaper, when the court followed up on this order at a subsequent hearing, he was advised that the LA Times was available in the day room. Appellant reminded the court due to increased security she did not get out to the day room. (RT 3891, 3931-3932.)

Appellant asked again that she'd be given telephone access. Her intention was that she would only contact her family to let them know that she was okay. (CT 1007.) The court did not reinstate telephone privileges. (RT 3892.)

Appellant advised that the court that since the jury's penalty verdict her circumstances at the jail had changed dramatically. She was now escorted by a deputy with a tazer which impacted her shower time, her time out of her cell for recreation, and contact with chaplains and the psychiatrist. (CT 1005.) The court delayed discussion of these concerns until a subsequent hearing.

At the December 18, 2003 hearing, the prosecution presented evidence to support the custodial staff decision to put appellant in a bar restraint at hearings

and additional restrictions which caused the loss of rights such a shower time and time outside her cell. [18]

The court began with the proposition that the restraint he observed in court on December 12, 2003 "was excessive without some explanation...." (RT 3907.)

The prosecution presented the testimony of Kevin Christy, a psychologist employed at the jail. According to Christy, when appellant returned from court one day, perhaps on the day of the death verdict, appellant was upset that deputies Jiminez and Zabokrtsky had testified against her. Appellant told Christy that she didn't think their testimony was needed and requested that those deputies not be around her "because she didn't know how she would respond to them...." (RT 3909.) Christy reported the information immediately. This was a one-time incident. (RT 3913.)

According to Deputy Zabokrtsky appellant's security handling was changed in part because of the death verdict and in part because of her comments reported by Christy. The upgraded security required that a sergeant be present at any time appellant's door was opened and she was to be moved, placement into a

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[18] It is unclear why the prosecution represented Los Angeles County Sheriff's Department which ran the jail as County Counsel should have been the appropriate entity to represent the decisions of the jail staff.

waist chain when she was is moved and remaining waist chained or shackled for the entire time she is out of her cell. (RT 3916-3918.)

The court permitted appellant to address the court. Appellant reiterated that it was ridiculous for them to have a taser ready when she went to the shower -- which was 10 feet from her door -- and that it was unfair that she not be given out-of-cell privileges because no sergeant was available to supervise. (RT 3924-3925.) According to appellant, "[T]his is their last hope to make me crazy, I can tell you that, and the sergeants have told me that, okay." (RT 3926.)

Ultimately the court found that the security measures were appropriate but that she should not be restrained at all by handcuffs or any other mode at the next court appearance which the court anticipated would be appellant's final court appearance. (RT 3923-3924.)

On January 12, 2004, at the time of her sentencing, appellant made a lengthy statement to the court. (RT 3978-4015.) [19] Much of it dealt with the conditions of her confinement. [20] As factual support for appellant's argument, a sampling of her comments are set out below.

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[19] The court estimated appellant's comments as approximately 100 pages of notes written on both sides of the standard sheet of paper. (RT 3998.)

[20] A good deal of appellant's comments were religiously directed. (RT 3979, 3981, 3982, 3983, 3985, 3993.)

I come before you now finally after three years of being silenced, demonized, condemned by the prosecution, by the defense and this court and those I called friends. (RT 3980.)

I, who have been shut down, called every wicked name in the book, abusively mistreated in Twin Towers Correctional Facility, orchestrated by the two PPO officers and the investigating officer, endorsed by this court to include my own attorney. (RT 3980.)

I have been forced to fight to keep alive and sane every day there and being unjustifiably, unusually, cruelly and inhumanly housed worse than an animal in the worst place in the women's tower. What I have called Hell they call the hole, T-211, a place where grown women must beg for toilet paper and sanitary napkins due to that we are given one or two sanitary napkins and 15 sheets of toilet paper per meal distribution. (RT 3980.)

Women are full of blood and excretion there because more is not given, and if it is, it is a privilege to have a choice for deputies to give, and they say it is because it is a discipline module. (RT 3980.)

For three years I've tried to keep my sanity in believing the Lord's promise of the truth in him delivering me home where I belong would come to pass. I have trusted three attorneys. Not one has defended me and my innocence. All have not cared. All have failed me. (RT 3981.)

Appellant admitted that her actions caused the solicitation charge but explained that she was not in her right mind. As before, appellant attributed her mental state of the abuses inflicted on her in Module 211 and specifically by Deputies Rachel Jimenez and Nicholas Zabokrtsky (RT 3981.)

I pray the higher courts see the need for the revival of diminished capacity or similar thereof because without it you give corrupt and dangerous people like Rachel Jimenez and Nicholas Zabokrtsky ... more a license to batter and push us over limit. (RT 3981-3982.)

Or I was already broken, I snapped, they did not walk up to her and say, oh, by the way, could you hurt someone. I still don't know how that ever flowed out of me. I don't remember much, but I am sorry to not deny that I was on those tapes. (RT 3982.)

Even through the absence of counsel, no visits from them, my family out of state, my mother dying, Rachel Jimenez taking from my cell 95% of my legal items, including evidence and work out of my case, seeing the things and throwing them out. The distressing letters from my beloved Autumn Rose, who I did not see through the duration of my incarceration through the trial. Then the detectives kept at her and telling her bad things about me and her watching her father work with the prosecution to get me killed. (RT 3983.)

Even as Mr. Houchin presented not one word of defense and restricted me from testifying. I know by law it supposed to be my choice, but without the opportunity to review things like evidence and statements, presenting questions to witnesses and support, help in preparing for it, only getting comments of you'd be a fool to do so. Mr. Sortino ripped him apart. (RT 3983-3984.)

Mr. Houchin never consulted with me, only stated things, belittled and ignored me. I had no idea he hadn't planned on even attempt to defend my innocence, which he admitted in a paper he had just focused on the penalty phase. That was obvious. (RT 3984.)

I've paid three years of my life for that and the lying for the four months of the investigation while under the over use of prescription painkillers and alcohol and they know it. (RT 3984.)

After an inmate, not an attorney, gave me the law cite that mandates might access to my attorney by phone, it was still restricted by only talking to him when he called first.... Needless to say, there has been silent in the phone department. Not even in emergencies can I contact him. (RT 3990.)

So I could not work on my defense. I am legally allowed to work on building my defense. It did not happen. But could not even testify, which I certainly wanted to do, but when you don't get, after months and months, even years of requests

anything to look at to refresh my memory, any evidence to both consult and have counsel present to corroborate my words and no witnesses are called and those of the prosecution not asked important questions and no direct now, I cannot effectively get up there, could I? (RT 3991.)

I wanted to very much, and like I said, I am not afraid of anyone but God. (RT 3991.)

I want you to try and understand that not only am I on very high doses of psych meds, one that had a sedating effect, and I have been locked out to an 8 x 8 no window dark room for over 2 ½ years. I have gone from a chronic claustrophobic too paranoid in large areas with lots of people. Then put 12 plus three jurors looking at me, hearing testimony, my hearing them not getting to the real essentials scared me. (RT 3991-3992.)

But three years frightened, confused, condemned, abused, persecuted. I have asked for Rachel Jimenez and Nicholas Zabokrtsky to be kept away from me when I got the death penalty. It was said that was a threat, so now I'm followed with a taser gun, and leg shackles, very uncomfortably and over excessively shackled. (RT 3992.)

I've complained, I've pleaded for help over 2 ½ years. (RT 3992.)

And yes, I realized as I self dosed myself with painkillers and alcohol, I did lie about things and pointed the finger at child molesters and originally hoped it would expose him and take action on that from the molesters of minors....(RT 3995.)

I was so bad mentally that I truly even felt pregnant and lived it, professed it, even got bloated. That is how mentally broken and on autopilot I was. (RT 3995.) [21]

As far as attorneys, Mr. Erlich wasn't counsel because my family got a new attorney. That attorney I tried to fire three times after I figured out he shouldn't have even taken the case because of where his loyalties are in retirement check.

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[21] At this point in the proceedings of the court took the break and advised appellant that on their return she would be given an additional 15 minutes only. (RT 3997-3998.)

It is so hard to deal with attorneys when they don't come to see you, when you can't talk to them on the phone. The mail doesn't come – they don't respond to your letters if they get them that's what I dealt with for three years. I'm sorry I got out of the bunch. Even with Yamamoto, I sent him a letter asking him why did you only have one acquittal in 17 years. That's why he withdrew. (RT 4014-4015.)

C. Conclusion

The placement of appellant in administrative segregation Module 211 resulting in a situation of sleep deprivation, physical and mental abuse, deliberate indifference to her welfare, and arbitrary deprivation of rights – with severe punishment attached to any complaints. Her unjustified and unexplained housing assignment amounted to a sustained, low-intensity attack on appellant that deprived appellant of her ability to participate in her own defense and to effectively defend herself. When objections to appellant's conditions of confinement were made by counsel, they were largely for the purpose of maintaining control of appellant, pacifying her and moving the case along. Whatever sincere objections were rendered by her defense counsel were met with desultory, ineffective efforts by the trial court to remedy the situation; gradually, the court came to blame appellant for the uncomfortable situation in which she herself. Many of the problems flowed from the unremitting hostility of deputies, who took it upon themselves to administer punishment to a woman

they had decided was guilty of killing her husband and infant child long before the jury returned its verdict.

Violations of appellant's right to assist in her own defense occurred in several ways including delaying of legal mail both to and from appellant and removal of legal materials from appellant's cell without cause.

The repeated violations of her privacy and of the confidentiality of her legal materials created a permanent unease within appellant. The court undertook no efforts to determine whether appellant's repeated complaints about interference with her legal rights occurred and if they did under what authority. The trial court undertook no efforts to remedy the interference with appellant's mail and legal materials.

The deleterious effects on appellant's mind and body from sexual-harassment, isolation, emotional abuse, ineffective medical treatment and arbitrary withholding of rights guaranteed by the state and federal constitution compromised her ability to assist in her own defense.

The effort to ameliorate appellant's treatment preoccupied both counsel and appellant at different times throughout the trial, and prevented them from concentrating on the task at hand, of preparing appellant's defense.

These conditions violated appellant's Fifth, Sixth and Fourteenth Amendment rights to due process of law, to assist in her own defense, and the effective assistance of counsel. They undermined every aspect of appellant's defense, and ensured that her conviction was obtained at a fundamentally unfair proceeding.

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III. THE TRIAL COURT'S DENIAL 0F TELEPHONE ACCESS AND VISITS FROM HER DEFENSE COUNSEL, AND PERMITTING JAIL INTERFERENCE WITH CORRESPONDENCE AND LEGAL MATERIALS DEPRIVED APPELLANT OF HER FIFTH AMENDMENT RIGHT TO COUNSEL SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL [22]

A. Summary of Facts/Proceedings Below

Many of the interferences with appellant's constitutionally guaranteed right to counsel committed by the jail staff and the court as well and the indifference to these transgressions demonstrated by both the trial court and appellant's trial counsel are outlined in detail above. Appellant's argument here is directed at the particularly onerous constitutional violations visited on appellant as she tried to secure her right to counsel in the most serious of all criminal cases, a death penalty prosecution.

Review of the record shows the following:

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[22] This argument is affected both the guilt and penalty phases of appellant's trial.

From the time she was incarcerated through the date she was transferred to Chowchilla after sentencing, appellant's trial counsel were required to seek a court order before counsel could meet in confidential "face-to-face" visiting rooms. The orders did not extend to substitute counsel or appellant's investigator. Some counsel did not seek such court order. Some counsel represented appellant for months before seeking a court order. *Appellant's trial attorney waited for nearly a year after his appointment and only a month before trial began to secure face-to-face visits with appellant.* These visits were required for counsel to play audio tapes for appellant. (CT 16-17, 182-185, 438-439.)

At the request of the prosecution, on April 17, 2001, appellant's telephone privileges were terminated. The termination of these privileges extended to appellant's defense team. (Supp. CT 1-6.) Appellant was denied access to communicate with her retained counsel even after she advised the court she needed access to the telephone because she wished to fire retained counsel and hire new counsel. Although she applied for an order permitting telephone access to her appointed defense counsel on numerous occasions this was not achieved until August 29, 2003, a mere 30 days before her trial began. Appellant complained that even once her attorney could be called, he frequently denied her calls. (CT 189, 198, 436-437, 493-505, 1003, 1007; RT 11-12, 3892.)

Beginning April 17, 2001 appellant's visits were monitored without her knowledge. (RT 19.)

Beginning before December 14, 2001 and continuing throughout her trial, delivery of appellant's legal mail was delayed for periods of weeks and sometimes tampered with by jail staff. For example, a letter from her attorney was opened and not delivered until more than two months after it was postmarked. Although the court seemed "to take an interest" in the fact that her legal mail was delayed, read by jail staff, and sometimes did not arrive at all, the court took no action to remedy this situation. (CT 192-197, 209, 1003; RT 18-32 110, 117-118, 481, 483, 484, 499.)

Appellant's cell was "tossed" and legal notes made for her attorney were seized by jail staff. (RT 481, 483, 484, 499.)

Appellant's requests to be given access to the law library were denied. Apparently the trial court was inclined to address this issue only if appellant were to proceed in pro per. (CT 211; RT 66-89.)

Appellant was denied the right to consult with an appellate attorney. (CT 1003.)

B. Applicable Law

California Penal Code § 2600 states that persons confined in state prisons may only "be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution and for the reasonable protection of the public." This statute protects those detained pending trial, and is thus binding on county jail authorities. (*De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 872.) The "necessary" component of §2600 requires that "a security measure be the least intrusive possible on inmates' rights yet flexible enough to satisfy the security need." (*In re Arias* (1986) 42 Cal.3d 667, 691.)

Section 2601(b) identifies specific rights which may not be restricted except as authorized by that provision including "[t]o correspond, confidentially, with any member of the State Bar.... or holder of public office, provided that the prison authorities may open and inspect incoming mail to search for contraband." The Sixth Amendment to the United States Constitution and the California Constitution "require counsel's diligence and active participation in the full and

effective preparation of his client's case. Criminal defense attorneys have a duty to investigate carefully all defenses of fact and of law that may be available to the defendant." (*People v. Brown* (1986) Cal.App.3d 537, 538.)

Counsel's obligation "includes conferring with the client, without undue delay and as often as necessary to elicit matters of defense. Counsel should properly advise his client of his rights and take all actions necessary to preserve them." (*Ibid.*) Thus, a defendant's ability to confer with counsel is critical to her case. Clients need to consult with trial attorneys in order to adequately investigate the case and make important decisions.

In the instant case, appellant's ability to confer with counsel was severely restricted for nearly 2 ½ years -- which was all but three months of her stay in county jail. Only one month –pretrial—was appellant permitted face-to-face meetings with her trial counsel. Additionally, it was not only telephone access to counsel that was denied appellant, but she never had telephone access to her investigator, was for long periods of pretrial custody, frequently denied "face-to-face" access to her counsel and investigator and denied private, confidential and timely access through the legal mail.

No showing that the above restrictions were necessary in order to provide for the reasonable security of the institution and/or for the reasonable protection

of the public was made. There were no allegations that the jail staff feared for custodial officer safety. It was clear that appellant DID NOT present a disciplinary concern. [23] Moreover, the only one in danger seems to have been appellant who was harassed and abused by jail staff in many ways described above in Argument II above.

The only safety concern which concerned restriction of telephone access which was voiced was appellant's "intimidation" of Palmira Gorham. However, the telephone call in question took place in March of 2001. Likewise, whatever solicitation efforts appellant was alleged to have engaged in took place more than a year before her trial began and did not involve allegations of telephone usage. (CT 218-219.)

C. Conclusion

The court permitted the restriction of appellant's access to counsel via telephone, via face-to face visits, and by failing to ensure her right to confidential legal mail. This resulted in *a de facto* total denial of her right to counsel. [24]

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[23] Ultimately it remains unclear why appellant was housed in Module 211, a disciplinary unit for nearly her entire stay in the Los Angeles County Jail.

[24] The jail staff did not assert that they were looking through appellant's legal mail, monitoring her visits, or "tossing" her cell and removing legal materials for security reasons.

Appellant's rights to confer with her counsel were violated by the telephone restriction and visits restrictions. This violation affected the ability to prepare for both the guilt and penalty phases. All this was done without any showing that an absolute restriction was necessary and constituted the least restrictive means in order to protect the safety of the Los Angeles County Jail or the public.

Reversal is required the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18). Alternatively, appellant has shown that there was a reasonable probability the error affected the verdict adversely to defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85).

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IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO DISCHARGE APPELLANT'S RETAINED ATTORNEY AT HER REQUEST [25]

A. Introduction

A defendant in a criminal case as a constitutional right to retain counsel of her choosing, and to discharge retained counsel as she sees fit. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) A trial court may deny a motion to discharge retained counsel only if "discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*Ibid.)*

In this case, appellant sought to discharge retained attorney Ward. Despite the fact that the court did not and could not have found that the discharge would disrupt the proceedings or result in significant prejudice to appellant, it nevertheless refused to allow appellant to discharge retained counsel and further, ordered counsel to continue in his representation of appellant -- ultimately until the entire retainer had been exhausted. This was in violation of appellant's rights to due process, a fair trial, and the right to counsel. Indeed, the court did not discharge Ward until after he made a motion to be discharged. (RT 74.)

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[25] This argument is affected both the guilt and penalty phases of appellant's trial.

This error alone entitles appellant to reversal of the judgment.

B. The Proceedings Below

On December 14, 2001, appellant appeared in Department 140 for a pretrial conference. Appellant was represented by her retained counsel M.R. Ward. [26] After the prosecutor announced that the People would not be seeking the death penalty, the matter was assigned for trial to Department 101, with the Honorable William J. Pounders judge presiding. (RT 10-11; CT 187.)

When the parties first appeared before Judge Pounders, appellant sought to address the court. Initially, the court advised appellant that she need to talk to her attorney first because what she said could be used against her. Mr. Ward responded to the court that he would be talking to appellant after the hearing. (RT 12.) Appellant told the court "No, no. I need to address the court, sir." With the court and Mr. Ward's permission, appellant stated that she was seeking replacement counsel. (RT 13.)

Appellant advised the court that in order to find counsel she needed phone access and that she had an application for an order that she would like to present to the court. At that time, Judge Pounders was apparently unaware that appellant did not have phone access or why. The prosecutor filled in the gaps

[26] Appellant's previous counsel, the office of the public defender, had been relieved on September 26, 2001. (CT 182.)

advising the court that there was a sealed order allowing monitoring of appellant's visits and termination of her phone access "because she contacted a witness in this case and threatened her in terms of her testimony...." (RT 13.) The prosecutor objected "to any access to the phones by this defendant for that very reason." (RT 14.)

Retained counsel Ward advised the court that he had been "working on a motion to get face-to-face interviews with [appellant]." (RT 14.) By this time, appellant had been represented by Ward for nearly 3 months and so far appellant had had no telephone access and no face-to-face meetings with her defense counsel.

Ward advised the court that he was attempting to devise a plan where appellant could call him and him alone. (RT 14.) After some discussions between the court, counsel and the prosecutor with regard to reestablishing appellant's contact with her attorney, appellant interjected that she had not seen Mr. Ward, and so had not been able to advise him that she was seeking different counsel. She advised the court specifically, "I'm looking for new counsel." (RT 17.)

When the court asked whether she understood the charges against her appellant responded:

> Appellant: I also understand, sir, I also understand the charges and I also understand what is underlying it, but at this point I'm not going to hurt myself, I am looking to help myself to get counsel.... My intention is to get counsel that is going to do the job I need him to do. Now, if not being able to get counsel, how am I supposed to be able to get a fair trial? (RT 18.)

In response to the court's query as to whether she had friends or relatives who could try to contact new counsel for her, appellant responded:

> Appellant: My sister lives in New York, my mother lives in Arizona. They're both working seven days a week just to try to compensate. I would have -- like I said, I did put together an outline of what I'm looking for, and they would be doing the Internet to background anybody that I might find, but in order for me to have counsel and have a person who is going to cover my case, I need to talk to them, and they need to get a hold of them, and the mail system, there is no way that I can go through the mail system and do that. It takes four weeks -- three weeks for me to get a legal letter from postmark to my room. It takes a week and a half to get out, and there's -- it's ludicrous to think that I can sit here with in any reasonable amount of time and go through that....But I'm asking at this point is I need to seek counsel. I no longer want Mr. Ward as my counsel, and I have justifiable reasons. I will not bring it up in -- I don't believe it's necessary right now. (RT 18-19.)

The court's response was swift, harsh, and ultimately in violation of the protections afforded appellant to be represented by retained counsel of her choice.

> The Court: It is unnecessary right now, but again if you think I'm going to be stupid enough to reestablish your ability to call witnesses and threatened them, I'm not going to do that, and I don't care how sincerely you look at me or how ardently you argue your position, you do now have counsel that -- of your choice, and there are ways to arrange to have

counsel represent you. I take it you brought this issue up before when the order was initially issued that you not have telephone contact. (RT 19.)

Appellant responded that she had not. In fact, had the court taken any time to determine the facts and the procedural history of underlying determination of appellant's telephone access, or listen to the parties at this hearing it would have realized that the order terminating appellant's telephone access was both *ex parte* and sealed.

In front of the prosecution, Mr. Ward addressed the communication problems between appellant and him.

> Mr. Ward: I will address Ms. Rodriguez's problem with communicating with me. For one, she's been unable to even call me, which we've already talked about. And I would submit one way around that would be more frequent visitations from counsel; however, for the past month in this case I have been involved in a four defendant case in Norwalk, not that I've been involved that deeply, but we're trying to make some dispositions and that, to clear the calendar for this case, and I have an associate counsel named Mr. Orozco who I've been conferring with and meeting and we've been working on this case. And also I submitted a letter for mitigation on the special circumstances, which at least with some modesty I think helped get rid of that death penalty.
>
> So it's not that I've been sleeping at the wheel or going on the golf course. I don't even play golf, and I haven't been deliberately ignoring her, **but I'm a lawyer and not a babysitter**, so I go see her when I can, and have felt in my discretion within the past month I've been busy on this case and also trying to clear the calendar on the other one.
>
> **If that makes Ms. Rodriguez unhappy, well, so be it. I'm the lawyer, and she's a client, and I have talked to her in depth I think as far -- I'm not so --**

I think when and if we go to trial on this I have to talk to her extensively some more, but it has to be my choice when and where and how often were going to do that. (RT 24, emphasis added.)

The trial court agreed with defense counsel's assessment. (RT 25.)

When the court suggested it would reinstate face-to-face visits as they had been afforded appellant previous counsel, Mr. Ward responded that not every future meeting would need to be face-to-face. "There might be one or two meetings where we would meet face-to-face in order to look at photos, sort things out and play the tape recorder and play, you know, reverse, fast forward and reverse that type of thing" (RT 25.)

Although Ward vouched for appellant stating he would not expect she would attempt to call witnesses again (RT 25-27), in Mr. Ward's estimation the lack of telephone to access was "the basis for some of this contentiousness right now. Had she been able to call me in recent weeks I could just tell her, hey, I'm busy, I'll see you on a certain date, that would have helped matters somewhat, but I was just busy enough in nursing this other case and also in her case that **I just did not have time to traipse down there every day. I'm not a social worker, I'm a lawyer."** (RT 28, emphasis added.)

After the court once again agreed with defense counsel's assessment, Ward added:

> Mr. Ward: She's a very attractive lady and nice to talk to, but I have to work on her case rather than just go socialize with her. (RT 28-29.)

Even though appellant had clearly stated her intention to fire her attorney, appellant was ignored throughout the rest of the hearing. (RT 29-32.)

On January 3, 2001 appellant advised the court in writing that "the Law office of Mr. M. R. Ward is no longer employed by me on this case and he needs to be removed as attorney of record." (CT 193.) Appellant further advised the court that she had notified Mr. Ward in writing of his removal as defense counsel and that she had instructed him to file all appropriate documents necessary with the court to ensure the expedition of the matter. (CT 193.)

In her written notification, appellant notified the court that she had not yet obtained new counsel.

> Due to the judge's clearly inappropriate and non-procedural ruling; I am finding it incredibly difficult to effectively search without telephone access. Taking this into serious consideration, I am asking the court's advisement on how to proceed in obtaining a state appointed attorney for my defense counsel; **if** I failed to secure someone within 30 days from the date of this document." (CT 193, emphasis added.)

Appellant sought unrestricted, private and unmonitored access for a period 30 days. The reasons for this request included (1) the severity of the charges; (2) the need to locate a highly qualified death penalty attorney, and (3) securing Ward's unused retainer for new counsel's use. (CT 195.) Appellant made efforts

to assure the court that she had no intention of using her telephone privileges in any manner other than to contact defense counsel and represented once more that this task could not be accomplished without telephone access of some sort. (RT 196.)

On January 16, 2002, the parties reconvened. The court acknowledged that it had received appellant's written request for a change of counsel and asked Mr. Ward "Is there anything new about that? You had a discussion about that with her?" (RT 33.)

Ward responded that he felt appellant may have been confused between the procedures for relieving counsel pursuant to *Marsden* and those which apply to retain counsel. Ward advised the court that he told appellant that retained counsel has a right to withdraw "with some pretty good excuses or reasons, and she has an absolute right to change -- usually an absolute right to change attorneys if she so desires." (RT 33.) Ward went on to advise the court that it was his impression that appellant was still considering seeking other counsel, but that it his obligation to continue working on the case until he was relieved. (RT 34.) [27]

The court agreed with Ward's assessment and added that the final decision was with the court.

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[27] This was an erroneous belief, especially because he had been fired by appellant and appellant sought to secure Ward's unused retainer for new counsel's use.

A defendant, if allowed to change counsel at will, which is what you suggest, could go up to the day of trial and say, well, I've got a new attorneys and I need time to let that new attorney prepare, and each time we come up for trial say the same thing and then ultimately permanently avoid trial. That is not acceptable. (RT 34.) [28]

The court addressed appellant:

Let me see if Ms. Rodriguez has anything about that. Anything you wanted to add to what you wrote to me, which is basically that you feel that you wanted to change counsel and retain counsel, it's easier for you to do. As far as appointing counsel is concerned, you don't select appointed counsel, and you asked about that as well. If you-- if there is a change of counsel and you cannot afford an attorney, the court appoints one for you, but I don't select the attorney nor do you. You start with the public defender's office, unless they declare a conflict, they select the attorney to represent you. I guess you were -- you were represented by the public defender at the prelim, so you understand what the situation is. I see from the transcript of the preliminary hearing that Kenneth Elrich was your counsel, he's a public defender, so you don't have an appointed counsel at that time, and all I'm getting at is I would appoint the public defender then to represent you if you don't have an attorney that you've retained, but they would select the attorney, and it might well be that same attorney. So anything you wanted to add to what you've written or what your attorney has said? Do you want to continue to look for counsel at this time or at least make a decision about that? (RT 34-35.)

Appellant advised the court that she would still like to look for new counsel. (RT 35; CT 198.) The court advised appellant that it was not inclined to change

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[28] This is not the case here; appellant's motion was first made within three months of Ward's appointment.

the telephone limitations whether or not she wanted to relieve Ward as defense counsel. (RT 35.)

The court advised appellant that the case was in early stages and so there was no prohibition to changing counsel. The prosecutor interjected that information he received from the legal liaison at Twin Towers that it was "basically impossible for the sheriff's to be able to limit phone calls at that facility." Going so far as to say if she has phone access, she has complete phone access.... and it appears to be impossible to allow her the limited access to the phone simply for the purpose of talking to her lawyer." (RT 36.)

Just prior to discussing scheduling issues for the remainder of this hearing, the court commented to Mr. Ward:

> I know as I said it you are correct that you must remain on the case until relieved by the court, even if your client says otherwise, for the reasons that I've designated, so you continue to work on the case. (RT 45-46.)

On June 19, 2002, appellant sent another letter regarding, among other issues, her desire to fire retained counsel Ward. (CT 204-214.)

In this letter, appellant told the court that she was "in great need of [its] intervention in a very serious matter. Appellant told the court that she had exhausted every possible avenue without success, that she has asked her attorney to help. Ward only responded "that he is not a babysitter." Appellant expressed

considerable concern about Ward and specifically how his heart condition impacted his performance on her case. "Sir, I am in serious danger, and I don't know where else to turn anymore. I need intervention and protection." (CT 204.) Appellant asked the court to inform her as to her options with regard to her attorney. "I fear by things he says and the time he is taking that it may not be wise to not think of options." (CT 212.) Appellant expressed that there continued to be multiple issues and concerns with regard to Ward. Appellant requested a closed courtroom hearing out of the presence of both the prosecutor and Mr. Ward. Appellant advised the court that Mr. Ward never visited her. It was her impression he didn't "see the need to protect his client." Although she was willing to attribute the lack of attention to the amount of time Ward needed to spend on his health she advised the court "Whatever the reasons I cannot afford to be ignored any longer." (CT 213.) [29]

On August 1, 2002, Ward filed a formal motion to be relieved as attorney of record. Although it contained confidential information including confidential attorney-client communications and retained counsel's personal belief in the truth of the charges against appellant, the motion was both heard in front of and served on the prosecutor. (CT 220-228; RT 66-89.)

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[29] Mr. Ward's medical condition was verified by him in court. (RT 64.)

More than eight months after appellant fired her retained counsel the court granted Ward's motion to withdraw and relieved Ward as attorney of record. [30]

C. Applicable Law

The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights (*People v. Ortiz* (1990) 51 Cal.3d 975, 982.) "The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state." (*Id.*, at 983; emphasis added; Code of Civil Procedure section 284(2).) The right to discharge retained counsel "is based on 'necessity in view both of the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust.'" (*Id.*, at 983; internal citations omitted.) A relationship of trust and confidence is especially essential when an attorney is defending his client's life. (*Ibid.*; *Smith v. Superior Court* (1968) 68 Cal.2d 547,561.) The right of an indigent defendant to discharge retained counsel is coequal with the right of a nonindigent defendant to do so. (*People v. Ortiz, supra,* 51 Cal.3d at 984.) If an indigent defendant's motion for

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[30] The court delayed permitting Ward to withdraw an additional two weeks until August 13, 2002. (RT 96.)

court appointed counsel is denied, "he must choose between proceeding with no legal assistance or continuing with a retained attorney reluctantly serving on a pro bono basis." *(Id.,* at pp. 984-985.) Accordingly, this Court applies the same rules when an indigent defendant seeks to replace retained counsel with court-appointed counsel, as it does when a defendant just wants to hire a different attorney.

A *Marsden* hearing is not the appropriate vehicle to consider a defendant's complaints against retained counsel. (*People v. Hernandez* (2006) 139 Cal.App.4th 101, 108; *People v. Lara* (2001) 86 Cal.App.4th 139, 155.) To discharge retained rather than court-appointed counsel, a defendant has no burden to prove that counsel is providing inadequate representation, or that client and counsel are embroiled in irreconcilable conflict. (*People v. Ortiz, supra,* 51 Cal.3d at 984.) When a trial court imposes such a burden, and denies a defendant the right to counsel of choice, reversal is automatic without any showing of prejudice. (*Id.,* at 988; *People v. Hernandez, supra* 139 Cal.App.4th at 105-109.) The error is structural, requiring automatic reversal. (*United States v. Gonzalez-Lopez* (2006) 126 S.Ct. 2557, 2560-2566.)

A trial court may only deny a motion to discharge retained counsel "if discharge will result in 'significant prejudice' to the defendant [citation], or if it is

not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz, supra*, 51 Ca1.3d at 983.)

In the instant case the court expressly found appellant's motion timely. (RT 36.) The court did not find that discharge would cause "significant prejudice to appellant, or "disruption of the orderly processes of justice."

In appellant's estimation a more egregious violation of a defendant's right to retain counsel of choice would be difficult to find. In the instant case appellant was forced to proceed with an attorney whom she could not telephone, who visited her infrequently, and who spoke of his duties to her in a manner that can only be characterized as condescending and paternalistic. It is difficult to imagine an attorney-client relationship more characterized by fear, suspicion, and frustration, on one side and resentment, bullying, and superiority on the other.

Also, Ward had serious health issues. Yet it took more than eight months of appellant's effort to have Ward fired. And then only after Ward used all of appellant's retainer did he file a motion to withdraw. In his motion – which he served on and argued in front of the prosecutor -- Ward could not have been any more disrespectful of appellant. He violated many of his professional obligations to his client. In addition to revealing personal and privileged information Ward blamed appellant's "total lack of cooperation in the preparation of trial, and her

totally uncalled for misbehavior while in jail" as the basis for his inability to properly represent appellant while neglecting to take responsibility for the fact that his ill health was the cause of previous continuances. (CT 221, RT 68.) Ward went so far as to blame appellant for "severely" damaging her case. (RT 74.) Even the trial court recognized Ward's descriptions of appellant was "critical" of her. (RT 69.) Ward stated he put in approximately 180 hours in the case. (RT 74.) This amounted to less than 23 hours per month during his tenure. Ward used up appellant's entire retainer. (RT 74.)

The trial court did more than erroneously denied appellant request to discharge her retained counsel. The court continually attempted to bully and scare appellant into keeping Ward as defense counsel. The court all but ordered Ward to use up appellant's retainer which it knew appellant wanted for new counsel. (RT 45-46.)

The misconduct of the court was amplified by it reminding appellant it would be very difficult to find a new attorney without telephone privileges, that no judge would likely order the return of her retainer, and that her only viable option might be to represent herself. (RT 76-77.) [31]

[31] Of course these are not the only available options. In these circumstances, lifting the restriction on phone privileges for the purpose of contacting counsel would have been reasonable. Also, an attorney could have been appointed or

D. The Requirement of Reversal

The denial of the motion to discharge was structural error requiring reversal of the guilt and penalty phase judgments. The right to counsel is fundamental. "The right of one charged with crime to counsel may not be deemed fundamental in some countries, but it is in ours." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) "The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel ...." (*Bland v. California Department of Correction, supra* 20 F.3d 1469.)

The right to discharge retained counsel implicates state and federal due process rights, as well as the right to counsel, because it advances two goals: "(1) ensuring the reliability of the guilt-determining process by reducing to a minimum the possibility that an innocent person will be punished; and (2) protecting the ideal of human individuality by affirming the state's duty to refrain from unreasonable interference with a defendant's desire to represent himself in whatever manner he deems best." (*People v. Ortiz, supra*, 51 Cal.3d at 988.)

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hired for the sole purpose of assisting appellant in finding new counsel. Appellant could have had access to an attorney who would then conference with any attorneys to whom she wished to speak. Security concerns do not trump to access to counsel. It is inconceivable the court was unable or unwilling to find a solution here.

Because the death penalty is qualitatively different from a sentence of imprisonment, the right to defend with counsel of choice also advances the Eighth Amendment guarantee of reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed. 944; accord: *Ring v. Arizona* (2002) 536 U.S. 584.)

Reversal is automatic when a defendant is erroneously deprived of the right to discharge his retained attorney. (*People v. Ortiz, supra*, 51 Cal.3d at 988.) Reviewing courts must refrain from speculating as to the prejudicial effect of injecting an undesired attorney into the proceedings, "especially when, as here, the defendant has repeatedly alleged inadequate assistance." (*Ibid.*; accord: *United States v. Gonzalez-Lopez, supra*, 126 S.Ct. 2557; *Bland v. California Department of Corrections, supra*, at 1479.) Because the court improperly denied appellant the right to discharge her retained attorney, she is entitled to automatic reversal.

In addition, the error also deprived appellant of her state-created liberty interest in the correct, non-arbitrary application of California's state laws governing the discharge of retained counsel, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (*Hicks v. Oklahoma* (1980) 447 U.S.

343, 346; *Hewett v. Helms* (1983) 459 U.S. 460, 466; *Ford v. Wainwright* (1986) 447 U.S. 399,428 [O'Connor, J, concurring].)

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V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S *MARSDEN* MOTION FOR APPOINTMENT OF NEW COUNSEL.

A. Introduction

"[C]riminal defendant's are entitled under the Constitution to the assistance of court appointed counsel if they are unable to employ private counsel," indicating that the right to change attorneys derives from the Sixth Amendment to the United States Constitution. (*People* v. *Marsden* (1973) 2 Cal.3d 118, 123.) " A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." *(People v. Memro* (1995) 11 Cal.4th 786, 857.) Here, appellant presented abundant evidence both that her attorney was not providing adequate representation and that she and counsel Houchin had become embroiled in an irreconcilable conflict. The court's failure to discharge Houchin and appoint new counsel constituted reversible error.

B. Procedural and Factual Background

1. Appellant's Written Motion

In September 2003, while represented by trial counsel Houchin, appellant filed a four-page request for an in camera hearing. In it she outlined her concerns about the defense of her case. (CT 482-485.) The court treated the motion as a *Marsden* motion. (RT 618.)

