IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

v.

GEORGE WILLIAMS, JR.
Defendant/Appellant

Supreme Court No.
Crim. S131819

San Diego County
Superior Court
No. SCD-172678

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
San Diego County
Honorable David J. Danielson, Judge

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INTRODUCTION

Appellant, George Williams, did not receive a fair trial. This was a cold hit murder case in which the only evidence linking appellant to the victim at the time of the crime was sixteen-year-old DNA evidence. Defense counsel conducted discovery and received the autopsy report and related materials. The autopsy report showed the presence of sperm in the victim, but the none of the sperm were intact. Over eight months before trial, defense counsel interviewed Dr. John Eisele, the then-coroner who had performed the autopsy in 1986, concerning the significance of the lack of intact sperm. Dr. Eisele told the defense that sexual intercourse evidenced by the sperm took place 48 to 72 hours before the victim's death. For the defense, this evidence was very valuable: if sex had taken place 48 to 72 hours prior to the victim's death, the sperm-based DNA evidence did not place appellant with the victim at the time she was killed.

For over eight months, the defense prepared for trial based on the opinion of the state's own witness, the coroner who had performed the autopsy. Moreover, in addition to this evidence, which undermined the heart of the prosecution case that appellant had raped and murdered the victim, the defense also had strong evidence that a third party, the victim's neighbor George Bell, had committed the crime: Bell gave a false alibi for his whereabouts at the time of the crime; he had remained silent on occasions when others directly accused or asked him about his possible role in the crime; he had raped his own wife on multiple occasions and used smothering techniques in those rapes similar to those which might have killed the victim in this case; he had threatened to kill his wife, telling her that he would put her six feet under and that he had done it before; he showed an obsessive interest in the circumstances of, and was aware of details of, the victim's death; he was constantly talking about the crime; and he repeatedly made statements

suggesting his own guilt, including a 12:00 a.m. phone call to the victim's mother ten years after the crime in which he told her that he needed to talk to the detective handling the case because "I can't live like this anymore. I can't hurt you anymore."

Armed with a two-pronged defense – (1) that the DNA evidence which placed appellant with the victim showed only that he had had sex with her two or three days prior to her death and (2) that there was more than sufficient evidence to suggest that George Bell had committed the crime and therefore to raise a reasonable doubt that appellant had committed it – the defense began the trial with good reason to believe they had a solid case for acquittal. After jury selection had begun, the prosecution disclosed for the first time to the defense that they had another witness, Dr. Glenn Wagner, the current coroner, who had re-examined the slide Dr. Eisele had used and found a sperm head on one of the sperm. The defense sent Dr. Wagner's slides to Dr. Eisele and Eisele indicated that these new slides did not change his opinion that the time of intercourse was more than 48 hours prior to the time of death.

Defense counsel's opening statement to the jury on September 2, 2004, confidently promised the jury that Dr. Eisele would testify that the sperm evidence showed that intercourse between appellant and the victim took place more than two days before her death.

And then the surprises began: first, on September 7, 2004, the morning that Dr. Eisele was supposed to testify for the prosecution, the prosecutor informed the defense that Dr. Eisele had changed his testimony and that he was now going to testify that using new equipment, he had seen an intact sperm on his original autopsy slide; second, the prosecution disclosed for the first time that another technician, William Loznycky, had prepared a separate slide at the time of the autopsy and that his notes indicated that he had observed an intact sperm at that

time way back in 1986. The prosecution conceded that it should have turned over this evidence to the defense, but it had been put in another file and they were not aware of it until shortly before the disclosure.

Understandably, the defense moved for mistrial – five days after the defense counsel had made his opening statement and promised testimony from Dr. Eisele supporting the defense theory of the case on the crucial question of when sexual intercourse took place, defense counsel was surprised by evidence that the People had in their possession for 16 years and by the revelation that Dr. Eisele, a key witness, who had made a dramatic change in his anticipated testimony after he had assured the defense that new views of the slides did not change his opinion. The credibility of defense counsel was undermined by making promises to the jury about the sperm evidence which were based on Dr. Eisele's eight-month-long adherence to his prior opinion; and the defense decisions about trial strategy over those eight months preceding trial had been made without critical evidence which the prosecution had failed to turn over despite a discovery request to do so. The trial judge denied appellant due process and a fair and reliable trial by erroneously denying the defense motion for a mistrial.

But the errors did not stop there. The prosecutor exacerbated the unfairness to the defense from its discovery violations and late disclosures by arguing to the jury that defense counsel had concocted the defense that sex had taken place two to three days prior to the victim's death, and the trial judge inexplicably overruled the defense objections to this prosecutorial misconduct. (Argument II below.)

Then the trial judge's rulings undermined the second prong of the defense by: (1) refusing to admit evidence from the investigating FBI agent that the victim's now-deceased mother had called him to report George Bell's bizarre phone call, in which ten years after the victim's death, he told her mother "I can't live this way anymore. I can't hurt you anymore."; (2) restricting the defense cross-examination

of Bell on these very statements; and (3) refusing to instruct the jury about the significance of the false alibi Bell repeatedly gave as evidence of consciousness of guilt. (Argument III, below.)

Then the trial judge, over an objection from the defense, permitted the prosecution to introduce evidence of other sexual offenses by appellant which unconstitutionally allowed the jury to convict him on evidence not that he had committed this crime, but that he had a propensity to commit such crimes and which were admitted in violation of Evidence Code Section 352 because whatever value they may have had to show a propensity to commit sexual assaults was outweighed by the prejudicial impact admission of this evidence had on jury's determination as to whether appellant was responsible for the victim's death. (Argument IV, below.)

The pattern of surprising the defense at critical stages of the trial continued in the penalty phase. After ruling that appellant would be permitted to present the videotaped statements of two elderly witnesses too infirm to travel from Indiana to California, on the morning defense counsel was to address the jury with his opening statement, the trial judge reversed himself and ruled the statements inadmissable, and then refused a defense motion to adjourn the trial so that the court and attorneys could take the testimony of these witnesses in their home state. The refusal of the trial judge to either allow the videos into evidence or adjourn the trial so that their testimony could be taken erroneously denied the defense the ability to present important mitigating evidence (1) from appellant's foster mother about the physical abuse of defendant as a child and his mother's own alcohol abuse and (2) from an elderly woman on the way appellant looked after her before and after her husband passed away, calling her regularly to inquire about her welfare and coming over to take care of any odds and ends that she needed repaired, and generally acting like a loving son to her. (Argument V, below.)

In addition, despite the fact that this case had highly charged racial overtones – the accusation that a black man had raped and killed a white girl – the trial judge erroneously refused a defense request that the jury be instructed not to allow race to affect their penalty verdict and thereby impaired appellant's rights to an impartial sentencing jury and a reliable penalty determination. (Argument VI.) The trial judge also erroneously refused a defense request to instruct the jury that their verdict would be carried out undermining each juror's sense of responsibility for their verdict (Argument VII.)

As discussed below, both individually and cumulatively, the errors denied appellant a fair trial, due process of law, and fair and reliable determinations of guilt and sentence.

STATEMENT OF THE CASE

A. The Charges

On June 9, 2003, the District Attorney of the County of San Diego filed a three-count information charging George Williams as follows:

Count 1:Murder of Rickie B. in violation of Penal Code section 187(a); it was specifically alleged that the murder was committed while in the perpetration of rape and kidnapping and was willful, deliberate and premeditated within the meaning of Penal Code section 189; it was further alleged that there were two special circumstances within the meaning of Penal Code section 190.2, subdivision (a)(17) : murder committed while engaged in the commission and attempted commission of the crime of rape in violation of Penal Code section 261 and murder committed while engaged in the commission and attempted commission of the crime of kidnapping in violation of Penal Code section 261[sic].

Count 2: Forcible rape of Rickie B. in violation of Penal Code Section 261(2).

Court 3: Kidnapping of Rickie B. in violation of Penal Code Section 207(a).

Priors: Defendant committed a serious felony on April 4, 1985 and did not remain free of a conviction for five years subsequent to his release from prison within the meaning of Penal Code sections 667.5(b) and 668, and further had been convicted of a serious felony within the meaning of Penal Code sections 667(a)(1) and 1192.7(c).
(1 CT 39-41.)

On June 13, 2003, the trial judge gave the parties notice of the prosecution's election to seek the death penalty. (1 CT 60.)

B. Trial Chronology

1. Pretrial Proceedings

There was active pretrial litigation. The defense filed 33 numbered pretrial motions and the prosecution litigated actively as well. (See 1 RT 2-13.) Pretrial motions relevant to this appeal include appellant's motions to preclude admission and reliance upon purported propensity evidence under Evidence Code section 1108, to permit introduction of a third party suspect's statements reflecting consciousness of guilt, and to instruct the penalty phase jury not to permit race to enter into its sentencing determination and to make that determination with the understanding that the sentence it selected would be carried out. (See Arguments IV, VI, and VII below.)

2. Guilt Phase Trial and Verdict

The trial began on August 19, 2004 with jury selection. (11 CT 2435.) The jury was selected on September 1, 2004. (11 CT 2449.) On September 2, 2004, opening statements were made by both the prosecution and defense, and the first prosecution witnesses were called. (11 CT 2451-2453.) On September 10, 2004, the defense moved for a mistrial and discovery sanctions because of the belated disclosure of sperm evidence and of a radical change in the testimony of the coroner, Dr. Eisele, on the critical issue of how long before death the victim had

sexual intercourse. (8 CT 1848.) In his opening statement to the jury, defense counsel, relying on the discovery that had been provided by the prosecutor and on Dr. Eisele's then current view on the issue, had made a critical promise to the jury he would no longer be able to keep, and would now face unwarranted and prejudicial damage to his credibility. The mistrial motion was argued on September 13, 2004 and denied on that date.[1] (21 RT 4277-4278.)

After calling 26 witnesses, and playing the videotape of the preliminary hearing testimony of the victim's mother (18 RT 3010) and an audiotape of the defendant being interrogated (19 RT 3702), the prosecution concluded its case in chief on September 15, 2004. (23 RT 4873.) The defense case began on September 15, 2004; the defense rested on September 21, 2004, after calling 17 witnesses. (26 RT 5600.) The prosecution called five rebuttal witnesses and then rested on September 21, 2004. (11 CT 2480-2482.) The defense called three surrebuttal witnesses and the evidence closed on September 22, 2004. (11 CT 2483-2484; 27 RT 6024.) Closing arguments were made and the jury was instructed on Thursday, September 23, 2004. (11 CT 2486-2487.) Formal jury deliberations began the morning of Monday, September 27. (29 RT 6800.) The jury reached a verdict on Tuesday afternoon, September 28. (29 RT 6807.) The jury found defendant guilty on all three counts: murder in the first degree as alleged in count 1, forcible rape as alleged in count 2 and kidnapping as alleged in count 3; the jury also found the two special circumstance allegations to be true: the murder was committed while defendant was engaged in the commission and attempted commission of the crime of rape and while defendant was engaged in the commission and attempted commission of the crime of kidnapping (11 CT 2494-2498.) There is no record of the jury reaching a verdict on the prior conviction allegations. (*Ibid.*)

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[1] The denial of the mistrial motion is a significant issue on this appeal and is discussed below in Argument I.

3. Penalty Phase Trial Chronology and Verdicts

On Thursday, September 30, 2004, pre-penalty phase motions were heard. (30 RT 6816-6884.) The trial judge granted the defense motion to present by videotape the statements of two elderly women who lived in Indiana and were too infirm to travel to California. One had personal knowledge of George Williams as her foster child and of the way he had been treated by his mother; the other had personal knowledge of the kindness of George Williams when he looked after her before and after her husband passed away. (30 RT 6825-6827.)

On Monday, October 4, the prosecution made an opening statement and presented 15 witnesses. (31 RT 7228-7388.) There were no proceedings from October 5 through October 11, 2004. On October 12, 2004, shortly before defense counsel was to begin his opening statement, the trial judge rescinded his ruling that the defense could present the videotaped statements of the two infirm witnesses by videotape.[2] (32 RT 7413-7416.) The defense then made its opening statement and presented 19 witnesses, resting its penalty phase case on Tuesday, October 19, 2004. (32 RT 7423 through 36 RT 8915.) Further motions, including a motion requesting a conditional examination of the two elderly and infirm defense witnesses in Indiana, were heard on Tuesday, October 19, 2004. (36 RT 8915-8956.) That motion was denied on October 19, 2004. (36 RT 8955-8956.) The prosecution then presented six rebuttal witnesses and penalty phase evidence concluded on October 20, 2004. (37 RT 9210.) On Thursday, October 21, 2004, closing arguments were made by both sides, the judge instructed the jury and the jury began deliberations. (38RT 9257-9288.) The jury deliberated further on October 25, 26, 27, and 28, November 1, November 2 and finally on November 8, 2004, some 17 days after they began their deliberations, the jury reached a

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[2] This rescinding of his earlier order and the rulings on related motions are an issue in this appeal. (See Argument V.)

determination that the penalty shall be death. (11 CT 2528-2533, 2535-2540, 2542-2543.)

The defense moved for a new trial and to preclude capital punishment on February 14, 2005 (10 CT 02338); The trial judge denied those motions and the automatic motion for modification of the death verdict pursuant to Penal Code section 190.4(e) on February 24, 2005. (11 CT 2546.) On that same day, the trial judge sentenced appellant to death on Count 1, for his violation of P.C. 187(a) 2ith special circumstances 190.2(a)(17); to six years, stayed pursuant to Penal Code section 654, for his violation of Penal Code 261(2); and to five years, stayed pursuant to Penal Code 654, for his violation of Penal Code section 207(a) The court. (11 CT 2546.). The trial judge also ordered that restitution be paid to the victim in the amount of $590.00. (*Ibid.*)

A judgment of death having been imposed, this appeal is automatic pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF FACTS

Guilt Phase Overview

Rickie Blake was last seen at her home on the night of April 10, 1986. Rickie had been to the dentist that day and her mouth was sore so she had soup and ice cream for dinner. (17 RT 2568.) Her father went to bed while she was still watching the Padres game on TV. (17 RT 2572.) Her sister Alicia was out for the evening and when she came home, she, Rickie and friends of Alicia talked outside for a while. When they came in, the phone was off the hook, which meant Rickie was talking with her friend Henry Lopez. (17 RT 2780.) Alicia asked Rickie to give her the phone because Alicia was expecting a call. (17 RT 2781.) A call came for Rickie from a man who identified himself as George[3].(17 RT 2784.) Rickie took

[3]Angela Caruso, who was there that night. testified that another call from a man identifying himself as George came in and she told him he sounded too old to be calling Rickie, told him he must be a pervert and hung up, (17 RT 2733.)

the phone and spoke with him; Alicia fell asleep. (17 RT 2786.) The next thing she knew, she was awakened by her mother very early in the morning with the news that Rickie was missing. (17 RT 2787.) The living room lights were still on and front door was wide open. (17 RT 2788.) They called the police. On the next night, April 11, Rickie's body was found on the side of an off ramp on I-15 by a woman exiting 1-15 after 10:00 pm. (18 RT 3016.) Police did not charge anyone with the crime until 17 years later when a DNA sample on a swab from the victim's vagina matched George Williams' DNA. The prosecution theory of the case was that George Williams abducted Rickie from her home on April 10, sexually assaulted her, strangled her, and then drove her body and dropped it off on the 1-15 off ramp where it was found at 10:00 pm on April 11. The defense was that she was killed by neighbor George Cardenas Bell and that George Williams had consensual sex with Rickie more than a day prior to her disappearance.