Appellant informed the court that she requested an in camera hearing "based upon important areas of urgency and conflict...." (CT 482.) Appellant noted that jury selection was to begin shortly and that the court had set a tentative date for evidence to begin on October 15, 2003. Appellant maintained that the dates were "absolutely unrealistic..." (CT 482.) Appellant recognized that the case had been ongoing for 2 1/2 years. Nevertheless, she informed the court "as it stands right now, this case is in no way ready to be litigated fairly by [the] defense." (CT 482.) In this regard, appellant noted that she had only recently been granted telephone access to her defense counsel. (CT 482.)

With regard to her relationship with defense counsel, appellant noted that there had been a "complete breakdown of trust and conflicts of interest." (CT 483.) As will be seen below, the conflict centered on appellant and trial counsel's

disagreement that appellant's mental state – at issue at both the guilt and penalty phases – should be investigated, evaluated and perhaps offered as evidence at trial; trial counsel maintained it need not however, appellant requested a mental health investigation.

Appellant also advised the court that a postponement would be necessary to give experts and her investigator ample time to prepare and present their findings accurately and successfully and asked for psychiatric expert Dr. Vicary to be removed from the case and replaced with another expert. (CT 483.) [32]

In her motion, appellant advised the court that Dr. Castellano had previously been involved in her case and was replaced by defense counsel with Dr. Vicary. Appellant explained she felt Dr. Castellano had superior qualifications and was not subject to ethical challenges which, given his recent difficulties in the Menendez case, could impair Dr. Vicary.

Appellant complained that "Mr. Houchin's procrastination's -- appellant had not yet met with Vicary -- should not be not [at][the] expense of her life and loss of a fair trial." (CT 483.) She noted any qualified psychological expert "would need adequate time to do a complete examination, work up, and report. Then prepare to testify with complete confidence her work is accurate." (CT 483.)

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[32] Appellant noted just days before jury selection in her trial was to begin she had not even met Dr. Vicary. (CT483.)

Appellant advised the court that she felt she had the right to certain "capital case entitlements," not limited to co-counsel, a co-investigator, and an outside mental health therapist so that she might "assist [her] attorney, remain coherent enough to stand trial, to help [her] cope with such serious charges, and mental state issues to...help [her] into war, as well as report any substantial changes in [her] competency...." (CT 484.)

Appellant expressed her right to be present at every hearing and to be made fully aware of all guarantees provided a defendant in a capital case. Appellant felt that there were (Code of Civil Procedure) 170 issues, regarding removal of the trial judge, to be which her attorney refused to do (CT 484), and believed "a continuation [was] critical and unavoidable so that these issues could be resolved.

Appellant concluded her motion with the following comment:

> "I do not feel most blame of my request for the issues of counsel should be directed to me, for my ability to communicate with my attorney has been greatly hindered by the courts, which left only mail and visits, both are also areas for address, which in addition to others can be handled by co counsel." (CT 484-485.)

2. The Hearing

Although each of appellant's requests i.e., for a *Marsden* hearing, for a postponement, and for replacement of her psychiatric expert reflected

appellant's dissatisfaction and conflict with her defense counsel, the court stated it would consider the *Marsden* motion *in camera* but that the request for a postponement "would be discussed openly...." (RT 618.)

The court began the *in camera* proceedings noting that appellant expressed "a complete breakdown of trust and conflicts of interest" with counsel Houchin. (RT 619.) The court advised appellant that she did not tell him "what the breakdown means and how it occurred and what the conflicts are...." (RT 619.) The court asked appellant to describe anything in addition to the "disagreement about the psychiatric assistance that you might receive...." (RT 619.) The court did not however give appellant the opportunity to do so but rather launched into a discussion of what appellant called "capital case entitlements."

> You also write about something that I don't understand, which you call capital case entitlements, and then not limited to co-counselors, there is no such thing. You're not entitled to two attorneys on a death penalty case. In some cases that is provided, but it is not always required, and in fact in none of the cases that I have seen, and I've lectured on the subject of capital case trials in California for the national judicial College and in the state of New York as well, two attorneys are not required, *and I've never seen a death penalty trial in which two attorneys were necessary*. (RT 619-620, emphasis added.)
>
> You also ask about co-investigators. You're not entitled to multiple investigators. An outside mental therapist. There would have to be some showing of the necessity for that, and in my view you are a very intelligent

person, and I can't believe that you need a therapist, but you can -- you can talk about that.[33] (RT 620.)

The court did not give appellant the opportunity to "talk about that."

The court went on:

So basically getting back to the Marsden issue, you need to tell me facts and circumstances, not conclusions, but things that are not being done that should be, things that have been done that shouldn't be, and why you think there's a complete breakdown of trust and conflict of interest.

Appellant asked the court for "another day" as she had just learned about some aspects of her case:

When speaking with Mr. Houchin finally over the telephone, there are issues that -- about my defense that are not being looked into that are being said are not defendable issues that in fact are especially for the solicitation count. There are witnesses that have not been contacted that he does not plan to contact. (RT 621.)

The court advised appellant that she would "need to specify what witnesses so that [it] could ask Mr. Houchin about that." (RT 621.)

Appellant explained that with regard to the solicitation charge there were " numerous doctors, numerous witnesses, numerous inmates" [that needed to be

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[33] At the time of this motion appellant was under the care of a jail psychologist and was medicated with antidepressant an anti-anxiety medications. The court itself had referred her out for psychological evaluations and had been presented extensive testimony about the deprivation of light and sound resulting from in appellant's solitary confinement. (CT 412, 413, 430, 432; RT 417, 505-507.)

spoken to] "and numerous... documents that need[ed] to be subpoenaed." (RT 621.)

The court once again chided appellant.

> Again that doesn't give me any information. Numerous doesn't tell me who. I need to know who. If you think there are documents that need to be subpoenaed or brought to court or people that need to be questioned, I need to know who they are. This is the time. The prosecution doesn't get this information. But I can't have you just sit there saying there's a lot to be done and it hasn't been done so I need a continuance and I need -- or I need a new attorney. That doesn't work. I need to know what the facts are, and that's not -- numerous is not a fact. (RT 621-622.)

When appellant once again asked for a day to put the information writing, having explained earlier that she had to hand write all of the copies of the motion and did not have time to put all of these facts in writing, the court declined to her request.

> The Court: No. Now is a good time. You've written 3 1/2 pages or 3 or 1/4 pages telling us what your concerns are. This is something relatively new, but if they're numerous, people that should be contacted, you shouldn't have a problem coming up with a few of them.
>
> Appellant: I thought you wanted a full –
>
> The Court: I would like a full list of the people that you think should have been contacted.
>
> Appellant proceeded to give a list of doctors:
>
> Appellant: Okay. There are doctors in the -- in the jail, Dr. Delcarlo is one, Dr. Betts, Dr. Anderson. There was a mental health worker named Heidi,

mental health worker Hildy, all these individuals and more been fully aware and have been following and fighting for me to be put out of 211 from day one and have significant information on why and how it has been affecting me. There are -- there are inmates that I have lists of that have witnessed afflictions with -- there are constant abusive, I mean cruel, and it's just the things that have been done to me prior to the alleged offense, I guess you'd call it. Even there are deputies which I had lists of that were taken from me along with 95% of my legal documents from my room from a witness that was told was destroyed. That witness, of course, is Rachel Jimenez. I've given letters to Mr. Ward and his many lists as I can to Mr. Houchin and Mr. Sanchez (court-appointed investigator) with names and booking numbers as things progressed, so I've been asking for him to get copies of those letters so I can restructure the list and talk to him about it and what each one represents. I've spoken to him about the state of mind, I've spoken to him about you know, we need -- we need time to have an evaluation. Two weeks is not enough. Mr. Houchin has told me that two attorneys are allowed, it's his call is what he says on a death penalty case, and I've been told that by law it's two counsels. (RT 622-623.)

At this point the court interjected that it was not the law that a death penalty defendant is entitled to two counsel, but rather that "the process is if the attorney assigned to the case feels that he or she needs assistance, there is that option available, but it is not a matter of in every capital case you're entitled to two defense attorneys. That's not the law." (RT 623-624.)

Appellant responded:

Considering Mr. Houchin has not handled areas that are significant in my defense, I believe we need assistance, because a lot of what they're stating happened is state of mind, was she conscious of doing this, what was she thinking when she did this or could she have done this because. That doesn't address me. He is stating I should come up and just say how I felt. That doesn't do anything to a jury. (RT 624.)

Once again appellant advised the court that she was not prepared to talk about the matter in detail so quickly and that she was under the impression that the motion would be scheduled like other motions.

The court responded:

> No. Normally a *Marsden* hearing is heard immediately. In fact, that is the requirement, but if you feel that you should have a different attorney or that your attorney is not competently representing you, we have this kind of hearing, and it's always done right away. (CT 485.)

When reminded once again by the court that she needed to provide specifics, appellant provided names and more importantly indicated that she had written both her current defense counsel and prior counsel with the names and information about inmate's who should be contacted. (RT 625.)

Appellant explained that these witnesses were important to the solicitation charge.

> All this is based around the state that they had put me in two and -- how do I say this without sounding admissions, like I'm admitting anything here. There is a lot of investigation in the jail itself that needs to be done to include my inmate file, to include books that are kept of me for signatures are made of things that get done to me. The hearing we had on last Monday, none of it was needing -- had been asked to be proven. No one knew what the other one was doing, yet no one offered to even look into it. No one offered to explain it to you, which I had asked Mr. Houchin to bring up to them in questioning the validity of me being in 211 compared to the rest of the jail, compared to other individuals that have the same counts, if not more, why am I in 211 for two years and they are not. These are issues

that need to be addressed that are not being addressed. I have a really hard time with remembering and recalling things from the case, the original case. I know this because I lived in this. That I need a -- I need -- these are areas that need to be looked into, that need to be investigated because my life is at stake here, and when I try to ask questions, I mean we're at each other's throat now on the phone because he's on -- seeming under pressure for some reason to get things done, and I had issues, and this is only in the last couple of months have questions even been coming up to me for the most part with my case. There is a lot of detail in my case. I don't know how us to explain it. It -- there's a lot of question as far as his direction and his interest in this case. He's just pushing to get it done, and that's not right. He's not ready. (RT 626-627.)

Vouching for defense counsel, the court commented that the amount of time that Houchin had been on the case was "not pushing" and "that it takes about a year to get things ready." (RT 627.)

Appellant was willing to agree that a year could be an adequate period of time under certain circumstances.

I would understand that if... these areas that are in need of more time had taken place earlier, had been looked at earlier so it would have the time throughout the year to be investigated, to be evaluated. It's only been, in my opinion, since I've received my ability finally to use -- to have my attorney calls that I'm finally there's questions that have time elements, and you can't-- there's no way that we can pull juror on some -- or with some of these undone. There is no way. (RT 627)

... and even professionals, even my investigator says we need time. We don't have it. And I don't understand what the rush is. I don't understand if -- there is a problem with him looking at issues that are my issues and not someone else's issues, you know. I believe he's a good attorney, and I'm not -- I'm not saying he's not. I'm just -- I'm concerned with the fact that there's a big portion of my defense that's not being handled, that's not

even being looked at, as being denied to be looked at, and that these -- these areas are impacting both the guilt and the penalty phase, and the last couple of weeks it's been -- it seems it's been pushing more for the penalty phase than it is for the guilt phase, and that concerns me. (RT 628.) [34]

Clearly the court did not understand appellant's concerns that counsel was focusing more on the penalty phase because it responded:

The Court: Why would you expect otherwise? The first thing to do is to try to defend the guilt phase, and the second thing, because you don't get time between the phase is [sic] to investigate the penalty phase, is be prepared for the penalty phase. Don't you think it's logical to go first with my client is not guilty on this is the way we're going to show that, and then if we lose this is the information the jury needs to assess in deciding what penalty should be imposed. Why isn't that logical? (RT 628.) [35]

Appellant: It's not illogical if -- if we had more time to sit --or to say OK, you're going to hit this case first, then we need to work on the other. We need to have both worked on, we can't just go into trial with what are we going to do for the penalty phase. He's asking me questions for the guilt phase that have these long -- that should have been answered before that's all a part of the puzzle, and it's -- he wants answers that I don't have. Whether it's memory, whether it's not even a fact. And – (RT 628-629.)

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[34] It seems clear appellant is referencing her mental state of which there is adequate corroborative evidence by way of her treatment in court, her treatment in the jail, her housing assignment, and that she was under the treatment of a jail psychologist as well as being given prescription medications. It is also clear that while appellant was attempting not to implicate herself she was aware that her mental state may in fact impact her defense. Also, because of appellant was charged with crimes with which specific intent was an element, appellant's mental state was in fact relevant. Moreover, as recognized by appellant, her mental state would be relevant for the penalty phase.

[35] Once again the court sides with defense counsel and even defends defense counsel rather than attempting to understand appellant's concerns.

The Court: You're talking about time. If you don't have the answers to these questions, what is time going to do? How is time going to give you the answer to the questions you can't answer?

Appellant: First because I would have psycho -- the psychologist's assistance and his being able to sit down and go more in detail of what he's trying to ask me, because he'll ask a question and I have no idea what he asks and then answer something that I think he's asking and it's -- I mean were butting heads because I need more information. I mean you're talking about especially things from my daughter 10 years ago. I mean I'm barely holding on to what they're doing in the jail. I'm -- I've been looking and looking and looking for a civil attorney, because I'll tell you it's not good what they've been doing, okay. But --. (RT 629.)

At this juncture the court referenced the previous hearing regarding appellant's custodial status and treatment in Module 211. However, that hearing was intended to bring to the court's attention the solitary confinement and deprivation issues which appellant had sought to alleviate. Appellant's point at the *Marsden* hearing, which was obviously lost on defense counsel and apparently lost on the court, was that her treatment in the jail impacted her actions, particularly with regard to the solicitation charge.

Although the court once again vouched for defense counsel stating "and actually your attorney is the one that brought that [to the] court" appellant would not be dissuaded from her argument.

Appellant: Exactly. But there are questions and issues and questions even on their statements, because nobody seemed to know the truth about anything what's going on with a piece of cardboard with why I'm down

there, with, you know, why my slot had been opened, how long I've been on medication. Nothing was accurate, and I tried to have him address these things, but it wasn't addressed. I mean everything that we're trying to say, even the attorney didn't know what exactly was happening. You know, I've written the court to get somebody in here to investigate, whether its internal affairs or something so you have accurate information. ACLU is actually investigating it because they know it is not consistent to what it should be, because they know how it's affecting me, and has been for the last two years. I have no liaison in that jail. Meaning when there are situations to complain to, when their situations I need, I'm supposed to go to Ms. Jimenez -- Deputy Jimenez and Deputy Zabokrtsky. I've been told by them if I do, I get witness harassment. I sit -- I sit in the jail for the last 2 1/2 years trusting my attorney and there's not much I can do besides right? Now it's different with the phone calls, if he calls, but I've even, I mean I understand time has gone by, but a lot of this isn't my fault. I written the courts for numerous times the last 2 1/2 years, but the point is that -- I think I'm getting off your question. There are issues that need to be addressed that involve an extensive psychological examination for all three counts, including my history two weeks is not something practical to ask a doctor to do. (RT 630-631.)

In a comment belittling appellant but indicative of the court's complete failure to grasp mental health issues, the court responded:

Isn't this kind of a catch 22 with a person who says he or she need psychological help is the one who's to be examined? In other words, how -- the point is if you really needed psychological treatment, psychiatric help, I would think you'd be the last person to know about that. It would be somebody else that would say something is strange about the things you're saying or what you're doing, we need to see what kind of mental health you need. You're the one saying you need mental help. And let me mention two, the video that I saw you being interviewed or talking with the undercover officer who purportedly had carried out a contract killing on your behalf, you were intelligent, charming, lucid, very persuasive.... that's pretty good evidence that you are altogether, that your mind is working very well. (RT 631.)

Appellant: No, Your Honor, it's not, because I guess it's my -- it's my raising where, you know, on the outside you look strong, on the inside I'm a mess. I've been on suicide watch too many times to say that it's even -- that I have it together. I've been in hysterics, I've been screaming out myself in the last two years. I come to court, and I try and act the way that I'm supposed to act out of respect when inside I want to scream. When situations -- that whole situation was just -- I don't know what you want to call it, automatic pilot or nervousness. I mean obviously I was nervous if I was left and I was scared. I mean I've had threats from this -- from that one before this happened, while it happened. There are issues that began that haven't even been addressed.... I mean there are -- the psychological part I'm talking about is twofold. There is one with the history, and looking into the situation.... I'm just -- I'm not comfortable with as things stand, and the push to get things done and when I know that there is other areas that need to be hit, they need to be investigated, need to be talked about.... I've had doctors tell me, even my own psychiatrist in the jail that I've seen -- I see now every two weeks, two weeks is not -- is not enough to look into my past, to look into three counts. (RT 633.)

The Court: Anything else you wanted to say?

Appellant: There's a lot I want to say, but I'm not sure how to say it. It you know, I don't understand what he's doing. I don't understand his approach. I don't understand how things can be left out that need to be in. I don't understand these things. (RT 633.)

In response to the court' repeated request for specifics, appellant responded:

Appellant: One being the investigation on the solicitation. I don't believe any significant investigation has been done. I've spoken to let me rephrase that. There are witnesses, like I said, Angel Garcia for one, they're Cynthia Rodriguez, there is Arlene Dugmore, all have information on witnesses such as Ms. Allen, such as Ms. Hall they've not been spoken to. Like I said, I'm looking into the events of the last two years, especially the first one, which is what led up to -- it's been over a year since the situation has happened,

okay. What has led up to that? What happened that led up to that? And then afterwards how could Ms. Jimenez, a deputy sheriff, who happens to be a witness in this situation, come into my room and clearly take, and there's reports and video that show evidence, that show legal documents, case sensitive documents from my attorney. All told it's been trashed. These are items that would show -- would help in solicitation itself. I can't use them because they're gone.... I'm not saying that I don't believe he's a good attorney. I'm just saying that I believe there needs to be more done. In solicitation, the background even on -- on a witness persuading charge, even background on my husband, there's big -- there's a big hole there as to other, you know, what other possibilities could have been. It's all circumstantial. To be flat out denied even to look into these issues, to me is saying I might as well, you know, say take me to prison because I'm going to be convicted and let me get an appeal, because there is a lot of appellate issues that are being placed on the record and not placed on the record. One being I asked him about potential 170 issues that I'd like to look into. He says no.... as far as your assessment, everybody looks at me and thinks I'm a rock, I'm not. I leave this court room and I break, okay? There's no way I can sit in a 20 day trial itself. People react differently to different things. Because I'm not sitting here drooling on myself doesn't mean that I don't need help. There has been days in my room, I'll tell you, that I've done that. I've asked for help, I've not gotten it even in the jail. I'm on such when he says mild antidepressants, if I take any more than what I'm taking, I'll have a seizure. That's as per my doctor. I don't want to seem unreasonable, but I'm trying to save my life, which is something I've not done, and yet all this, even the media I don't understand it, because I don't feel like I'm anybody special, but I have asked for help for the last two and a half years from here, from the jail, from my attorneys and now I get up to trial and all these things are not being looked at. I'm scared to death. I really am. And sometimes it makes me just want, you know, not even worry about trial, not even go to trial, because it's -- I have asked all my attorneys and Mr. Houchin and I think he can tell you, to come and talk to me about certain things you know, sit down and break down what we are doing, but he's -understand he wants to get to trial in October, but if we can't, we can't. Am I supposed to come to trial half ready? That doesn't sound right. If he had a year, he had it a year, but I don't know what has been done for a year. (RT 635-636.)

The Court: The point is you don't have to be ready for trial, your attorney has to be ready to represent you. Given the circumstances that you've been in custody for over two years and that during a large part of that time you've had no telephone contacts because of the solicitation charge, obviously you're not going to be prepared for trial. Your attorney outside is the one that has to prepare for trial, and you are already indicating, which is quite true, he's a very good attorney. He's already tried a very difficult case in this court, two juries, three defendants, and got attacked from behind by one of the attorneys on the defense side and had to fight the prosecution and the defense counsel at the same time. He would not be on the list of approved attorneys for death penalty cases if he was not qualified. And we just recently reviewed that, all the judges had an opportunity to comment about it. It doesn't do us any good to have someone incompetent, and basically you're not saying he's not competent. You're saying he's not prepared. You're not prepared and he's not prepared. Do you want to give him an opportunity to respond to those comments that?

Appellant: Yes.

Mr. Houchin explained that in his opinion appellant's central issue was for placement in Module 211, her treatment by Deputy Jimenez and what affect that may have had with respect to the solicitation count. (RT 637-638.) Counsel characterized his discussions with appellant as "very matter of fact." (RT 637.)

Defense counsel recognized that appellant wished to present testimony relevant to her mental state. However defense counsel would only offer appellant the opportunity to testify before the jury and did not entertain presenting evidence in any other manner.

> Mr. Houchin: I've indicated to her that her mental state with regards to that solicitation count is something that can be commented on by her. She wishes that a doctor take the stand and in her place testify as to what it was that caused her to say and do those things which the court has been apprised of in different testimony, and also the videotape the court has also reviewed. Diminished capacity is no longer a defense. I've indicated to her that certainly if there are some things going on in her head, she has every opportunity to take the stand and explain to the trier of fact why it is that she did the things that she did. She can get on the stand and she can contradict the truthfulness of different testimonies that we have heard here and what I anticipate will be other testimony after this trial begins. That has been, if there has been a sore spot, that has been the sore spot. With regards to her mental state, I've had the opportunity to have and review for some time and with others a report, a very lengthy report prepared by a panel psychologist Dr. Richard Romanoff. (RT 639.)

After the court vouched for Dr. Romanoff, defense counsel continued explaining that he chose Dr. Vicary to testify at the penalty phase. According to defense counsel, Dr. Castellano declined to work on the case. Defense counsel stated:

> With respect to again the defense that she wishes that there be more investigation of the solicitation, but are only certain things that others can do for us on that mental state. I'm sure that Dr. Vicary, and I've talked to him about also addressing that issue, that was not an issue when the initial report was prepared by Dr. Romanoff. This occurred after he was appointed after he did his work up. Certainly Dr. Vicary will rely in part on the report and the work of the test that Dr. Romanoff did, and I've asked him also if he could take a look at the issues that my client wishes very much to discuss, what, if any of fact her treatment by the deputies control other had on her committing what's been alleged as a solicitation of murder. (RT 639-640.)

The court invited defense counsel to address appellant's comments about witnesses to the solicitation charge noting that Deputy Jiminez was listed on the prosecution's witness list. Defense counsel characterized the testimony of witnesses suggested by appellant as corroborating the treatment appellant claimed she suffered by Jiminez. "Pretty much the way I understand it a character impeachment perhaps of Deputy Jiminez on the issue of what may have led to my client doing what is alleged in the solicitation for murder count." (RT 640.)

When the court suggested there may be an issue with Jiminez being a potential witness as well as having custodial contact with appellant, defense counsel responded:

> To be honest about it, judge, when I have people that are in the position to come in on a guilt phase or certainly a penalty phase with regards to my client's activity, my concern was, should my client be transferred someplace else, the potential was I could double up the number of deputies who would be coming in here with not so kind things to say of my client. I was thinking more in terms of damage control, I'll be very honest with the court. With respect to where my client was, talking with her, keeping her settled, being able to keep the potential evidence against us that may come in in the penalty phase at a minimum. (RT 641.)

The court commented:

Well, bottom line is are you prepared to try the case in the three charges that are pending... so basic question is are you ready to try the case?

Defense counsel responded:

and I can explain my approach to this case and my theory of representing my client has differed with her opinions and her wishes and her desires, and these are just hard decisions and I have to make, and I'm going to make them. (RT 642.)

The court addressed appellant:

They are, and I don't think, Ms. Rodriguez, you understand that. Your attorney has to decide the tactics in the case, and you are not educated in the law, and you've not tried any death penalty cases. There will be some times when you think your attorney is doing something wrong, but he must do that. You've had some difficulties with attorneys. You didn't seem to like the public defender when he represented you at the preliminary hearing, you didn't seem to like your own retained attorney, Mr. Ward. Mr. Yamamoto came in, and he's one of the finest attorneys that I've ever seen in criminal defense work. I've known him for almost 20 years, and for some reason there was a conflict and he very quickly left the case. Mr. Houchin has been on it since -- well, a full year, since September of last year, but it seems that you have some desire to control the attorney, which you can't do. The attorney is not a puppet. The attorney has to do is required under the law, and that may at times be in disagreement with what you want to have done. You've already acknowledged that he is a good attorney, and as I said, I've had personal experience recently with him, and I know that that is true. He also has that reputation. Your concern seems to centralize on the issue of your custody, and we did have a hearing on that. I don't think that's going to change because of the circumstances, meaning that with the charges against you, you had to be first of all separated from others. Since now you are facing the death penalty, because of the solicitation charge different things had to be established to control the situation and to prevent or their solicitation, assuming that there was one, and that was something that the master calendar court dealt with. [36] But I don't see a

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[36] The trial court repeatedly characterizes appellant's housing status in Module 211 and restriction of telephone access to counsel as resulting from the solicitation charge. However, it was after the dissuading of a witness charge filed in March, 2001 that the prosecution obtained the order to restrict appellant's telephone access. Appellant's housing status there was never for disciplinary

reason to replace your counsel, and I don't see a reason for postponement. Obviously you're nervous about the situation. Nobody going into a death penalty trial, and that includes the court as well as the attorneys and certainly a defendant who has been waiting for two years for this, is anxious to see that process go forward, but 2 1/2 years almost now, it has been a long process, and it has to end at some point. You have to basically put your trust in your attorney, recognizing that he is a good attorney, at some point justice has to take place. We have to have the trial and see whether you're guilty of these charges, and, if so, what the penalty should be. (RT 643-644.)

The court invited appellant to make further comments but instead of permitting her the opportunity to respond to defense counsel's statements the court once again vouched for defense counsel and characterize appellant's concerns a delaying tactic (RT 645-646), thus ending the hearing.

C. Legal Argument

1. The State Test

The landmark case of *People* v. *Marsden* (1973) 2 Cal.3d 118, established the state parameters for a defendant's motion to substitute new counsel. In *Marsden* the trial court failed to listen to the defendant's reasons for requesting a change of attorney, and this Court held: "a trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request." *(Id.* at p. 123.) Even though the *Marsden* court could not ascertain whether the defendant had a

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reasons.

meritorious claim, it reversed finding that the trial judge's denial of the motion without giving him an opportunity to "catalogue acts and events beyond the observations of the trial judge to establish the incompetence of his counsel," denied him a fair trial. *(Id.* at p. 126.) Quoting *Gideon* v. *Wainwright* (1963) 372 U.S. 335, [83 S.Ct. 792, 9 L.Ed.2d 799,], the *Marsden* court further held, "criminal defendants are entitled under the Constitution to the assistance of court appointed counsel if they are unable to employ private counsel," indicating that the right to change attorneys derives from the Sixth Amendment to the United States Constitution. *(Id.* at p. 123.)

In *Marsden,* this Court further held that the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during trial is within the discretion of the trial court, and the defendant has no absolute right to more than one appointed attorney; however, a defendant does indeed have the right to change counsel "where the record clearly shows that the first appointed counsel is not adequately representing the accused." *(Id.* at p. 123.) "Thus, a judge who denies a motion for substitution of attorneys solely in a basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of its discretion to determine the competency of the attorney." *(Id.* at p. 124.) It is not enough that a trial court

simply listen to a defendant's grievances regarding his attorney. Appellate courts have reversed when, as in the present case, the trial court's inquiry was less than adequate:

> "[The] mandate of *[Marsden]* is not limited necessarily to a case where the trial judge refuses to give the defendant the opportunity to be heard ... [The] *ratio decidendi* of the high court's opinion tells us that the judge's obligation to listen to an indigent defendant's reasons for claiming inadequate representation by court-appointed counsel is not a pro forma function. It tells us also that under some circumstances a court's ruling denying the request for substitution of attorneys without a careful inquiry into the defendant's reasons for requesting the substitution 'is lacking in all the attributes of a judicial determination.' [Citations.] This duty-of-inquiry includes 'an inquiry into the state of mind of the court appointed attorney' and an attempt 'to ascertain in what particulars the attorney was not providing appellant with a competent defense.' *(People v. Burgener* (1986) 41 Cal.3d 505, citing *People v. Munoz* (1974) 41 Cal.App.3d *66. Munoz* has also been cited with approval by this Court in *People v. Lewis* (1978) 20 Cal.3d 499.)

Since *Marsden,* there have been many cases from this Court reaffirming its principles, including *People v. Barnett* (1998) 17 Cal.4th 1044, which summarized the legal principles relevant to a defendant's request for change of counsel:

> *"Marsden* motions are subject to the following well-established rules. 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance [Citation.] A defendant is entitled to relief if the

> record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].'" *(People v. Memro* (1995) 11 Cal.4th 786, 857.)

Denials of *Marsden* motions are reviewed under an abuse of discretion standard. *(People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) [25 Cal.Rptr.2d 867, 864 P.2d 40].) Denial "is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel. [Citations.]" *(People v. Webster* (1991) 54 Cal.3d 411.)

> "A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict representation is likely to result. [citation]." *(People v. Hart* (1999) 20 Cal. 4th 546, 603, citing *People v. Crandell (1988)* 46 Cal. 3d. 833, 854.)

Thus, the state court has developed a two-prong test for assessing when a defendant should be allowed to change attorneys: either when there has been actual inadequate representation or an irreconcilable conflict that may likely lead to the ineffective assistance of counsel. While lack of trust is a factor that the court must consider in whether there is an effective attorney-client relationship, a simple assertion by an accused of lack of trust or inability to get along with one

attorney is not in and of itself sufficient grounds for *Marsden* relief. (See inter alia *People v. Berryman* (1993) 6 Cal.4th 1048, 1070.)

Decisions from the Court of Appeal in non-capital cases in which appellate courts have reversed for failure to grant a *Marsden* motion are also instructive. In *People* v. *Groce* (1971) 18 Cal.App.3d 292, the First Appellate District reversed for the trial court's failure to grant a *Marsden* motion. In *Groce,* the defendant complained that his attorney did not seek to admit into evidence a pertinent doctor's report. *(Id.* at p. 295.) Instead of delving into the concerns of defendant Groce and whether the attorney-client relationship was intact, the court denied appellant's motion finding that trial counsel was "a very, very competent attorney, and insofar as the voir dire of the jury, and also during the cross-examination as well as the direct examination of witnesses, so far [was giving defendant] very good representation." *(Ibid.)* The Court of Appeal reversed finding that the trial judge had improperly denied the substitution of attorney motion solely upon the basis of his courtroom observations of defense counsel. *(Id.* at pp. 296-297.)

In *People* v. *Hill* (1983) 148 Cal.App.3d 744, the appellate court followed the rationale of the *Groce* decision. In *Hill,* the defendant, as in the present case, complained extensively about the conduct of his trial counsel. *(Id.* at pp. 753-754.)

The trial court did an extensive investigation of appellant's claims by contacting various parties *ex parte* including the director of the private defender program. *(Ibid.)* Quoting *Groce,* the *Hill* court held that "although the judge's informal inquiries were no doubt well intentioned, they [did] not serve the interest protected by *Marsden." (Id.* At p. 755.) The court reversed finding that it was improper for the trial court to deny the *Marsden* motion based upon its previous and present observations of the competency of defense counsel. *(Ibid.)*

Similar to *Groce* and *Hill,* in the present case, the trial court denied appellant Rodriguez's motion in large part because of its own opinions regarding the competency of Mr. Houchin. (See also *People v. Cruz* (1978) 83 Cal.App.3d 308, 317 [conviction reversed even though the appellate court found that defendant was allowed to offer his reasons for his dissatisfaction with his attorney because the court should have inquired further into the particulars of defendant's claim].)

Other state cases in which this Court has failed to reverse for failure to grant a *Marsden* motion are illustrative and certainly distinguishable from the present case. For example, in *People v. Barnett* (1998) 17 Cal.4th 1044, 1092 the court denied motion where defendant merely "disillusioned with counsel," but nonetheless described counsel as a "great guy" and when there was no reference

to an irreconcilable conflict. In *People v. Silva* (1988) 45 Cal.3d 604, 622 [defendant's mere belief that attorney did not have his best interests at heart was insufficient to grant the motion to substitute counsel.

Applying the state test for substitution of counsel to the present case, it is clear that the trial court abused its discretion by not granting appellant's motion. The present case represents the quintessential case of the complete dissolution of an attorney-client relationship, and it was clear error for the court to not appoint new counsel for appellant.

First, for each of appellant's charges the prosecution was required to prove the element of specific intent. Although Penal Code section 28(a) abolished the diminished capacity defense, it did not prohibit evidence of the actual existence of a particular mental state to be introduced at the guilt phase. Evidence of both capacity to form an actual existence of a mental state was admissible at the guilt and sentencing phase. (Penal Code section 25(c).) Evidence of intoxication, mental defect, disorder, or disease was admissible to negate an element of the crime in question. (*People v. Saille* (1991) 54 Cal.3d 1103.) Moreover, expert testimony could have been offered on how appellant's experiences and background would have affected her perceptions and conduct at the time of each of the charged crimes. (*People v. Nunn* (1996) 50 Cal.App.4th 1357 [defense expert

permitted to opine that defendant tended to over react to stress and apprehension, which could result in his acting impulsively under certain circumstances, but not permitted to testify the defendant had acted impulsively and respect to the case itself].) This evidence could have proven particularly helpful in defending appellant against the solicitation charge the prosecution did much to encourage appellant to commit. And while completely admissible in defense at the guilt phase, "front loading" the mental health issues into the guilt phase could have laid the groundwork for a successful penalty phase. Here, however, trial counsel Houchin was not even willing to investigate evidence that could have potentially helped appellant.

The court's own opinion of trial counsel, including its own observations of Houchin's perceived competency in the courtroom, not only do not answer the pertinent inquiry in a *Marsden* motion and provide a legally improper basis upon which to deny such motion but, given the fact that appellant's mental state was relevant and expert testimony could be offered demonstrates Houchin's, misunderstanding of relevant law for that reason the court's opinion of trial counsel was wrong.

"A judge cannot base his disposition of a request for substitution of counsel on his or her own confidence in the current attorney and his observation's of that

attorney's previous demonstrations of courtroom skill." *(People* v. *Hill* (1983) 148 Cal.App.3d 744, 753.) Certainly it is possible that an accused may have a "good attorney" but the synergy between the two individuals could lead to a poor attorney-client relationship. Similarly, an attorney who usually performs competently may not do so in a particular case. Thus, the trial court erred by focusing on this improper criteria.

Trust and effective communication are the two pillars supporting the attorney-client relationship. This is true especially in a criminal case. This Court has held that effective assistance of counsel contemplates a relationship of trust and cooperation between attorney and client, particularly when the attorney is defending the client's liberty. *(Smith* v. *Superior Court* (1968) 68 Ca1.2d 547, 561-562; see also, *People* v. *Crandell* (1988) 46 Ca1.3d 833, 893.) The American Bar Association Standards for Criminal Justice provide:

> "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." (ABA Standards for Criminal Justice 4-3.1 (a) (2d. ed. 1980).)

The Standards also recognize: "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. *(fd.* at section 4.29 (commentary).)

Here appellant informed both her attorney and the court that the conditions of her confinement impacted her fragile mental state. The court had competent evidence that appellant was isolated and deprived of basic human necessities such as natural light, contact with others, and time outside her cell. The court had competent evidence that appellant had restricted contact with her attorney. The court had competent evidence that appellant was being medicated while awaiting trial. Both the dissuading a witness charge and the solicitation charge arose during appellant's confinement. Defense counsel was absolutely wrong that only appellant could testify regarding the conditions of confinement and how appellant's experiences and background might have affected her perception and conduct. Defense counsel did not assert that his decision not to present evidence on appellant's mental state was a reasonable tactical decision based on thorough investigation. Rather, he did not understand that such evidence was admissible on the issue of appellant's capacity to form the required mental state. The court did not correct defense counsel's mistaken understanding of the law but rather vouched for him.

To the degree that there was a dispute in the evidence, the trial court was empowered to hold, and before dismissing appellant's claims should have held an evidentiary hearing on this matter. (See *Schell v. Witek* (9th Cir. 2000) 218 F.3d

1017.) Similarly, the trial court was empowered to appoint independent counsel if necessary for appellant. Because Houchin was unwilling, independent counsel should have been appointed to consult with a properly funded expert who had the opportunity to fully evaluate appellant, the circumstances of her confinement, and evaluate whether or not appellant's perceptions and conduct may have been affected.

The trial court gave short shrift to appellant's arguments and clearly did not give her the "meaningful review" required by both state and federal law. In addition to failing to conduct an evidentiary hearing, and appoint independent counsel the trial court attempted to coax appellant into minimizing the obvious conflicts that she was having with her attorney. Despite appellant's responses to the court, a clear breakdown of the attorney-client relationship permeates this appellant's record.

Appellant only need to demonstrate that her attorney was not providing adequate representation or the two had become embroiled in an irreconcilable conflict making effective representation unlikely. Appellant demonstrated both, and her convictions must be reversed.

2. The Federal Test

As recognized by this Court, "a denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel [citations omitted]. *(People* v. *Hart* (1999)20 Cal.4th 546.) Federal courts, even when reviewing a state conviction, have uniformly applied a three-part test for assessing whether a state trial court's denial of a motion to change counsel constituted an abuse of discretion:

> [W]hen reviewing the denial of a motion to substitute counsel for abuse of discretion, we consider the following three factors:
> (1) timeliness of the motion;
> (2) adequacy of the court's inquiry into the defendant's complaint; and
> (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. *United States* v. *Walker* (1990) 915 F.2d 480, 482 (internal quotations omitted.)

These elements, required under the Sixth Amendment, are consistent with California state law, which protects the defendant's constitutional right to counsel of his choice. (See e.g., *People* v. *Ortiz, supra,* 51 Cal.3d 975; *People* v. *Marsden, supra,* 2 Cal.3d 118; *Bland* v. *California Department of Corrections, supra* 20 F.3d 1469.)

In a case factually similar to the present case, the Ninth Circuit Court of Appeals reversed the federal convictions of an individual for the trial court's failure to make adequate inquiry into the reasons that he wished to substitute counsel. In *United States* v. *Adelzo-Gonzalez* (9th Cir. 2001) 268 F.3d 772, appellant was convicted of alien smuggling and related charges. At a pretrial status conference, appellant requested substitution of counsel indicating that "I don't have an understanding with [my defense attorney] I feel like he is always pressuring me, like he is forcing me. He mentions my family ..." *(Id.* at p. 775.) The court reviewed the district court's denial of the motion for substitution of counsel on an abuse of discretion standard. *(Id.* at p. 777.) Despite the fact that the district court held a long inquiry with defendant Adelzo-Gonzalez, similar to that in the present case, the appellate court found this inquiry to be inadequate:

> [T]he district court asked only open-ended questions and put the onus on defendant to articulate why the appointed counsel could not provide competent representation. While open-ended questions are not always inadequate, in most circumstances the court can only ascertain the extent of a breakdown in communication by asking specific interrogated questions. *(Id.* at p. 777-778 citing *United States v. Torres-Rodriguez* (9th Cir. 1991) 930 F.2d 1375, 1381 abrogated on other grounds.)

Despite the trial court's finding that there was no serious conflict between the appellant and his attorney, the appellate court reversed finding:

> [T]here were clear indications of serious discord and friction

> between Adelzo-Gonzalez and his attorney. Adelzo-Gonzalez expressly stated that he and the appointed attorney were not getting along, that the appointed attorney did not pay attention to him and he had used bad language and the appointed attorney had threatened to sink 'me for 105 years .. .' *(Id.* at p. 778.)
>
> The appellate court continued:
>
> The appointed counsel's responses during the inquiries were also informative of the nature of his relationship with Adelzo-Gonzalez. He opposed Adelzo-Gonzalez's motions and he even went so far as to try to prevent his client from making the motion at the final pretrial hearing. The appointed counsel openly called Adelzo-Gonzalez a liar ...*(Ibid.)*

The *Adelzo-Gonzalez* trial court committed the same error as the trial court in the present case. "The court's questions to both the appointed counsel and *Adelzo-Gonzalez* focused on counsel's competence and capacity to provide adequate representation ... [t]here was too much emphasis on the appointed counsel's ability to provide adequate representation and not enough attention to the status and quality of the attorney-client relationship. *(Id.* at p. 778.) The court concluded, "the perfunctory inquiries did not provide the district court a sufficient basis to determine the extent of the breakdown in communication. ('The court did give both parties a chance to speak and make limited inquiries to clarify what was said. However, [it] made no inquiries to help it understand the extent of the breakdown.')" *(Id.* at p. 778-779.)

After addressing the first prong of the test, the adequacy of inquiry, the appellate court next analyzed the extent of the conflict, holding:

> [I]t is evident that there was a serious breach of trust and a significant break-down in communication that substantially interfered with the attorney-client relationship . . . Adelzo-Gonzalez made it clear on the record that he held little if any trust in his attorney. *(Id.* at p. 779.)

While the facts in the present case are similar to *Adelzo-Gonzalez,* the breakdown in relationship between attorney Houchin and appellant was even more evident and extensive.

In the instant case, appellant was absolutely correct that evidence of her confinement and the treatment of her by custodial staff could in fact be useful to explain her conduct. Neither her attorney nor the court recognized that possibility. In this death penalty case, it was most important to humanize appellant and attempt to explain that, rather than being a someone who in a calculating manner sought to kill a witness, appellant's perceptions and conduct were influenced by her background, experiences, mental disorders, and medication.

Moreover, similar to *Adelzo-Gonzalez,* the trial court asked questions of appellant but placed too much emphasis on whether trial counsel was competent in general and not on the actual dynamics of the attorney-client relationship in

the present case. (See also *United States v. Walker* (9th Cir. 1990) 915 F.2d 480, 483 [reversing finding that the court did not properly focus on the nature and extent of the conflict between defendant and counsel, not on whether counsel was legally competent and finding that defendant's lack of confidence with his attorney arouse out of a disagreement over trial preparation and potential witnesses, rather than any unreasonableness or manufactured discontent].)

In another case similar in several aspects to the present case, *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, the Ninth Circuit Court of Appeals reversed the conviction of a California state prisoner in large part due to the possibility of an actual communication breakdown with his counsel. Even though the trial court had not allowed adequate inquiry into the problems with the attorney-client relationship, the trial court reversed finding:

> We are gravely troubled over another issue ... the question whether [defendant] was, in his state court trial adequately represented by counsel ... The result was that [the defendant] was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate. *(Id.* at p. 1169.)

Unlike the equivocal record in *Brown,* the present case shows a breakdown in the attorney-client relationship with appellant being forced into both a guilt and penalty phase trial without effective representation.

In applying the tripartite test in the present case, it is clear that all three factors stack up in appellant's favor. First, without question appellant's motion was timely.

Second, the court's inquiry into the performance of her attorney, was less than adequate. The dialogue between appellant and the court indicates that the court did not truly listen to appellant but simply steered her toward saying the talismanic words that would lead to the court's desired result that appellant remain with her represent counsel. The court improperly drew the improper deduction that because it believed that appellant had a good attorney, that she was therefore receiving effective representation. The court did not inquire into the heart of the matter – whether appellant and her attorney were effectively communicating so that attorney Houchin could adequately prepare a guilt phase and penalty phase defense for appellant. And most important the court failed to heed the obvious sign that because trial counsel refused to properly investigate appellant's mental state for possible use at the guilt phase to counter specific intent charges, appellant was in fact not receiving the effective assistance of counsel.

Finally, trial counsel was ineffective and there had been a complete breakdown in communication between the attorney and client, coupled with the

attorney's failure to discuss mental state issues with his client, failure to provide a timely and thorough pretrial mental health evaluation demonstrates beyond doubt that any meaningful relationship had ceased to exist. [37]

Therefore, in examining the three federal criteria, it is clear that the court erred in failing to grant appellant's motion mandating reversal of his convictions.

D. Prejudice

In *Marsden,* this Court purportedly applied the *Chapman*[38] standard of prejudice. *(People* v. *Marsden, supra,* 2 Ca1.3d 118, 124; accord, *People* v. *Chavez* (1980) 26 Ca1.3d 334, 348.) However, in *Marsden* the court summarily reversed appellant's conviction finding that because of the incomplete record, it could not ascertain whether defendant had a meritorious claim. *(People* v. *Marsden, supra,* 2 Ca1.3d 124.) Despite the language of *Marsden* and *Chavez,* many California appellate courts continue to treat *Marsden* error as prejudicial per se: *"Marsden* error is typically treated as prejudicial per se, since the very nature of the error precludes meaningful appellate review of its prejudicial impact." *(People* v. *Hill* (1983) 148 Cal.App.3d 744; see also *People* v. *Hidalgo* (1978) 22 Cal.3d 826;

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[37] As discussed elsewhere trial counsel offered no defense whatsoever at the guilt phase, offered a truncated and incomplete penalty phase case in mitigation, and failed to meet the prosecution's aggravators.

[38] *Chapman* v. *California* (1967) 386 U.S. 18 [87 S.Ct. 824,17 L.Ed.2d 705.]

People v. *Lewis* (1978) 20 Ca1.3d 496, 499; *People* v. *Munoz* (1974) 41 Cal.App.3d 62, 67; *People* v. *Groce* (1971) 18 Cal.App.3d 292, 296-297.)

The ultimate constitutional question that the courts must answer is not whether the state court "abused its discretion," but whether "this error actually violated [a defendant's] constitutional rights in that the conflict between [him] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in an attorney client relationship that fell short of that required by the Sixth Amendment." *(Schell v. Witek* (2000) 218 F.3d 1017,1026.)[39]

This Court should apply a reversal per se test because of the fundamental right to counsel involved. However, even if this court applies the *Chapman* standard, the prejudice here is glaring and reversal is mandated.

Here, even the trial judge noted that conflicts had developed between the two but dismissed them as inherent in any death penalty case and as attempts by appellant to delay the inevitable. (RT 646-647.) Where the trial court went astray was by not focusing on the complete lack of communication and the extreme distrust that was occurring between the two as evidenced by the record. Instead

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[39] In an analogous situation when a defendant is not attempting to change court appointed attorneys, but is attempting to retain new counsel and is denied that right, the federal courts have applied a reversal per se standard. (See *Bland v. California Department of Corrections* (1994) 20 F.3d 1469, 1477.)

of focusing on the legitimate reasons why appellant would be unable to work with an attorney who would not consider the fact that her mental state was relevant and evidence of it was admissible at the guilt phase, the trial court summarily concluded that appellant was better off with a lawyer who "is a great advocate." (RT 647.)

Appellant's request to have new counsel appointed should have been honored. Her judgments of conviction must now be reversed.

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VI. APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BY THE DENIAL OF ANY MEANINGFUL HEARING ON HER COMPETENCY TO PROCEED TO TRIAL

A. Introduction

It is a fundamental pillar of criminal due process that "'A person cannot be tried or adjudged to punishment while such person is mentally incompetent. '" (*People v. Samuel* (1981) 29 Cal.3d 489,495; *People v. Pennington* (1967) 66 Cal.2d 508, 516-518; *Pate v. Robinson* (1966) 383 U.S. 375, 378.)

As this Court in *People v. Ary* (2011) 51 Cal.4th 510, 517, discussed, "When a trial court is presented with evidence that raises a reasonable doubt about a defendant's mental competence to stand trial, federal due process principles require that trial proceedings be suspended and a hearing be held to determine

the defendant's competence. (*Pate v. Robinson, supra*, 383 U.S. at p. 385, 86 S.Ct. 836; *People v. Taylor* (2009) 47 Cal.4th 850, 861; *People v. Halvorsen* (2007) 42 Cal.4th 379, 401.) Only upon a determination that the defendant is mentally competent may the matter proceed to trial." (*Id.,* citing *Pate v. Robinson, supra*, at p. 385, 86 S.Ct. 836.)

"California law reflects those constitutional requirements. Section 1368, in subdivision (a), requires a trial court to suspend criminal proceedings at any time "prior to judgment" if the court reasonably doubts "the mental competence of the defendant." A defendant can create reasonable doubt through substantial evidence of mental incompetence, or the trial court can raise the issue on its own. (*People v. Lewis* (2008) 43 Cal.4th 415, 524; *People v. Blair* (2005) 36 Cal.4th 686, 711; see § 1368, subds. (a) & (b).) Section 1369 provides for the appointment of psychiatrists as well as licensed psychologists to assess the defendant's mental competence (*Id.,* subd. (a)); and it allows both the defense and the prosecution to present evidence to either support or counter a claim of the defendant's mental incompetence to stand trial (*Ibid.,* citing *Id.,* subds. (b)-(d))."

Where substantial evidence of mental incompetency is shown, a competency hearing must be held and defendant may not waive a hearing. (Penal Code §1368, *et seq.; People v. Beivelman* (1968) 70 Cal.2d 60, 70-72; *People v.*

Marks (1988) 45 Cal.3d 1335, 1340-1344; *People v. Harris* (1993) 14 Cal.App.4th 984, 994.) Failure of a trial court to employ procedures to protect against trial of an incompetent defendant deprives her of her due process right to a fair trial under the Fifth and Fourteenth Amendment and requires reversal of her conviction. (*Drope v. Missouri* (1975) 420 U.S. 162, 171; *People v. Medina* (1990) 51 Cal.3d 870, 881-882 [affd. *Medina v. California* (1992) 505 U.S. 437]; *People v. Stankewitz* (1982)32 Cal.3d 80, 90-91.)

In appellant's case, a number of factors contributed to the denial of a meaningful competency hearing requiring reversal of her conviction and death sentence.

B. Factual and Procedural Background

As discussed above, throughout her stay in county jail of more than 2 years pretrial, appellant – who had a history of suicide attempts and mental health hospitalization and treatment -- was deprived of medical attention, sleep, sunlight, contact with other inmates, time outside her cell and nutrition. She was exposed to repeated forms of physical and mental abuse, and her privileged attorney-client relationship and work product were interfered with. (See Argument II re: Conditions of Confinement above.)

Appellant repeatedly expressed concerns to the trial court about her mental state and physical well-being.

As early as January 2001, concerned for her personal safety, appellant pleaded to the court:

> "To try and ensure my personal safety in relations to the custody staff especially, I would like to ask the court to attempt to keep my position of no council (sic) as confidential as possible. There are facts to substantiate this request." (CT 192-197.)

Appellant feared "oppressive treatment" and "any further horrific affliction in addition to [her] current situation." (CT 196.)

In a letter dated June 19, 2002 she wrote:

> "Your honor I will tell you that it is so bad that if I don't get help soon I do not believe I will be sound minded enough for trial. As it is, I count myself lucky to get through each day. Sir, the statements I am making are not just words, they are verifiable through medical reports, eyewitnesses including staff and other documentation. I do have intentions on filing a full complaint with the right jurisdictions but I have no doubt the process is very time-consuming and expensive. Which honestly I do not have that luxury of strength or time to spare at this point. I am really in need to be heard in person as a person not seen as an inmate this would allow me to tell the situation in more detail, if I wrote everything you would have a 30 page letter." (CT 205.)

Also,

> "[I believe myself to be] in serious danger." (CT 205.)

Appellant spoke of intensifying "mental torment" and "vicious and despicable" treatment. Appellant expressed her concern that if the court would not take action she would not be able to make it through trial. (CT 205-206.)

Appellant told the court she was exposed to tuberculosis and other contagious diseases and allowed to shower only every six days. Appellant stated that she was never given any recreation, that her medications were "toyed with," and that she was "sexually advanced upon and watched by male senior staff members while showering." (CT 207.)

Appellant stated that the rooms were never cleaned and that they smelled toxic. According to appellant "mites, poisonous spiders and flees bite, infect and scar me head to toe every day and night." Appellant informed the court that she wore the same uniform and underpants for a week, the same thermals for four months, and use the same blankets for three to four months. According to appellant no provisions were made for the cold and no health care was given for resulting problems. According to appellant there were no windows, no fresh air and no circulating air. According to appellant she was not allowed a TV or newspaper or exercise ability. Appellant advised that she was constantly cursed at and subjected to very cruel games. For example appellant told the court that although it was known by the jail staff that she was [an] "extreme

claustrophobic," jail staff had handcuffed her, placed her in a small room and laughed as she went into convulsions, threw up and urinated on herself. She was left in vomit and urine overnight and denied a shower and clean clothes for two to three days. Appellant stated that whenever she complained she would be reprimanded. She informed the court that she had been sexually advanced on. When she wrote to the commander of twin towers, Ms. Kathy Taylor with her complaints and a request for help, according to appellant Lt. Brown arrived at her door with "very serious threats and nasty statements." (CT 207-208.)

According to appellant:

> "My suspicions are the detective is intentionally keeping me here to torment me more. I have had full belief for over a year that they don't want me to make it to trial and Sir they are very critically close!" (CT 210.)
>
> Appellant pleaded with the court to transfer her to some housing which would enable her "to regain some type of sanity and strength to make it to trial" and to protect her from the threats made against her. (CT 211.)

On June 19, 2002, appellant requested an evaluation done in regard to her mental state to see if she was "honestly mentally strong enough to continue proceeding at this time." (CT 212.)

No action was taken on this request until, more than one year later, when on August 22, 2003, approximately one month before jury selection for appellant's trial began, the trial court faxed to the Sheriff and medical services at

the Los Angeles County Jail a request for an "emotional state evaluation – medication status" of appellant. The request was prompted by appellant moving the court "for an order requiring a medical examinations (sic) or specific medical treatment." The court requested it be advised of the results of said examination on or before August 28, 2003 when appellant was due back in court. (CT 412, 413.)

On August 27, 2003 a fax was sent to the trial court from S. Sharifa. (CT 430.) The accompanying medical service bureau court order worksheet indicated "client had been receiving mental health [treatment] from the twin Towers jail for the past two years. She was last evaluated by this clinician on 8-27-03" and assigned by Sh. Sharifa, Ph.D. (CT 432.) No indication of treatment rendered, results of evaluation, medication status, or other specific information regarding appellant's mental status was provided.

On August 28, 2003 at the end of the afternoon session, in the presence of the prosecutor, defense counsel raised appellant's mental state with the trial court and mental health treatment at the jail. (RT 416.)

> Well, my client, and I should say I have concerns after speaking with my client. I have seen certainly a change in her demeanor, and an onset of that has been within the last two weeks. This is certainly additional or different than what they believed they've been treating her for the last two years. (RT 416-417.)

The court asked what it was defense counsel was "asking or recommending."

> I'd like for someone to sit down and talk to her and see what her mental state is. I'm having a difficult time even when I go down to see her to keep her focused on things. Her emotional state is certainly not conducive to preparing for this trial. (RT 417.)

During the next day's proceedings appellant described for the court some of her disorders such as eating disorders, claustrophobia, and other physical illnesses such as passing out, throwing up, stomach problems, skin problems, headaches, and "accidents." Appellant explained that she could not eat or sleep and that she is seen her psychiatrist only once every three weeks because of scheduling issues. Also, as a result of her exposure to infected inmates that she needed to be treated for TB. Appellant believed that Deputy Jimenez was responsible for telling other inmates that she killed her daughter, and because this information had been circulated through the jail, appellant was receiving death threats. (RT 477, 480, 481-483, 487, 489, 499.)

Appellant explained that as a result she was at the point where she could no longer focus on her case and assist her attorney. Appellant expressed to the court that her sanity was in jeopardy and that she needed help and additional counseling so that she could participate in her defense. (RT 480-483, 490.)

> I'm a mess, I really am a mess, and I've been that way for a while, but it's to the point now where were starting to really get into this, and I can't answer simple questions for him, and that makes me even worse, because this is my life were talking about, you know, not 180 days, my life, and I need to be able to help him. I know it's frustrating to him to as I break down more than anything. (RT 491.)

Defense counsel agreed with appellant's characterization of her mental state and its impact on their case preparation. (RT 498.)

The Court commented:

> Beyond that whenever the doctors and the doctors are the ones that need to evaluate her both physically and mentally, this court does not have a medical degree or psychiatric degree, so I'm really not qualified to say what's happening is appropriate or inappropriate, and that's why were talking about doing a better order. (RT 494.)

The court determined that appellant needed a psychiatric evaluation and that a report be presented to the court. (RT 495.)

On August 29, 2003 at 11:26 a.m., the court faxed to the Sheriff and medical services of the Los Angeles County Jail a medical order specifying appellant receive a "psychiatric evaluation and report back to the court, Depart. 101." The court requested it be advised of the results of the psychiatric examination on or before September 15, 2003. (CT442-443.) No report from the jail staff followed. However, on September 15, 2003, at a hearing regarding appellant's conditions of confinement, Dr. Maloney described appellant's

treatment as seeing a psychiatrist, Dr. Diana DelCarlo once every three weeks and being prescribed Wellbutrin and Buspirone. (RT 505-509.)

Appellant's jury was sworn and testimony began on October 15, 2003. On October 23, 2003, at 4:31 p.m., the court faxed to the Sheriff and medical services of the Los Angeles County Jail a request to dispense appellant's medications. According to the order, appellant's medications had not been dispensed due to her being in court; the court requested it be advised of the results of its earlier request. (CT 818-819.).[40]

The only response to the court's requests for psychiatric and medical examinations and a status report regarding appellant's medications is dated November 14, 2003 – after the jury had returned guilty verdicts, the penalty phase had been completed and they jury had returned verdicts of death. (CT 968-972, 995.)

It reads:

> "In response to your court orders dated October 23 rd and October 24, 2003 inmate Angelina Rodriguez was examined and treated on November

[40] The minute order dated October 24, 2003 (8:30 am) indicates the bailiff informed the court that appellant had refused to leave her cell to attend trial proceedings. The court ordered the Sheriff to extract appellant from her cell using any means necessary to include force. It does not appear appellant or her counsel were present at the time of this action. (CT 822.) By 9:38 am, both appellant and her counsel were present in court. (CT 824; RT 2654.)

12, 2003 **[dates also after the jury had returned guilty verdicts, the penalty phase had been completed and they jury had returned verdicts of death]** at Twin Towers Correctional Facility, by Manuel Natividad, M.D.

Remarks:

1. Patient has a current diagnosis of cold symptoms (resolved).
2. Patient's medications are up-to-date.
3. Patient's prognosis is good.
4. Patient's care and treatment are continuing.
5. Patient is fit to continue trial proceedings." (CT 997-998.)

Evidence of mental illness continued to present itself still at the time of appellant's sentencing on January 12, 2004, when she engaged in a long rambling statement to the court expressing religious delusional thought – part of which is outlined below.

> Appellant: My hopes and faith were elevated when God showed his presence or after only the prosecution's presentation of the solicitation, the result was a non-conviction. Thank you Lord and your angels. So since God leaves nothing half done, there was a greater peace in me as well as joyful anticipation to see what he was going to do next. He said bestow, watch, listen, believe and wait. I did and had a hunch he was going to do something to show his place in a big way. He most certainly has. I even, thanks to my family, got to visit my precious Autumn Rose after all this time and discovered our bond is solid and Jesus is our adhesion. Those around me and the thousands praying for me were shocked at the jury's call for the death penalty. After my breaking down in the back in the lockup, Deputy Masaino can attest to that, God said get out. What are you doing? Do you doubt my position now?
>
> I got up. I knew in my heart there was going to be mountains moving. Perhaps he allowed it knowing it would gain more media so I could

proclaim this today and my story finally begin to be told, helped and actions finally begin. Or maybe it was to give a false sense of victory to those against me not only to begin to give me this promise he stored for me but to show how he can use everything in anyone he needs to do his work, and in my opinion, he showed he had a sense of humor.

The 12th day of November, just like Satan died 2004 years ago as Christ hung his head, as you like Satan celebrated, rejoiced, their shock and 10,000 Angels cried. You walk through those courtroom doors feeling very victorious.

Let me ask you to search your memory as to the weather that night when you drove away from this courthouse. It made headlines because it thundered, shaking the earth, flooded from the downpour, not just the rain but hail. It was considered one of the worst night storms thus far.

Who prevailed to God 2004 years ago? Who defeated death for those who believe in him Christ did. Today is the day of reckoning here. Today you will not only see how they were used for my good, but how in accordance with the laws of the state and the nation, the truth shall prevail and give you no true disputes with what God has given me to present and what you must do and what I am to receive from you.

When I discovered his gift, I rejoice so hard and laughed so wondrously and sang all night to the Lord was grateful, and I cried on my knees and I for days. Not only did he proclaimed the truth to the nation, but he exalted among the earth because he used my enemies to do it, and I thank you gentlemen. The Lord uses the amicus to do his greatest work and humble slows that think they are mighty. In the darkest places, even the smallest hole of light shines bright and clear. I thank you Lord. Be still and know that I am God, for I shall be exalted among the nation and the earth. (RT 3985-3987.)

C. Because There Was Extensive and Substantial Evidence of Incompetence, Due Process Required the Process for Determining Appellant's Competency to Stand Trial be followed

A defendant who, as a result of mental disorder or developmental disability, is "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner," is incompetent to stand trial. (Penal Code §1367.) When there is a good faith doubt regarding the competence of a criminal defendant, the trial court must suspend criminal proceedings and hold a competency hearing. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *De Kaplany v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 979 (en banc) ["*Pate* . . . held that where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the trial judge on his own motion must empanel a jury and conduct a hearing to determine competency to stand trial"]; *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666 ["Under the rule of [*Pate*,] a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial"].) (See too *People v. Ary, supra*, 51 Cal.4th 510.)

One is mentally incompetent if, as a result of a mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner. A defendant must have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, be able to assist in

preparing his defense, and have a rational as well as factual understanding of the proceedings against him. (See, *e.g., Drope* v. *Missouri, supra,* 420 U.S. at p. 71; *Dusky* v. *United States* (1960) 362 U.S. 402.)

The constitutional standards for mental competency are codified in the California Penal Code.

> A person cannot be tried or judged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (Penal Code § 1367(a).)

The procedure in this jurisdiction for determining competency, is clearly set out by statute:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.
>
> (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall

> order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.
>
> (c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined. If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call. If the defendant is declared mentally incompetent, the jury shall be discharged. (Penal Code § 1368.)

In the case at hand, the trial court failed to observe procedures adequate to protect appellant's right not to be tried or convicted while incompetent to stand trial by failing to institute formal proceedings pursuant to Penal Code sections 1367-1370, to determine her mental competency to stand trial. Further, the court should have appointed a mental-health expert to thoroughly examine appellant and convene a competency hearing. *(Drope* v. *Missouri, supra,* 420 U.S. at p. 172.) For more than one year appellant advised the court that due to physical conditions and her mental state, she was not able to assist her attorney. Although it took more than a year for trial counsel to request a psychiatric evaluation , he did in fact do so and the court did in fact request that a psychiatric

evaluation be performed. The jail staff either ignored or deferred the court's request. It was the requirement of the court and counsel to ensure the proper procedures were complied with.

Appellant's case is distinguishable from that of Herbert Koontz. (*People v. Koontz* (2002) 27 Cal.4th 1041.) In *Koontz*, examination of the record failed to support the defendant's claim of incompetency to stand trial based on this Court's determination that the record did not show that Koontz lacked an understanding of the nature of the proceedings or the ability to assist in his defense. To the contrary, this Court found that the defendant (who, it will be recalled, had had extensive prior experience with the criminal justice system) put on evidence, conducted cross-examination and testified on his own behalf and that despite his early difficulties in working with former appointed counsel and investigators, by the time of trial he apparently enjoyed a good working relationship with his investigators. Further, the defendant's witness list expanded as his investigation progressed and, although the jury ultimately credited the prosecution's evidence over defendant's version of the shooting, the defendant's story contained no bizarre content, as opposed to mere exaggeration or lies. (*Id.*, at p. 1064.)

Moreover, having sent appellant out for a psychiatric evaluation, the trial court was required to follow through and determine appellant's competency to stand trial.

Once the court declares a doubt concerning a defendant's competency to stand trial, or there is substantial evidence of incompetence, the trial court must appoint a psychiatrist or licensed psychologist to examine the defendant. (People v. Harris(1993) 14 Cal.App.4th 984, see too Pen. Code section 1369(a).

Once a trial court expresses a doubt concerning a defendant's competence to stand trial, an incompetency trial must be held regardless of the defense or prosecution position on the issue. (*People v. Marks* (1988) 45 Cal.3d 1335.)

The trial court's referral of appellant for a psychiatric evaluation prompted by appellant and her counsel's declarations that she could not assist in her defense qualifies as such an expression of doubt as to competency requiring a hearing.

Furthermore, in addition to this doubt expressed by the court, there was substantial evidence of appellant's incompetence requiring a competency examination and a hearing.

The court and counsel were aware of appellant's suicide attempts, her mental deterioration likely in part brought about by her conditions of

confinement; and her need to be medicated while awaiting trial. Trial counsel acknowledged that that appellant could not assist in her defense. the trial court recognized that the deprivation of sun and sound for extended periods of time amounted to psychological torture.

The picture which emerges is of a woman who is really decompensating over the course of her long confinement.

Despite the recognition by the court and counsel that a psychiatric evaluation and a hearing on appellants' competency was needed, none was ever held. The trial of a mentally incompetent defendant is a denial of due process and constitutes *per se* reversible error. *(Dusky* v. *United States* (1960) 362 U.S. 402; *James* v. *Singletary* (11thCir. 1992) 957 F.2d 1562, 1571.)

Should this Court disagree that the error was reversible per se, as a further consequence of defense counsel's inability to see the interplay between appellant's mental state and the crimes she was alleged to have committed, defense counsel essentially questioned no witnesses and offered no explanation to the jury for appellant's actions. In argument he was reduced to arguing only that appellant was a poor liar.

Consequently, the error was prejudicial and requires reversal. *(People v. Mayes* (1988) 202 Cal.App.3d 908, 920 [Competency finding reversed because

error by trial court in denying defendant right to present evidence of incompetency cannot be shown harmless beyond a reasonable doubt].) In the context of the competency hearing, appellant had a right to a competent psychiatric evaluation. *(Ake* v. *Oklahoma* (1985) 470 U.S. 68, 80; *Harris* v. *Vasquez* (9th Cir, 1990) 901 F2d 724, 726.)

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VII. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF IMPROPER DEMEANOR TESTIMONY

A. Factual Background

Testimony regarding appellant's demeanor was offered both pretrial and before the jury at the guilt and penalty phases. As argued below, some demeanor testimony was improperly before the jury, and other demeanor testimony contributed to erroneous pretrial rulings.

Further, without any discernable distinction why an objection was raised and/or sustained, the record shows that on occasion, defense counsel imposed objections on grounds of speculation and that, at times, trial counsel failed to impose an appropriate objection. On occasion, the trial court sustained defense counsel's objections and at other times overruled them. In those instances where counsel failed to object, there could have been no reasonable tactical purpose for

not objecting when he objected to similar testimony coming at other times. Alternatively, because the trial court employed varying and inconsistent standards regarding the admissibility of demeanor testimony by, at times sustaining defense counsel's objections and at other times overruling them, further objection by defense counsel would have been futile.

1. Demeanor Testimony

On August 28, 2003, just a month prior to jury selection, during pretrial motions regarding the admissibility of appellant's taped statements, Los Angeles County Deputy Sheriff Joe Holmes testified that he taped a telephone interview with appellant on Sunday, February 11, 2001. The taped conversation occurred at the Twin Towers Jail four days after appellant had been arrested and two days after she had been arraigned in court; represented by the Office of the Public Defender. (CT 8-11.) Holmes testified that after a telephone page, he contacted Matt Morones who told him appellant had requested the detective come to the jail to talk to her. (RT 221-228.) Holmes unsuccessfully attempted to contact Detective Steinwand then brought a tape recorder to the jail to interview appellant. (RT 223-224.) [41]

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[41] The tape recorded interview contains Holmes's Miranda warnings, but does not contain an audible response from appellant. Holmes testified that appellant nodded her head up and down and said "Yeah." (RT 225-228; Peo. Exh. 1 Tab A.)

Holmes testified that during the first portion of the interview appellant gave her version of how her husband died. Thereafter, Holmes confronted her with his belief that what she had told him was not true. (RT 228-229.)

The prosecutor asked:

> "Did you notice a change in her demeanor in any way from the way she was acting during the first part of the interview when she was telling you and her later version of what had occurred to her husband versus her demeanor as you describe to her the things that you learned in your investigation and as you've told her that you didn't believe she was telling you the truth?" (RT 229.)

Holmes responded "Yes." (RT 229.)

Defense counsel objected:

> "I'd object as speculative, your Honor, what may change may be or what that change may appear to be or mean. (RT 229.)

The objection was overruled. (RT 229.)

Holmes explained that during the first portion of the interview appellant appeared "confident and forthcoming" and that she "controlled the interview" (RT 230), but as he began to the discuss the problems with her story appellant was "visibly shaken." (RT 230.)

"Her eyes are the most noticeable thing. Her eyes became larger and larger because she didn't realize and was unaware of the things that we knew." (RT 230.)

When asked next what Holmes saw that caused him to notice her change in attitude, Holmes responded:

> "She was visibly shaken. She was obviously to me completely unaware that any of the conversations were tape recorded and was unaware of all we had learned in the investigation, and her confidence had dissipated." (RT 231.)

Defense counsel's objection "as to the confidence characterization" only was sustained.

Most of the demeanor testimony was offered at trial.

Over an objection of speculation, Montebello Police Officer Sharpe testified appellant's demeanor was unusual in that the way she was crying "seemed rehearsed or kind of forced." Sharpe explained "although it was audible, the crying noise, there was a lack of tears, and as soon as I would talk to her, ask her a question, she would immediately kind of snap out of it and answer the questions real quick, and in my experience that's usually someone who just lost their husband, they're difficult to speak with and communicate to." (RT 1783.)

When asked to describe the things that he noticed on prior similar occasions with other individuals about how those individuals related to police, over an objection of speculation, Officer Sharpe responded: "When you deal with someone like that, they're very upset and they really don't want to talk to you.

The little information you get from them, it's hard to understand because they're crying, they have a lump in their throat, so to say, and it's just very awkward and very hard to talk with them. You have to keep repeating yourself and you have to really try to calm them down and constantly tell them to take a deep breath and everything is going to be all right, and then you finally get a question in." (RT 1784-1785.)

Sharpe saw none of this with appellant and found her easier to talk to. "I mean as soon as I began speaking with her, it was as if she forgotten about what was going on, and she immediately drew her attention right to me and the question that I was asking." There was no objection. When asked whether he saw tears in speaking to appellant, Officer Sharpe responded "I may have seen some tears, but there was a great lack of them." Defense counsel's objection based on speculation was overruled. (RT 1785-1786.)

Frank Rodriguez' sister, Rebecca Perkins, had never met appellant. Their first face-to-face contact was at the funeral. (RT 1807.) Asked whether or not she found anything odd about appellant's demeanor during the two telephone conversations she had with appellant before the funeral, Ms. Perkins responded "She had no emotion. She didn't cry, she wasn't upset, she was just a matter of

fact. She was not indifferent (sic), she didn't -- for her husband dying, she had no emotion." Defense counsel did not object. (RT 1816-1817.)

When asked to describe appellant's demeanor during the visitation and the funeral Ms. Perkins stated "she wasn't upset for losing her husband." At this point trial counsel's objection as speculation was sustained, however, trial counsel did not move to strike the answer. (RT 1825.)

Mickey Marracino, the life insurance agent who sold the policy on Frank, Marracino described appellant's demeanor during the September 9, 2000, telephone call after Frank's death as unusual as "there was no emotion to it at all. It was sort of matter of fact the way she was talking to me and explaining everything. She didn't cry, she didn't hesitate in anyway, she didn't lose any train of thought or...." Defense counsel's objection as speculation was overruled. Marracino continued: "she didn't stop to compose herself the way other people have done when I've talked to them when they've lost a loved one." (RT 1864-1865.)

Frank's sister, Shirley Coers, met appellant for the first time at Frank's visitation. Prior to the ceremony, Coers had a number of telephone conversations with appellant during which they spoke of funeral arrangements. When asked to describe appellant's demeanor, Coers testified she always seemed very "calm,"

"not upset not crying, not sad." Defense counsel's objection as speculative was overruled. (RT 1876-1880.)

At the prompting of the prosecutor and the overruled objections of defense counsel, Ms. Coers again described appellant's demeanor as always "very calm" "not upset, not crying, not sad." (RT 1880-1881.)

Over an objection of speculation, Sergeant Gregory Wisely of the Montebello Police Department testified as to his impressions about the "oddness" of the conversation with appellant.

> "Well, it was just -- it was odd because of the manner in which it came. It was out of order, it was out of context. It was dry, she was dry, there was no emotion, and her first questions were regarding -- her first questions were relating to the coroner's department, the disposition of the body. She had mentioned that she wanted to have the body cremated, and the questions were centered around that, not, you know, cause of death, which is normally what we hear or, you know, what happening with the case, that sort of thing." (RT 1915-1917.)

Without objection Detective Holmes was permitted to testify:

> "I knew that [appellant] was calling every day and every single conversation was regarding financial, getting money to make it, and she wanted the coroner's office to come back as soon as possible was a cause of death so that she could be financially better off." (RT 2029-2030.)

B. Argument

Testimony regarding appellant's demeanor was irrelevant, without foundation and based on speculation.