The prosecution case-in-chief consisted of the following: (1) DNA match; (2) Rickie's personal habits of not dating and being afraid to leave the house at night; (3) George Williams' prior history of committing sexual assaults; (4) autopsy evidence that suggested that Rickie was sexually assaulted and died by strangulation and that she might also have been force-fed alcohol and partially drowned when the alcohol went to her lungs; (5) possible links to George Williams through the skating rink that Rickie's sister frequented and Rickie sometimes did as well.

The defense case consisted of two main prongs: (1) that the coroner at the time of the crime found that the sperm from which the DNA sample was obtained was deposited 48 to 72 hours prior to the victim's death and therefore in no way linked George Williams to her death; and (2) George Cardenas Bell was the actual killer. The evidence adduced in the prosecution guilt phase case, the guilt phase defense and the prosecution rebuttal is discussed in that order below.

PROSECUTION GUILT PHASE CASE

Each of the five categories of evidence which the prosecution offered in the guilt phase – (1) DNA match; (2) Rickie's personal habits of not dating and being afraid to leave the house at night; (3) George Williams' prior history of committing sexual assaults; (4) autopsy evidence; (5) possible links to George Williams – is summarized below.

(1) DNA Match

James Wiegand testified that on January 15, 2003 (119RT 3422), the California Department of Justice ran a computer search of a DNA sample provided by the San Diego Police Department (taken from the victim of an unsolved case) and found the sample had 13 exact matches with George Williams' DNA using the STR technique. (19 RT 3421.) Gary Horner, a private forensic serologist, did a comparison of the defendant's DNA sample and the sample taken from the victim; the samples matched using the RFLP method which is highly predictive. Even a match in DNA profiles is not exact; nor does it tell the source of the semen. (19 RT 3465.) Annette Peer, a DNA analyst for the San Diego Police Department testified that she did DNA testing on March 12, 2003 with a known reference sample from George Williams and a DNA sample from the crotch of Rickie Blake's underwear and got a match. (19 RT 3628.) This confirmed the same result as the Department of Justice got. (19 RT 3630.) All there labs which tested the sample got the same result. (19 RT 3631-3633 [describing Exhibit 36].) The probability that the DNA results would match would be 1 in 190,000 African Americans, 1 in 9,300 Caucasians and 1 in 2404 Hispanics. Using all three tests and all 13 markers, the probability of a match in the general population matching this sample would 1 in 1.4 quadrillion for African Americans, 1 in 1.4 quadrillion for Caucasians and 1 in 161 trillion for Hispanics. (3737) The defense did not dispute the DNA evidence.

(2) Rickie Blake's Behavior Inconsistent with Consensual Sex

William Blake, Rickie's father, testified that Rickie was in eighth grade and was very shy and did not go out at night very often. (17 RT 2563.) Christina Aguirre testified that Rickie was not the kind of person who would go out at night to find her cat. (27 RT 2770.) William Blake testified that they bought a spotlight for outdoors so she would go out of the house at night. (17 RT 2561-2563.) If her parents were home she would go to the door when the bell rang and see who it was but would not open it someone she did not know; instead, she would get her parents. (17 RT 2563.)

Henry Lopez testified that he and Rickie met as friends and became boyfriend and girl friend in 8th grade. (17 RT 2598.) They talked a lot on the phone (17 RT 2599.) He once went to a birthday party for her at the skating rink. (17 RT 2600.) Even when he moved away they talked on the phone every night. (17 RT 2597.) He testified that the relationship was not physical; they may have held hands at the birthday party, but there was no sex. (17 RT 2602.) Rickie was a good family girl; she did her homework and was good in school. (*Ibid.*) They talked about kissing and he may have thought about sex, but he never talked about it with Ricky. (17 RT 2603.) He never saw Rickie's letter to Christina in which she talked about having sex with him. (17 RT 2604.) Christina Aguirre testified that Rickie's letter to her about "losing her cherry to Henry" on his 15th birthday was just talk; there was no truth to the letter, just talk. (17 RT 2750.) Rickie's sister, Alicia (Bootsie) Blake Conrad, testified that Rickie's only interest in boys was Henry Lopez and that she had never gone out on a date. Their parents did not allow dating until age 16. (17 RT 2775.)

(3) Other Sexual Assaults by George Williams

The prosecution introduced two incidents of sexual assaults which they contended showed Williams' propensity to commit sexual crimes. The first was an incident in 1984 in which he rubbed lotion on his 6 year old daughter's vaginal area . The second involved the rape of his wife's next door neighbor and her daughter.

Idella Williams, George Williams' daughter, testified that in 1984, when she was six years old and her mother was out, her father came into her room and rubbed lotion on her vaginal area. (20 RT 3862.) She did not remember much about the incident, but does remember that she said "daddy" to make him stop. (20 RT 3863, 3865.) She did not recall him doing anything with his this finger. (20 RT 3863.) She does not recall telling the police that he gave her alcohol when he did this (20 RT 3866.) Brenda Williams (Idella's mother and George's wife), testified that she left her children in George's care to go pick up Christmas presents that she had stored at a friend's house. (20 RT 3877.) George had been drinking and was supposed to put the children to bed.(20 RT 3883.) When she returned home, George was in the corner sitting on the floor in a fetal position, rocking back and forth. (20 RT 3887, 3898) Idella was frightened and would not talk, but eventually told her mother that her father had rubbed lotion on her and when she told him to stop and he did. (20 RT 3887.) She read the police report and it said that Idella told the police that George had given her some pina colada. (20 RT 3890.) Brenda took Idella to the hospital that night. (20 RT 3889.) The incident was reported to the police. (*Ibid.*)

Velma Williams (no relation to George) testified that in 1986 she lived in an apartment building across the hall from Brenda Williams (who was then separated from George.) (20 RT 3893.) George came around to visit his wife Brenda and kids two or three times a week, so Velma knew who he was but had no interaction with him. (20 RT 3937.) She was taking the trash out and as she went back into

her apartment, George followed her and when she declined his request to come in, he forced his way in. (20 RT 3939.) George had been drinking; Velma could smell it; he had a forty-ounce bottle of malt liquor with him and a brown bag with liquor in it. (20 RT 3957.) She told him that if he did not leave, she would call the cops; she picked up the phone, but he pulled the cord out of the wall and said he wouldn't leave until he fucked her. (20 RT 3942.) He tried to force her to drink some beer by putting a beer bottle to her lips, but she kept turning away as she continued to try to force her to drink. (20 RT 3943.) Then, he tried to pull her clothes off and then ordered her to stand up and take her clothes off. She got completely naked and he ordered her to lie down on the bed. (*Ibid.*.) He then took the cord from the curling iron and tied her hands together tightly and tied her ankles together with the phone cord; then he tried to insert his finger in her vagina, untied her ankles and tried again. (20 RT 3944.) Then, he asked for vaseline and she was afraid he would kill her so she went to the bathroom and got baby oil (20 RT 3945.) He put the baby oil in her vagina and anus and then had vaginal intercourse with her and ejaculated and then he turned her over and began having anal intercourse with her, but was unable to maintain an erection. (20 RT 3946.) After this, she was still on her stomach and he hogtied her and gagged her. (20 RT 3947.) He then took off the gag and asked her who else was in the apartment and she said her girls were in the room asleep; she told him to please not touch her daughters and that he could do whatever he wanted with her; a few minutes later, she heard a scream from her girls' room. (20 RT 3948.)