It is axiomatic that only relevant evidence is admissible. (Evid. Code § 350; *People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.) In that regard, "relevant evidence" includes evidence that has any tendency in reason to affect the credibility of a witness. (Evid. Code § 210; *People v. Melton* (1988) 44 Cal.3d 713, 743-744; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.)

Evidence is not relevant if it has a tendency to prove or disprove a disputed intermediate or ultimate fact of consequence to determination of the action only by resort to inferences or deductions from that evidence that are speculative or conjectural in nature. (*People v. Louie* (1984) 158 Cal.App.3d 28, 46.) In other words, evidence that produces only speculative inferences is not relevant evidence.

For example, in *People v. Sergill etc.* the prosecutor sought to introduce the opinion of police officers as to whether a child witness was telling the truth. Similarly here, because the witnesses did not know appellant and were unaware of her reputation for honesty or veracity or their opposites, they were not permitted to testify as to any aspect of her character. (See *People v. Sergill, supra,* 138 Cal.App.3d at p. 39; see too Evid. Code, § 780, subd. (e).)

The question then is whether the testimony was admissible as expert or lay opinion testimony. Clearly it was not.

Although a witness's observations of a defendant's demeanor may be relevant, an opinion as to the meaning of those observations is an opinion which is only properly admitted if relevant to an issue in dispute and properly admitted as a lay or expert opinion. (*People v. Sergill, supra,* 138 Cal.App.3d at p. 40 [a lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording. Where the witness can adequately describe his observations, his opinion or conclusion is inadmissible because it is not helpful to a clear understanding of his testimony].) Here, the testimony went further than just describing the observations of appellant by the witnesses.

Neither were the opinions admissible as expert opinions. "'The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citations.]" (*People v. Hernandez* (1977) 70 Cal.App.3d 217, 280.) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to

which his testimony relates. (Evid. Code, § 720, subd. (a).) Whether a person qualifies as an expert in a particular case depends on the facts of that case and the witness' qualifications. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited. (*People v. Kelly* (1976) 17 Cal.3d 24, 39.)

Holmes's pretrial testimony regarding appellant's demeanor was only relevant if it was elicited for the purpose of proving that appellant had not told the truth when she gave her version of what happened before Holmes confronted her with what he knew. He was not qualified to give such expert testimony. Moreover, he gave an improper lay opinion when he testified appellant "didn't realize and was unaware of the things that we knew." (RT 230) and that it was obvious to him that appellant was "completely unaware that any of the conversations were tape recorded and was unaware of all we had learned in the investigation, and her confidence had dissipated." (RT 231.)

Holmes trial testimony that Detective Holmes was permitted to testify he knew appellant "was calling every day and every single conversation was regarding financial, getting money to make it, and she wanted the coroner's office to come back as soon as possible was a cause of death so that she could be financially better off" (RT 2029-2030), was improper opinion testimony.

Likewise Montebello Police Officer Sharpe was asked to give his opinion as to why appellant's demeanor was unusual. Because it was not proper lay or expert opinion, Sharpe should not have been permitted to testify that appellant's demeanor was unusual because to him, her crying "seemed rehearsed or kind of forced" and that in his experience someone who just lost their husband, [is] difficult to speak with...." (RT 1783.)

Similarly, Sergeant Gregory Wisely opinions about the "oddness" of his conversations with appellant were inadmissible expert testimony intending to prove appellant was lying and unconcerned about her husband's death. (RT 1915-1917.)

Rebecca Perkins – who had never met appellant was asked to give her lay opinion and to whether or not she found anything "odd" about appellant's demeanor. Her response that she was indifferent and had no emotion was irrelevant and based on speculation. (RT 1816-1817.)

Shirley Coers's –who also had never met appellant – description of appellant not being upset during telephone conversations was improper lay testimony. (RT 1876-1881.)

Mickey Marracino, the life insurance agent who sold the policy on Frank Marracino description of appellant's demeanor when compared to other people

he has talked to who have lost a loved one was improper "expert" opinion and should not have been admitted. (RT 1864-1865.)

C. Prejudice

Here, the evidence sought to be admitted, i.e., testimony that appellant was cold, not affected by Frank's death, and did not cry when expected to, was offered by the prosecutor to support the prosecutor's theory of guilt, to support a true finding on the special circumstance allegation and was a basis for the court's denial of appellant's Penal Code 190.4 motion. Of course, the inference the prosecutor wished the jury to draw from the demeanor testimony was exactly what he argued to the jury – that appellant was cold blooded and deserving of the death penalty. While it is clear that opinions as to the meaning of appellant's demeanor itself were inadmissible, the entire subject matter of appellant's extra-testimonial emotional responses to Frank's death, as told to the jury by people who had never met her before, who themselves were likely in shock and grief, and the opinions of law enforcement offered as "expert" psychological testimony about how survivors respond was also not admissible.

The prosecutor seized on the demeanor testimony during his closing arguments and the Court relied on it imposing death

At guilt, the prosecutor argued:

[Mickey Marracino] this is somebody in a disinterested party, a third person with no relation to this woman, no relation to Frank, and he came and he told you just like everybody else, just like Shirley Coers, just like Becky Perkins, just like Sergeant Wilsey a few days later when he talked to her at Montebello Police Department, she displayed no emotion, her demeanor was cold, her demeanor was flat, she didn't display any emotion for the fact she just found her husband's body seven hours earlier face down on the bedroom floor. All she wanted to know is what's going to happen to the money. How do I go about filing a claim? (RT 2596.)

Five days after her husband's dead her primary concern is trying to get this money, trying to get the cause of death out of the coroner. And if you listen to that tape and listen to the way she's describing the last week of Frank's life, you know what Mickey Marracino and Becky Perkins and Shirley Coers told you about how cold she is and how she didn't care about the fact that he died, because you can hear her describing the last week, and when you get up to the point where she's talking about the last night when she finds them on the floor, you can listen to that tape. There is no emotion, there is no breaking down, there's no display of crying. You can't hear a thing she doesn't care about Frank. She wants the money. She killed Frank, and you can hear from her tone in her voice, she doesn't care about Frank. (RT 2659-2600.)

As I said, ladies and gentlemen, this case is not about Palmira Gorham, it's not about Matt Morones, it's what that woman did to her husband on the night of September the 8th and the early morning hours of September the 9th. And what the evidence in this case has proved beyond a reasonable doubt is that she knowingly, willfully, with premeditation and deliberation as cold and calculating as any killer could be, she poisoned her husband until he fell down dead on the floor of his bedroom. That's what she did, that's what I proved, and it's your obligation to return verdicts of guilty. (RT 2670-2671.)

At sentencing the Court told appellant:

I have to say it is the coldest killing I've ever seen. Most of the murders, and most of the cases we have our murder cases in this court, over the past

> 20 years I've never seen a colder heart. She seemed to have no care for the agony that she put her husband through, and the sole goal being to make a profit in his death. (RT 3977.)

The error was not harmless beyond a reasonable doubt. The prosecutor was permitted to focus the jury's attention on irrelevant demeanor testimony to improperly prejudice the jury against appellant. Under either relevant standard of prejudice (*Chapman v. California, supra,* 386 U.S. 18; *People v. Watson, supra,* 46 Cal.2d 818), the errors must be seen as prejudicial, whether considered by themselves or in conjunction with other errors in this case. (See *Mak v. Blodgett, supra,* 970 F.2d at 622.)

Admission of irrelevant and speculative demeanor testimony was especially wrong because this case was a capital trial. Both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama, supra,* 447 U.S. 637.) Courts must take extra precautions to ensure a juror's decisions are not influenced by "irrelevant" considerations. (*Zant v. Stephens, supra*, 462 U.S. at 885) or are the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.) Admission of the demeanor testimony in question created a significant risk of undue influence.

Even if this Court finds the testimony had some probative value, the prosecutor plainly used the speculative demeanor evidence to paint a picture of appellant out of speculative inferences, untethered to the admissible evidence in the case. His description of appellant as a woman who would kill her husband and daughter for insurance money, attempt to kill a friend to stop her testimony and then cast blame on an innocent bystander because she was a bad person was evidenced by her lack of caring and emotion. Use of demeanor testimony at the guilt phase contaminated the penalty phase and prevented any successful argument appellant deserved mercy.

In sum, it is reasonably possible and reasonably probable that without the demeanor testimony, and particularly without the prosecutor's inflammatory argument, at least one juror's verdict would have been more favorable to appellant. Thus, the judgments of conviction and death must be reversed.

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VIII. EVIDENCE OF JUDICIAL BIAS REQUIRES REVERSAL OF APPELLANT CONVICTIONS AND DEATH SENTENCE

A. Introduction

The judgment of conviction and sentence of death was rendered in violation of appellant's rights to a fair, reliable, nonarbitrary, and rational

determination of guilt and individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant record evidence presented during the trial, and as to which appellant had notice and a fair opportunity to test and refute, to have the jury consider and give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, to confrontation and compulsory process, to a jury trial by a fair and impartial jury, to due process, to equal protection, to a trial free of materially false and misleading evidence, to a fair trial, to conviction and sentencing determinations beyond a reasonable doubt, to an impartial and disinterested tribunal, to be free of cruel and unusual punishment, to a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e), and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial judge was biased and prejudicially predisposed to disfavor the defense and favor and unfairly assist the prosecution, and pursuant to such bias, prejudice and predisposition, engaged in misconduct, demonstrated bias, failed to avoid the appearance of impartiality mandated by the Code of Judicial Conduct, and intervened in violation of the foregoing rights.

The trial judge had actual and/or the appearance of bias against appellant and a partiality for the prosecution that were consistently and continuously manifested by the trial court's rulings, comments, impatience, insensitivity, interjections, and cavalier attitude. His wholesale dismissal of appellant's continuous pleas for assistance in the jail conditions she was subjected to for years, the interference with her right to counsel, and the interference with her medical care, coupled with numerous incendiary comments, constituted flagrant and unconstitutional misconduct and further demonstrated bias against appellant. The court's bias had the unconstitutional effect denying appellant her right to counsel, denial of her right to participate meaningfully in her defense, of improperly expanding the scope of aggravation to a jury properly should have heard and of limiting the scope of mitigation the jury properly should have heard, considered and weighed when deciding the sentencing phase.

The trial judge oscillated between inappropriate behavior on the one hand and absence, inattention and confusion on the other and otherwise behaved in a prejudicial manner that violated appellant's constitutional rights, constituted conduct unbecoming of a jurist and grossly violated the Code of Judicial Ethics.

B. Applicable Law

The California Code of Judicial Ethics requires that a judge:

"participate in establishing, maintaining, and enforcing high standards of conduct," and warns that the judge "shall personally observe those standards so that the integrity and independence of the judiciary will be preserved" (Canon 1), "respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Canon 2), "require order and decorum in proceedings before the judge." (Canon 3B(2)), "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...."(Canon 3B(4)), "perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" (Canon 3B(5)), and "require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel, or others." (Canon 3B(6)).

Aside from the judicial canons, appellant relies upon well-established due process principles in this area which guarantee that a litigant shall proceed before

an impartial and disinterested tribunal in order to preserve "both the appearance and reality of fairness." (*Marshall v. Jerico, Inc.* (1980) 446 U.S. 238, 242), for the Fourteenth Amendment is not offended only where actual bias exists.

In the instant case, the court violated every one of the Judicial Canons discussed above. Appellant's capital trial was infected with unfairness, prejudgment, harassment, belittlement, and open hostility.

For example, the trial court repeatedly chastised appellant for what it perceived to be her failure to get along with defense counsel.

On December 14, 2001, appellant's first appearance before trial judge Pounders, the trial court was openly hostile to appellant when appellant requested the opportunity to address the court about her housing assignment in Module 211. Except for a rare instance or two of civility, the court remained openly hostile to appellant for the more than three years she appeared in his court. (RT 18-32.)

When frustrated by the court's failure to permit her to discharge her retained counsel and locate new counsel, the court responded on a personal level and improperly accused her of engaging in torture.

> The Court: I'm not going to jump in here and at your word decide that I'm going to change your housing and give you free access to the telephone. I mean it does take some level of intelligence to get to this point in life

where you're sitting as a judge in Superior Court and you have the power of life and death over a defendant. I don't know how you think you're going to argue your way into something that's already been decided with regard to your housing and telephone access. It's amazing to me that you would assert that position, given the charge of against you of trying to dissuade witnesses in a case involving special circumstances of murder for financial gain and *torture murder*, I believe, is the other one. (RT 20-21.) [42]

At the preceding dated August 28, 2002, the court chastised appellant for conceding to Mr. Yamamoto's request to withdraw. (RT 100-109.)

The Court: Okay. One thing I want to explain to you is that the basis for it is an inability to establish a relationship with you that is going to be effective in representing you. What I cannot let you do is continue to reject attorneys until you find the one that pleases you the most. The county is not required to pay for an attorney that you select. The selection of the attorneys is not my choice, it's not going to be your choice. It is among those, as I mentioned, that have been qualified to handle death penalty cases and do a good job with them, and Mr. Yamamoto has tried a case in this court before and I know he's an excellent attorney. So all I can see is the fault is on your side that you're not allowing the attorney to establish a good relationship with you to be able to represent you effectively. You didn't like the public defender that did your prelim, you didn't like your own attorney that you hired and then created the situation in which Mr. Yamamoto feels he cannot adequately represent you. See what I'm saying? This is going to be your last chance of changing an attorney. You cannot continue to change attorneys. At some point you're going to be stuck. It's like being in cement, the cement disheartening. At some point you can't get out of it. Do you see what I'm saying? It's an important decision on your part. You cannot -- one person that's the strongest advocates for you in court is your attorney, and if you're not going to corporate with your attorney, you're stuck with the result. I can't do anything about it, but I cannot continue to let you change counsel. Do you understand that? (RT 100-101.)

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[42] The trial court was corrected by defense counsel that appellant was not charged with a special circumstance of torture murder. (RT 21.)

However, appellant did not "fire" the public defender, who had declared a conflict. Although not legally necessary, appellant had set out in great deal the difficulties she had with retained counsel, who the court would not, for many months and not until the retainer had been used, permit appellant to fire. Moreover, attorney Yamamoto moved to withdraw. Appellant did not move to replace him.

Without any evidence whatsoever and although he should have removed the prosecutor from any hearing involving her relationship with counsel, the court agreed with the prosecutor's comments that appellant was manipulating the legal system. (RT 102.) As the hearing continued the prosecutor accused appellant of specifically creating a problem so that she might be appointed a specific attorney. (RT 106.) When appellant attempted to defend herself the court once again blamed her for her attorneys' inability to effectively represent her.

> The Court: ... what I'm saying is when the problem is between you and a series of attorneys, at the suggestion is the problem is on your side, not their side. This is three attorneys now that you've not -- or that you've had either retained or appointed to represent you and you've not appreciated their work. You wanted them removed. So at some point you've got to understand you're creating the problem, and if you continue to create the problem that causes the attorney to feel that they cannot effectively represent you, you're going to be stuck with the result, because I cannot continue to change counsel for you. This is an extra time. The reason I'm really doing it is, first of all, I know Mr. Yamamoto. I know he is sincere in

his statement that he feels he can't effectively represent you because of the circumstances. And he's tried a case in my court very effectively so I know he's a good attorney. This is the third time around that he's identified something very quickly and a change of counsel looses a couple of weeks at most right now, but at some point have got to say that the law does not allow you to select your attorney and have the court pay for that attorney, so you're going to have to accept an attorney who is found to be qualified, and Mr. Yamamoto is qualified, he does an excellent job. You didn't want them, you didn't work with him at least enough for him to say he can adequately represent you in a death penalty case. It's a critical decision. You've got to be able to cooperate with your attorney. I'll give you one more chance on that. (RT 108-109.)

On April 21, 2003 during an *ex parte* motion where the subject of the proceeding was payment to defense investigator Sanchez (a hearing at which appellant was not present), the court took the opportunity to malign appellant to her attorney.

The Court: -- making Ms. Rodriguez happy with her attorneys, since she fired her retained attorney and then for some reason or other, excellent attorneys appointed by the court asked to be relieved because of the relationship, so long as you haven't come to blows, I thank you very much. (RT 128-3.)

During appellant's *Marsden* motion the court reiterated its unsupported opinion that appellant was the cause of the difficulties between herself and defense counsel.

The Court: There are, and I don't think, Ms. Rodriguez, you understand that. Your attorney has to decide the tactics in the case, and you are not educated in the law, and you've not tried any death penalty cases. There will be some times when you think your attorney is doing something wrong,

but he must do that. You've had some difficulties with attorneys. He didn't seem to like the public defender represented you at the preliminary hearing, you didn't seem to like your own retained attorney, Mr. Ward. Mr. Yamamoto came in, and he's one of the finest attorneys that I've ever seen in criminal defense work. I've known him for almost 20 years, and for some reason there was a conflict and he very quickly left the case. Mr. Houchin has been on it since -- well, a full year, since September of last year, but it seems that you have some desire to control the attorney, which you can't do. The attorney is not a puppet. The attorney has to do is required under the law, and that may at times be in disagreement with what you want to have done. You've already acknowledged that he is a good attorney, and as I said, I've had personal experience recently with him, and I know that that is true. He also has that reputation. Your concern seems to centralize on the issue of your custody, and we did have a hearing on that. I don't think that's going to change because of the circumstances, meaning that with the charges against you, you had to be first of all separated from others. Since now you are facing the death penalty, because of the solicitation charge different things had to be established to control the situation and to prevent or their solicitation, assuming that there was one, and that was something that the master calendar court dealt with. [43] But I don't see a reason to replace your counsel, and I don't see a reason for postponement. Obviously you're nervous about the situation. Nobody going into a death penalty trial, and that includes the court as well as the attorneys and certainly a defendant who has been waiting for two years for this, is anxious to see that process go forward, but 2 1/2 years almost now, it has been a long process, and it has to end at some point. You have to basically put your trust in your attorney, recognizing that he is a good attorney, at some point justice has to take place. We have to have the trial and see whether you're guilty of these charges, and, if so, what the penalty should be. (RT 643-644.)

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[43] The trial court repeatedly characterizes appellant's housing status at Module 211 and restriction of telephone access to counsel as resulting from the solicitation charge. However, it was after the dissuading of a witness charged that the prosecution obtained the order to restrict appellant's telephone access and it appears that at all times appellant was housed in 211. Her housing status there was never for disciplinary reasons.

The court continually belittled appellant's concerns even when the issue was tampering with legal mail (which according to appellant happened frequently) and appellant's ability to assist in her own defense (which resulted in numerous orders for mental health evaluations which were frequently not complied with or complied with in a completely cursory manner).

For example, when appellant brought to the court's attention that a letter from her then attorney Mr. Ward was delayed and opened, the court commented there was nothing he could do about it. At a later court date, the court seemed perplexed that the jail would interfere with appellant's legal mail. "I don't understand why they would have a problem with that." (RT 484.) The Court conceded 100% authority to jail staff in this regard and did not even question custodial deputies about whether appellant's mail was being interfered with although both deputies Jimenez and Zabokrtsky appeared before him at later dates.

When appellant brought the disruption of her legal mail to the attention of the court once again the court indicated he would have the bailiff check into it. (RT 3890-3891.) There was never an indication that the bailiff actually did so or that appellant's legal mail was ever maintained confidentially. [44]

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[44] In appellant's case, the trial court had a continuing practice of abdicating

During appellant's *Marsden* motion, much of the court's dialogue with appellant can only be characterized as bullying and demeaning. The court belittled appellant's requests for the basic necessities to a competent capital case including second counsel and investigative assistance in the penalty phase. Oddly, the court maintained it had *"never seen a death penalty trial in which two attorneys were necessary."* (RT 619-620.)

Even after defense counsel vouched for his court appointed panel investigator, the trial court would not permit the investigator, Mr. Sanchez and appellant to speak by telephone, effectively limiting appellant's telephone contact to her attorney at times when her attorney called her and to no one else. (RT 426.)

Even the one time where the court seemed to express his concern that appellant was isolated in an 8' x 8' cell with all openings to the outside covered by deputies and he recognized the psychological damage such severe isolation could have on a person, he permitted the conditions to continue unabated all but 2 hours a day – and this improvement was not ordered until the month before appellant's jury trial began (RT 528 -546, 552-553.)

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responsibility to the custodial staff of Twin Towers jail. Even in instances where the court deemed fit to issue an order regarding appellant's care and needs, the jail staff was never confronted or question by the court when the orders went unfulfilled and unanswered. (CT442-443; RT 417, 3931-3932.)

Without the benefit of mental health expert input, to the judge decided restoring appellant's sight to outside her cell into the jail interior would be more beneficial to her than the mental health counseling she requested. (RT 549-550.)

Although it was known to the court appellant was receiving psychiatric medications and counseling the court refused to acknowledge appellant's plea for additional mental health intervention telling appellant "[I]n my view you are a very intelligent person, and I can't believe that you need a therapist, but you can -- you can talk about that." (RT 620.)

In hearings involving confidential matters, such as appellant's mental state and appellant's relationship with her trial counsel, the trial judge permitted the prosecutor to be present and comment. At times the court went so far as to solicit the prosecutor's opinion and advice on confidential matters. (RT 417, 423, 504-505, 531, 535, 538, 542, 549.)

The court initially agreed when appellant requested she be permitted to take a shower every day, but then backpedaled when jail staff indicated, that due to staffing levels and scheduling, a shower a day would be difficult. (RT 552-553.)

Most of the concerns and requests made by appellant over the years she was before Judge Pounders went completely unanswered and uninvestigated (see generally RT 66-89, 90-97, 102-109, 552-552): these included "tossing" of her cell

for no reason and interference with legal mail (RT CT 209, RT 118, 481-483, 484, 499), lack of access to the law library (CT 211-212), housing with ill inmates (CT 207, RT 480, 481, 482, 487, 489), threats from jail staff and inmates alike (CT 205-206, 209-210), sexual advances from jail staff (CT 207-208) and lack of sanity feminine products, change of underwear, sleep wear and uniforms, TV, newspapers showers and exercise, dirty rooms filled with vermin. (CT 207-208, RT 486.)

Moreover, in the instant case, not only did the trial judge express his bias *against* appellant, he also expressed his bias *toward* the prosecution and in a manner designed to "protect" the conviction on appeal. This was most telling when after all both parties had rested and appellant had been sentenced to death, the court permitted the prosecutor to call witness and present evidence to clean up the record for appeal.

The prosecutor advised the court that he wanted to place on the record evidence that the staging of Palmira's murder and use of Mejia to confront appellant was not to "somehow generate consciousness of guilt" or "turn this case into a death penalty case" but because of concerns that "other inmates that had been released might be out looking for Ms. Gorham and that Ms. Hall wasn't the only one who had been contacted to cause harm" (RT 3894.) The prosecutor

stated that he "wanted the record to be complete on appeal" (RT 3894), by having an evidentiary hearing where Steinwand and Valdez would "testify as to their intent and the discussions that they had with [him] about how [they] were to proceed in this investigation. (RT 3895.) [45]

However, there was no evidence to support any offer of proof that appellant contacted anyone else and the prosecution employed the solicitation to commit murder charge as an aggravator. The investigation was not, as the prosecutor claimed for the sole purpose of protecting Palmira. The investigation

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[45] On **November 6, 2001**, the prosecutor advised the court and counsel that he would not be seeking death. (RT 186.) On **March 13, 2002**, the prosecution advised the court that it would be resubmitting the case to the district attorneys' death penalty committee for reconsideration of whether or not to seek the death penalty. (RT 200.) On **July 23, 2002** the prosecution filed its notice of evidence in aggravation. (Pen. Code § 190.3; CT 218-219.) On **August 1, 2002**, the prosecution advised the court and counsel that the penalty committee had decided the death penalty would be sought in this case. (CT 229.) On **April 29, 2003**, a felony complaint was filed alleging appellant committed the crime of solicitation of Hall to commit the murder of Gorham. (CT 283.) Preliminary examination on the new charges took place on **May 16, 2003**. (CT 283.) The Information was filed on **May 30, 2003**. (CT 330-331.) The cases were joined and on **September 26, 2003**, three days before jury selection began, a new information alleging capital murder, dissuading a witness and solicitation to commit murder was filed. (CT 488-490, 493-505.)

was for the very purpose of ensuring a true finding on solicitation to murder aggravator and to persuade the jury to vote for death.

Nevertheless, the trial court erroneously granted the prosecutor's request and responded:

> I think that's a very good idea, given the power of that videotape in the penalty phase. That is, Ms. Rodriguez' reaction to the information she received was I think very powerful evidence that persuaded the jury rather quickly that she had no remorse, so I agree with you. (RT 3895.)
>
> I think that should be done, at least to make the record clear. I think that it was a valid [penalty phase] argument on Mr. Houchin's part, but it would do well to finish taking evidence on that subject. (RT 3896.)
>
> Defense counsel interposed no objection.

Thereafter, the court permitted the prosecutor to call witnesses and made a finding as to the "purpose" of the detectives continued investigation which favored the prosecution. (RT 3935-3970.)

C. Conclusion

Here, the trial court's reaction to the prosecutor's request for a post trial hearing in order to protect the convictions – when no vehicle for said evidentiary hearing applies -- demonstrated his prejudice against appellant and for the prosecution.

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IX. APPELLANT WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS, TO A FAIR TRIAL AND TO HER RIGHT TO BE PRESENT THE TRIAL COURT'S ERROR IN CONDUCTING PROCEEDINGS IN APPELLANT'S ABSENCE

A. Summary of Proceedings Below

On three occasions, the trial court conducted unauthorized proceedings outside the presence of appellant. Appellant had not waived her presence for any of these proceedings.

1. August 28, 2003 Proceedings

The parties convened on this date to address the erroneous release of preliminary hearing exhibits into the custody of the district attorney. This hearing began with appellant being present. (RT 164-165.) When, at the outset, the prosecutor voiced his intention to request the court rescind its provisional order permitting appellant telephone contact with defense counsel and asked to proceed in camera stating: "I'm reluctant to state in open court what my concerns are only because if she does not already know about this, it would be telegraphing to her what is possible." (RT 167.)

Defense counsel did not object to proceeding and actually joined the prosecutor's request to proceed outside appellant's presence. Appellant was not

asked to waive her presence. (RT 168.) This hearing occurred approximately one month before trial began.

Outside appellant's presence, the prosecutor advised the court that in *nearly 2 ½ years earlier*, in March 2001, appellant had contacted witness Palmira Gorham by telephone.[46] The court acknowledged that this was accomplished by a three-way call between appellant, Ms. Gorham's niece and Gorham. (RT 169-170.) The prosecutor advised the court that a year after that, in March 2002, (*nearly 18 months before this hearing*) in his opinion, appellant solicited inmate Gwendolyn Hall to kill Gorham. (RT 170-171.) The prosecutor's concern with the court's provisional order permitting appellant telephone access to her attorney was that appellant might have access to other inmates' booking numbers (which were required to place a call) and thereby access to the telephone numbers those "other inmates" were permitted to call. (RT 173.)

There was *no* evidence that appellant had attempted to circumvent the phone system and the prosecutor did not correct trial counsel's opinion that "we're speculating on what she may or may not know and what she may or may not have access to." (RT 179.) All parties acknowledged that appellant's capital

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[46] Appellant's telephone privileges were revoked on April 17, 2001. (RT 21.) By the date of this hearing, appellant had been without telephone access to counsel for nearly 2 ½ years.

jury trial was to start in "about a month." (RT 180.) The parties continued to discuss possible alternatives to securing telephone access to defense counsel. Neither of the parties nor the court had firsthand knowledge of the jail phone system. (RT 181.)

The court recognized the critical nature of these telephone access proceedings.

> The Court: ...because we're basically talking about Ms. Rodriguez' constitutional right to counsel. She's got to be able to communicate with counsel, in my opinion. So, it's a constitutional right, not just a privilege that we're restricting..." (RT 185.)

2. August 29, 2003 Proceeding

Prior to appellant being brought into court, the trial court went on the record to continue the discussion from the day before. Defense counsel and the prosecutor were present. (RT 419.) The parties discussed on the record a procedure to provide appellant telephone access to her counsel with the input of a Los Angeles Sheriff's Deputy. (RT 420-421.) Appellant was brought into court as the hearing progressed. (RT 421.)

3. September 29, 2003 Proceeding

Prior to appellant being brought into court, the trial court brought in witness Gwendolyn Hall and ordered her to return at a future date. (RT 659-660.)

B. Applicable Law

In *Campbell v. Rice* (9th Cir. 2004) 408 F.3d 1166, 1171, the court stated the constitutional principle that "[a] defendant has a right to be present at any critical stage of his criminal proceedings if his presence would contribute to the fairness of the procedure." Even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.)

In *Campbell*, the Court concluded that Campbell's due process rights were violated when he was excluded from the in-chambers hearing in which defense counsel, the prosecutor, and the judge discussed the conflict of interest raised by the felony prosecution of defense counsel by the same district attorney's office that was prosecuting Campbell. The *Campbell* Court found that it was clear that Campbell's presence at the in chambers hearing would have contributed to the fairness of the procedure. This was so because "[n]o one was representing Campbell's interests at this critical hearing, during which the trial judge considered whether defense counsel McCann could zealously defend Campbell against the same district attorney's office that was prosecuting her. If Campbell

had been present at this conference, or had the trial court appointed another attorney to represent Campbell during this conference, Campbell or his appointed counsel could have asked questions to more fully flush out the nature of McCann's conflict. Because Campbell was never informed of the conflict, Campbell could neither assert his objections to McCann's continued representation or waive his right to conflict-free counsel." (*Id.*, at p. 1141.)

In the instant case at the hearings regarding her telephone access to counsel, no competent witness testified as to the ability of the sheriff's department to address the court's concerns. Appellant's need to telephone her counsel and her successful and unsuccessful efforts to date were never properly addressed. Out of her presence and with no real representation by her attorney of record, the prosecutor's speculation about what she may or may not know or what she may or may not do prevailed over appellant's right to counsel which the court recognized as constitutionally guaranteed. Appellant was denied any representation and her own presence at a critical proceeding in which her constitutionally guaranteed access to counsel was denied based on based on a single telephone call which occurred more than two years earlier.

C. The Requirement of Reversal

The standard of review is whether the prejudice resulting from a defendant absence may be found harmless beyond a reasonable doubt. (*Rushen v. Spain* (1983) 464 U.S. 114, 121.) No such harmless error finding is permissible in this case because appellant was absented without her consent at proceedings which involved her right to contact her defense attorney. These hearings occurred a mere month or so before her capital jury trial began. This resulted in the denial of appellant's right to due process and to a fair and reliable sentencing determination by an impartial jury, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and 17 of the California Constitution. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 [plurality opinion]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 108 S.Ct.1981, 100 L.Ed.2d 575.)

The denial of a fair and impartial tribunal constitutes structural error requiring relief per se. The absence of an impartial tribunal here also had a substantial and injurious influence and effect on each of the jury's determinations.

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X. APPELLANT'S 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES UNDER *Crawford v. Washington* WAS VIOLATED BY THE TRIAL COURT'S ADMISSION OF EVIDENCE

A. Introduction

Under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), appellant contends that her right to confront witnesses was violated by the admission of hearsay evidence in the form of (1) the taped conversation between Gwendelyn Hall and investigators as testified to by investigators; (2) the notes written by Gwendolyn Hall as testified to by investigators; (3) the autopsy report and testimony of the medical official regarding Alicia's cause of death; (4) the lab results and testimony indicating Oleander was found in the victim's organs; (5) the lab results and testimony indicating Ethylene Glycol was found in the victim's organs and (6) Autumns' alleged statements to investigators.

Because *Crawford* was decided after the trial in this case, trial counsel's failure to object on these grounds was excusable. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2.) Because the failure to object is not waived, this Court should address the issue on the merits.

B. Applicable Law

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment provides: In all criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him . . . ." (U.S. Const., Amend. 6; *Pointer v. Texas* (1965) 380 U.S. 400.) The central concern of the Sixth Amendment's Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845.)

In *Crawford*, the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated by the admission of testimonial statements of a witness who was not subject to cross-examination at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford, supra,* 541 U.S. 36 at p. 68 [124 S.Ct. 1354, 158 L.Ed.2d 177] .)

The United States Supreme Court cited a dictionary definition of "testimony" as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" and confirmed that the class of testimonial statements includes affidavits, custodial examinations, prior testimony not

subject to cross-examination, and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *(Id.,* at pp. 51-52.)

The United States Supreme Court also provided illustrations of statements that could be considered testimonial: (1) "'*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,'" and (2) "statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.* at p. 52 [124 S. Ct. at p. 1364].)

In *Crawford*, the defendant's wife gave a tape-recorded statement to the police during her interrogation. The defendant invoked the marital privilege to prevent her from testifying, but the prosecutor offered her taped statement as a declaration against penal interest. The trial court admitted her statement, finding it sufficiently trustworthy under the test of *Ohio v. Roberts* (1980) 448 U.S. 56, which allowed the admission of hearsay statements, despite a lack of confrontation and cross-examination, so long as the declarant was unavailable and the hearsay statement bore "adequate indicia of reliability." (*Id.* at p. 66.)

Rejecting the "open-ended balancing tests" of the *Ohio v. Roberts'* framework, the Supreme Court reversed. Despite whatever indicia of reliability may have accompanied the wife's statement, the defendant had been denied his right to confront and cross examine her, a necessary element under the Sixth Amendment. The Court ruled that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, ***and interrogations by law enforcement officers fall squarely within that class.***" (*Crawford, supra,* 541 U.S. ___, 124 S.Ct. at pp.1364-1365, emphasis added.)

In the aftermath of *Crawford* both State and Federal Courts have grappled with its application to a wide variety of evidence, some of which presents itself in the instant case. While appellant herein maintains all of the evidence noted above was admitted in violation of her right to confrontation, because cases have been developing along the lines of what types of evidence are excludable under *Crawford* – whether it be forensic evidence vs. statements to law enforcement, appellant will describe the particular evidence and the law which applies to it specifically.

1. Appellant's Alleged Statements to Gwendolyn Hall as reported to law enforcement by Hall

On May 10, 2002, inmate Gwendolyn Hall was interviewed at the Twin Towers Jail by a number of law enforcement officials, including investigating detectives Valdez and Steinwand and custodial staff deputies Jimenez and Zabokrtsky. When Hall met with law enforcement, she was shown two pages of notes which Hall identified as notes she had taken while talking with appellant on May 8 and May 9, 2002 and had given to Deputy Zabokrtsky. The interview was tape recorded and played for the jury. Additionally, Detective Steinwand testified about the contents of the interview at appellant's preliminary hearing, pretrial hearing and at trial. Zabokrtsky and Jimenez testified at pretrial hearings.

Although called to testify at appellant's jury trial and at an evidentiary hearing before the penalty phase, Hall answered that she did not remember her conversations with appellant. The trial court declared her unavailable. Hall did not testify at the preliminary hearing or pretrial motions. (CT 717-758 [transcript of 5/10/02 interview]; CT 292-312, 319 [Steinwand's testimony at the preliminary hearing]; RT 357-367, 376, [Zabokrtsky testimony at pretrial hearing]; RT 340-346, 393-407 [Steinwand testimony at pretrial hearing]; RT 378-391 [Jimenez testimony at pretrial hearing]; RT 3098-3100 [Hall testimony before penalty phase

an court finding of unavailability]; RT 2213-2225 [Hall testimony at trial]; RT 2226-2242 [Zabokrtsky testimony at trial]; RT 2243, 2253 [court finding that Hall unavailable at trial even regarding notes she gave to Zabrostsky]; RT 2244-2274, 2278-2292 [Steinwand testimony at trial concerning 5/10/02 Hall interview]; RT 2252, 2254, 2256, 2257, 2260 [audio tape of 5/10/02 interview played]; RT 2246-2248, 2251-2252 [Hall notes shown to jury]; RT [trial counsel's objections based on hearsay].)

The evidence contained in the May 8, 2002 note authored by Hall, given to police, shown to the jury and testified to by Steinwand contained Palmira Gorham's name, address, telephone number and directions to her house; appellant's then-attorney's name; and two monetary notations. The note dated May 9, 2002 reads: "make it look like a robbery" "she has nice furniture & computers" "go with a u-haul" "Palmira can be killed with what I killed my husband with – you can buy it anywhere it tastes sweet" "your [sic] gonna laugh when I tell you what it is – anei-freeze [sic]. It cost [sic] about $4.00. Make Palmira drink a lot of it – break her neck after giving her the anei-freeze – so it can look like a robbery gone bad. So you'll have to stay with Palmira at least three hours after she drink [sic] it because you don't want the hospital or physician to save her. Anei-freeze work [sic] fast." "When you get out send me a birthday

card saying job well done." I'll be able to buy you a house anywhere you want." (Peo. Exhs. 24, 25, 27, 28.)

In the taped interview, Hall read the contents of her notes and elaborated on what appellant told her. (CT 724-726, 731-734, 738-740.)