She then pretended to have to go to the bathroom and George untied her legs(20 RT 3949.) She then asked to see her daughters; she was allowed to look in the room but not allowed to check them physically. (20 RT 3950.) He then took her back to the bedroom and had intercourse with her again and he eventually fell asleep with Velma was sitting on top of him. (20 RT 3951.) At this point, she was

able to get her arms untied and slowly move off the bed and get her daughters and get out of he apartment. As she got her daughters, she noticed a pool of blood in daughter Alicia's bed. (*Ibid.*)

She took her keys with her and was able to lock the door so that George could not get out without a key. (20 RT 3952.) She took the girls to her Aunt's house and called the police who arrived within five minutes; she took the police to her apartment and they brought George out. (20 RT 3952-3953.) George was still asleep when the police got there. (20 RT 3959.) Then she went to the hospital. Alicia was taken to Children's Hospital. (20 RT 3956.)

Dr. Marilyn Kaufhold, a pediatrician at Children's Hospital testified that she treated Alicia on April 18, 1986. (22 RT 4756.) Alicia had red marks on her wrists that were consistent with some kind of restraint. (22 RT 4758.) She testified that the child suffered from a blunt penetrating injury to her vaginal area; the extent of the injury was more consistent with penetration by a penis than a finger, but she couldn't say that a finger would be incapable of causing such an injury. (22 RT 4769.)

(4) Autopsy Evidence

a. General Observations. Dr. John Eisele, the San Diego County coroner who performed the autopsy shortly after Rickie's body was found, testified that injuries to Rickie's body included: two black eyes (22 RT 4618); damage to the mouth including an area of bruising and tearing on the lower lip and hemorrhage extending onto the gum (*Ibid.*); an injury to the left eye consistent with a punch; an injury to the right eye consistent with either a punch or the neck being squeezed and back pressure building in the veins (22 RT 4619.) There was a bloody foaming liquid coming out of the nose, but no injuries to the nose itself. (22 RT 4620.) The injuries to the mouth are consistent with a blow to the mouth, possibly pressure to the mouth. Although Dr. Eisele could not say what caused the injury, it was

consistent with being caused by something smaller than a hand or fist such the opening of a bottle. (22 RT 4625.) The teeth were intact. (22 RT 4626.) There was bruising on the neck and a small quarter-inch scrape; there were two areas of bruising on the neck, mottled blue discolorations. (22 RT 4627.) They were the kind of injuries which could be caused by pressure or squeezing (22 RT 4630), but he could not rule out suffocation. (22 RT 4731.)

There was hemorrhaging underneath the scalp in three places indicating three blows to the head. (22 RT 4631, 4696.) The medical effects of these blows were minimal, but it is possible they could have caused unconsciousness. (22 RT 4697.) The damage was caused by a blunt object that did not have a sharp edge; something like a fist or a board could have done it, but not a club. which would have broken the skin. (22 RT 4631.) It could also have been done by the head slamming down on a flat surface; the injury was probably caused shortly before or immediately after death. (22 RT 4632.)

There were several areas of internal bleeding into the soft tissue of the neck: two areas along the left side of the upper neck behind the jaw bone; an area on the based of the neck extending slightly under the shoulder blade; an area deep inside the neck on the back of the voice box. These areas are protected because they deep in the neck area. (22 RT 4644-34.) The injuries to the neck are consistent with the neck being squeezed either by hands or by ligature. (22 RT 4635.) There was no mark on the outside of the neck, which excludes a rope, but does not exclude an item of clothing as the item that could have been around the victim's neck. (*Ibid.*.) Dr Eisele testified that the bladder and stomach were empty, but this was consistent with her last meal which was soup and ice cream. (22 RT 4636.)

b. Cause of death. Dr. Eisele testified that his team tested for blood alcohol and drugs; Rickie's blood alcohol was .04, the equivalent of two beers over a short period of time. (22 RT 4641.) There was no alcohol detected in the vitreous

humor of the eye; they checked the vitreous humor to determine if the blood alcohol level was attributable to decomposition of the body. (22 RT 4642.) Although the conclusion is not free from doubt, he concludes that the alcohol level in the body was not consistent with ingestion alone, but it was higher that he would expect for the degree of decomposition he saw; because of this, he favors a conclusion that the blood alcohol level was due to a combination of decomposition and ingestion. (22 RT 4643.) On cross-examination, Dr. Eisele admitted that in December, 2003, he had concluded that the alcohol was attributable to decomposition, not consumption. (22 RT 4684) and as of the opening days of trial, he told the defense investigator that on September 7, 2004, he disagreed with the conclusion that the alcohol in the blood was the result of consumption. (22 RT 4686.)

Dr. Glenn Wagner reached a different conclusion about the source of the blood alcohol level. He testified that the blood alcohol level was definitely at least in part the result of ingestion; the only question he had is whether it was all from ingestion or part from ingestion and part from decomposition. (23 RT 4813.) This difference was significant because it led to different conclusions about the likely cause of death. Dr. Eisele concluded that the cause of death was asphyxia by strangulation. He concluded this because she had signs consistent with strangulation – the hemorrhage to the neck and outside of the neck and hemorrhaging in the lining of the eyes. Moreover, there was no other cause of death found after a thorough autopsy. (22 RT 4643.) He checked the hyoid bone that sits on top of the voice box and it was not broken; but this is not uncommon in young victims whose hyoid bone is flexible. (22 RT 4645.) Dr. Eisele agreed on cross-examination, that the marks on the neck that was part of the basis for his conclusion of strangulation could not have been caused by the fingers. (22 RT 4710.) Dr. Eisele thought that death by suffocation was also possible because of blunt force trauma to the lips. (22 RT 4703, 4705.)

Dr. Wagner, on the other hand, though he had originally agreed with Dr. Eisele that strangulation was the cause of death (23 RT 4718), changed his mind based on a two-step process. First, damage to the lips, including the tearing of the frenulum, could have been caused by the small opening of a bottle of liquid. (22 RT 4625[4].) Dr. Wagner found the tearing of the frenulum fascinating because is it is a very rare injury in adults and is almost uniquely suffered by infants who have been force fed a bottle. (23 RT 4809.) This caused Dr. Wagner to re-read the autopsy and the investigative report which both describe pulmonary edema; this led him to conclude that Rickie Blake died by drowning. (23 RT 4811,) Her lungs were full of fluid. Dr. Wagner believed that the the finding of pulmonary edema, the injuries to the lips and the alcohol toxicology studies were linked. The injuries to the lips only occur if the teeth are closed; that is how the frenulum tears. If the injury to the lips was caused by a bottle, the contents of the bottle did not get into the stomach; that is why the alcohol did not get metabolized and explains why the alcohol was not found in the vitreous. (23 RT 4813.) On cross-examination, Dr. Wagner testified that the injuries to the neck indicated that she died by manual strangulation and the that drowning was an additional contributing factor, not the primary cause. (23 RT 4838-4839.)

c. Time of death. According to Dr. Eisele, the time of death was perhaps 12 to 24 hours prior to the autopsy he performed on the morning of April 12, beginning at 9:45 a.m. (22 RT 4605-4606; 4648.) Based on post-mortem changes and the degree of lividity, Dr. Wagner estimated the time of death as between midnight and 9 AM on April 11. (22 RT 4791.) Dr. Wagner arrived at this

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[4] The damage to the lips could not have been caused by a baseball bat; it was a blunt object and the resultant damage to the body from the trauma to the lips was minor. (22 RT 4708).

conclusion through the observations of the degree of rigor mortis and lividity at the time the body was found as well as estimates of body temperature. (23 RT 4806.)[5]

d. Evidence of sexual assault. Dr. Eisele testified that the body was found with bra and top pulled up over her breasts. (22 RT 4605.) There was no tearing or anything else unusual about her clothes. (22 RT 4720.) He testified on cross-examination in answer to hypothetical question that the positioning of the tank top and bra was consistent with them having been displaced when the body was moved after death. (22 RT 4694.) He also testified that there were no injuries to the breasts. (22 RT 4719) Dr. Wagner, an additional medical expert called by the prosecution, testified that given the lividity patterns, it would appear that the bra was displaced at or close to the time of death . (23 RT 4807.)

Eisele's inspection of the vagina and anus was done with the naked eye, but with help from an assistant holding a flashlight; there are new tools for magnifying that were not available then. (22 RT 4636.) With the tools he had available, he did not see any injuries or abnormalities in the vagina. (22 RT 4637.) It is not remarkable to see no physical injuries in a rape case, depending on the size of the penis, the size of the vagina and the degree of penetration, and the degree of resistance. (22 RT 4638.) Two swabs were taken from the each orifice. (22 RT 4638.) No sperm were found on the slides prepared from swabs of the rectum or the or the mouth. (22 RT 4641) But Dr. Eisele saw sperm heads on the vaginal slide. (22 RT 4640.)

Dr. Wagner concluded that there was sexual assault, based on the presence of sperm, the physical injury to the body, including injuries to the neck, head and

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[5] There is some confusion in Dr. Wagner's testimony because at one point, he uses 11:00 am on April 11 as the time of the body was found (23 RT 4805:13), but the body was actually around 10:45 in the evening on April 11, 1986 (17 RT 2182; 18 RT 3016.). Dr. Wagner did testify that she was dead 24 hours or less prior to the time the autopsy slides were made. (23 RT 4821.)

face, and the stains on the clothing. (23 RT 4826.) Dr. Wagner also testified that given the uniform nature of the vaginal cells in the autopsy slides, he concluded that Rickie Blake had not yet had her first period, because the vaginal cells of women who have started menstruating vary in color from the effects of estrogen. (23 RT 4824-4825.)

e. Timing of sexual intercourse. At the time of the autopsy, Dr. Eisele saw sperm heads only on the vaginal slide. (22 RT 4640.) The sperm had started degenerating and there were no intact sperm (ones that had both heads and tails.) (22 RT 4640.) Only about 10 to 20 sperm heads were found. (22 RT 4641.) Dr. Eisele was not comfortable determining when the victim last had sex. (22 RT 4651.) He originally did not find any intact sperm, but he went back to look at the vaginal smear and did find an intact sperm that had both head and tail; he had previously told the defense that his estimate of when she last had sex was 48 to 72 hours prior to death. (22 RT 4650.) Now that he has seen the intact sperm, he is not comfortable estimating when she last had sex. (22 RT 4651.) However, on cross-examination, he agreed that the evidence is still more consistent with having taken place more than 48 hours before death. (22 RT 4680), but noting that "more consistent" is a very low level of certainty. (22 RT 4681.) On redirect, Dr. Eisele testified that subsequent to being interviewed by defense counsel, he studied an article published in 2001; the article did not change his opinion but made him lean towards an "earlier" time of intercourse "within a day or day and a half *after death.*" (22 RT 4744 emphasis added.)[6]

Dr. Wagner testified that the rule of thumb is that within 24 hours of intercourse sperm heads only will be present in the vagina; when he looked closely at the slides he saw an intact sperm on the slides taken from Rickie's body and that

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[6] On the facts of this case intercourse *after death* did not appear to make sense. Doctor Eisele may have meant "within a day or day and a half *prior to the autopsy.*" .See 22 RT 4744-4745.

led him to conclude that intercourse took place less than 24 hours from the time the autopsy slides were made. (23 RT 4827-4828.).[7] (23 RT 4827.) On cross-examination, Dr. Wagner testified that the maximum post mortem period for observation of sperm with heads was 168 hours and that the average was 38.4 hours; he also agreed that the length of time sperm could be detected increased if the body was refrigerated, (23 RT 4846.) On redirect, Dr. Wagner stated that the average interval between sex and the time of death was 28 hours when heads only were present. (23 RT 4863.) Finally on further redirect Dr. Wagner clarified that the article on which he relied indicated that the average post-mortem interval for vaginal findings was 23 hours for intact sperm, 38.4 hours for the presence of both intact and. heads, and 28 hours for heads only (excluding the 2.5 month outlier). (23 RT 4869.) 96 hours was the maximum post mortem interval for sperm heads only. (23 RT 4868.)

(5) Possible Links Between George Williams and Rickie Ann Blake

In addition to the testimony from Alicia (Bootsie) Blake and Angela Caruso that a man named George had called twice for Rickie the night she disappeared (see fn 10 and accompanying text, *supra*), the prosecution presented four witnesses who thought it was possible they had seen a man who looked like a 1991 photograph of George Williams at the skating rink which Bootsie Blake frequented and Rickie sometimes went to in 1986. August Carniglia testified that he owns and operates Skate Land, a roller skating rink in Chula Vista. (20 RT 3816.) He did not know Rickie Blake, but knew her sister, Alicia; Alicia was a regular skater; she was about 17. (20 RT 3819.) The witness did not know of Rickie until her death was reported

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[7] The record is not clear as to whether the interval being described is between time of sex and time of death or time of sex and time of autopsy. (Compare 23 RT 4827 [apparently time of autopsy]) with 23 RT 4863: Q: "these averages that Dr. Collins came up with were from the autopsy dating past to the time of death to the time of sex" A: That's my interpretation, yes."].)

in newspaper articles. (20 RT 3820.) On March 25, 2003, police showed him three photos and he told them one of them looked like a customer, but couldn't be sure. (20 RT 3824.)

Marcus Hawkins testified that he had worked at Skate Land for 20 years. He did not personally know Rickie Blake or her sister. (20 RT 3833-3834.) He became aware of her disappearance from a flyer posted on the rink door. (20 RT 3835.) The person pictured in exhibits 5 and 6 looks familiar. (20 RT 3836.) Hawkins thinks the person pictured was standing outside the skating rink. Hawkins saw the individual only once. (20 RT 3838-3839.) He did not recognize anyone in the courtroom. (20 RT 3839) Augustus Salton worked security at Skateland from 1980 and 1984 and stayed around as a customer. (20 RT 3841-3842.) He knew Alicia Bootsie Blake and through her, Rickie. (20 RT 3843.) The photo in Exhibit 5 stood out to him, especially the facial hair, sideburn and mustache which were typical of the 1980's, but he could not place the person in a location. (20 RT 3847-3748.) He did not recognize anyone in the courtroom. (3848.) Angela Caruso testified that, although she is not certain, the defendant in court looked like the photograph of the black male she identified as someone who hung around the skating rink. (17 RT 2736.)[8]

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[8] The photo used was taken in 1991; neither this witness, nor any of the other witnesses who viewed the lineup were shown a military photograph of defendant taken in 1986, the date of the death of Rickie Blake . (20 RT 3811-3812)

DEFENSE GUILT PHASE CASE

The defense guilt phase case had two prongs: (1) that George Cardenas Bell was likely the killer and (2) that Rickie had consensual sex with George Williams long before the killing and that was the source of Williams' DNA in her body.