The entire taped conversations runs through 41 transcript pages. (CT 717-758.) The entire tape was played for the jury. (RT 2252, 2254, 2256, 2257, 2260.) In tape, among other things, Hall told law enforcement that appellant told her Linda Allen was a "star" witness against her. Appellant asked Hall to tell custodial officers information about Allen so that Allen would be moved back to Module 211; that some people would get Allen when she was sentenced to prison; that appellant's attorney passed on information as to when Allen was in court; and that when Allen was in prison she wanted someone to shoot her with a syringe of AIDS or HIV tainted blood. (CT 720, 737-735, 741, 745-746, 747.)

Regarding Palmira Gorham, Hall told law enforcement that while at first she thought appellant was just talking, she came to realize that appellant was serious about soliciting her to have Gorham killed. (CT 721.) At first, appellant talked about the circumstances of her case. She told Hall that she had been married four times and that she was married to her last husband for four months before he died. Appellant had an insurance policy on her husband for $250,000.

Appellant did not really love Frank – she had had a hard life with men. (RT 723-724.)

Hall told officers that appellant admitted that she used anti-freeze to kill her husband and that the same could be used to kill Gorham. Appellant told Gorham that she had been giving her husband anti-freeze for days in Gatorade. Although she took her husband to the hospital in the middle of those days, she knew the anti-freeze would not be detected. Appellant gave Hall directions to Gorham's home and told Hall she wanted Gorham's death to look like a robbery gone bad and that when the job was completed, Hall should send her a birthday card. (CT 725-726, 728, 729.)

Appellant told Hall that she would give her $25,000 or $30,000 from the insurance money she would get when she was released. (RT 727.)

At various times the prosecutor stopped the tape and asked Steinwand questions. (RT 2244-2274, 2278-2292.) Steinwand first testified about how he and other law enforcement agents came to interview Hall; how he came into possession of the notes. (RT 2244-2249.) Steinwand testified Hall told him that she had taken the notes while speaking with appellant. (RT 2249.) Steinwand identified the audio tape and verified that the transcript was a fair and accurate copy of the tape. (RT 2250.)

After the prosecutor published the notes to the jury and handed out a transcript of the tape, defense counsel interposed an objection on the grounds of hearsay. (RT 2253.) The trial court responded: "And the court has concluded that Ms. Hall's statements that she does not recall are not truthful. (RT 2253.)

Steinwand testified about the contents of the notes and how appellant asked Hall to kill Gorham and then send her a birthday card informing her that the job was done. (RT 2258, 2260, 2263-2264, 2265-2274, 2275-2283, 2291.)

Although the *Crawford* court declined to articulate all of the categories of evidence which would be deemed "testimonial," when this Court first confronted the application of Crawford to forensic in *People v. Geier* (2007) 44 Cal.4th 555, this Court noted that the United States Supreme Court did identify "various formulations of this core class of testimonial statements..." (*People v. Geier, supra*, 44 Cal.4th at p. 978.) "One included formalized ex parte in-court testimony or its 'functional equivalent[s]'--i.e., material such as affidavits, custodial examinations, confessions, depositions, prior testimony that the defendant was unable to cross-examine, "'or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.' " (*Ibid.,* citing *Crawford, supra*, 541 U.S. 36, 51-52.) Another included "'statements that were made under circumstances which would lead an objective witness reasonably to believe that

the statement would be available for use at a later trial.'" (*Ibid.*)

Quoting *Crawford*, this Court explained, at a minimum, "testimonial," for purposes of the confrontation clause, "applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*, citing *Crawford, supra*, 541 U.S. 36, 68.)

In *Geier*, this Court noted that the United States Supreme Court shed some further light on the question of what constitutes a "testimonial" out-of-court statement in *Davis v. Washington* (2006) ___U.S. ___ [165 L.Ed.2d 224, 126 S.Ct. 2266] (*Davis*)." (Id., at p. 602.) This Court noted that in *Davis*, "[t]he general principle enunciated by the court was as follows: 'Statements are nontestimonial when made in the course of police interrogation objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" (Id., at pp. 603-604, citing *Davis, supra,* ___ U.S. at p. ___ [126 S.Ct. at pp. 2273-2274], fn. omitted.)

Ultimately, from, *Crawford* and *Davis* this Court articulated a three prong test:

> "[W]hat we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Id.*, at p. 605.)

Finally, the admission of testimonial hearsay statements violate the confrontation clause -- unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*People v. Geier, supra,* 41 Cal.4th at p. 597.)

Clearly the Hall's May 10, 2002 statements to law enforcement agents – as well as her two written notes regarding information appellant allegedly gave her -- were testimonial. The statements and contents of the notes, which described appellant's alleged criminal activity in soliciting Hall to kill Gorham, were made to law enforcement for possible use at trial.

2. Autumns' alleged statements to investigators

The day before Autumn's testimony at the penalty phase, the prosecutor advised the court that Autumn gave a statement the same day that the defendant was arrested that there was a special bottle of Gatorade for Frank and that she was not allowed to have any. Also, that appellant asked Autumn to help feed Frank the Gatorade – which she had done. (RT 3159-3160.) According to the prosecutor, Autumn had given three statements two of which were more or less

consistent and then a third one which was substantially different. Based on the third statement, the prosecutor had decided not to call Autumn. (RT 3162.)

Ultimately, the content of Autumn's damaging statements regarding her involvement in Frank's death was raised by the prosecutor during cross examination of Dr. Vicary about the report prepared by prior psychiatrist Dr. Romanoff.

Q: Dr. Romanoff confronted her with the -- a report from the police that he had reviewed which indicated that her daughter had been interviewed and had told the police that her mother had fed her husband -- her stepfather Gatorade and that she had been told by her mother she couldn't have any of that Gatorade. Dr. Romanoff confronted her with that, didn't he?

A: Yes, he did.

Q: And her explanation for it, why she would not let Autumn have any Gatorade was, quote, "because money was so tight and we needed the Gatorade for him." That's what she told Dr. Romanoff was the reason Autumn couldn't have any Gatorade; isn't that true?

A: Yes. (RT 3687-3688.)

And later:

Q: Doctor, you're aware that she used her daughter to help poison her husband, aren't you?

A: Yes.

Q: And you're also aware [based on his special circumstance memorandum]... that Autumn told investigators, Autumn Fuller told investigators, after the defendant arrest, she told the investigators, "that the night the defendant died,

her mother made him drink a whole bunch of red Gatorade and that she," meaning Autumn, Autumn, "had helped her mother feed him the Gatorade." You're aware of that, aren't you?

A: Yes.

Q: This defendant poisoned her husband to death for money and used her nine-year-old daughter as an unwitting accomplice and that murder, and it's your opinion that she's a loving and supportive mother? (RT 3705-3706.)

Dr. Vicary was called to testify after Autumn had been excused. Prior to Autumn's testimony the prosecutor advised the court and counsel that unless the direct examination became "too much of a... circus in terms of the emotional impact and the emotions" he would refrain from going into Autumn's taped statements. Although he reserved his final decision until the direct examination of Autumn was complete, the prosecutor had no questions of Autumn, including any about her statements to police. Defense counsel's examination of Autumn did not include the topic of her statements to law enforcement. (RT 3263-3264, 3266.)

Like Hall's statements to police, Autumn's statements to police were clearly testimonial. As she had been excused before the statements were admitted through Vicary, appellant did not have the opportunity to cross examine Autumn. Respondent is likely to argue that Autumn's statements were not offered for the truth of the matter but rather to test Vicary's opinion that, if sentenced to life,

appellant could be a good mother to Autumn. However, that theory is disproved both by the questions of the prosecutor:

Q: Doctor, you're aware that she used her daughter to help poison her husband, aren't you?

A: Yes.

Q: This defendant poisoned her husband to death for money and used her nine-year-old daughter as an unwitting accomplice and that murder, and it's your opinion that she's a loving and supportive mother? (RT 3705-3706.)

And, the prosecutor's argument in favor of death

> Finally, he tells you she can have a constructive relationship with her daughter Autumn and she can still be a loving mother despite the fact she's in prison and she has to meet her daughter in prison. And Autumn came in and beg for her mother's life. Dr. Vicary's opinion on that is worthless. It's not supported by the facts he himself looked at. He saw my special circumstance memorandum. He admitted that he read it. He admitted that he read the part where it documented Autumn's interview with investigators when she told investigators this defendant made the defendant (sic) drink a red bottle of Gatorade, and she helped her mother feed Frank that Gatorade. Dr. Vicary admitted that he read that, he admitted he was aware of that, and he still told you, he still looked at you with a straight face and he told you, oh, yes, I think she's a good mother and she can have a constructive relationship. Really? A woman who uses her child to help poison her husband can have a constructive and loving relationship? Dr. Vicary was aware of that. He gave you that opinion. Despite that, he looked at you with a straight face and said that. You know you can't believe a word that Dr. Vicary says about that. How can you say that? It just defies common sense. (RT 3796-3797.)

3. The autopsy report and testimony of the medical official regarding Alicia's cause of death, the lab results and testimony

indicating Oleander was found in the victim's organs and the lab results and testimony indicating Ethylene Glycol was found in the victim's organs

Appellant recognizes that this Court has granted review in a number of cases which present the issue of whether the defendant denied his right of confrontation under the Sixth Amendment when the prosecution presents forensic evidence by way of a report or the testimony of an expert who did not actually perform the scientific test in question as well as how the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314, affect this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555. [47]

People v. Geier, supra, 41 Cal.4th 555, involved the testimony of the prosecution's DNA expert, that in her opinion DNA extracted from vaginal swabs taken from the victim matched a sample of defendant's DNA. On appeal, Geier asserted that the testimony violated his Sixth Amendment confrontation right as construed by the Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36,

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[47] See for example S176886: Where one forensic pathologist testified to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist; S176213: when a supervising criminalist testified as to the result of drug tests and the report prepared by another criminalist; S176620: when (a) one nurse practitioner testified as to the results of a sexual assault examination and the report prepared by another nurse practitioner, and (b) a supervising criminalist testified as to the result of DNA tests and the report prepared by another criminalist .

because the opinion was based on testing that she did not personally conduct. (*Id.,* at pp. 593-594.)

After an exhaustive discussion of United States Supreme Court decisions in *Crawford* and *Davis*, and a number of decisions of other state courts (Id., at pp. 597-608), this Court concluded that the DNA report was not testimonial for purposes of *Crawford* and *Davis*. (Id., at p. 608.)

After this Court's decision in *Geier*, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314. In *Melendez-Diaz* the defendant objected to the admission of three "certificates of analysis" that showed that the seized substances contained cocaine. In Massachutes, state law required a forensic analyst, at the request of the police, to test seized evidence for the presence of illegal drugs and required the analyst to provide the police with his or her findings on a signed certificate, on oath. The certificate could then be admitted in court as prima facie evidence of the composition, quality, and net weight of the substance at issue in the prosecution. The *Melendez-Diaz* court held these certificates, which it described as "quite plainly affidavits," were testimonial statements because they were made under oath and under circumstances which would lead an objective witness

to believe that the statement would be available for use at a later trial. (*Id.,* at pp. ___[174 L.Ed.2d 319-321].)

The court further observed that the certificates "are incontrovertible a '" solemn declaration or affirmation made for the purpose of establishing or proving some fact,"'" namely that the substance found in defendant and his co-defendants possession was cocaine. (*Id.,* at p. 321 quoting *Crawford, supra*, 541 U.S. 51 at p. 51.)

The court rejected the argument that a lab analyst's report is not testimonial because it contains "near-contemporaneous" observations of a scientific test, rather than statements by lay witnesses of events in the past. (*Id.,* at pp. 324-325.) It also rejected a related argument that there is a difference between testimony recounting past events, "which is 'prone to distortion and manipulation,'" and testimony that is the result of "neutral, scientific testing.'" (*Id.,* at pp. 325-326.) The court explained that "[f]orensic evidence is not uniquely immune from the risk of manipulation....A forensic analyst responding to a request from law enforcement official may feel p[ressure- or have an incentive – to alter the evidence in a manner favorable to the prosecution." (*Id.,* at p. 326.) The court added, "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Ibid.*)

3.a. The autopsy report and testimony of the medical official regarding Alicia's cause of death

On September 20, 1993, then Deputy Medical Examiner for Santa Barbara County, Wallace Carroll, examined Alicia's organs after the autopsy was performed. Carroll determined the cause of death to be asphyxiation due to airway obstruction. At the time of her death, Alicia had two lower front teeth. Alicia weighed approximately 30 pounds and measured approximately 30 inches in length. (RT 2865-2869, 2874.)

Carroll did not perform the autopsy. He "viewed the body" then "returned to view the organs." (RT 2868.) Dr. Ducale, the pathologist assistant performed the autopsy. (RT 2873.) Although Carroll "reviewed all the dictation and so forth" (RT 2868), Carroll did not personally observe the number of teeth Alicia had or make the notation in the autopsy report about her teeth. (RT 2873.) When asked whether "he" determined the cause of death, Carroll responded "Yes, "we" did. (RT 2868.) The autopsy report was entered into evidence. (RT 2874; Peo. Exh. 45.)

Whether or not Alicia had any teeth and where they were was evidence essential to the prosecutor's theory that appellant murdered her daughter.

"I didn't happen from a baby chewing on it." (RT 3766.)

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for Ethylene-Glycol or Oleander. (RT 2085-2087.) According to Anderson, they "needed help." (RT 2089.)

On November 9, 2000, after receiving a call from one of the detectives indicating there was reason to test for ethylene-glycol, a sample was sent to Medtox Laboratories in Minnesota to test for that substance. According to Anderson, another coroner employee, Joseph Muto, requested the testing at Medtox. Muto also received the test results back from Medtox. (RT 2090-2096; Peo. Exh. 19.) According to Anderson, the Medtox test results indicated that the level of ethylene-glycol was consistent with a fatal amount. (RT 2089-2090, 2095-2097, 2100.) Thereafter, Anderson tested the heart blood, the femoral blood, the gastric and vitreous fluid for the presence of ethylene-glycol. Ethylene-glycol was present in each sample. (RT 2100-2102.)

On December 26, 2000, Anderson sent out samples to the University of California at Davis to be tested for Oleander (RT 2107-2108.) According to Anderson, Birgit Puschner, a toxicologist at UC Davis, in the animal health and food safety lab, received blood samples, stomach contents and a liver sample from which it was requested she perform Oleander testing. Oleander was present in all four samples. The amount in the stomach contents was deemed to be significant and would indicate recent exposure through ingestion. (RT 2112-

"She only had two lower teeth. Her teeth were nowhere near where this break occurred. (RT 3771.)

3.b. The lab results and testimony indicating Oleander was found in the victim's organs, the lab results and testimony indicating Ethylene Glycol was found in the victim's organs

On September 26, 2000, based on the information from Frank's mother, Steinwand contacted Los Angeles County coroner's office and advised them that it was possible Frank may have ingested Oleander. It took several months before the officers were "able to get Oleander tests sent out and results back from them." (RT 1978, 1984-1985.)

Los Angeles County Department of Coroner Supervising Criminalist Dan Anderson performed a toxicology screening to eliminate common drugs of abuse such as cocaine, methamphetamine, barbiturates, opiates and alcohol substances on samples obtained from Frank Rodriguez. (RT 2078-2079, 2081-2083.) Anderson explained "there's no such thing as a general screening for everything."

However, the tests run by Anderson did not indicate Frank had ingested a "fatal amount of anything." (RT 2084, 2089.) In the case of both ethylene-glycol, the primary chemical component of antifreeze, and Oleander, specific tests would be required. The Los Angeles Coroner's Office did not have the ability to screen

death. Dr. Clark based this opinion on autopsy results indicating very small amounts of ethylene-glycol in the stomach -- meaning it had been absorbed into the body -- a process that would take five to six hours -- and the finding of crystals in the kidneys. (RT 2140-2142.) In Dr. Clark's opinion, Frank Rodriguez would have had to have taken four to five shot glasses of ethylene-glycol. (RT 2151.) Dr. Clark also reviewed medical records from Kaiser Permanente generated by Frank Rodriguez's September, 7, 2000 visit. According to the medical records, doctors at Kaiser did not measure for ethylene-glycol. Nevertheless, Dr. Clark found it interesting that the hospital had performed tests which indicated Frank Rodriguez's kidneys were functioning within the normal range and the acidity level of his blood was also with in normal ranges. Additionally, Frank wasn't given any therapy for ethylene-glycol. It was Dr. Clark's opinion that either he was not suffering from ethylene-glycol poisoning or he had taken ethylene-glycol within an hour of coming in to the hospital. (RT 2146-2148.)

Dr. Clark found it difficult to say what if any part the oleander played in Frank's death. He hypothesized it would certainly have caused him to become nauseated and to vomit. He could not predict how the levels of Oleander would correlate with the chance that he may have died of an irregular heartbeat although that could have been possible. (RT 2152.)

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ethylene-glycol poisoning; (5) Dr. Clark's opinion that Frank Rodriguez received fatal doses of the ethylene-glycol that killed him with in 24 hours of the time of death, and most likely within six or seven hours of the time of death; (6) Dr. Clark's testimony that on based on autopsy results indicating very small amounts of ethylene-glycol in the stomach and the finding of crystals in the kidneys confirmed his opinion as to the time of death and amount of ethylene-glycol ingested; (7) Dr. Clark's opinion based on Kaiser medical records that (a) doctors at Kaiser did not measure for ethylene-glycol, (b) his kidneys were functioning within the normal range, (c) the acidity level of his blood was with in normal ranges; and (4) Frank wasn't given any therapy for ethylene-glycol – all of which formed the basis for (8) Dr. Clark's opinion that either he was not suffering from ethylene-glycol poisoning or he had taken ethylene-glycol within an hour of coming in to the hospital; and (9) Dr. Clark's opinion that oleander would have caused Frank to become nauseated and to vomit and that (10) the symptomology noted in the Kaiser medical records was with Oleander poisoning. Reliance by Clark and Anderson on these reports violated appellant's right to confrontation.

C. Admission of the testimony based on the evidence was not harmless

Confrontation Clause violations are subject to the federal harmless-error analysis articulated in *Chapman v. California, supra,* 386 U.S. at p. 24. The

2119.) Puschner's report was entered into evidence. (Peo. Exh. 21.) No one from Medtox testified. Anderson's final report (Peo. Exh. 20), referenced both the results of Puschner's report and the Medtox report. (RT 2106, 2108.) In no other case had Anderson testified as an expert regarding the presence of Ethylene-Glycol. He had not published or lectured on the presence of Ethylene-Glycol. (RT 2109-2110.)

Puschner testified that she received samples from the Los Angeles Coroner's Office and determined that those samples contained Oleander. (RT 2116-2119.)

Emergency medicine physician (in other words he saw patients) Richard Franklin Clark, was the medical director of the poison center at the University of California at San Diego. (RT 2120-2123.) Based on his review of documents prepared for him by the Office of the District Attorney (Peo. Exh. 22) and Exhibits 21 (Puschner's report), 8 (Kaiser records), and 20 (Coroner's results), Dr. Clark offered his opinion that the documents indicated the presence ethylene-glycol in Frank's tissue and that he was of the opinion that Frank Rodriguez died from ethylene-glycol poisoning. (RT 2134-2138.) It was Dr. Clark's opinion that Frank Rodriguez received fatal doses of the ethylene-glycol that killed him with in 24 hours of the time of death, and most likely within six or seven hours of the time of

PENALTY PHASE ARGUMENTS

XI. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

Appellant has demonstrated that this Court should reverse her conviction because of substantial guilt phase errors. Those same errors also poisoned appellant's penalty phase. Should this Court hold that the guilt phase errors were harmless as to the guilt determination, it should nonetheless reverse the death sentence because of the prejudice those errors caused appellant at the penalty phase.

The jury was instructed by the trial court that they should consider all guilt phase and penalty phase evidence in deciding the sentence: "In determining which penalty is to be imposed on a defendant, you shall consider all the evidence which has been received during any part of the trial of this case." (RT 3863.) The prosecutor emphasized this instruction during closing argument. (RT 3742-3743, 3747-3750, 3751-3753, 3775-3779.)

In this case, the errors in the guilt phase were not harmless in the penalty phase. For example, life-leaning jurors were erroneously excused for cause excusal of a juror; the conditions of appellant's confinement in jail -- which extended throughout her guilt and penalty phase trials -- were so adverse as to

death. Dr. Clark based this opinion on autopsy results indicating very small amounts of ethylene-glycol in the stomach -- meaning it had been absorbed into the body -- a process that would take five to six hours -- and the finding of crystals in the kidneys. (RT 2140-2142.) In Dr. Clark's opinion, Frank Rodriguez would have had to have taken four to five shot glasses of ethylene-glycol. (RT 2151.) Dr. Clark also reviewed medical records from Kaiser Permanente generated by Frank Rodriguez's September, 7, 2000 visit. According to the medical records, doctors at Kaiser did not measure for ethylene-glycol. Nevertheless, Dr. Clark found it interesting that the hospital had performed tests which indicated Frank Rodriguez's kidneys were functioning within the normal range and the acidity level of his blood was also with in normal ranges. Additionally, Frank wasn't given any therapy for ethylene-glycol. It was Dr. Clark's opinion that either he was not suffering from ethylene-glycol poisoning or he had taken ethylene-glycol within an hour of coming in to the hospital. (RT 2146-2148.)

Dr. Clark found it difficult to say what if any part the oleander played in Frank's death. He hypothesized it would certainly have caused him to become nauseated and to vomit. He could not predict how the levels of Oleander would correlate with the chance that he may have died of an irregular heartbeat although that could have been possible. (RT 2152.)

because in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. (*People v. Brown* (1988) 46 Cal.3d 432, 464 citing *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137.)

If, as was the case here, any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, one of the twelve jurors may have been swayed by the inadmissible evidence or error. It follows that, in the absence of that evidence or error, the death penalty would not have been imposed. For that reason, this Court has concluded that "it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial." (*Ibid.*)

In *Satterwhite v. Texas* (1988) 486 U.S. 249, the Supreme Court considered the effect of constitutional error in the guilt phase upon the penalty determination. In *Satterwhite*, the Court held that the harmless error standard in *Chapman v. California* (1967) 386 U.S. 18, should be used to decide whether psychiatric evidence obtained in violation of the defendant's right to counsel and admitted at the penalty phase of a capital trial was prejudicial enough to require reversal of the death sentence. The Supreme Court stated that such error

The symptomology noted in the Kaiser medical records was, for the most part, consistent with Oleander poisoning. The addition of diarrhea was something Dr. Clark could not say with certainty would have occurred from Oleander poisoning. (RT 2153.)

On November 28, 2000, after receiving a toxicology report which indicated ethylene-glycol, Dr. Chinwah reviewed kidney tissues for crystals associated with the ingestion of ethylene-glycol. Dr. Chinwah formed the opinion that the kidney tissues were consistent with the ingestion of ethylene-glycol. (RT 2166-2169.) Dr. Chinwah formed the opinion that Frank Rodriguez had died from ethylene-glycol and Oleander toxicity. (RT 2170.)

As noted above, improper hearsay evidence was offered against appellant. Given the court's holding in *Melendez-Diaz* there can be little doubt that the following are all testimonial: (1) test results back from Medtox and Anderson's testimony that the Medtox test results indicated that the level of ethylene-glycol was consistent with a fatal amount; (2) Anderson's testimony that a toxicologist at UC Davis performed Oleander testing and that Oleander was present in all tested samples; (3) those portions of Anderson's final report which referenced both the results of Puschner's report and the Medtox report; (4) Dr. Clark's opinion based on the Medtox report indicated Frank Rodriguez died from

This Court has adopted a "reasonable possibility" standard for assessing prejudice resulting from state law errors at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) However, in *Chapman, supra*, the United States Supreme Court equated an almost identically worded standard adopted by it in *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, with the Chapman standard of "harmless beyond a reasonable doubt." The Supreme Court stated:

There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility that the evidence complained of may have contributed to the conviction" and requiring the beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman, supra*, 386 U.S. at 24.)

Thus, the Supreme Court has recognized that the language of "reasonable possibility" and of "harmless beyond a reasonable doubt" implicate virtually the same standard and impose the same burden upon a "beneficiary of a constitutional error." This Court should similarly recognize that the "reasonable possibility" standard articulated in *Brown, supra*, is functionally equivalent to the "harmless beyond a reasonable doubt" standard adopted in Chapman. Under this standard, it is not certain beyond a reasonable doubt that the many guilt phase

errors were harmless with respect to the jury's decision to impose a death sentence.

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XII. THE USE OF INADMISSIBLE EVIDENCE IN AGGRAVATION THAT APPELLANT -- EIGHT YEARS EARLIER – ALLEGEDLY MURDERED HER INFANT DAUGHTER VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

The United States Supreme Court has made it clear that the "fundamental respect for humanity" underlying capital jurisprudence gives rise to "a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584 (quoting *Gardner v. Florida* (1977) 430 U.S. 349, 363-64, (White, J., concurring) (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.). Consequently, the evidence used to select death over life must be reliable and non-arbitrary. (*Gardner v. Florida, supra*, 430 U.S. at 359-61; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.)

California courts have long recognized that evidence of other criminal activity "may have a particularly damaging impact" on a jury's sentencing verdict. (*People v. Polk* (1965) 63 Cal. 2d 443, 450-51; see also *People v. Robertson* (1983)

33 Cal.3d 21, 54; *People v. McClellan* (1969) 71 Cal. 2d 793, 804 n.2 [noting survey findings that "evidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty"].) In accordance with this recognition, California has established strict procedural safeguards that must be observed when a penalty phase jury is presented with evidence of unadjudicated criminal activity. These procedural safeguards are designed to ensure the reliability of the sentencing jury's use of such evidence. (See generally, *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn.25, where this Court held that the trial court should not permit the penalty jury even to consider such evidence as an aggravating factor unless there is proof establishing the commission of an actual crime, and unless there is sufficient evidence to find the essential elements of that crime beyond a reasonable doubt.)

In this case, the notice of evidence in aggravation (Pen. Code § 190.3), was filed on July 23, 2002. The notice stated among other things, that should the case reach a penalty phase, the people intended to offer evidence of "the defendant's murder of her daughter, Alicia Fuller, on or about September 18, 1993." (CT 218-219.)

Ultimately, the alleged murder of appellant's infant daughter, Alicia, in 1993 was introduced at the penalty phase of trial. The court committed multiple

errors in admitting this evidence, evidence which should never have gone before the jury. First, the court failed to hold an adequate *Phillips* [48] hearing to determine whether there was sufficient evidence to find the essential elements of that crime beyond a reasonable doubt, and the evidence adduced at that truncated hearing was insufficient to establish the commission of an actual crime. Second, even if evidence of the alleged crime was properly admitted, the evidence before the jury was legally insufficient for the jury to have found beyond a reasonable doubt that appellant committed the crime. Third, the court erred in admitting statements appellant made in a during a deposition taken related to a civil action. Although defense counsel objected to the deposition evidence, he was ineffective for having done so on the wrong grounds. Fourth, the prosecution expert was permitted to testify beyond the scope of his expertise. Fifth, the court erred in precluding the defense expert from testifying areas within his expertise. And, finally, the court failed to properly instruct the jury with regard to the aggravator.

This evidence was untrustworthy and unreliable, and was inadmissible under the California death penalty statute. It was also inflammatory, and exceedingly and unduly prejudicial.

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[48] *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn.25.

B. Procedural History

In 1993, appellant's 13-month-old daughter Alicia choked on a portion of a pacifier while napping in her crib. Paramedic and fire personnel efforts to revive the baby failed and she was pronounced dead. Thereafter, appellant and her then husband, Tom Fuller, sued Gerber, the manufacturer of the pacifier for wrongful death. At the time of the incident, Gerber had issued a recall for the type of pacifier on which Alicia had choked. The lawsuit was settled out of court. Neither appellant nor her husband were ever charged with any crimes in connection with Alicia's death. [49]

On March 13, 2002, the prosecutor informed the trial court that based upon a follow-up investigation in the death of Alicia, he intended to resubmit the case to the penalty committee for reevaluation of their decision not to seek death. (RT 53.) 50 [51]

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[49] Record cites and complete facts are set out in the argument below, as relevant.
[50] Death previously had been taken off the table on November 6, 2001. (CT 186.)
[51] Initially, the prosecutor represented that he had two boxes of material which he would not copy, but invited defense counsel to look at. Defense counsel did object to the failure of the prosecutor to provide discovery and did not file a formal discovery motion to obtain the materials. (RT 56.) Later, the prosecutor advised the court and counsel that he had retrieved the entire litigation file from Gerber. Once again he advised defense counsel that he would not copy the entire file, but would will make it available for counsel's review. Once again, defense

The prosecutor's Notice in Aggravation, which included "the defendant's murder of her daughter, Alicia Fuller, on or about September 18, 1993" was filed on July 23, 2002. (CT 218-219.)

On August 29, 2003 – more than one year after it had been noticed as an aggravator and only a month before trial began --defense counsel requested a preliminary examination on the unadjudicated Alicia Fuller murder aggravator. The court agreed to hold a hearing of an unspecified type at which only the prosecution expert would be called to testify before he testified in front of the jury. (RT 448-458, 493-505; CT 218-219.)

Jury selection began in the case on September 29, 2003. (CT 493-505.)

Penalty phase opening statements and evidence commenced on October 31, 2003. With the exception of one defense witness who was called out of order, the prosecution presented its penalty phase evidence through November 7, 2003, including the aggravating evidence regarding the death of appellant's child. The defense concluded its penalty phase presentation on November 10, 2003. The jury returned a death verdict after deliberating 2 ½ hrs that same day. (CT 875, 968-972, 995.)

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counsel did not object to the prosecutor's failure to provide complete discovery and did not file a formal discovery motion to obtain the materials. (RT 119.)

C. Trial Court Errors

1. The court failed to hold an adequate *Phillips* hearing to determine whether there was sufficient evidence to find the essential elements of that crime beyond a reasonable doubt, and the evidence adduced at that truncated hearing was insufficient to establish the commission of an actual crime.

A week before jury selection began, on September 19, 2003, California Institute of Technology, Dr. Wolfgang Knauss, who was a professor of aeronautics and applied mechanics, was called by the prosecutor. (RT 560-561.) The trial court characterized the purpose of the pretrial hearing as "to determine the admissibility of the evidence with regard to the death of Ms. Rodriguez' child, and more specifically the structure of that pacifier that apparently caused the death." (RT 560.) Knauss was the only witness to testify at this hearing. Counsel stipulated, for the purpose of this hearing, that Knauss was an expert on the failure of viscous materials including rubber. (RT 560-562.)

In 1994 Knauss was contacted by civil attorney, Barry Novak. Novak represented appellant and her then husband Tom Fuller as plaintiffs in a civil case against Gerber. (RT 565.) Novak sent Knauss the pacifier that had failed. Knauss examined the pacifier and took pictures but, did not conduct any tests on it. Knauss prepared an eight-page report on how he thought the pacifier may have failed. (RT 564.) In response to the prosecutor's hypothetical, at the hearing in

appellant's capital trial, Knauss testified that the physical condition of the pacifier was inconsistent with the scenario that a 13-month-old child with two teeth could have cut through the pacifier, based upon the appearance of the fracture surface. (RT 569-571)

Knauss would not have expected the failure to have occurred so closely to the pacifier shield if the failure was caused by biting and sucking action. (RT 572.) Knauss had in his file in court a series of microscopic photographs of the pacifier. (RT 566.) Photo boards People's Exhibits 2 and 3 contained the photographs. Knauss did not have a photograph which showed where the failure occurred. To the best of his recollection it occurred within a millimeter or two of the place where the rubber emanated from his shield or was connected to the shield. (RT 572.)

Although defense counsel objected for lack of foundation when Knauss testified about an infant's use of a pacifier, Knauss was permitted to testify that he concluded the pacifier was not damaged by the sucking of an infant. He based his conclusion primarily on "the roughness and the unevenness of the fracture." (RT 575.)

After pointing to the photographic exhibits Knauss testified:

"This you would not have seen in a sucking kind of failure, and I will use the technical term in a fatigue, which means repeated loading." (RT 575.)

When asked what kind of failure he would expect to see from repeated sucking Knauss responded:

" ... if this was a fatigue type fracture, that crack would have propagated in both directions more or less smooth or would a very small degree of roughness, and on the other side when the fractures come around to the other side, there may have been a step, single step. That's what I would've expected." (RT 575-577.)

Knauss opined that the failure occurred "was due to external trauma, but he could not identify precisely what that might have been, because [he had] no information in that regard." (RT 578.)

"I had thought hard at the time as to how this might occur, especially if it was that close to the shield, and the only thought I could come up with that a hard object like a chair or something like this, not necessarily smooth ran over the nipple and broke it." (RT 579.)

When asked for his experience in examining tools applied to the surface of rubber Knauss responded that his experience was in the intentional destruction of tires where pliers had been used to grip the rubber so it could be cut. (RT 581.)

When asked whether or not the marks he saw were consistent with application of a pliers to the pacifier Knauss first said that it would be consistent and then admitted that he had never seen this kind of application before:

Knauss: I have to say, in all honesty they are not identical to what I have observed in the tire situation, but it's a different rubber, so you wouldn't see the same kind of damage." (RT 582.)

Knauss had never performed tests on or had been asked to examine any other pacifiers. The only other "failed nipple" Knauss had seen was the one his grandson chewed apart when the grandson was four years old. (RT 587.)

As to Alicia's pacifier, Knauss performed no tests and made no "measurements" regarding its degradation related to age. This was so because his instructions from Novak were that he was not to destruct the pacifier in any way. (RT 588.) Knauss acknowledged that the degradation of the pacifier would begin directly after fabrication and that the rate of degradation and failure due to age would be difficult to quantify. (RT 588.)

Back in 1994, Knauss was given the pacifier and asked to determine how it failed. According to Knauss he explored "all possibilities" and concluded the damage was "consistent with someone stepping on it or rolling over it with a hard wheel. (RT 592-593.) He could think of no other scenario. (RT 593.) It was not until he was asked by the prosecution to "consider the possibility of an intentional application of force" that Knauss concluded the damage could be consistent with application of a pair of pliers. (RT 595-596.)

After Knauss finished his testimony, defense counsel argued the evidence was "potentially very prejudicial to the defendant" and "given the testimony of [Knauss], the parameters within the tests were made, it's simply insufficient to go to the jury." (RT 607.) The prosecutor argued that taken as a whole, Knauss's testimony pointed "unequivocally" that the fracture in the pacifier was "caused by the application of external force" which led inescapably to the conclusion that "this thing was taken apart before it was placed in the infant's mouth...." (RT 607.) The trial court ruled the evidence was "sufficient [to] withstand a challenge under Factor B" and although potentially very emotional and very prejudicial, it should be submitted to the jury to evaluate. (RT 608.)

Because the trial court denied appellant's right to a Phillips hearing, error requiring reversal of appellant's death sentence occurred.

Aggravating evidence is limited to evidence that comes within one of the specified factors listed in Penal Code section 190.3. (*People* v. *Boyd* (1985) 38 Cal.3d 762, 773.) Section 190.3, subdivision (b), allows the prosecution to introduce as an aggravating circumstance "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." In order for the prosecution to present "other violent crimes" evidence, an actual crime must

have been committed. In other words, the criminal activity "must amount to an actual violation of a specific penal statute."(*People* v. *Grant* (1988) 45 Cal.3d 829, 850.) Additionally, "there must be sufficient evidence for the trier of fact to determine that the elements of the offense have been proved beyond a reasonable doubt." *(Ibid.)*

The trial court must determine whether the evidence exists by which the jury can make such a finding, before permitting the prosecution to present the other crimes evidence to the jury. *(People* v. *Boyd, supra,* 38 Cal.3d at p. 778; *People* v. *Clair* (1992) 2 Ca1.4th 629, 672-673.)

The importance of this requirement cannot be overstated: "... [U]nder California law the reasonable doubt standard plays a vital role with regard to evidence of unadjudicated offenses offered in aggravation at the penalty phase of a capital trial." *(People* v. *Benson* (1990) 52 Cal.3d 754, 810.) When a jury is going to decide between life and death, the trial court must be extremely careful to ensure that every safeguard is observed to protect defendant's right to a full defense. *(Gardner v. Florida* (1977) 430 U.S. 349,357.) The reasonable doubt standard is required to ensure such reliability. *(People* v. *Balderas* (1985) 41 Cal.3d 144, 205, n. 32.) Because of the importance of meeting the reasonable doubt standard, it is often advisable for the court to "'conduct a preliminary inquiry

before the penalty phase to determine whether there is substantial evidence to prove' the alleged other criminal activity involving force or violence, specifically, the elements of the underlying offense." *(People* v. *Clair, supra,* 2 Cal.4th at p. 673, quoting *People* v. *Phillips* (1985) 41 Cal.3d 29, 72, n. 25.)

Here, the evidence presented was not sufficient to permit a trier of fact to find criminal activity beyond a reasonable doubt.

C.1.a The Court Failed To Apply the Correct Legal Standard in Determining Whether Aggravating Evidence that Alicia's Death was a Homicide Should be Introduced at the Penalty Trial, and The Evidence Before the Court Was Insufficient to Find that the Jury Could Properly Find Beyond A Reasonable Doubt That Alicia's Death Was A Homicide

As noted above, when defense counsel requested a "preliminary examination" on the unadjudicated Alicia Fuller murder aggravator, the court recognized that admission of evidence regarding the child's death would be highly prejudicial if it were not a proper aggravator, but commented that he saw no authority for the proposition that the defense must be given a preliminary examination on an aggravator. (RT 448-449.) Ultimately, the court agreed to hold a preliminary hearing-like hearing at which the prosecution expert would be called to testify before he testified in front of the jury. (RT 450-458.)

> Mr. Houchin: However, death is different. This case is different, and even among death penalty cases this case is going to be different. And I think

irrespective of whatever we may attempt or be able successfully to put on in a penalty phase in this case, I think it is going to fall on deaf ears.... Once that information crosses into the jury box, once they get a taste of this, there is not going to be a burden of proof that is going to be applied to the introduction of that into their penalty phase deliberation. This case is going to be over when they hear that. (RT 450-451.)

The Court: But I don't know what your point is. Obviously an aggravating circumstance, and this falls into category (b), I believe, of crimes of violence or threats of violence. That's the whole purpose of the aggravating circumstances, to show that given the choice, two choices that exist, the maximum penalty should be imposed.
Are you basically suggestion that the court should determine beyond a reasonable doubt that the defendant is guilty of that crime before the evidence is submitted to the jury? (RT 451.)

Mr. Houchin: I think that the court should conduct a hearing to decide if there is even the same burden of proof, had this case been filed by itself, that there would be a burden met at the preliminary examination to get that to the jury....I think simply the fact that it was litigated...that an amount of $700,000 was used to settle the case, and certainly far in excess of nuisance value, I think that's enough information to at least allow the defendant to have a preliminary hearing on that, to see if it even passes mustard [sic] to be used. It doesn't past mustard [sic] at the preliminary examination, my understanding, its not going to be able to be used in a penalty phase....But I think she's entitled to at least an evidentiary hearing to see if there's even enough to get to a jury, to allow this jury to use what could be the most devastating piece of evidence in this case.

The Court: I would agree [with] your – final point, probably would be the most devastating evidence. (RT 452.)

Defense counsel added that an aggravator that appellant murdered her infant daughter would confuse the jury and be "incredibly prejudicial." (RT 459.)

The only evidence offered at the hearing was the testimony of Dr Knauss – an engineer who examined and photographed, but did not test the subject pacifier. After Knauss' testimony, the trial court permitted evidence of appellant's "murder of her daughter Alicia" to come before the jury under Pen. Code §190.3(b) stating:

> Court: I do find the evidence to be sufficient to submit to withstand a challenge under factor (b), I believe it is, of 190.3. The evidence is admissible, and the reason I reviewed this because as Mr. Houchin has indicated, it's potentially very emotional evidence, very prejudicial if it does not sustain challenge, and the initial challenges sufficient here to show that it should be submitted to a jury and let the jury evaluate. (RT 608.)

Because the trial employed an erroneous standard of proof, error requiring reversal of appellant's death sentence occurred.

As this Court has recognized, the purpose of a *Phillips* hearing is to determine whether the prosecution has substantial evidence to support the other-crimes evidence it intends to introduce in aggravation. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.) By comparison, when a preliminary hearing concludes, the magistrate must determine whether enough evidence has been presented to hold the defendant to answer. The magistrate is required to weigh evidence, resolve conflicts, and assess credibility. (*Johnson v. Superior Court* (1975) 15 Cal.3d 248.) It is well settled that the quantum or degree of proof

necessary in the context of a preliminary examination is evidence that would lead a person of ordinary caution or prudence to believe and consciously entertain a strong suspicion of the guilt of the accused. (*People v. Encerti* (1982) 130 Cal.App. 3d 791.)

This standard is significantly lower than the substantial evidence standard required by *Phillips.*

This Court has held that substantial evidence is evidence that reasonably inspires confidence and is of solid value. (*People v. Morris* (1988) 46 Cal.3d 1, 19: *People v. Bassett* (1968) 69 Cal.2d 122, 139.) It is evidence that is reasonable, credible, and of solid value. (*People v. Green* (1980) 27 Cal.3d 1, 55*; People v Rushing* (1989) 209 Cal.App. 3d 618.) For evidence to be substantial it must be of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v. Caldwell* (1984) 36 Cal.3d 210.)

Thus, in order to find that evidence that appellant murdered her infant daughter was proper under Penal Code section 190.3 (b), the trial court had to determine that a reasonable jury could find, by applying the appropriate standard of proof beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21), that all the elements necessary to find appellant guilty of the crime of murder were present.

In the present case, the trial court applied the wrong legal standard in determining admissibility.

The task was not, as the trial court mistakenly believed to " sustain challenge" and "show that it should be submitted to a jury and let the jury evaluate" but rather to insure that extremely prejudicial testimony was not placed before the jury before a determination had been made by the trial court that the facts to be placed at issue in fact constituted a crime and that there is substantial evidence to support the charge. (*People v. Morris, supra*, 46 Cal.3d at p. 19.)

Moreover, the evidence should have been excluded as misleading, cumulative, or unduly prejudicial. (See *People v. Box* (2000) 23 Cal.4th 1153, 1200-1201 [Although a trial court lacks discretion to exclude *all* factor (b) evidence on the ground it is inflammatory or lacking in probative value, it retains its traditional discretion to exclude specific evidence if it is misleading, cumulative, or unduly prejudicial.

For those reasons reversal is required.

2. Even if evidence of the alleged crime was properly admitted, the evidence before the jury was legally insufficient for the jury to have found beyond a reasonable doubt that appellant committed the crime.

Evidence of Alicia's death was offered at the penalty phase only.

On September 18, 1990, Santa Barbara County Deputy Sheriff Ralph Ginter was assigned to the Lompoc substation as a patrol sergeant. Shortly before noon Ginter and his partner Ted Teote were dispatched to appellant's home at 3912 Mesa Circle in the City of Lompoc. The officers arrived on the scene within three or four minutes. The fire department was there on the officers' arrival. When Ginter entered the residence he observed that fire personnel had taken a baby out of its crib. There was a plastic backing of a pacifier was lying in the crib. Ginter took the pacifier with him to the hospital and eventually released it to appellant. According to Ginter appellant was adamant about getting the pacifier back because she did not want this to happen to another child. According to his report, the nipple portion was left on the bedroom floor. Ginter escorted appellant to another room. (RT 2819-2820, 2828, 2831-2833.)

Fire department personnel attempted to resuscitate the baby. An ambulance arrived at the scene to continue resuscitation efforts and the child was transported to Lompoc Hospital. The deputies transported appellant to the hospital. (RT 2826.) Because the ambulance carrying Alicia had broken down Ginter and appellant arrived at the hospital first. (RT 2827-2838.)

On September 18, 1990, Santa Barbara County fire engineer David Mandeville responded to an emergency dispatch to appellant's home. He and his fellow firefighters were the first to arrive at the scene. When they arrived appellant was outside. Mandeville thought that was odd because "normally I guess all other calls where a child or infant is choking, the parents are with the child." When the firefighters arrived appellant was outside waving her arms.[52] Mandeville and Captain Hoard entered the home. Captain Hoard escorted appellant into the living room and Mandeville went down the hallway to where the baby was. The baby was in a crib, lying on her back and not responsive. When he attempted mouth-to-mouth resuscitation he could feel an obstruction. He found a piece of pliable plastic in her throat, and popped it out. The plastic was approximately half the length of his little finger down her throat. (RT 2840-2846.)

The pacifier nipple fell to the floor. Mandeville started chest compressions. Within a couple of minutes the county fire department paramedics arrived at the scene. Mandeville drove with the baby and the paramedics to the hospital. In route, the ambulance broke down. The paramedics intubated the baby and

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[52] Appellant explained that her reason for doing so was that all the buildings looked the same and she wanted the fire department to find the right one. (RT 4004-4005 [motion for a new trial].)

continued CPR until a replacement ambulance arrived approximately 10 minutes later and took them to the hospital. At the hospital, the baby was taken into the emergency room. (RT 2847-2852.)

The parties stipulated at that appellant and her husband Tom Fuller delivered the pacifier consisting of the nipple and the backing to Richard Brenneman an attorney at law in Santa Maria. Mr. Novak, a lawyer that appellant and her husband hired, filed a lawsuit and obtained a settlement from Gerber. (RT 2855-2856.)

On September 20, 1993, Santa Barbara County Deputy Sheriff Claude contacted appellant and her husband Tom Fuller to obtain the pacifier so that it could be photographed. Mr. Fuller indicated to the deputy that the pacifier had been given to his attorney. Tuller made arrangements with Brenneman to pick up the pacifier. Tuller took the pacifier to the sheriff's substation in Santa Maria and had it photographed. After having the pacifier photographed, Tuller returned both pieces to Brenneman's office. (RT 2858-2864.)

On September 20, 1993, then Deputy Medical Examiner for Santa Barbara County, Wallace Carroll, determined the cause of death to be asphyxiation due to airway obstruction. At the time of her death, Alicia had two lower front teeth. (RT 2865-2869, 2874.)

In late 1993 or early 1994, Barry Novak, an attorney specializing in handling of major injury wrongful death matters on behalf of victims was contacted by appellant and her husband, Tom Fuller, regarding the death of their 13-month-old child, Alicia Fuller. The basis of the lawsuit was that the infant's death was due to the failure of a Gerber pacifier that had blocked the child's airway. The agreement reached between Novak and the Fuller's was for costs and 40% awarded to Novak and the remaining settlement awarded to the Fullers. (RT 2913-2916.)

Novak testified that the pacifier was in two pieces. Novak sent the nipple and backing plate to Dr. Wolfgang Knauss, to have it examined. At the time Dr. Knauss was affiliated with Caltech University in Pasadena. Dr. Knauss was instructed not to perform any tests which may involve destruction of any part of the pacifier. Novak received a written report which included photographs from Dr. Knauss. (RT 2916-2920.)

After receiving the pacifier pieces and the report back from Dr. Knauss, Novak contacted Dr. Gary Hamed who was then associated with the University of Akron. Novak sent Dr. Hamed the pacifier pieces and exemplar Gerber pacifiers he purchased from stores. Dr. Hamed was directed to determine, in their pristine state, what amount of force it would take to separate the nipple from the plastic

pieces and to further analyze the broken pacifier nipple to see if he could determine a location that might have been an initiating stress or weakness point. (RT 2920-2922.) [53]

California Institute of Technology professor Wolfgang Knauss testified that he taught classes and researched the failure and fracture of polymers. (RT 2947-2948.) In 1994, Knauss was contacted by attorney Barry Novak and asked to analyze a pacifier to see whether he could ascertain how it had broken. Knauss received two pieces of the pacifier. Knauss observed that part of the rubber nipple was still left in the shield. After he examined the pacifier pieces they were returned to the attorney. Knauss photographed at the pacifier and prepared a report with his findings. (RT 2951-2956; Exhibits 43, 46, 50A, 50B.)

According to Knauss, the damage he observed on the pacifier was not consistent with a child chewing through it and also not consistent with a baby sucking the pacifier apart. (RT2958-2959.) According to Knauss, there was "no way in which [the damage] can all occur as one process of a fatigue or of a repeat pulling action." Also, the fracture was not, in Knauss' opinion, consistent with some kind of small crack or tear in the nipple which may have been inadvertent and was exacerbated by the child's sucking action. (RT 2962.) According to

[53] Novak was a prosecution witness.

Knauss, the nipple failed because of some external trauma or application of a tool. "Well, there was some kind of a tool or some kind of a device that imprinted itself, did damage to the rubber with great force locally and left these fractures behind." (RT 2963-2964.) Knauss could not reconstruct what forces would generate the fracture. He admitted that in his report he speculated that something may have rolled over it (RT 2964-2965.) [54]The prosecutor established that Knauss' initial efforts to explain how the nipple had failed were made without being given information that the incident might have been based on an intentional act. If he factored in that the failure could have been intentionally made, Knauss' opinion was that the damage is consistent with the use of pliers. (RT 2969.)

The defense called Gary Hamed, who had tested the pacifier at the time of the lawsuit. Hamed was a specialist in the fracture of natural rubber. According to Hamed "maybe a handful of people... work principally with natural rubber." (RT 3183-3184.)

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[54] Trial counsel did not impeach Knauss with his earlier testimony that a chair may have damaged the pacifier and that until he was told by the prosecution to consider an intentional act may have degraded the pacifier, he never posited application by a tool and had no basis to conclude it could have been pliers.

Hamed tested the nipple that led to the death of Alicia Fuller. Hamed was given the pacifier which Alicia choked on as well as exemplar pacifiers by attorney Barry Novak. Hamed conducted what were called "tensile tests," which were tests in which the sample was pulled apart and the strength and elongation it took before failure was measured. Hamed's tests caused failures in the pacifier samples. This occurred by the growth of a crack. Hamed also tested a couple of exemplars by grabbing the nipple with a pliers-like device that clamped onto the nipple and then pulled. In this case what happened was the nipple pulled away from the face shield. According to Hamed, "the nipple stayed all in one piece" and extruded through the hole that was holding it in the pacifier face shield. This test did not cause any cracking in the face shield itself. (RT 3190-3192.)

Referring to defendant's Exhibit D., a "dumbbell" or "dog bone specimen" diagram, Hamed explained that a test specimen was cut out of a sheet of rubber which was used to measure the strength of rubber. The rubber was grabbed from both ends and pulled apart. One of the purposes of this test was to determine the effects of cuts on the strength of rubber. Hamed explained that the specimen was tested first without cuts and then cuts of different sizes are introduced to the specimen to determine how the strength changed as the cut was introduced.

There was a marked decrease in the strength as the cut size grew. (RT 3192-3194.)

Hamed also compared the strength of the rubber that was in the exemplar nipple to the strength of the rubber in the nipple that had failed and caused Alicia's death. It was determined that its strength was significantly less than the exemplars. It was also noted that there was discoloration which was consistent with degradation. Hamed explained that a darkening of the nipple was consistent with oxidation of the sample. Moreover the sample nipple that resulted in Alicia death was consistent for an absence of sufficient anti-degradant. Based on the tensile tests performed on both the exemplar pacifiers and the pacifier that caused the baby's death, the tensile strength of the accident pacifier was less than that of the exemplar pacifiers. (RT 3203-3219.)

In other words" the rubber was certainly weaker than would be expected." (RT 3198-3199.)

Hamed testified that he was familiar with prosecution expert Dr. Knauss. Hamed explained that the series of photographs taken by Knauss' office represented a cracked pattern or the contour of the cracked path which Hamed explained was "very reminiscent of the way natural rubber fractures in either a fatiguing or a catastrophic mode." (RT 3200.) Unlike the opinions given by

Knauss, during his analysis of the pacifier, Hamed did not see anything consistent with the surface trauma testified to by Knauss. Neither would Hamed testify that the fracture line he saw would necessarily have been caused by torsion or a twisting action. (RT 3202.)

Hamed repeatedly reminded the prosecutor that the samples that were tested did not have cuts on them. On samples that were cut, as the cut got larger the sample got weaker. (RT 3220-3222.) With cut exemplar pieces considerably less stress was required for it to break. Hamed could not offer any opinion as to the pounds per square inch than a baby would exert on a pacifier by sucking on it. Hamed did offer an opinion that the sucking action of an infant would be insufficient to cause the failure in the pacifier without the presence of a cut. (RT 3240-3241.)

Hamed identified an initial fracture site in Alicia's pacifier. His opinion was that "once a cut was initiated, complete fracture of the baglet could have occurred by incremental fatigue crack growth under the stresses exerted by a baby under normal use." (RT 3231, 3232, 3235-3237, 3239.)

The damage to the nipple observed by Hamed could have resulted from being stepped on or run over by something round such as a round wheel. In Hamed's opinion, the pacifier probably shouldn't have failed unless it had been

degraded in some way. Hamed testified that it was possible that an adult could have intentionally caused initial fracture through the use of some tool or scissors or rolling the pacifier under a hard object and then stretched it back and forth until it broke into two pieces. (RT 3215, 3248.)

Appellant's ex-husband Thomas Fuller was called by the prosecution at the penalty phase. Appellant and Fuller were married on March 15, 1990. The marriage lasted for just over four years. Appellant and Fuller had two children; Autumn, who was born on November 25, 1990, and Alicia who was born on August 7, 1992. Alicia had been born prematurely and had episodes with apnea and bradycardia. Alicia spent a couple of months in neonatal intensive care and was not sent home until those episodes had stopped. Although Alicia's health improved as she got older, she required regular care by doctors. (RT 3026-3029, 3037-3038, 3047.)

On the day Alicia died, Fuller was in San Diego on business. He was informed by an officer from the San Diego Police Department that there was an emergency involving his daughter. He called a sergeant in the Santa Barbara County Sheriff's Department and then went home. At the time of Alicia's death, Fuller had no suspicions that his wife had been involved. Both Fuller and

appellant sought counseling after Alicia's death. Appellant's sessions continued longer than Fuller's. (RT 3029-3031, 3048.)

Appellant and Fuller decided to sue Gerber. At first they hired an attorney named Brenneman, but after deciding he may not be right for taking on such a big company, they hired Barry Novak. The lawsuit was eventually settled for $710,000. The largest portion went to Barry Novak. The remaining settlement was divided 60/40 between appellant and Fuller respectively. At the time of the settlement appellant and Fuller had already divorced. According to Fuller the two arrived at the 60/40 split after appellant told him she was entitled to more money because she was the one who found the daughter dead in the crib. (RT 3031-3033.)

Prior to Alicia's death, Fuller was unaware that appellant had obtained a $50,000 life insurance policy for Alicia. Fuller learned about the policy approximately a month after the child's death when appellant brought up the fact that it had lapsed and she was going to try to get it reinstated. The proceeds from the insurance policy were used for a down payment on a house which Fuller continued to live in after the divorce. Eventually, Fuller could not sell the house and it was repossessed by the bank. (RT 3033, 3055-3057.)

Fuller recalled an incident some months prior to Alicia's death when the family was visiting family in Michigan for Alicia's baptism. While eating at a restaurant a customer walked by and told the family that she thought that the pacifier Alicia was using was part of a recall. Because they did not know whether the customer knew what she was talking about, Alicia continued to use the pacifier. Because Alicia seem to prefer the Gerber pacifier, that was the type they always purchased. (RT 3036-3038, 3046, 3052-3053.)

The prosecutor elicited that six months to a year after Alicia died appellant was interviewed by a local news station. When asked to describe whether he noticed anything unusual or what he would consider to be inappropriate about her behavior during the interview Fuller responded: "Well, I do remember that she seemed to have a little smile on her face every once in awhile, and she just seemed to enjoy the attention." (RT 3042-3044.) [55] [56]

Prudential financial operations and control manager, Craig Biggs, identified a life insurance policy which insured Alicia Fuller. Appellant was the owner/applicant of the policy as well as the agent who sold the policy. Appellant was also named the primary beneficiary. Ana Fuller, Alicia's grandmother and Autumn Fuller, Alicia's sister, were named as secondary beneficiaries. The policy

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[55] Defense counsel's objection as nonresponsive was overruled. (RT 3042-3044.)

[56] See Argument VII re: Improper Demeanor Testimony.

was issued on July 8, 1993 for the amount of $50,000. This type of policy was typically sold as an investment for future needs such as college. The policy was paid approximately one month after Alicia's death. (RT 2929-2945-2946; Peo. Exh. 48.)

According to Detective Steinwand, the report of Dr. Knauss was seized pursuant to a search warrant in the capital case . (RT 3077.) Steinwand had been aware that appellant's younger daughter had died. After seeing the report Steinwand contacted the sheriff's department in Santa Barbara County and Gerber seeking any reports and other information. At some point during the investigation Steinwand interviewed Dr. Knauss. Eventually all of the information Steinwand had accumulated during his investigation of Alicia's death was forwarded to the Santa Barbara Sheriff's Department. (RT 3078-3079.)

Portions of appellant's February 19, 1996 deposition, taken in the case of Fuller versus Gerber, was read to the jury. (RT 3541.) At her deposition, when asked when she last checked the pacifier, appellant stated her best estimate it would have been the day it came to her house after it had been at her friend's house for a few months. (RT 3543.) Appellant checked the pacifier to make sure it wasn't sticky, overused, and dirty, was intact and there were no cracks or evidence of wear. Regarding the shield and the button appellant said she looked

at it and touched it to make sure it wasn't loose. (RT 3544.) Appellant always checked the pacifier before she gave it to Alicia. She would rinse it off every time and look at it to see that it was intact; although she might not check it in detail each time, she always looked at it before she gave it to her child. She did not always pull on it. At no time did appellant observe that it was "less than intact." (RT 3547-3549.)

According to her deposition testimony, on the day that Alicia died, at about 10:15 a.m., after appellant fed the children breakfast, Alicia appeared sleepy. She usually laid down for a nap at 10:30 or 11:00 a.m., so appellant put her down on her stomach in her crib in appellant's bedroom and gave her the pacifier. Alicia usually went to sleep with a pacifier.

At approximately 10:30 a.m. appellant went in to look in on Alicia and make sure she was sleeping, which she was. Appellant could hear her breathing. Because Alicia had a little bit of a runny nose, she had been on a decongestant for a couple of days. Appellant had given her a dose early that morning. When appellant checked on Alicia at 10:30, she still had the pacifier in her mouth. Appellant left the room and continued to play with Autumn. Sometime between 11:00 a.m. and 11:30 a.m. appellant returned to check on the baby. At this time appellant noticed that she was not moving and she did not hear her breathing.

According to the deposition testimony, she looked "really different" and her color was pale blue. Her eyes were partially open. When appellant touched her, the baby was cold and clammy. Appellant knew right away that she needed help. She ran for the phone and called 911. Until they arrived, appellant was on the phone the entire time. When she returned to the bedroom, she noticed the broken part of the pacifier. Although appellant had taken an infancy care class at the hospital, she did not administer CPR. According to deposition testimony, appellant stated, "I tried to take it out, but I think I was too frantic and didn't pick her up right." Appellant recalled the fire department arriving first. They pushed her out of the way and began to ask questions; they brought her into the living room but she could hear everything that was going on in the bedroom. (RT 3558-3576.)

The parties stipulated "the pacifier recall mentioned in the testimony of Dr. Wolfgang Knauss and Tom Fuller was voluntarily initiated by the Gerber Co. in March of 1993 based upon five consumer reports that the subject pacifiers had separated into three pieces. The three pieces were the pacifier shield, the shield end cap, and the rubber baglet. At the time of the recall, no injuries or chokings to infants had been reported." (RT 3576.)

Gigi Colaiacovo, appellant's sister visited appellant from New York approximately every three months before Alicia's death. The last time she visited was approximately one month before Alicia died. Colaiacovo described appellant as a great mother. She testified that appellant gave the baby great care and always loved her kids. On the day Alicia died, appellant called Colaiacovo from the hospital. She was hysterical and crying. Colaiacovo had received many phone calls from appellant reporting that Alicia was sick but she couldn't believe it when appellant told her that the baby had suffocated on a pacifier. Appellant was inconsolable. Colaiacovo returned to California for the baby's funeral (RT 3585-3586.)

When a claim of insufficiency of evidence is raised on appeal, the appellate court must determine whether there was substantial evidence from which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant committed the crime charged beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781]; *People v. Johnson* (1980) 26 Cal.3d 557,576.) In making this determination, the appellate court must view the evidence in the light most favorable to respondent. (*People v. Mosher* (1969) 1 Cal.3d 379,395; *People v. Reilly* (1970) 3 Cal.3d 421,425.) However, the court may not limit its review to the

evidence favorable to the respondent, but must consider all of the evidence that must have been rejected by the trier of fact to support the judgment. (*People v. Redmond* (1969) 71 Cal.2d 745, 755-756.)

Accordingly, in determining whether the record is sufficient, the appellate court can give credit only to "substantial" evidence (i.e., evidence that reasonably inspires confidence and is "of solid value"). (*People v. Redmond, supra*, 71 Cal.2d at 755-756.) Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient. Suspicion is not evidence; it merely raises a possibility, and is not a sufficient basis for inference of a fact. (*People v. Raley* (1992) 2 Cal.4th 870, 889-891.) A reasonable inference may not be based on suspicion alone, or on imagination, speculation, surmise, conjecture, or guess work, but must be drawn from the evidence. (*People v. Raley, supra*, 2 Cal.4th at 889-891; *People v. Morris* (1988) 46 Cal.3d 1, 21.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the Supreme Court said that "generally first degree murder convictions are affirmed when (1) there is evidence of planning, motive, and a method of killing that tends to establish a preconceived design; (2) extremely strong evidence of planning; or (3) evidence of motive in conjunction with either planning or a method of killing that indicates a preconceived design to kill." (*People v. Mincey* (1992) 2 Cal.4th 408, 434-435.)

These factors are not the exclusive means, however, to establish premeditation and deliberation; for instance, "an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127.)

In viewing the evidence in the light most favorable to the prosecution, few assertions were supported by substantial evidence. While there was evidence that Alicia's death was caused by choking on a portion of a pacifier nipple which had separated from the base of the nipple, the cause of the damage to the nipple as having been intentionally caused by appellant was not established by evidence sufficient to support a conviction by the standard of beyond a reasonable doubt. Certainly, no evidence supported the prosecution's theory that appellant put a portion of the pacifier down Alicia's throat. Moreover, there was not even evidence to support a finding that appellant intentionally caused damage to the pacifier so that it might fail – a theory not advanced by the prosecution.

The court and the prosecutor seemed to be of the mind that there were only two possible explanations for the failure of the pacifier – either it failed as other recalled Gerber pacifiers or it was intentionally pulled apart by appellant with pliers, and a portion shoved down Alicia's throat – also by appellant.

However, a multitude of scenarios were possible. The pacifier may have failed due to a manufacturing defect or normal wear and tear. It may have been subjected to negligent treatment such as being rolled over by a chair. By all accounts, there was no evidence that the damage to the pacifier was the result of a criminal act committed by appellant. Although the experts agreed that the pacifier could not come apart by the sucking of a child it was not Knauss's opinion that the damage was criminal rather than negligent and necessarily committed by appellant.

In the instant case there was no direct evidence that as theorized by the prosecution, appellant intentionally destroyed Alicia's pacifier and put a portion of it down her throat. There was no medical evidence that Alicia suffered any bruising or other injury. There was no eyewitness testimony and no confession. There was no contemporaneous examination of the pacifier. Standing alone, without the capital crime of which appellant had been convicted, no reasonable jury could have found appellant guilty of intentional murder based solely on the evidence in that case alone.

As for the scientific evidence, both party's experts agreed that the pacifier Alicia choked on was degraded in some way. The defense expert's testing demonstrated the rubber of Alicia's pacifier was not as strong as the rubber in

exemplars he purchased for comparison. The experts agreed that in a pristine condition the pacifier would not have failed by the sucking or biting action of an infant. However, no expert testified that the degradation did not come from a manufacturing flaw or use over time. No expert testified that the degradation could not have come from normal wear and tear or accidental degradation such as having been rolled over with a chair or having been stepped on by the heel of a shoe. In fact, the pacifier could have failed due to being old. (RT 3000.)

3. The court erred in admitting statements appellant made in a during a deposition taken related to a civil action. Although defense counsel objected to the deposition evidence, he was ineffective for having done so on the wrong grounds.

On November 6, 2003, in the middle of appellant's penalty phase, the prosecutor advised court and counsel that it intended to offer portions of the transcript of appellant's February 19, 1996 deposition given in the case of Fuller versus Gerber Products Company. The prosecutor's intention was to highlight three sections of appellant's deposition, all of which had to do with appellant's comments regarding checking the pacifier. (RT 3478.)

Defense counsel objected to the introduction of the deposition testimony on the grounds of dissimilarity of parties, that it was a civil action, and that there was "dissimilarity of intent from both parties." (RT 3529-3531.)

The court responded that because the deposition was prior recorded testimony it was not otherwise excludable. In response the prosecutor clarified that the deposition was not being offered as prior testimony but as an admission, thus alleviating the requirement of alignment of parties. The court overruled defense counsel's objection. (RT 3531.)

Appellant's deposition was offered in a question/answer format, with the prosecutor asking the questions asked of appellant during the deposition and a paralegal responding as appellant responded. (RT 3541.) [57]

The trial testimony included appellant's statements that she would check the pacifier to make sure it wasn't sticky, overused, and dirty, was intact and there were no cracks or evidence of wear. Appellant would she looked at it and touched it to make sure it wasn't loose. (RT 3544.) Appellant always checked the pacifier before she gave it to Alicia; although she might not check it in detail each time. At no time did appellant observe that it was "less than intact." (RT 3547-3549.)

On the day that Alicia died, at about 10:15 a.m., appellant laid Alicia down with her pacifier for a nap. Alicia usually went to sleep with a pacifier.

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[57] Defense counsel stipulated to foundational issues that the transcript was in fact an accurate deposition transcript of appellant's 2/19/96 deposition in the litigation of Fuller versus Gerber Products Company. (RT 3532, 3541.)

At approximately 10:30 a.m. appellant went in to look in on Alicia who was sleeping. She still had the pacifier in her mouth. Because Alicia had a little bit of a runny nose, she had been on a decongestant for a couple of days. Sometime between 11:00 a.m. and 11:30 a.m. appellant returned to check on the baby. At this time appellant noticed that she was not moving and she did not hear her breathing. According to the deposition testimony, she looked "really different" and her color was pale blue. Her eyes were partially open. When appellant touched her, the baby was cold and clammy. Appellant knew right away that she needed help. She ran for the phone and called 911. Until they arrived, appellant was on the phone the entire time.

When she returned to the bedroom, she noticed the broken part of the pacifier. Although appellant had taken an infancy care class at the hospital, because she was frantic, she did not administer CPR. Appellant recalled the fire department arriving first. They pushed her out of the way and began to ask questions; they brought her into the living room but she could hear everything that was going on in the bedroom. (RT 3558-3576.)

3a. Appellant's deposition testimony was not admissible as an admission.

Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party ...." An "admission" is defined as an "extrajudicial recital of facts by the defendant that tends to establish his guilt when considered with the remaining evidence in the case," (*People v. Brackett* (1991) 229 Cal.App.3d 13, 19; accord, *People v. Mendoza* (1987) 192 Cal.App.3d 667,675-676.) Not amounting to a confession, which is a complete admission of culpability, an admission is an acknowledgment of some lesser fact that tends to prove culpability. An admission must be offered against the party. (Evid. Code section 1220.)

Appellant contends that that the statements made during her deposition were not "admissions." [58]

The portions of appellant's deposition read to the jury are set out at RT 3542-3576 and discussed above. At no time during appellant's deposition does she make any statement which could remotely be considered an admission that she intentionally tampered with the pacifier in such a way so as to cause or

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[58] Although defense counsel did not to object on these grounds, he was unquestionably trying to have the testimony excluded, thus there could be no reasonable tactical purpose for failing to assert proper grounds for the objection. Thus, failure to assert those grounds would constitute ineffective assistance of counsel.

facilitate Alicia's death by choking – let alone qualify as admissions to the very intentional act of putting the nipple down Alicia's throat as claimed by the prosecutor. Neither do appellant's deposition statements rise to the level of negligent treatment of the pacifier. To the contrary, appellant explained that she checked the pacifier frequently and generally explained what happened the day Alicia died.

The prosecutor told the jury that appellant's deposition statements were lies. In other words self-serving statements as opposed to statements admitting some culpability. Appellant maintains that by acknowledging appellant's deposition statements reflected innocent behavior rather than guilty behavior, the prosecutor conceded her deposition statements did not qualify as admissions.

The prosecutor's penalty argument was that appellant intentionally shoved a portion of the pacifier down Alicia's throat.

> "Alicia Fuller, a pacifier nipple shoved down their throat, dying suddenly, unexpectedly." (RT 3735.)

The prosecutor argued that appellant had prior knowledge of the defective nature of the pacifier, and that she took advantage of an opportunity when

Alicia's father was out of town, to both make money and "bring [herself] back as the center of attention. (RT 3760-3761.) [59]

> "She got it wrong, ladies and gentlemen. She heard about the recall and she figured cha-ching, that is my way to get some cash. But what the problem was, didn't know all the facts of the recall and that the recall that Gerber was involved in had absolutely nothing to do with the pacifier nipple tearing out of a pacifier." (RT 3762.)

The prosecutor took appellant's comments, which in no way were admissions of any involvement in the death and characterized them as lies so that he could bolster his character assassination of appellant.

> "She lied in her deposition because that's what she felt she had to do to show herself to be the grieving mother, the mother that valiantly tried to save her daughter's life." (RT 3763.)

As the deposition testimony contained no admissions and the obvious intent of the prosecutor was to use the testimony to demonstrate appellant was a liar, admission of the deposition as containing "admissions" by appellant was error.

3b. Appellant's deposition testimony was not admissible to show consciousness of guilt and the jury was not properly instructed

A party's false statement may be admitted in a civil or criminal case not to prove the truth of the matter stated, but to show consciousness of guilt. (People

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[59] See Argument VII re: the inappropriate admission of demeanor testimony.

v. Kimble (1988) 44 Cal.3d 480, 498.) However, this was not the basis argued by the prosecution for the deposition to be admitted.

Assuming arguendo, appellant's deposition testimony was admissible to show consciousness of guilt, because the trial court failed to so instruct the jury, prejudicial error was committed.

A trial court has a *sua sponte* duty to instruct on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885; see also *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [credibility of witnesses]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [circumstantial evidence]; *People v. Reeder* (1976) 65 Cal.App.3d 235, 24l [expert testimony].)) "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.]" (*People v. Putnam* (1942) 20 Cal.2d 885, 890.)

Adequate instructions are especially important at the penalty phase of a capital case, where a heightened degree of reliability is required. (*Walton v. Arizona* (1990) 497 U.S. 639, 653; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) It is essential that capital sentencing "be reliable, accurate, and nonarbitrary. [Citations.]" (*Saffle v. Parks* (1990) 494 U.S. 484, 493.)

Penalty phase instructions were discussed by the court and parties at various times during the penalty phase. (See RT 3526, 3614-3616, 3722-3723.)

When asked whether he had any special instructions or "anything new or different about instructions" defense counsel responded that he did not. At no point did any party or the court discuss any instructions referring to appellant's deposition statements. (See too CT 991-992 chart indicating instructions requested modified given, refused, or withdrawn and CT 976, jury told to specifically disregard guilt phase instructions.)

CALJIC 2.03 provides: "If you find that before this trial the defendant made willfully false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination."

This Court recently noted "where...an instruction simply informs the jury that a fact or cluster of facts is not, without more, substantial evidence of guilt under the ordinary legal rules set forth elsewhere in the instructions, we have not imposed a duty on trial courts to provide such an instruction *sua sponte*. For example, the instructions concerning consciousness of guilt (CALJIC Nos. 2.03, 2.04, 2.05, and 2.06) [60] recite that such evidence is not sufficient by itself to prove

[60] None of these instructions were given at the penalty phase. (CT 989-992.)

guilt, this Court has not specifically held that the trial court has a *sua sponte* duty to instruct the jury accordingly. (See Judicial Council of Cal. Crim. Jury Instns. (Fall 2007) Bench Notes to CALCRIM No. 371 ['No authority imposes a duty to give this instruction sua sponte'])" (*People v. Najera* (2008) 43 Cal.4th 1132, 1139.)

However, referring to *People v. Atwood* (1963) 223 Cal.App.2d 316, 334, where the appellate court found that the trial court had a *sua sponte* duty to instruct on adoptive admissions and false statements indicating a consciousness of guilt, this Court agreed that depending on the particular evidentiary circumstances of the case a s*ua sponte* duty to instruct might exist.

Appellant maintains this is just that sort of case.

In discussing 2.03 as well as other "consciousness-of-guilt" instructions in *People v. Jackson* (1996) 13 Cal.4th 1164, this Court observed: [i]n the present case, each of the four instructions [CALJIC Nos. 2.03, 2.04, 2.06, 2.54] made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, *while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to*

circumspection regarding evidence that might otherwise be considered decisively inculpatory. (*Id.*, at p. 1224, emphasis added.)