1. George Cardenas Bell was likely the killer

(a) Incriminating Statements and Behavior by Bell and his family.

George Bell's estranged wife Gloria Zertuche testified that Bell talked about the crime more than 50 times after they married in 1993.(23 RT 4882.) Part of what scared her was that he described the events as if he was there – as if he was narrating something he saw; he would cry sometimes about this; he did this a lot. (23 RT 4883) He would say it was an accident. (23 RT 4883.) But Bell also threatened her a lot of times and she told the police that on one occasion that he said he would put her six feet under and that he had done it before. (23 RT 4887.)

Bell told her that Rickie's cat would meow a lot and he went outside to strangle it and Rickie opened the door. (23 RT 4891.) and would not shut up. (23 RT 4896.) He talked about the crime so much that she asked him directly whether he had committed the crime; he did not answer; he just got silent. (23 RT 4985) Bell hated cats and would regularly go out at night and strangle them if they were meowing; a neighbor had 20 cats and Bell killed all but 4 or 5 of them. (23 RT 4892.)[9]. Bell himself testified that the only reason he can think that Rickie opened the door was if the cat was squealing or wailing. (26 RT 5834.) Ramey Forrest, a close friend of Rickie's at school, testified that Rickie was very angry one day at school and complained that Bell hated her cat. (24 RT 5144.) Bell also told Gloria that Rickie's glasses were probably in the trunk of Greg Richardson's car which had been crushed at junkyard; he also told her that there was a tire mark on Rickie's

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[9] Bell denied ever killing any cats. (26 RT 5698)

face. (24 RT 4889.)[10] Bell admitted that he had said to Gloria that the night Rickie disappeared, the cat was outside and when she opened the door it was an accident and started crying. (26 RT 5709.) Bell testified that he could have told one of the guys that Rickie had been in the trunk of the car, but it was just speculating about how it could have happened. (26 RT 5846.) He spoke about it so often that it scared Gloria; so often that she asked him whether he had committed the crime; he would never answer her question, which was what he did when he did not want to lie. 24 RT 4886.)

Bell admitted that ten years after Rickie's death, he called Mrs. Blake at 12:20 in the morning and told her that he needed to talk to Detective Olias. (26 RT 5714.) He said he "did eventually" remember saying to her. "I can't live like this anymore. I can't hurt you anymore." (26 RT 5713.)

Bell also spoke and behaved in ways that made neighbor Nolan Kennedy suspect Bell was involved in the killing. Kennedy testified that Bell would speak about Rickie's death as if he had been there. His voice would change. (24 RT 5077.) Bell had a drinking problem; when he got drunk he got belligerent. It did not go beyond belligerent to violent. (24 RT 5078.) Bell talked about a tire mark on Rickie's face which made Kennedy wonder how Bell would know it was there unless he had been there. (24 RT 5079, 5097.) On more than one occasion, Bell would say it was an accident (24 RT 5083); once when Bell was drunk, he teared up and said that it possibly was an accident and wasn't meant to happen. (24 RT 5080.)

Michaele Schmuckal, a friend of Rickie's sister Alicia, testified that she heard Bell talk about Rickie's death, apologizing and saying it was an accident and shouldn't have happened; she heard him say this five to ten times. (24 RT 5213-

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[10] Bell testified and admitted that he told Gloria that Rickie had a tire mark on her face, but stated this was part of his theorizing on how the crime happened. (26 RT 5691.)

5215.) It was said as if he was apologizing. (24 RT 5214.) The first time she heard this was not long after Rickie's death; the last time she heard it was at a concert at Coor's Amphittheater in 1996 or 1997. (24 RT 5215.) Concerning the concert, Schmuckal was there with Alicia Blake and by chance they ran into Bell in the parking lot. He said that he was sorry and it should not have happened;[11] Bell had been drinking and was crying (24 RT 5216.) The conversation did not begin that way, but he became very emotional and started hugging her and Alicia. (24 RT 5218.) This was not the first time he had behaved this way; it had happened five or 10 times before: he would say he was "sorry" and that "it shouldn't have happened," or "it was an accident." (24 RT 5219, 5221.)

Alicia remembered an incident when George Bell walked into her room and acted weird and sad. (25 RT 5289.) After staring at the walls for a time, Bell said "I am sorry, it shouldn't have happened that way. I am sorry, sorry. (25 RT 5290.) She admitted telling the district attorney's investigator that Bell came into her room, stared at the walls and began crying hysterically. (25 RT 5292.) The way he behaved made her think that Bell may have had some involvement in Rickie's death. (25 RT 5307.)

Greg Richardson testified that Bell told him that he swung by the store that night and that he swung by Richardson's house, but that Richardson was not there. (25 RT 5343.) Bell was acting so strangely that it caused Richardson to ask Bell whether he killed Rickie. (*Ibid.*) Richardson put the question directly to Bell; Bell just looked at him without answering and looked like he was looking for answers. (25 RT 5345.) Bell testified that he did not answer because it would have been meaningless because Richardson would not have believed him. (26 RT 5806.) Bell denied he ever told Richardson to keep this conversation confidential or that he

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[11] Bell denied saying anything directly to Schmuckal, indicated she may have been present when Bell was talking to Alicia Bootsie Blake. (26 RT 5819-5820)

thought someone tried to have sex with Rickie and have been drunk and blacked out . (26 RT 5807.) Richardson also testified that Bell is okay when he sober, but gets mean when he is drunk. (25 RT 5345)

Richardson also testified that the car Bell was driving at the time of Rickie's death was a Ford LTD that was leaking transmission fluid. (25 RT 5402-5403.) SDPD Detective Olias tesfied that Richardson came to Olias in August of 1987 and asked whether transmission fluid was found where the body was found. Richardson said that the LTD had a bad transmission leak[12] and that the transmission would slip. (25 RT 5403, 5406, 5432.) Bell asked Richardson to fix the transmission and Richardson was working on the LTD the night of Rickie's wake. (25 RT 5404.) That was the night Bell had the strange conversation with Richardson; Bell said that the night Rickie disappeared, he dropped his girlfriend off at nine o'clock and then drove by Rickie's house, but didn't see anything. (25 RT 5404-5405.) Richardson believed that Bell killed Rickie because Bell blacked out because of his drinking; Richardson knew two times that Bell had done something that he did not remember because of his drinking. (25 RT 5409, 5468.) Bell would say something like someone tried to have sex with her and they put their hand over her mouth to shut her up and they must have accidentally suffocated her. (25 RT 5411.) Richardson contacted the police when five other people had similar conversations with Bell. (25 RT 5421.)

Bell told defense investigator Ann Bartoe that the night Rickie disappeared, he came home from work and saw his sister Cindy sitting with Rickie on the Blake

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[12] Oily drops were found at the scene of the crime which the defense contended was transmission fluid. (18 RT 3519.)Defense witness Jennifer Shen, a SDPD criminatlist testified that she tested swabs taken from the murder scene and determined that the drops near the body were petroleum product consistent with either motor oil or transmission fluid. (25 RT 5449.) It is impossible to differentiate between the two in the laboratory given the sample size. (*Ibid.*)

front porch and then took them to the store for ice cream and soda. (25 RT 5493.) He then went over to his girlfriend Andrea Armstrong's house and came home around 10:30 or 11:00 p.m. [13] (25 RT 5489.)

Bell himself testified at trial and admitted that he told his wife that he would put her six feet under and he had done it before when she was accusing him of killing Rickie. (26 RT 5689) His wife, Gloria, was constantly bringing up the death of Rickie and he did not want to respond because she transformed what he said. (26 RT 5690.) She would manipulate law enforcement, call the cops on him, (26 RT 5692)

Cindy Bell also acted in a way that created suspicion. William Blake testified that Cindy came by and cleaned up Rickie's room while Rickie was missing and took away a trash bag. (25 RT 5186.) After that the relationship with Cindy changed; once when William Blake asked to talk with Cindy, he was told to contact her lawyer.(5188, 5193.) Rickie's sister, Alicia, also testified that ever since Rickie's death, Cindy Bell has avoided the Blake family. (25 RT 5287.)

(b) False statements about his whereabouts on the night Rickie disappeared.

Greg Richardson testified that Bell claimed that he was with his girlfriend Tink Armstrong, the night Ricke Blake disappeared; Bell said he was not with Rickie but had been with his girlfriend and that he had dropped his girlfriend sometime after nine o'clock and went home. (25 RT 5341.) Bell himself testified that he told Richardson he was with Armstrong that night. (26 RT 5807.) Armstrong testified that she was in Los Angeles at a funeral that night and spoke with Bell by phone. (25 RT 5421.) Contrary to George Bell's testimony, Cindy Bell testified that she did not see Rickie the day before she disappeared and George

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[13] Anderson testified that she was out of town at a funeral that night. (25 RT 5321.)

Bell would be mistaken if he said that he saw Cindy and Rickie sitting on the front porch. (26 RT 5868.)

(c) Physical and sexual assaults on his girlfriend and later his wife that resembled the attack on Rickie Blake.

Andrea Armstrong was Bell's girlfriend at the time of the Rickie's death and testified that Bell struck her in the face and she sustained two black eyes as a result.(25 RT 5322); it was after they broke up when he tried to get her to come back and was frustrated when she would not. (25 RT 5331.) Defense investigator Susan Mangum testified that Nolan Kennedy told her that on several occasions Kennedy saw Bell choke his girlfriend Andrea Armstrong. (24 RT 5098.)

Gloria Zertuche testified Bell was violent to her; when she didn't want to have sex with him, he would force her by either choking her or putting the pillow over her head He mainly choked her and put his hand over her face.(23 RT 4891.) He liked to grab her by the face; the hand went over her mouth and face. (*Ibid.*) This happened when he was abusing alcohol or drugs. (23 RT 4891-92.) Bell raped her a couple of times. (23 RT 4895) His method of raping her was to hold his hand over her nose and choking her by holding her neck. (24 RT 5004.)[14]

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[14] George Bell denied ever choking Zertuche for sex or ever forcing her to have sex, but admitted that he put a pillow over her head to stop her from falsely yelling that he was assaulting her and that someone should call the cops. (26 RT 5697.) When confronted with the guilty plea form he signed after denying that he had assaulted Gloria, Bell also admitted that in 2000, he pled guilty to battery on his wife Gloria Zertuche. (26 RT 5717.) Bell described the situation which led to him being arrested for assault and Gloria losing a child with a miscarriage as situations in which Gloria was wild and upset and he tried to calm her down, and then she complained about him engaging in domestic violence. (26 RT 5844-5845)

2. Rickie Blake Had Consensual Sex with George Williams A Day or Two Prior to Her Death

a. Rickie's Interest in Boys and Relationship with a Black Man Named George Suggested That Sex with George Williams could have been Consensual.

Ramy Forrest. a close school friend of Rickie Blake from the September of 1985 to the time of her death, testified that Rickie was infatuated and giddy about a black man named George with whom Rickie hung out at the skating rink where they danced and did flips. (24 RT 5112.) Forrest met this George at school when Rickie introduced her to him. (24 RT 5110.) and Rickie swore her to secrecy because George was black. Forrest identified a photograph of George Williams as being the George she met with Rickie at school. (24 RT 5116-5117.) On cross-examination, Forrest testified that the George she met was 17 or 18 and did not look 29 years old. (24 RT 5250.) Forrest testified that as she recalls, Rickie started talking about this George about a month or so before Rickie died. (24 RT 5118) Forrest and Rickie wrote notes to each other all the time at school; they talked a lot about boys and both Rickie and Forrest were interested in black males and they discussed this. (24 RT 5118.) Rickie told Forrest that she had feelings for George and talked about when she saw him and when she hoped to see him. (24 RT 5118.)

Angela Caruso testified that she was aware of a phone call from a man named George to Ricky; Caruso was rude to George and hung up the phone. (24 RT 5232.) Alicia Aldridge, Rickie's sister, testified that the night prior to Rickie's disappearance, Alicia answered the phone and it was a person named George; Rickie never mentioned anything about receiving strange phone calls. (25 RT 5270.) Alicia answered one phone call the night of the Rickie's disappearance; other than that, Alicia did not recall answering any calls from George, but Alicia did not usually answered the phone. (25 RT 5271.)

Cindy Bell testified that Rickie had asked her whether Cindy had ever given her phone number to guy named George; Cindy had the impression that Rickie was wondering why the guy was calling her and that Rickie had not met him. (26 RT 5860.) Cindy often gave a fake phone number to guys she was not interested in and when they would call, Rickie would tell them that say that Cindy does not live here. (26 RT 5862.) Cindy further testified that Rickie sounded interested and curious when she told Cindy about the calls (26 RT 5884.) Cindy further noted that Rickie that a year before her death, Rickie and Cindy stayed with Rickie's uncle Beto and Rickie and the son of an apartment house manager would walk and they kissed. (26 RT 5884)

b. Sex Between George Williams and Rickie Anne Blake Took Place some 48 Hours Prior to Rickie's Death

This is an issue where the defense case was made by the prosecution's own witness, Dr. John Eisele, the San Diego County Coroner at the time of Rickie's autopsy. Dr. Eisele stated in his autopsy report that he prepared vaginal slides from the victim and that he saw no intact sperm. (8 CT 1848.) When the defense spoke with Dr. Eisle on December 10, 2003, he gave his opinion that intercourse had occurred 48 to 72 hours prior to Rickie's death. (8 CT 1849, 1858) At trial, he confirmed that he had told the defense that his estimate of when she last had sex was 48 to 72 hours prior to death. (22 RT 4650.) However, examining the slides with different lighting just before trial, he saw an intact sperm, after that he was not comfortable estimating when she last had sex. (22 RT 4651.) However, he agreed that the evidence is still more consistent with having taken place more than 48 hours before death. (22 RT 4680 [cross-examination]), but noted that "more consistent" is a very low level of certainty. (22 RT 4681.) On redirect, Dr. Eiseley testified that subsequent to being interviewed by defense counsel, he studied an article published in 2001; the article did not change his opinion that intercourse had

taken place 48 hours prior to death, but made him lean towards an earlier time of death, as little as a day or day and a half before death. (22 RT 4744; but see 22 RT 4745 [time period of his estimate runs from the time the swabs were taken].) Thus, Dr. Eisele's never disavowed his opinion that intercourse took place 48 hours before death, a time undermining the core of the prosecution case placing defendant with the victim at the time of her assault and death.

Dr. Eisele's opinion that intercourse was more consistent with intercourse forty-eight hours prior to Rickie's death supported the defense theory that sex between George Williams and Rickie Ann Blake was voluntary. Moreover, Dr. Eisele testified that there were no signs of vaginal injury you would expect to see in a woman who had been raped: no contusions or lacerations or hemorrhaging (22 RT 4722); no tears or swelling in the labia or to the area i where the labia come together. (22 RT 4723); no damage to the inner thigh area. (22 RT 4724) and generally none of the injuries that one might expect to see if a young girl with no previous coital experience was raped. (22 RT 4725.) Although many rape cases occur without injury (22 RT 4737), the lack of any such injuries made it less likely that the sex engaged in was coerced.