In not giving the cautionary instruction, appellant's penalty phase jury had no guidance on how to evaluate appellant's deposition statements other than that given to it by the prosecutor who argued appellant's deposition statements demonstrated she was a liar and murdered her infant daughter for money and attention. The trial court's failure to instruct the jury as to the law applicable to appellant's deposition statements at the penalty phase left the jury without essential guidance regarding the standards they should use in evaluating that evidence. Such a cavalier approach to jury instruction at the penalty phase of a capital trial cannot be squared with the Eighth Amendment. As a result, appellant was denied her right to an accurate and reliable jury determination of her punishment (U.S. Const., 6th & 14th Amends.; Cal.Const., art. I, § 16), her right to a fair and reliable penalty determination (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17), and her right to due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15).

4. Before the jury and at the pre-penalty phase hearing, the prosecution expert was permitted to testify beyond the scope of his expertise.

The only testimony that the damage was caused by the intentional act of

applying pliers to the pacifier came from Knauss, who did not test the pacifier; had never conducted tests on other pacifiers, and whose only other experience with a broken pacifier came from his 4 year old grandson.

In the instant case, Dr. Knauss offered expert testimony without sufficient foundation, skill, knowledge or training to support said opinions.

For the purpose of the pretrial hearing to determine the admissibility of evidence of Alicia's death only, trial counsel stipulated that Dr. Knauss was a qualified expert on the failure of viscous materials, including rubber. (RT 563.) Counsel offered objections to Knauss's opinions regarding infant behavior.

At the pretrial hearing, when asked for his experience in examining tools applied to the surface of rubber, Knauss responded that his experience was in the intentional destruction of tires where pliers had been used to grip the rubber so it could be cut. (RT 581.) When asked whether or not the marks he saw on the pacifier were consistent with application of pliers, Knauss first said that it would be consistent and then admitted that he had never seen this kind of application before:

> Knauss: I have to say, in all honesty they are not identical to what I have observed in the tire situation, but it's a different rubber, so you wouldn't see the same kind of damage." (RT 582.)

At the pretrial hearing, when asked about the relation of the fracture to the shield Knauss responded:

> "I would not have expected -- well, there are two reasons. Having had grandchildren recently, I am -- I am familiar with the fact that for a baby of that age to chew into a nipple -- I've neither observed and found it very hard to believe. Apart from that, the fact that this rupture occurred so close to the shield would have to imply that the biting was done at precisely the time when the baby was also sucking because the shield would have to be sucked in very close toward the teeth so that the teeth can make an incision where it occurred." (RT 573.)

Defense counsel's objection to this answer on grounds of lack of foundation was sustained. However, when the prosecutor sought Knauss' opinion as to where Knauss would expect an infant's teeth to come into contact with the pacifier, defense counsel's objection for lack of foundation was overruled. (RT 574.) Defense counsel continued to object for lack of foundation when Knauss testified talk about an infant's use of a pacifier. The objections were overruled. (RT 575.)

Trial counsel failed to object to Knauss's qualification as an expert on rubber at trial. However, he did object to Knauss's opinions regarding infant behavior.

At trial, Knauss explained that his topic of research was the "failure of fracture of polymers, which included rubbers." (RT 2948.) Knauss' bachelor

degree was in engineering and his master's degree and doctor's degrees were in aeronautics. Knauss wrote his doctorate dissertation on "the failure of rubbers" and taught graduate students on the subject. (RT 2948-2050.) However, Knauss' expertise did not include any work with pacifiers or the material they are made out -- latex natural rubber --. (RT 2980.) Knauss agreed that research and study in latex natural rubber is a specialty which "people who deal with baby nipples would spend a lot of time on that topic." (RT 2981.) Knauss testified that his transition from aeronautics to rubber and analysis involved analyzing rubber used to bind boosters to rockets and the separation of those boosters during rocket flight. (RT 2950-2951.) Appellant submits this is a far cry from issues involving latex pacifiers. Knauss admitted he had not done any studies with regard to aging or degradation of latex natural rubber. (RT 3001-3002.)

Although he had no information on the age of the pacifier, or information, such as testified to by appellant at her deposition, that the pacifier had been used by a child previous to Alicia, Knauss rendered the opinion that the subject pacifier was new.

> "I'm deducing from the age of the baby as to what the age of the pacifier might be. It certainly would seem to me less than a year or something like this." (RT 3000.)

Because Alicia was born on August 7, 1992 and died on September 18, 1993, not only was Knauss wrong about the pacifier being new, he was also wrong about it age if it had been purchased when Alicia was born.

Although he gave opinions that the damage caused to the pacifier which Alicia choked on could have been initiated by a tool such as pliers or being run over by a chair, Knauss freely admitted that the only tool mark analysis he had ever conducted was on tires. (RT 2993.) Knauss also agreed that failure's and/or cuts with respect to latex natural rubber do not act or react the same as other materials. (RT 2995-2996.) Knauss did not perform any tests on the pacifier Alicia choked on. (RT 2995.)

Knauss admitted he had not done any studies with regard to aging or degradation of latex natural rubber. (RT 3001-3002.)

At trial, Knauss continued his speculation on what amount of force an infant (recall, Alicia was more than one year old) could exert on a pacifier and went so far as to invite the parties and the jury "to take a nipple and try to bite it off with your front teeth." (2974-2976, 3006.)

Expert testimony is permitted when the subject of the testimony is "sufficiently beyond common experience that the opinion of an expert would

assist the trier of fact."[61] (Evid. Code, § 801, subd. (a).) An expert opinion must satisfy two prerequisites. First, there must be evidence of the witness's special skill, knowledge and training.[62] (Evid. Code, § 720, subd. (a).) Second, there must be a sufficient foundation for the view expressed in testimony. (Evid. Code, § 801, subd. (b).) "'The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement.' " (*People v. Kelly* (1976) 17 Cal.3d 24, 39 , quoting *People v. King* (1968) 266 Cal.App.2d 437, 445.) Evidence Code section 801, subdivision (a) provides expert testimony must be "[r]elated to a subject that is sufficiently beyond common experience that the

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[61] Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; (b) based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

[62] Evidence Code section 720 provides: "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, 'training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony."

opinion of an expert would assist the trier of fact." This Court has interpreted this language to require exclusion of expert opinion "only when it would add nothing at all to the jury's common fund of information ...." (*People v. McDonald* (1984) 37 Cal.3d 351, 367.)

Admission of Knauss's testimony as an Expert on Pacifier Destruction and Infant Use was Prejudicial and Knauss should not have been permitted to testify. His role in the civil litigation was to examine the pacifier to help civil counsel determine whether a law suit against Gerber should follow. But, whether or not the pacifier was defective in the manner covered by the recall was not really the issue. Multiple explanations for the degraded nature of the pacifier existed. The prosecutor employed Knauss not as an expert to which his qualifications applied, but rather to raise an inference that if the pacifier did not break down as recalled pacifiers had – which had never been proven -- appellant must have murdered her daughter.

A trial court's decision on this ground is subject to the abuse of discretion standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 971; *People v. Bloyd* (1987) 43 Cal.3d 333, 357.) A reviewing court will find error concerning a witness's qualifications as an expert if the record shows the witness "clearly lacks" the necessary credentials. *(People v. Farnam* (2002) 28 Cal.4th 107, 162.)

The present case satisfies this standard of review.

The crux of Knauss' pretrial and trial testimony was that the damage seen in the pacifier Alicia choked on could not have been caused by her sucking action...even if the pacifier was degraded in some manner before it was given the child. While Dr. Knauss conceded the damage could have been caused by innocent wear and tear or damage, he seized on the prosecutor's suggestion that it was completely taken apart, probably by a pair of piers, which permitted the prosecutor to argue the scenario that appellant shoved a piece of the pacifier down Alicia's throat.

It is the usual rule that errors in ruling on the admissibility of evidence are matters of state law which only require reversal of the judgment when it is probable that the defendant would have received a more favorable outcome in the absence of the errors. *(People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243].) Although the present case satisfies this demanding standard for reversal, the error is best understood as being of constitutional dimension.

Violations of state evidence rules are of constitutional dimension when the resulting conviction is contrary to federal constitutional norms and render the trial fundamentally unfair. *(Jammal v. Van de Camp* (9th Cir. 1991) 926 F.2d 918, 919.) The error in permitting Dr. Knauss to testify as an expert on pacifier rubber,

when his experience involved no testing or study of such material and his observations of infant behavior based on his having recently become a grandfather, demands reversal of the judgment. The error in qualifying Dr. Knauss as an expert on pacifier materials and failures and the actions of infants supported the prosecutor's otherwise unsupported theory that appellant had intentionally destroyed her child's pacifier and shoved a piece of it down the child's throat for insurance money and attention. If believed by even one juror, a more prejudicial outcome could not be imagined.

5. The court erred in precluding the defense expert from testifying areas within his expertise.

After the prosecutor had given his opening statement at the beginning of the penalty phase, referencing its intent to introduce evidence in aggravation that "like Frank Rodriguez" Alicia Fuller "was murdered by" appellant for money and after he began offering testimony on the aggravator (RT 2805, 2819-2878), the prosecutor requested a hearing out of the presence of the jury to determine whether Barry Novak was "going to impose a work product objection" and to resolve an issue "of some things that [defense] counsel wants to go into...." (RT 2878-2879)

Novak was called as a prosecution witness. Out of the presence of the jury Attorney Barry Novak testified that he specialized in products liability litigation. Novak also held a Ph.D. in engineering. (RT 2891.)

Novak testified that at the time of appellant and Tom Fuller's lawsuit, Gerber had recalled the type of pacifier, the Gym pacifier, on which Alicia choked. [63]

> The recall that Gerber had instituted was because of reports that baglets, the pacifiers themselves were separating from the plastic assembly. I should point out that they were separating as a whole rather than being ripped off, but they were having problems with baglets separation and the concern was that it may be a choking hazard. (RT 2894.)

Novak first sent the pacifier to Knauss. Novak instructed Knauss to examine the pacifier, but not degrade it or test it to determine why it failed. According to Novak, "Dr. Knauss' report indicated that some type of external force may have caused some abrasion on the baglet which then would have degraded the integrity of the baglet so that it would take less than optimal forced to separate..." (RT 2898.)

Novak contacted Dr. Hamed to get an expert opinion which involved "testing the post strength of (sample) pacifiers and investigating further to what degree the pacifiers would have to be degraded." Unlike Dr. Hamed, Dr. Knauss

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[63] No one from Gerber testified at any pretrial or trial proceeding.

was never asked to do any destructive examination of sample pacifiers. or the pacifier on which Alicia choked. (RT 2901-2902.)

According to Novak, Knauss's opinion that the failure of the pacifier was associated with external trauma to the pacifier assembly was entirely consistent with the Novak's theory of the case. Novak explained that his theory of the case was never that the pacifier was sucked off in its pristine, full strength condition by the Alicia. His theory was that there were many activities and environments that can degrade the integrity of the pacifier system, assuming it was properly assembled to begin with. Some activities mentioned by Novak included over exposure to light, detergents, misuse, and stepping on it accidentally. Novak's main theory of the case was that since one never knows when a pacifier will fail, particularly if it had some type of micro-crack in it and it loses its strength Gerber should have included a warning on the pacifier itself that before it is given to a child, the caretaker should pull before each use in order to avoid a situation where the pacifier may fail. Novak testified that what Dr. Knauss had seen was consistent with foreseeable use of the product and tied in to his particular theory of the case. (RT 2898-2901.)

In Novak's opinion, the settlement in the case involving Alicia's death ($710,000) was far from nuisance value, which Novak estimated would have been

in the range of $10,000-$15,000. As support for this opinion, Novak testified that he was unaware of any other case where more money was awarded for the wrongful death case of a 13-month old child. This fact was due in part because jury instructions required the jury offset the cost of caring for the child from the recovery and for that reason children's deaths were not worth much. (RT 2893, 2896, 2902.)

The prosecutor objected and the court ruled that whether the settlement was more than "nuisance value" was not within Novak's expertise as a product litigation defense attorney and he was not permitted to render such an opinion before the jury. (RT 2910-2912.)

As noted above, expert testimony is permitted when the subject of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Novak was competent to express an expert opinion that in his experience as a products liability attorney representing exclusively plaintiff's, in a wrongful death suit involving a child, $710,000 far exceeded nuisance value for settlement.
It was the defense's theory that the pacifier was defective. The fact that Gerber settled the case without admitting liability in an amount which exceeded in the representing attorneys opinion, nuisance value, was circumstantial evidence that

the pacifier was defective. One would certainly imagine that, had Novak testified the amount was in the neighborhood of nuisance value, the prosecutor would have asked if that opinion be expressed to the jury.

Moreover, the defense did not seek to have Novak testify to the actual motivation of Gerber. Should the prosecutor have felt that information relevant or if it chose to present evidence that $710,000 could be equated with "nuisance value" in a case such as this, the prosecutor was free to call a witness from Gerber or any other witness it chose.

Instead, the prosecutor seized upon the trial court's ruling to argue – without any evidence whatsoever – that to Gerber, this settlement was of "nuisance value" and nothing more that the cost of doing business.

To convince the jury of his theory that appellant murdered Alicia the prosecutor argued:

> "Well, ladies and gentlemen, $710,000 is a lot of money. I'm not going to argue to you that it's not. It's a huge amount of cash, but the fact of the matter is it's a cost of doing business for a company like Gerber.
>
> "Use your common sense. Gerber is a huge corporation. They have huge revenue. Their entire business is children and infant products. Can you imagine the press, the publicity, the bad reputations are going to get if they allow this case to go to trial? Even if they are to emerge victorious, even if the verdict ultimately is, hey, Gerber, you didn't do anything wrong, they've got to suffer through a trial that could last weeks, they'll have possible press coverage, certainly in the local area of Santa Maria.

"They made any money decision. You know what, $700,000 is a lot. It's a cost of doing business. It's a small amount of money when you consider our revenues and you look at the damage is publicity could do, even though we haven't done anything wrong, even though we might have emerged victorious is a lawsuit, that's a risk you can't take.

"Use your common sense, ladies and gentlemen. That's why they settled this case. They didn't have Dr. Knauss' reported. (sic) they settled it because it was a cheap way of getting out of this thing in terms of what the effect could be ultimately on their revenue." (RT 3774.)

6. The court failed to properly instruct the jury with regard to the aggravator.

It is well settled that before a jury in the penalty phase of a capital case may consider evidence of unadjudicated other crimes in aggravation, they must find that the crime has been committed beyond a reasonable doubt. (*People v. Robertson, supra,* 33 Cal.3d at p. 54.)

The United states Supreme Court held in *Jackson v. Virginia*:

The standard of proof beyond a reasonable doubt plays a vital role in the American scheme of criminal procedure, because it operates to give concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding by impressing upon the factfinder the need to reach a subjective state of near certitude of guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. (443 U.S. at p. 315, citing *In re Winship* (1970) 397 U.S. 398.)

Here, the jury was instructed that "every person who unlawfully kills a human being with malice of forethought is guilty of the crime of murder, in violation of Penal Code section 187." Appellant's penalty phase jury was instructed on both first and second degree murder. (RT 3867-3868.)

It is well settled that in order for a jury to consider as an aggravating circumstance evidence of an uncharged crime, the court must give an instruction to the jury requiring that it find beyond a reasonable doubt the defendant committed the crime. (See *People* v. *Robertson* (1982) 33 Ca1.3d 21, 53, citing *People* v. *Stanworth* (1969) 71 Cal.2d 820, 840.)

D. Individually and Cumulatively the Errors Complained of Require Reversal

In the instant case, it cannot be doubted that the jury, having just convicted appellant of murdering her husband for insurance money, took into account that offense when evaluating the sufficiency of proof against appellant that she murdered her daughter for financial gain.

The use of this evidence in the penalty phase violates due process under the state and federal constitutions. (*People v. Anderson* (1968) 70 Cal.2d 15: *People v. Granados* (1957) 49 Cal.2d 490.) Without this aggravating circumstance

having been found by the jury, appellant would not have been sentenced to death.

It is inconceivable that without the introduction of the murder of appellant's husband for financial gain as a factor to be included in the equation, a reasonable juror could never find appellant guilty of killing her daughter by the standard of beyond a reasonable doubt.

The failure to exclude this testimony from the jury's consideration deprives the judgment of the reliability necessary for a judgment of death. There is a distinct possibility that appellant's death sentence is predicated in part upon evidence of criminal activity of which appellant was presumed innocent and was never proved guilty of beyond a reasonable doubt. As such the death judgment must be reversed because appellant was deprived of due process of law and a reliable and the sentence is based on a constitutionally impermissible factor. (*Zant v. Stephens* (1982) 462 U.S. 862, 885; *Johnson v. Mississippi, supra,* 486 U.S., 100 L.Ed.2d 575.)

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XIII. THE COURT ERRED IN ADMITTING EVIDENCE REGARDING APPELLANTS COMMENTS ABOUT ERLINDA HALL AS PART OF THE PEOPLE'S CASE IN AGGRAVATION BECAUSE THOSE COMMENTS DID NOT CONSTITUTE THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT TO USE FORCE OF VIOLENCE

A. Introduction

In its notice of aggravation, the prosecution had listed appellant's "post arrest solicitation of the murder and/or assault upon Peoples's witnesses Erlinda Allen[64] and Palmira Gordon."

At the penalty trial, defense counsel objected to any references made to Allen as irrelevant and asked that they be redacted from the Hall transcripts and not played for the jury. His objection was erroneously overruled. (RT 3061-3064.)

The court erred in allowing any testimony related to Erlinda Allen. First, Allen had not testified in any proceeding and therefore was not one of the People's witnesses. Second, the evidence of the alleged solicitation to assault Allen related to Hall did not amount to a crime. The introduction of this evidence violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

B. Factual and Procedural Background

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[64] Although Erlinda Allen was the subject of evidence in aggravation, there were no separate solicitation of murder or other charges filed which concerned her.

On July 23, 2002, the prosecution filed a notice of aggravation that included "the defendant's post arrest solicitation of the murder and/or assault upon People's witnesses Erlinda Allen and Palmira Gorham." (CT 218-219.) In an April 29, 2003, complaint, appellant was charged with solicitation to commit the murder of Palmira Gorham but was not charged with any offense related to Allen (CT 273-276.) The solicited individual in both the aggravator and the charge was Gwendolyn Hall.

On August 29, 2003, the court granted the prosecutor's motion to consolidate the solicitation charge with the murder case. At trial, Hall testified briefly at the guilt phase and not at all at the penalty phase. The jury hung on the solicitation to commit murder charge. A mistrial was declared before the beginning of the penalty phase. [65]

C. Trial Testimony Relating to Erlinda Allen

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[65] The capital case proceeded as case no. BA213120 and the solicitation to commit murder case proceeded under case no. BA246675 until the trial court granted the prosecutor's motion to consolidate. (CT 332-346.) Ultimately the three count information containing the capital murder charge, dissuading a witness charge and solicitation to commit murder charge upon which appellant was tried was filed on September 26, 2003 as case no. BA213120. (CT 488-490.) As noted in the Statement of the Case, On October 29, 2003 the jury informed to the court that it remained deadlocked on count three, solicitation of murder. On the same day, the court declared a mistrial on that charge. (CT 871, 873-874.)

Erlinda Allen never testified at the guilt or the penalty phase of appellant's trial, nor were any tapes of Gwendolyn Hall in which she mentioned Allen played for the jury. The sum total of the **guilt trial testimony** relating to Allen is as follows:

At the guilt phase, Steinwand testified that he and Sergeant Holmes interviewed witness Erlinda Allen who was also an inmate at Twin Towers jail facility. The interview with Allen took place several months before the interviews with Gwendolyn Hall. Allen told the officers about conversations she had had with appellant. The interviews with Allen were recorded. (RT 2254-2256.)

Three of appellant's conversations with Hall were taped. These taped interviews were not played for the jury or entered into evidence and Erlinda Allen did not testify at appellant's trial.

At the penalty phase, except for some brief mentioning of Allen in the three taped conversations between Hall and appellant discussed below, no evidence additional to that which was offered at the guilt phase was offered in support of the aggravating circumstance of solicitation of the murder of Erlinda Allen.

Defense counsel objected to any references made to Allen as irrelevant and asked that they be redacted from the transcripts and not played for the jury. His objection was overruled. (RT 3061-3064.)

D. Appellant's Comments to Gwendolyn Hall Regarding Erlinda Allen Did Not Constitute A Crime Involving the Use or Attempted use of Force or Violence or the Express or Implied Threat to use Force or Violence and Should Not Have Been Admitted

Circumstance in aggravation number two notified the prosecution's intent to offer evidence of "the defendant's post arrest solicitation of the murder and/or assault upon People's witnesses Erlinda Allen...." (CT 218-219.) Because Erlinda Allen was not a prosecution witness, because the only evidence was appellant's comments to Gwendolyn Hall, and because appellant's comments about what she wanted to happen to Allen in state prison were hearsay and did not amount to an actual crime, this evidence should not have been offered at appellant's trial.

In *People v. Boyd* (1985) 38 Cal. 3d 762, 773-75, this Court held that the 1978 death penalty law precludes the jury from considering evidence offered in aggravation unless it is relevant to one of the factors listed in Penal Code Section 190.3. Subdivision (b) of Section 190.3 provides that the sentencer may consider as an aggravating circumstance "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." The requisite "criminal activity" under Section 190.3(b) must amount to "an actual crime"-- that is,

conduct which violates a penal statute. (*People v. Phillips* (1985) 41 Cal. 3d 29, 72; *People v. Boyd, supra,* 38 Cal. 3d at 776; see also *People v. Grant* (1988) 45 Cal. 3d 829, 850.)

By the same token, section 190.3(b), expressly forbids the admission of evidence of any uncharged crime that does not involve the use or attempted use of force or violence or the express or implied threat to use force or violence. (*People v. Balderas* (1985) 41 Cal. 3d 144, 202 n.29.) "The purpose of this statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is *not of a type which should influence a life or death decision*." (*People v. Boyd, supra*, 38 Cal. 3d at 776 (emphasis added).)

Appellant's comments to Gwendolyn Hall, the only evidence offered in support of the aggravating circumstance of solicitation to assault or murder Erlinda Allen was not sufficient to constitute criminal activity of the sort admissible under section 1903 subd. (b).

Foremost, Erlinda Allen was not a witness in the prosecution's case at guilt or at penalty. Should this Court deem the fact that Allen was not a witness not dispositive of appellant's claim, the comments made by appellant simply do not amount to an "express or implied threat to use force or violence."

"The crime of solicitation consists of asking another to commit one of the crimes specified in Penal Code section 653f, with the intent that the crime be committed. The gist of the offense is the solicitation, and the offense is complete when the solicitation is made. It is immaterial that the crime which is the object of the solicitation is never accomplished, that no overt acts are taken toward its accomplishment, or even that the crime is impossible to accomplish. Section 653f has a twofold purpose: to protect individuals from being exposed to inducement to commit or join in the commission of crimes, and to prevent solicitations from resulting in the commission of the crimes solicited. Section 653f, subdivision (b), prohibits soliciting another to commit murder." (*People v. Cook* (1984) 151 Cal.App.3d 1142, 1145, internal citations omitted.)]

The crime of solicitation of murder requires an act of solicitation as well as "the intent that the crime [of murder] be committed." (§ 653f, subd. (c).) Both are lacking in the instant case.

Foremost, there was no evidence that appellant solicited any person to assault Allen and no evidence that she conveyed any threats of assault to Allen. The only mention of any assault with AIDS tainted blood came from the hearsay statements of Hall, during her interview with law enforcement officers on May 10, 2002. Although this conversation with Hall was taped, appellant was not a party

to it. These statements were introduced at the penalty phase, after Hall claimed a lack of recollection at the guilt phase.

In his penalty phase argument to the jury, the prosecutor focused on appellant's **attempts** to retaliate against Erlinda Allen, specifically suggesting appellant had somehow arranged for Allen to be assaulted with AIDS tainted blood. (RT 3740-3742.) However, no evidence of any attempt was introduced and in none of the taped conversations between appellant and Hall does appellant solicit Hall to commit such an act nor does appellant tell Hall that she solicited another to do so. When Hall was asked whether or not she had ever heard of appellant trying to solicit someone else to help her, Hall responded "I've never heard her tell nobody all -- nobody nothing." (CT 744.) Simply, there is no evidence whatsoever that appellant solicited Hall or any other individual to commit any kind of assault on Linda Allen.

The use of improperly admitted evidence to persuade the jury during closing argument is a fact from which a reviewing court can discern prejudicial error. *(People v. Woodard* (1979) 23 Cal.3d 329, 341 [152 Cal.Rptr. 536, 590 P.2d 391].)

> Has the things that she has done in her life and the murder of Frank, the death of Alicia, the intimidation of Palmira Gorham, the solicitation to kill Pamira Gorham, the retaliation against Linda Allen, that other inmate you

heard about but didn't testify where Gwendolyn Hall told you, well, she's obviously talked to friends in prison, and she's talked about how because Linda Allen cooperated with the police, when she gets to Chowchilla prison shall be taken care of. She'll get that shot of AIDS tainted blood in her back, the same thing inmates due to other inmates that don't pick her drug debts.

Those are the things you need to consider. If you find those things so substantial that indicate she has stepped over the line, then death is the appropriate punishment...." (RT 3740-3741.)

You have to look at the things that she has done, you have to look at the acts that she has committed, the violence, the intimidation, over and over again, the reasons that she did it, for money... (RT 3741.)

You can consider the fact that she retaliated or attempted to retaliate against Linda Allen after her arrest. (RT 3742.)

Moreover, the prosecutor mistakenly argued to the jury that they did not need to find beyond a reasonable doubt that appellant had retaliated or attempted to retaliate against Linda Allen. According to the prosecutor's argument evidence of the alleged Allen retaliation was a circumstance of the crime.

You can consider the fact that she retaliated or attempted to retaliate against Linda Allen after the arrest. Those are all facts and circumstances of the crime" for which appellant had already been convicted....you're to consider the facts of those crimes and how horrible those crimes were and what it involved in terms of the calculating, cold way that she did it, in fashioning what the appropriate penalty should be. (RT 3743.)

Certainly, this type of evidence would have a significant impact on a jury. As this Court has long acknowledged, other crimes evidence has "a particularly damaging impact on the jury's determination of whether the defendant should be executed." (*People v. Polk* (1965) 63 Cal.2d 443, 450.) A death sentence infected by inadmissible evidence which appears to establish prior criminal activity, but which in truth does not, is highly improper. Clearly there is a reasonable possibility that admission of such evidence affected the jury's deliberations. Appellant's death sentence is thus invalid and must be reversed. (*People v. Davenport* (1985) 41 Cal.3d 247, 290.)

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XIV. IT IS REASONABLY LIKELY THAT ONE OR MORE JURORS WERE MISLED INTO THINKING THAT, IF APPELLANT KILLED UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE THAT WAS LESS THAN EXTREME, SUCH DISTURBANCE WAS NOT A FACTOR IN MITIGATION

A. Introduction

The jury was told that, in determining whether appellant should live or die, it should "consider . . ., if applicable: . . . (d) whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance." (CT 983; emphasis added; CALJIC No. 8.85(d); Pen. Code §190.3, subd. (d).)

By virtue of the rights to due process, fair trial, right to present a defense, and to a reliable sentencing determination, implicitly and explicitly guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, jurors must be permitted to "consider and give effect to all relevant mitigating evidence offered by a defendant." (*Boyde v. California* (1990) 494 U.S. 370, 377-378; accord, *Penry v. Lynaugh* (1989) 492 U.S. 302, 328 ["full consideration of evidence that mitigates against the death penalty is essential"].)

Limiting appellant's jury to the consideration of "extreme mental or emotional disturbance" violated the latter constitutional mandate. (See *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1165-1166 [Montana scheme held unconstitutional because it permitted sentencer "to refuse to consider . . . mitigating evidence simply because it fell below a certain weight"]; *Kenley v. Armontrout* (8th Cir. 1991) 937 F.2d 1298, 1309 [defendant need not be insane for mental health problems to "be . . . considered mitigating evidence"]; *People v. Robertson* (1982) 33 Cal.3d 21, 59-60 [violates Eighth Amendment to permit jury to consider "mental disease" as mitigating but not "mental defect"].)

This Court has held that instructing a jury with factor (d) is not error if the jury is also instructed with factor (k). [need to insert the case here.] (CALJIC No.

8.85(k); Pen. Code §190.3(k).)[66] Barring evidence to the contrary, the Court has said, it will be presumed that jurors in a given case understood that factor (k) was a catch-all category that allowed them to consider as mitigating the defendant's less-than-extreme mental or emotional disturbance. (*People v. Wright* (1990) 52 Cal.3d 367, 443-444; accord, *People v. Ghent* (1987) 43 Cal.3d 739, 776; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308.)

In *Wright*, this Court left room for defendants to show that the presumption should not be applied. (*People v. Wright, supra,* 52 Cal.3d at 444-445.) Appellant submits that there are both general and case-related reasons for not applying the presumption here.

B. The Wording Of The Instructions And The Arguments Of Counsel Made It Likely Jurors Would View Factor (d) As Imposing A Limitation On The Kind Of Mental Health Evidence They Could Consider Mitigating

First, in both law and logic there is a principle that the specific overrides the general. (See, e.g., *People v. Trimble* (1993) 16 Cal.App.4th 1255, 1259 ["Special provisions control more general provisions"].) There is a related principle:

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[66] Appellant's jury was instructed to consider, "if applicable: . . . (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (CT 983.)

"Expressio unius est exclusio alterius. The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Applying these principles to factors (d) and (k), it seems plain that, when factor (d) states that killing under the influence of mental or emotional disturbance may be considered a mitigating factor if the disturbance was "extreme." This "necessarily means the exclusion" of any lesser disturbance and "control[s the] more general provision" of factor (k). Since the rules of statutory construction are rules of reason, there is every reason to think a reasonable juror would reach the same conclusion.

Second, to conclude otherwise -- i.e., to conclude that factor (k) overrides factor (d) -- would be tantamount to declaring factor (d) extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a word surplusage . . . be avoided" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factor (d) surplusage.

Third, the language of factor (k) in no way compelled a juror to interpret it as overriding factor (d). To the contrary, the pertinent portion of factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the

defendant's character . . . that the defendant offers as a basis for a sentence less than death . . ." There was no reason a juror would necessarily see appellant's mental or emotional disturbance at the time of the killings -- the subject of factor (b) -- as an "aspect of [her] ... character." A juror was most likely to believe that factors (d) and (h) and (k) dealt with different subjects.

Fourth, a 1994 study discovered that, of the 491 upper level undergraduates who heard factor (k) read aloud five times, 36% of them believed the factor was aggravating, not mitigating. (C. Haney, M. Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law and Human Behavior 411, 418-424.) That statistic strongly suggests that reconsideration by this Court of the propriety of factor (d) would be in order. A juror who believed that factor (k) was aggravating, obviously, was not going to conclude that factor (k) was so all-encompassing a mitigating factor that it overrode the limitation on mitigation contained in factor (d).

Finally, unlike in *Wright*, the penalty phase arguments presented by counsel in this case do not permit the conclusion that every one of appellant's jurors understood that factor (d) was extraneous.

In *Wright*, the prosecutor could have been understood as arguing that mitigation was limited to "extreme mental or emotional disturbance." "[D]efense counsel's astute closing argument," however, "negated any possibility of" a juror believing that less extreme mental states were not mitigating. Counsel specifically explained that "even if . . . [defendant's] mental or emotional disturbance may not be classified as extreme, that by no means requires that it should be thrown out as a factor . . . . You," he told the jury, "simply are to consider" the latter under factor (k). (*Id.* at 444.)

In this case, the prosecutor's treatment of factor (d) was comparable to that given in *Wright*. In his reference to factor (d), the prosecutor said:

> First of all, was defendant operating under extreme mental or emotional disturbance at the time she committed this crime? Is that some kind of mitigation? You heard no evidence of that, ladies and gentlemen. She had her psychiatrist come here on Friday and testify. You didn't hear one word out of him that she was psychotic when she committed this crime, she was delusional, she was hallucinatory, she didn't know what she was doing, she had no impulse control. You didn't hear any of that. What you heard was, well, she's depressed. (RT 3746.)

The prosecutor went on to say that if the appellant was in fact depressed it was just as likely that she was depressed from having been in jail for two years as anything having to do with Frank's death. (RT 3746.)

The prosecutor then added:

> And even if she was depressed at that time, that's not some extreme mental or emotional disturbance that somehow mitigates this crime.... it does not justify, it does not mitigate that kind of conduct. *It's not the extreme mental and emotional disturbance that the law is talking about.* (RT 3747 [emphasis added].)

Later,

> She's got no mental disease or extreme mental or emotional disturbance that affects the way she thinks. (RT 3752-3753.)

In the instant case the prosecutor's comments about how appellant did not present evidence of psychosis, being delusional, or having no impulse control were exactly the kind of comments this Court cautioned against in *Wright.* If the jury had heard credible evidence of these mental states it would have to acquit appellant of the charged capital murder. This is so because factor (d) mental states are something less than a mental defense to the crime charged. Factor (d) mental states are necessarily less extreme than a mental defense to the crime charged.

Here, the prosecutor frequently confused with a degree of mental disease and/or extreme mental or emotional disturbance which could qualify as mitigation with that which would be a legal defense to the crime charged.

> Again there is no evidence in this case of any mental disease or intoxication. Dr. Vicary didn't talk to you about any mental disease. He didn't give any clinical diagnoses she was pathological in some sense or psychotic or no impulse control. She has no such mental disease.... she's

> got no mental disease or extreme mental or emotional disturbance that affects the way she thinks. Yep, she's got a problem. She likes to kill people for money, but she does that for venal motives because she wants the money. She is completely aware and rational and reasonable in her conduct when you look at what her ultimate goal is. She pursues it with a relentless abandoned in a remarkably logical way. There is absolutely nothing wrong with this woman's mental abilities, except for maybe the fact that she's not quite as smart as she thinks, and the police were little bit smarter and that's why they caught her. But there's no mental disease or intoxication that in any way justifies, minimizes or in any way mitigates this murder that she committed. (RT 3752-3753.)

Moreover, unlike in *Wright*, defense counsel's argument did not clarify matters. To the contrary, although he had presented factor (d) evidence to the jury by expert opinion, he never explained that the evidence of depression and anxiety diagnosed was in fact sufficient to be considered mitigating. Defense counsel never corrected the prosecution's argument that the mental health evidence offered by appellant was not legally sufficient to be considered mitigating.

In sum, there is a compelling "basis [both] in the record [and without] for concluding the jury failed to give proper weight to the evidence of defendant's mental and emotional difficulties." (*People v. Wright, supra,* 52 Cal.3d at 444.)

The combination of the misleading instructions and arguments made it reasonably likely that, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, one or more jurors failed to "consider and give effect to all relevant

mitigating evidence offered by" appellant. (*Boyde v. California, supra*, 494 U.S. at 377-78.)

C. Prejudice

The error cannot be deemed harmless. Much of appellant's mitigation evidence was testimony regarding her mental state. Whatever theory of defense can be gleaned from defense counsel's argument amounted to a case for mercy based on appellant having been molested and otherwise abused by people she trusted to such an extent that it impacted her ability to think clearly, rationally, and morally with regard to Frank's death. Thus, it was reasonably possible and reasonably probable that jurors felt that appellant killed while under the influence of a mental or emotional disturbance that was less than extreme and because of factor (d) did not believe it was proper to count that disturbance as a mitigating factor. It is thus both reasonably possible (*Chapman v. California, supra*, 386 U.S. at 24) and reasonably probable (*Strickland v. Washington, supra*, 466 U.S. at 693-695) that instructing the jury with factor (d), compounded by counsel's failure to explain the latter, adversely affected the outcome of the penalty deliberations. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at 341.) The judgment of death must be reversed.

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XV. THE COURT IMPROPERLY DENIED APPELLANT'S APPLICATION FOR MODIFICATION OF THE DEATH SENTENCE UNDER PENAL CODE SECTION 190.4, SUBDIVISION (e), DEPRIVING APPELLANT OF DUE PROCESS OF LAW AND A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF HER RIGHTS SECURED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Here, the trial court committed multiple errors in denying appellant's application for modification of the verdict. These errors include the court's failure to make an independent on-the-record reweighing of the aggravators and mitigators; the court's improper minimization of or ignoring of mitigating factors while it exaggerated and gave undue weight to aggravating factors; and the court's improper consideration of aggravating matters not within the statutory list.

B. The Proceedings Below

On January 8, 2004, defense counsel filed a written motion in support of an a proposed order reducing the death sentence recommended by the jury to a sentence of life without the possibility of parole. Attached to the motion was an additional report of Dr. Vicary who re-interviewed appellant after the jury's death verdict. (CT 1038-1042.)

According to Dr. Vicary, he was instructed to re-explore the issues of mitigating circumstances, including remorse. Dr. Vicary was of the opinion that there were several mitigating factors in appellant's case. According to Dr. Vicary, appellant had deep remorse for the murder of her husband which she was reluctant to share for legal and psychological reasons. Appellant continued to suffer from major depression and remained a serious suicide risk. Dr. Vicary was of the opinion that appellant needed ongoing psychiatric treatment and medication.

Dr. Vicary outlined additional mitigating factors which included a chaotic family background and a childhood during which she was repeatedly molested by a series of adult males. Because appellant's family blamed her for these molestations and appellant, in turn blamed herself, she became depressed at an early age and attempted suicide on several occasions. Appellant had a history of failed relationships with dominating and controlling men, and self-medicated with both alcohol and prescription drugs. (CT 1040-1042.) According to Dr. Vicary, appellant was a "devoted, nurturing and protective mother." (CT 1041.)

Dr. Vicary found appellant's expressions of remorse to appear genuine. Dr. Vicary concluded, "[I]f the jury would have learned about her deeply felt, remorseful feelings it could have made a difference in their verdict. It would also

have been useful to further explain in detail some of the other mitigating factors in the case. These offered a psychological explanation for the crime in contrast to a purely financial motive." (CT 1041.)

On the day *before,* January 7, 2004, the prosecution filed its opposition to the motion to modify penalty and statement in aggravation. (CT 1022-1034.) As grounds for denying the motion, the prosecutor asserted appellant's conviction for the murder of her husband. (CT 1024.) The prosecutor pointed to appellant's efforts to implicate a third-party, dissuade the testimony of a witness, and solicit another inmate to commit murder. The prosecutor also asserted that appellant was responsible for her daughter's death. (CT 1024.)

The parties argued the motion on January 12, 2004. [67] The court's written order denying appellant's modification motion and its commitment pursuant to a judgment of death were filed on the same date. (CT 1064-1068.) As the court's oral denial of appellant's motion for modification and commitment pursuant to a judgment of death reads verbatim from the written order (RT 4016-4026), there is little doubt it was prepared prior to the actual hearing.

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[67] The modification motion immediately followed appellant's motion for a new trial. (RT 3970.) As will be discussed below, some of the court's comments with regard to the motion for a new trial are relevant to his comments regarding the modification motion.

At the hearing on the motion, defense counsel pointed to a number of factors as grounds for reducing the sentence of death to life. Among these he argued appellant had been free from contact with law enforcement for her entire life. Also, her background and specifically the molestations [68] were important factors to be considered. Finally, defense counsel pointed out that Dr. Vicary, in his report, had concluded appellant did have remorse, an issue, according to defense counsel, the court had brought up and that "the jury apparently was concerned with." (RT 3976.) [69]

At this point, the trial court interrupted counsel and commented on its perceptions regarding appellant's remorse or the lack thereof:

> How do you square with what the doctor has said, Dr. Vicary's report of January 7, 2004, where he says the defendant does have remorse for the murder of her husband and that she's reluctant to share that remorse for legal and psychological reasons? There's been no indication of remorse at

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[68] Defense counsel seemed acutely uncomfortable with the subject of repeated molestations suffered by appellant. Neglecting to mention the other instances of molestation, in his comments to the court in this regard he referred to continued molestation which resulted in two pregnancies as "the problems with the paternal grandfather...." (RT 3976.)

[69] In its denial of appellant's motion for a new trial, the court commented that the videotape of appellant's meeting with the undercover officer in which she was shown the staged photographs of Palmira's death, "was very powerful evidence of essentially a lack of remorse by Ms. Rodriguez. Even if one is to believe that she had nothing to do with the attempt to murder her best friend, her response to it being presented to us visually in the form of a Polaroid photograph was rather chilling." (RT 3974.)

all during the trial, and in fact it's hard to believe that there would be any remorse.

He was only married for a few months when she created the circumstances under which he received a $250,000 life insurance with her as a beneficiary, and two months after that roughly attempts to kill him by the use of loosening the gas connection, which also endangered not only her husband but also the community around her husband in the event that there had been an explosion, then attempting to poison him with oleander poisoning, and on the failure of that a week later poisoning him for a long period of time with anti-freeze.

And I have to say it is the coolest killing I've ever seen. Most of the murders, and most of the cases we have our murder cases in this court, over the past 20 years I've never seen a colder heart. She seemed to have no care for the agony that she put her husband through, and the sole goal being to make a profit in his death.

So I don't see how the doctor's opinion squares with any of the evidence that I've seen throughout this trial. (RT 3976-3977.)

Defense counsel concluded his remarks in support of the modification motion with the comment:

I thought it necessary for me to talk to Dr. Vicary and see what he could do with regards to this issue, given the importance of that lack, apparently, of apparent remorse to the jury, and I felt obligated to present that to the court. (RT 3977.)

Thereafter appellant addressed the trial court. (RT 3978-4015.)

C. The Relevant Law

"Pursuant to section 190.4, in ruling upon an application for modification of a verdict imposing the death penalty, the trial court must reweigh independently

the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict." (*People v. Crittenden* (1994) 9 Cal.4th 83, 150.) This independent, on-the-record evaluation is designed to make the process for imposing a sentence of death rationally reviewable, and to help ensure the reliability of any determination that death is the appropriate sentence. (See *People v. Frierson* (1979) 25 Cal. 3d 142, 178-179.) This Court subjects the trial court's ruling to independent review, scrutinizing the trial court's determination after independently considering the record, but without making "a de novo determination of penalty." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1106.) Here, the trial court failed to follow the legal requirements in denying the motion.

The court also denied appellant her right to a fair and reliable penalty determination secured by the Fifth, Eighth, and Fourteenth Amendments when it minimized the mitigating factors or ignored them entirely while exaggerating the aggravating factors and giving them undue weight.

To withstand constitutional scrutiny, the trial court must adhere to well-established limitations in conducting its section 190.4(e) review. First, the trial court must only consider evidence that was before the jury. (*People v. Brown* (1993) 6 Cal. 4th 322, 337.) Second, the trial court must restrict its evaluation of

aggravating circumstances to those specifically enumerated in California's death penalty statutory scheme. (*People v. Boyd* (1985) 38 Cal. 3d 762, 773 [matters that are not within the statutory list of aggravating factors are not to be given any weight in the penalty determination]; see § 190.3 [enumerating statutory factors].)

Importantly, because section 190.4(e)'s review procedure creates a constitutionally protected liberty interest for any defendant sentenced to death, an error or deficiency in the sentence review process can constitute a violation of a defendant's constitutional right to due process. (See *Hicks v. Oklahoma*, *supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522.)

First, appellant's rights under the Sixth, Eighth, and Fourteenth Amendments were violated by the trial court's premature decision to impose death, evidenced by the court's preparation of the final judgment and ruling before the final sentencing hearing. In *People v. Medina* (1995) 11 Cal.4th 694, 783-784, this Court held that the trial court did not improperly prejudge the motion for modification of sentence by formulating tentative rulings in advance of argument and reducing those tentative rulings to writing. (See also *People v. Hayes* (1990) 52 Cal.3d 577, 644-645; *People v. Dennis* (1998) 17 Cal.4th 468, 550-

551.) However, here, there is no doubt the court's written ruling was anything but tentative. The oral ruling was a verbatim reading of the written tentative ruling.

In appellant's case, moreover, the court failed to discharge its mandatory statutory responsibilities under section 190.4(e) because it did not conduct an independent review of the penalty factors and of the evidence supporting the jury's findings, thereby depriving appellant of a fair and reliable penalty determination in violation of his rights secured by the Fifth, Eighth and Fourteenth Amendments. Although the court recited aggravating and mitigating factors for the record, in merely reading from a prepared written statement, appears to have done so without any actual consideration of the applicability/inapplicability to the appropriate sentence for appellant. Also, the court considered an improper factor – appellant's purported lack of remorse , and relied on a number of inappropriate factors, such as an apparent belief that appellant could never have cared for her husband, in denying appellant's motion.

In addition, the court also denied appellant her right to a fair and reliable penalty determination secured by the Fifth, Eighth and Fourteenth Amendments. The trial court's findings ignored the very real mitigating evidence resulting from appellant's history as a multiple abuse victim and the effects that her family's

blame of here had on her. The court's failure to properly review appellant's death sentence requires the death verdict to be reversed. (See *People v. Burgener* (2003) 29 Cal.4th 833, 890-892.)

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OTHER ARGUMENTS

XVI. THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF

A. The Statute and Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond a Reasonable Doubt The Existence Of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Ca1.3d 512,541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any

delineated burden of proof. [70]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997)16 Ca1.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Ca1.4th 764, *842; People v. Ghent* (1987) 43 Ca1.3d 739, 773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 471-472, *Ring v. Arizona* (2002) 536 U.S. 584, 607, and *Blakely v. Washington* (2004) 542 U.S. 296, 300-313.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed

[70] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of violent criminal activity (Pen. Code, § 190.3 subsection (b)) must be proved beyond a reasonable doubt.

imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra,* 530 U.S. at pp.471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring* v. *Arizona,* the Court applied *Apprendi* 's principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra,* 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.* While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra,* 536 U.S. at p. 609.) [71] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's

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[71] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra, 536*U.S. at p. 610 (cone. opn. of Scalia, J.).)

sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id.)*

In *Blakely,* the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington. supra,* 542 U.S. at p. 300.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.)* The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. *(Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra,* 542 U.S. at p. 303, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions. [72] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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[72] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(t) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (t), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(t) (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); NJ.S.A. 2C:II-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.07 I(c) (West 1993); *Statev. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).
Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. §53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 PJd 915.)

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance - and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra,* 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43,79 [penalty phase determinations are "moral and ... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. [73] As set forth in California's "principal sentencing instruction" (*People* v.

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[73] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though Ring expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that Ring requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the

Farnam, supra, 28 Cal.4th at p. 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CT 987-988, 990, 992 CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury, and before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings. [74]

In *People* v. *Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code, 190.2 subsection (a)), *Apprendi* does not apply. After *Ring,* the Court repeated the same analysis. (See, e.g., *People v. Prieto*

State labels it - must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[74] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Ca1.3d 1222, 1276-1277; *People* v. *Brown, supra,* 40 Cal.3d at p. 541.)

(2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.) This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey, supra,* 530 U.S. at p. 494.) As stated in *Ring,* "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely,* points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington, supra,* 542 U.S. at p. 328 (dis. opn. of Breyer, 1.), original italics.)

Thus, as stated in *Apprendi,* "the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment

than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." *(Ring* v. *Arizona, supra,* 536 U.S. at p. 604, quoting *Apprendi* v. *New Jersey, supra,* 530 U.S. at p. 541(dis. opn. of O'Connor, 1.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase - that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring* v. *Arizona, supra,* 536 U.S. at p. 604, quoting *Apprendi* v. *New Jersey, supra,* 530 U.S.

at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring* v. *Arizona, supra,* 536 U.S. at p. 610 (cone. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer. California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. [75] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People* v. *Snow, supra,* 30 Ca1.4th at p.126, fn 32, citing *People* v. *Anderson, supra,* 25 Ca1.4th at pp. 589-590, fn.14.)

The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another."

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[75] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also - and most important - to render an individualized, normative determination about the penalty appropriate for the particular defendant. ..." (*People* v. *Brown, supra,* 46 Ca1.3d at p. 448.)

(*People* v. *Prieto, supra,* 30 Ca1.4th at p. 275; *People* v. *Snow, supra,* 30 Ca1.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence. In both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, anyone of a number of possible aggravating factors may be sufficient to impose death - no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the Federal Constitution.

In *Prieto,* the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra,* 512 U.S. at p.

> 972). No single factor therefore determines which penalty death or life without the possibility of parole - is appropriate. (*People v. Prieto, supra,* 30 Ca1.4th at p. 263, italics added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present - otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan, supra,* 53 Ca1.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra,* 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whiifield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d *256; Johnson v. State* (Nev. 2002) 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi, Ring,* and *Blakely.* In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own - a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. *(Blakely, supra,* 542 U.S. at p. 304.) Thus, under *Apprendi, Ring,* and *Blakely,* whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that

the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt. [76]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi, Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The

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[76] In *People v. Griffin* (2004) 33 Ca1.4th 536, in this Court's first *post-Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432,437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]"': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra,* 33 Ca1.4th at p. 595.) In *Leatherman,* however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights? *(Leatherman, supra,* 532 U.S. at p. 429.)

This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely. Leatherman* was concerned with whether the Seventh Amendment's ban on reexamination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo.* Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo,* it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *(Id.* at pp. *437,440.) Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra,* 30 Ca1.4th at p. 263.) In *Ring,* Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence."

(Ring v. *Arizona, supra,* 536 U.S. at p. 606, quoting with approval *Apprendi* v. *New Jersey, supra,* 530 U.S. at 539 (dis. opn. of O'Connor, 1.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge* v. *California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring:*

> Capital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . .. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death, *(Ring v. Arizona, supra,* 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of Ring to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser* v. *Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 37 U.S. 358, at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." *(Gardner* v. *Florida, supra,* 430 U.S. at p. 358; see also *Presnell* v. *Georgia* (1978) 439 U.S. 14.) Aside from the question of the

applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra,* 397 U.S. at pp. 363-364; see also *Addington* v. *Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided.

In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra,* 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors ... the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use

of the challenged procedure." (*Santosky* v. *Kramer* (1982) 455 U.S. 745, 755; see also *Matthews* v. *Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" *(Speiser* v. *Randall, supra,* 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra,* 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338,342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306,310 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630,632 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 219, 225 [appointment of conservator].)

The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer, supra,* 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not *only* the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society imposed] almost the entire risk of error upon itself." *(Santosky* v. *Kramer, supra,* 455 U.S. at p. 755, quoting *Addington v. Texas, supra,* 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky.* They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky, supra,* 455 U.S. at p.763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a

prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship, supra,* 397 U.S. at p.363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California, supra,* 524 U.S. at p. 732.) In *Monge,* the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n *a capital sentencing proceeding,* as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" [I won't keep fixing the italics, but you likely still have a lot to correct.] (*Monge v. California, supra,* 524 U.S. at p. 732, quoting *Bullington* v.

Missouri (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin, supra,* 33 Ca1.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case.

As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard: We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the

reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment. (*State* v. *Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. *(Beck* v. *Alabama, supra,* 447 U.S. at pp. 637-638; *Monge* v. *California, supra,* 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People* v. *Superior Court (Mitchell)* (1993) 5 Ca1.4th 1229,1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People* v. *Hayes* (1990) 52 Ca1.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings* v. *Oklahoma* (1982) 455 U.S. 112, at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination

also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt* v *Florida (1976)* 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills* v. *Maryland, supra,* 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true.

The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People* v. *Duncan, supra, 53* Ca1.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[77]

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[77] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

A fact could not be established - i.e., a fact finder could not make a finding - without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, §520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as

explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra, 486* U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors - and the juries on which they sit respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable - "wanton" and "freakish" (*Proffitt v. Florida, supra,* 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. at p. 374) - that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either. If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. *(Sullivan v. Louisiana* (1993) 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is - or, as the case may be, is not - is reversible *per se. (Sullivan v. Louisiana, supra, 508 U.S. 275.*

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad* v. *Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, 1.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People* v. *Bacigalupo* (1992) 1 Ca1.4th 103,462-464 (cert.

granted on other grounds in *Bacigalupo* v. *California* (1992) 506 U.S. 802); see also *People* v. *Taylor (1990)* 52 Ca1.3d 719,749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew* v. *Georgia* (1978) 435 U.S. 223, 232-234; *Woodson* v. *North Carolina, supra,* 428 U.S. at p. 305.)[78] With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* - particularly its reliance on *Hildwin* v. *Florida* (1989) 490 U.S. 638, 640 - should be reconsidered. In *Hildwin,* the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *(Id.* at

[78] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin* v. *United States* (1991) 502 U.S. 46, 51.)

pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo.*[79]

Applying the *Ring* reasoning here, jury unanimity is required 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, supra,* 494 U.S. at p. 452 (cone. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." *(Brown* v. *Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge* v. *California,* 524 U.S. at p. 732; accord *Johnson* v. *Mississippi* (1988) 486 U.S. 578, 584; *Gardner* v. *Florida, supra,* 430 U.S. at p. 359; *Woodson* v. *North Carolina,* .428

[79] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People* v. *Prieto, supra,* 30 Ca1.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith* v. *Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf. *Johnson* v. *Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based on a plurality vote of nine out of twelve jurors].)

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People* v. *Wheeler* (1978) 22 *Cal. 3d* 258,265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases. [80] For example, in cases where a criminal defendant has been charged with

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[80] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.31201(2)(b)(II)(A)(West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1 (g) (SmithHurd

special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Fist, supra,* 897 F.2d at p. 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 Ca1.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both

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1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa.Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law.Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).)

the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury. In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire. *(Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless

the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context. The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People* v. *Hawthorne, supra,* 4 Cal.4th at p. 79; *People* v. *Hayes, supra,* 52 Ca1.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." *(Boyde* v. *California, supra,* 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

A defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer considers it. However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wel1s, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Comell L. Rev. 1, 10.)

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 convict appellant of any charge or special circumstance.

Similarly, the jury was instructed that the penalty determination had to be

unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the Federal Constitution. (See *McKoy v. North Carolina, supra,* 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (Ibid.; see also *Mills v. Maryland, supra,* 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and .the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

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 his rights to due process, equal protection and a reliable capital-

sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as her corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cr. *Delo* v. *Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. XIV; Cal. Const., art. I, §§ 7 & 15), her right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner

(U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17),and her right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People* v. *Arias* (1996) 13 Ca1.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. *(Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, her death sentence must be reversed.

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XVII. THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

In the penalty phase, the trial court instructed the jury with CALJIC No. 8.88[81] on the weighing process. This instruction was vague and imprecise, failed

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[81] The trial court instructed the jury: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant. After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree. Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this

to describe the weighing process accurately that jurors must apply in a capital case, was improperly weighted toward death and deprived appellant of the individualized, moral judgment required under the federal Constitution. This instruction, which formed the centerpiece of the trial court's description of the sentencing process, violated appellant's rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution. [82] (See e.g., *Mills* v. *Maryland, supra,* 486 U.S. at pp. 383-384.) Reversal of the death sentence is required.

B. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial," however, provided the jurors with no

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courtroom." (CT 987-988, 990, 992.)

[82] Appellant recognizes that this Court has rejected arguments challenging CALJIC No. 8.88 in cases such as *People* v. *Preuo, supra,* 30 Cal.4th at p. 264 and *People* v. *Catlin* (2001) 26 Cal.4th 81,174. However, for the reasons stated below, those decisions should be reconsidered.

guidance as to "what they have to find in order to impose the death penalty...." (*Maynard* v. *Cartwright* (1988) 486 U.S. 356,361-362.) The use of this phrase violates the Fifth, Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . ..." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386,391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862 at p. 867, fn.5.)

In analyzing the word "substantial," the *Arnold* court concluded:

Black's Law Dictionary defines "substantial" as "of real

> worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result. (224 S.E.2d at p. 392, fn. omitted.) [83]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between *[Arnold]* and this case are obvious." [Lots of italics below need to be cleaned up.] (*People v. Breaux* (1991) I Cal.4th 281,316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold's* analysis. While *Breaux, Arnold,* and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." *(Arnold, supra,* 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term *"substantial* history of serious assaultive criminal convictions" *(ibid.,* italics added), while the instant

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[83] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 202.)

instruction, like the one in *Breaux,* uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." *(Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold.* The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *(Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. at p. 235.) Because the

instruction rendered the penalty determination unreliable (U.S. Const., Amends. V, VIII and XIV), the death judgment must be reversed.

C. The Instructions Failed To Convey the Central Duty of Jurors in the Penalty Phase

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. *(Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Ca1.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." *(People v. Brown, supra,* 40 Ca1.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Ca1.4th 879, 948 (disapproved on other grounds in People *v. Combs* (2004) 34 Ca1.4th 821,860); *People v. Milner* (1988) 45 Ca1.3d 227,256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the

central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (lOth ed. 2001) defines the verb "warrant" as, *inter alia,* "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. *(Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." *(Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" *(Blystone* v.

Pennsylvania (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established. Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference in CALJIC No. 8.88 to the appropriateness of the death penalty. (CT 988.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which

expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." (CT 988.)

The crucial sentencing instructions violated the Fifth, Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. V, VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346) and must be reversed.

D. 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

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3) [84] The United States Supreme Court has held that this mandatory language is

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[84] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People* v. *Brown, supra,* 40 Ca1.3d at p. 544, fn. 17.)

consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde* v. *California, supra,* 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks* v. *Oklahoma, supra,* 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An

instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. *(Sullivan* v. *Louisiana, supra,* 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." *(People* v. *Duncan, supra,* 53 Ca1.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People* v. *Moore, supra,* 43 Cal.2d at pp. 526-529; *People* v. *Costello* (1943) 21 Ca1.2d 760; *People* v. *Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People* v. *Mata* (1955) 133 Cal.App.2d 18, 21; see also *People* v. *Rice* (1976) 59 Cal.App.3d 998,1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan* v. *United States, supra,* 157 U.S. at p. 310.) [85]

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[85] There are due process underpinnings to these holdings. In *Wardius* v. *Oregon,*

People v. *Moore* (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ... , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows.... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. *(Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan,* the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the

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supra, 412 U.S. at p. 473, fn.6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14,22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance o Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. *(Wardius v. Oregon, supra,* 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People* v. *Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States* v. *Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived her of due process. (See *Evitts v. Lucey* (1985) 469 U.S. *387,401; Hicks* v. *Oklahoma, supra,* 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal

Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants - if not more entitled - to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one,

served by denying capital defendants such protection. *(See* U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.) Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455,469-470, affd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

E. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes, supra, 52* Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital

sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

The instructions given in this case resulted in this capital jury not being properly guided on this crucial point. The death judgment must therefore be reversed.

F. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XVIII. THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. '" *(Barclay* v. *Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt* v. *Florida, supra,* 428 U.S. at p. 251 [opinion of Stewart, Powell, and Stevens, JJ.].)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg* v. *Georgia, supra,* 428 U.S. at

p. 198; *Proffitt* v. *Florida, supra,* 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley* v. *Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *(Id.* At p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People* v. *Farnam* (2002) 28 Cal.4th 107,193.)

As Justice Blackmun has observed, however, the holding in *Pulley* v. *Harris* was premised upon untested assumptions about the California death penalty scheme:

> *[I]n Pulley* v. *Harris,* 465 U.S. 37, 51 [J, the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'providers] jury guidance and lessen[s] the chance of arbitrary application of

> the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [J, quoting *Harris* v. *Pulley,* 692 F.2d 1189,1194,1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley* v. *Harris.(Tuilaepa* v. *California, supra,* 512 U.S. at p. 995 (dis. opn. Of Blackmun, J.).)

The time has come for *Pulley* v. *Harris,* to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. *(Furman* v. *Georgia (1972)* 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational- if not the only - effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[86]

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[86] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2)(1992); Ga. Code Ann. § 1710-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.l(I)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 4618- 310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa.Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Coop. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(I)(D)(1993); Va. Code Ann. § 17. 110.1C(2)(Michie 1988); Wash. Rev. Code Ann. § 10.95. 130(2)(b) (West 1990); Wyo. Stat. § 6-2- 103(d)(iii) (1988). Many states have judicially instituted similar review. See *State v. Dixon*(Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975)

The present case exemplifies why intercase review should be mandatory in a capital case. Appellant was a woman with a serious psychiatric condition brought on by lengthy sexual abuse by her father's father and other men whom she trusted. At the time of the murder, appellant was under the influence of drugs and alcohol and the pretrial conditions to which she was subjected severely and negatively impacted her already fragile mental state. The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United States Supreme Court in *Pulley* had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *(Pulley v. Harris, supra,* 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some

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307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer.v. State* (Ind. 1980) 417 NE.2d 889,899; *State v. Pierre, supra,* 572 P.2d at p. 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins* v. *State* (Ark. 1977) 548 S.W.2d 106. 121.

consistency from jury to jury when rendering capital sentencing verdicts.

Consequently, defendants with a wide range of relative culpability are sentenced to death. California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of her death sentence.

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XIX. CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." *(Trop* v. *Dulles* (1958) 356 U.S. 86, l01.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford* v. *Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson* v. *Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of

Stevens, 1.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. In 2005, Liberia and Mexico abolished the death penalty and in 2006, the Philippines also abolished it. Forty countries have abolished the death penalty for all crimes since 1990. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of August 2006), Amnesty International website, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty International, August 2006.) The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency moving to abolish capital punishment worldwide. (See *Ring* v. *Arizona, supra,* 536 U.S. at p. 618 (cone. opn. of Breyer, 1.); *People* v. *Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2005, ninety-four per cent of all known executions took place in China, Iran, Saudi

Arabia and the United States. (Amnesty International, *supra,* "Facts and Figures on the Death Penalty," August 2006.) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 1000 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty international, *supra, About the Death Penalty.)* As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment ... Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past. (April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[87]

The continued use of capital punishment in California and the

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Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit:

> The cases of Derrick Jamison and the other 118 individuals released from death row since I973·demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of lethal error ...
> *(Ibid;* in February 2005, Derrick Jamison became the 119th wrongfully convicted person to be released from death row on the grounds of innocence.)

United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163,227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky, supra,* 492 U.S. at pp. 389-390 (dis. opn. of Brennan, J.).)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law,* Amnesty International Website, *supra.)*

Additional support for this position is also evident by the adoption of international and regional treaties providing for the abolition of the death penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section I of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig* v. *Miller (1968)*389 U.S. 429, 439-441; *Edye* v. *Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[88]

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[88] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum.

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section I of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248,267-268.)

Once again, however, appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. *(People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent* (1987) 43

Rts. J. 59.

Cal.3d 739,778-781; see also 43 Ca1.3d at pp. 780-781 (cone. opn. of Mosk, 1.); *People v. Hillhouse* (2002) 27 Cal.4th 469,511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F;3d 1461, 1487 (dis. opn. of Norris, 1.).)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray, supra,* 477 U.S. at p. 534 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

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XX. CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

California's death penalty scheme fails to require that the jury make a written statement of findings and reasons for its death verdict. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional *(People* v. *Fauber* (1992) 2 Cal.4th 792, 859), that

holding should be reconsidered as the failure has deprived appellant of her Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and meaningful appellate review of her death sentence.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People* v. *Martin* (1986) 42 Cal.3d 437, 449, citing *In re Podesto* (1976) IS Cal.3d 921,937-938.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentencing choice. *(Ibid;* Pen. Code, § 1170, subd. (c).) Because the Eighth and Fourteenth Amendments afford capital defendants more rigorous protections than those afforded non-capital defendants (see *Monge* v. *California, supra,* 524 U.S. at p. 732; *Harmelin* v. *Michigan* (1991) Sol U.S. 957, 994), and because providing more protection to a non-capital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see *Myers* v. *Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that the sentencing entity in. a capital case is constitutionally required to identify for the record the aggravating and mitigating circumstances found and rejected.

As discussed previously in this brief, the decisions in *Apprendi* v. *New Jersey, supra,* 530 U.S. 466, *Ring* v. *Arizona, supra,* 536 U.S. 584, and *Blakely* v. *Washington, supra,* 124 S.Ct. at p. 2543, require that a jury decide unanimously

and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know which, if any, of the aggravating factors in this case were found by al1 of the jurors. Moreover, the Court itself has stated that written findings are essential to meaningful [appellate] review." *(People* v. *Martin, supra, 42* Ca1.3d at pp. 449-450.) Explicit findings in the penalty phase of a capital case are especially critical because of the magnitude of the penalty involved (see *Woodson* v. *North Carolina, supra,* 428 U.S. at p. 305) and the need to address error on appellate review. (See, e.g., *Mills* v. *Maryland, supra,* 486 U.S. at p. 383, fn. 15.) California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. *(Tuilaepa v. California, supra,* 512 U.S. at pp. 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot adequately assess prejudice where, as in appellant's case, aggravating factors have been improperly considered.

Accordingly, the failure to require written findings regarding the sentencing choice deprived appellant of her Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection of the law, and meaningful appellate review of her death sentence. This constitutional deficiency in California's death

penalty law requires reversal of appellant's death sentence and remand for a new penalty trial.

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XXI. THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT, REQUIRING REVERSAL

Numerous errors, many of federal constitutional dimension, occurred at appellant's trial. Appellant has shown how each of those errors individually prejudiced her case. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors undermines any confidence in the integrity of the proceedings and may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637,642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *(Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams* (1971) 22

Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; *People v. Hernandez* (2003) 30 Cal.4th 835,877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (l0th Cir. 2003) 317 F.3d 1196, *1206-1208; Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

The methodical and purposive grinding down of appellant by depriving her of medical attention, sleep, sunlight, contact with other inmates, and time outside her cell and nutrition, by exposing her to repeated other forms of physical and mental abuse, and by repeated intrusions upon privileged attorney-client documents and other willful interference with her ability to work on her own defense combined to undermine appellant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to assist in her own defense.

Appellant was denied contact with her attorney and was forced to continue working with an ineffective attorney whom her relationship had completely broken down. That same counsel all but abandoned his client at both the guilt and penalty phases of appellant's capital trial.

Appellant's biased and hostile trial judge doomed appellant's opportunity for a fair trial at the outset. Compounding the problem, the trial court improperly admitted irrelevant and highly prejudicial evidence of appellant's demeanor and character, the death of appellant's daughter as a murder aggravator and talk about another jail inmate as evidencing an intent to solicit her murder. All of this improperly admitted inflammatory evidence depicted appellant as a cold calculated murderer who would go so far as to kill her own infant daughter for insurance money -- bringing appellant that much closer to a guilty verdict and death sentence. The trial court also made numerous other improper evidentiary rulings, all to appellant's detriment.

In addition, the prosecution, law enforcement and jail staff manipulated appellant's documented psychological conditions to encourage and entrap appellant into making admissions against herself and engaging in "tough talk" which was then used to stage additional crimes which could be brought against her.

Finally, the trial court employed the wrong standard in improperly denying appellant's joint motion for modification and new trial. These and the other multiple errors undermined the reliability of the both the guilt and penalty verdicts.

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. *(Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams, supra,* 22Cal.App.3d at pp. 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker* v. *Gladden* (1966) 385 U.S. 363,366; *People* v. *Pierce* (1979) 24 Cal.3d 199,208.) In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People* v. *Hayes* (1990) 52 Ca1.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People* v. *Hamilton* (1963) 60 Cal.2d 105, 136-137;see also *People* v. *Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584,605,609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) In the instant case, it certainly cannot be said that the errors had "no effect" on any

juror. *(Caldwell* v. *Mississippi* (1985) 472 U.S. 320,341.) Given the severity of the errors in this case, their cumulative effect was to deny appellant due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Killian* v. *Poole, supra,* 282 F.3d at p. 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal"']; *Harris* v. *Wood, supra,* 64 F.3d at pp. 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v Wallace, supra,* 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People* v. *Holt* (1984) 37 Cal.3d 436,459 [reversing capital murder conviction for cumulative error].) Appellant's conviction and death sentence must be therefore be reversed.

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XXII. ANY FAILURE OF DEFENSE COUNSEL TO REQUEST OR OBJECT TO ANY OF THE JURY INSTRUCTIONS SHOULD BE EXCUSED

Because it is the trial court's duty to see that the jurors are adequately informed on the law, appellant's failure to request a clarifying instruction or object to an incorrect instruction does not waive the issue. (*People v. Shoals*

(1992) 8 Cal.App.4th 475, 490-491 [failure of court to define "maintaining" and "opening," is reversible error in case charging a violation of Health and Safety Code section 11366].) The error is also not waived by appellant's failure to object, because the trial court has a "duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury." (*People v. Satchell* (1971) 6 Cal.3d 28, 33 fn. 10.) Counsel's failure to object does not waive any instructional errors, because they all affected appellant's fundamental rights. (Pen. Code § 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503, 505-506.) As observed in *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20: "the people make their oft-repeated, but only occasionally applicable, contention the issue was waived, or alternatively that any error was invited, because defendants failed to object to, or request a modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty." (See also *People v. Hernandez* (1988) 47 Cal.3d 315, 353; *People v. Harris* (1981) 28 Cal.3d 935, 956; *People v. Andersen* (1994) 26

Cal.App.4th 1241, 1249 [if a defendant's substantial rights will be affected by the asserted instructional error, the court may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court].)

When a trial court's failure to give a jury instruction so infects the trial that a criminal defendant is deprived of a fair trial, the Due Process Clause of the Fourteenth Amendment is violated. (*Henderson v. Kibbe* (1977) 431 U.S. 145, 155, 52 L.Ed.2d 203, 97 S.Ct. 1730.) When a jury instruction is omitted, "whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury." (*Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 745, *cert. denied* (1996) 517 U.S. 1158; *Henderson v. Kibbe, supra*, 431 U.S. at 156.) "[T]he death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585.) Thus, appellant's instructional claims should be considered by this Court, whether or not appellant's lawyer objected.

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XXIII. THIS COURT SHOULD REVIEW ALL ERRORS ON THE MERITS, RATHER THAN INVOKING PROCEDURAL BARS BECAUSE DEATH IS THE ULTIMATE PENALTY

Because of this Court's preference for procedural waivers, appellant has relegated nearly all issues with procedural problems to her habeas petition. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [ineffective assistance of counsel claims properly brought in a habeas corpus proceeding].)

Appellant respectfully requests this Court to follow the example of the Kentucky and Pennsylvania Supreme Courts and review all errors on the merits. It is a sick system that would kill someone simply because her court-appointed attorney was ineffective by missing, failing to understand, or wrongfully neglecting to raise all possible issues in their proper contexts with appropriate citation to all relevant state and federal constitutional grounds. While the justice system may have some legitimate interests, in most criminal cases, to rely on trial counsel to object on all grounds to preserve the issue, it is unseemly to have the same rules apply to death cases. Capital case litigation should not be reduced to some kind of arcane game, where the omissions of appointed defense counsel seal the fate of the condemned. The state should not execute people before this Court reviews all errors on their merits.

In *Rogers v. Commonwealth* (Ky. 1999) 992 S.W.2d 183, 187, the Kentucky Supreme Court explained:

> [U]npreserved errors are reviewable in a case where the death penalty has been imposed. . . . The rationale for this rule is fairly straightforward. Death is unlike all other sanctions the Commonwealth is permitted to visit upon wrongdoers . . . . Accordingly, the invocation of the death penalty requires greater caution than is normally necessary in the criminal justice process.

In *Commonwealth v. O'Donnell* (1999) 746 A.2d 198, 204, the Pennsylvania Supreme Court explained:

> [I]t is the practice of this Court to relax our waiver rules in death penalty cases because of the irrevocable and final nature of the death penalty. . . . [S]ignificant issues perceived sua sponte by this Court, or raised by the parties, will be addressed and, *if possible from the record,* resolved. Similarly, this Court should discontinue the "gotcha" nature of dismissing claims on the arcane and technical minutiae waiver "rules," particularly when appellant's life is at stake. On that basis, appellant convictions and sentence should be reversed.

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XXIV. CLAIMS RAISED IN THE HABEAS PETITION ARE INCORPORATED BY REFERENCE, BUT ONLY IF THIS COURT DETERMINES THAT SUCH CLAIMS SHOULD HAVE BEEN RAISED ON APPEAL

It is likely, appellant will file a habeas petition related to her conviction before this Court decides her direct appeal. Appellant believes that the habeas

claims will be appropriately raised in the habeas petition, because they rely, at least in part, on extra-record facts, or claim ineffective assistance of counsel, often for failure to preserve appellate issues. Thus, if this Court determines that any habeas claims should have been raised in this appeal, appellant incorporates each and every allegation based on the trial and appellate record. Because of the large size of this opening brief, appellant does not wish to burden the Court with possibly unnecessary briefing that is duplicative of her habeas petition.

****

CONCLUSION

Appellant respectfully requests this Court to reverse the judgment below and grant her a new trial, or, at a minimum, reverse the judgment of death and remand for a new penalty hearing.

Dated: 3/1/11

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Angelina Rodriguez
By Appointment of the Supreme Court

CERTIFICATION OF WORK COUNT

PURSUANT TO CALIFORNIA RULES OF COURT, RULE 13

I certify that Appellant Rodriguez' Opening Brief consists of 101,689 words. Appellant's Application to File an Oversized Opening Brief was filed separately. However, the brief falls within Rule 8.630 which establishes a word limit of 102,000 words for opening briefs in capital cases.

Dated: 3/1/11

Respectfully submitted,

KAREN KELLY
Attorney for Appellant Angelina Rodriguez
By Appointment of the Supreme Court

PROOF OF SERVICE

I am a citizen of the United States and am employed in the Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

APPELLANT'S OPENING BRIEF

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Modesto, CA addressed as follows:

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I, K. Kelly, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 3/3/11 at Modesto, California.