Prosecution Rebuttal Case

SDPD Detective Hank Olias, who was in charge of press and media, testified that he released many of the details of the Rickie Blake case to the media, including when and where the body was recovered, the location of the Blake residence, how the family found the house in the morning, when Rickie was last seen alive, whether law enforcement thought she was killed at her home, the nature of her injuries, the cause of death, the fact that she had gone to the dentist earlier in the day; the name of the lady who found her; information regarding phone calls from George, and what Rickie was wearing. (5602-5603.) He had not disclosed that Rickie's glasses were never found. (26 RT 5605.)

SDPD criminalist John Simms testified that there were Negroid type hairs in the items in the evidence bag containing Rickie's pants and underpants. (26 RT 5617.) However, you cannot determine the probable race of individual by a small hair smaple. The most you can say is that the hair exhibits characteristics that are consistent with having come from a certain racial origin. (26 RT 5619.) The parties stipulated that based on DNA analysis, the hairs found were not provided by either George Williams or George Bell and came from two different people. (26 RT 5623.)

George Bell testified that he spoke to the police about Greg Richardson because Richardson seemed to know things that only the killer would know such as exactly where the body was found and even drew a map. (26 RT 5645.) Richardson also told Bell that Richardson was not home that night, but Bell did not believe that because Richardson was always home in his garage working on cars. (26 RT 5647.) Richardson would blurt out things like he wasn't there and said it was about 20 minutes from his motel to where Rickie's body was found. (26 RT 5647) He saw Richardson with bait for cats and was sitting there with a BB gun waiting to shoot them with it. (26 RT 5649.) Bell eventually told the police about this because it frightened him. (26 RT 5650.) Bell likes cats; he never did any bad things to cats and did not get upset when, after he married Gloria Zertuche, cats were pooping in their yard in Imperial Beach; the cats were not bothering him down there. (26 RT 5650.) At night, they would wake up his daughter and he would go outside to try to scare them away from his daughter's window where they were fighting. (26 RT 5650.) He never in his life put a cat in a paint can. (26 RT 5651.) In any case, he had no problems with the Blake cat and he would never do anything bad to it. (26 RT 5651.)

Bell bought a Ford LTD from his mother and had it for two or three years, including 1986. (26 RT 5653.) The transmission was acting up for six or seven

months and he tried to fix it with the help of a co-worker, but eventually Greg Richardson fixed it. (26 RT 5655.) Bell believed the car was fixed after Rickie's death. (26 RT 5656.) After Bell saved up enough money, he bought a pickup and let a friend use the LTD. (26 RT 5656.) Bell said that he heard that Greg Richardson had Greg's own Cutlass crushed in a junkyard and Bell thought that was suspicious. (26 RT 5657.) It was one of the things that Bell told the police about. (Ibid)

Bell denied that he cut off contact with the Blake family after Rickie's death; he did stop calling Mrs. Blake on Mother's Day as he used to; he went to the funeral and paid his respects; in fact he was a pallbearer. (26 RT 5659.) He did not return to the cemetery because both Ricki and Bell's stepfather were buried there and he did not want to let go of them. (26 RT 5660.)

Bell remembered the incident at Coors amphitheater; he had been drinking heavily and was trying to help Bootsie Blake with a guy she did not seem to like. (26 RT 2661.) He asked Bootsie if she would like him to get rid of the guy and she said yes. (26 RT 5663) He told people he was sorry about Rickie Blake, not in the sense of apologizing, but in the sense that it happened. (26 RT 5663.) What he told his wife is that Rickie was a good girl and he couldn't believe that it happened to her; it would have been more likely to have happened to his own sister. (26 RT 5665.)

Bell remembers being asked by Detective Olias for an alibi and he told investigators that he was with his girlfriend Andrea Armstrong. (26 RT 5666.) He told Armstrong about it as soon as heard about it, calling her on the phone and telling her that he would be over in five minutes; He told her he couldn't believe it. (26 RT 5670.)

On cross-examination, Bell said he started dating Andrea Armstrong when he was 19 and she was 14. (26 RT 5677.) He denied that he punched Andrea; it was a slap. (26 RT 5679.) Says he slapped her to make it easy for her to end the

relationship; it was the only way he could get her to break up with him. (26 RT 5681.) He denies that his personality changes when he gets drunk; and denied that he got drunk at his a wedding reception and choked Andrea; anyone who said so would be lying. (26 RT 5682.) He also denied blacking out; he would go home and fall asleep and wake up a little groggy, but not black out. (26 RT 5684.) He also denied that he ever said that the death of Rickie was an accident, or that he told Gloria that Rickie's glasses were in the car that got crushed. (26 RT 5685.) He did speculate about what might have happened to her. (26 RT 5686.) But he denied that he said more than 50 times that it was an accident. (*Ibid.*) He also denied that Gloria ever asked him to stop talking about the crime because he was scaring her. (26 RT 5697.)

Cindy Bell testified that she did not go into Rickie's room the night she disappeared, but did go into it the next day. (26 RT 5856.) She did so to try to cope with the loss of her friend and to grieve in her own way; She was only in the room by herself for a brief time, then Rickie's sister Alicia came in and Cindy cleaned up the room and put papers in order. (Ibid.) She took a stuffed animal from Rickie's room, but put it in the coffin at the wake. (26 RT 5658.)

Cindy Bell also testified that her brother George would get angry, violent and obnoxious when drunk; he would talk loud and ramble. (26 RT 5878.) Andrea Armstrong never heard George Bell admit anything at all to indicate that he did this crime. (26 RT 5892) She also testified that the Bells had a cat named fluffy and George loved fluffy and had no problem with the cat. (26 RT 5893.)

PENALTY PHASE

Prosecution Case

The prosecution penalty case consisted of (A.) the testimony of four persons who had been sexually assaulted by defendant and (B) the father and sister of the Rickie Ann Blake who testified on the impact of her death on them and their family. The testimony is summarized below.

A. Other Sexual Assaults

1. **Sandra Stephens**

Sandra Stephens testified that 23 years before, when she was fifteen years old, she was hanging out, drinking and smoking pot in a van with her brother, some other friends and George Williams. Her brother and the other friends got out of the van leaving her and Williams alone in the van.[15], defendant told her to come to the store with him and drove away (31 RT 7239-7240.) He passed the store and started hitting her and calling her a bitch. (31 RT 7241.) He drove around for several hours with her begging him to let her out and let her go. He just kept hitting her and cussing at her (31 RT 7241.)

She thought that they ended up on a military base in a deserted area. (31 RT 7242.) He stopped and tried to pull her into the back of the van which he resisted, but he eventually got her in the back of he van and began ripping her clothes off. (31 RT 7243.) He first started performing oral sex on her and then got on top of her; she was having her period at the time and told him she could not have sex and asked him to let her go. (31 RT 7243.) But he penetrated her; she is not sure he ejaculated. (31 RT 7244) By the time it was light, she was able to escape and run to patrol car which had come to the area and reported that she had been raped. (31 RT 7245) She testified against George Williams at a preliminary hearing, but then did

[15] On cross examination she did not remember her testimony in the preliminary hearing that her brother asked her to go to the store with Williams to get something (31 RT 7249-50.)

not come back to court for the trial because she wanted to put the matter behind her and her mother told her that now that she had reported him and his wife knew what type of man he was, that was good enough. (31RT 7248.)

Billy Crowell, who was with the Navy Shore Patrol on November 13, 1981, the date of the Sandra Stephens incident. (31 RT 7256-7257.) He testified that he came upon a van parked on a ballfield and when he pulled within 50 or 60 feet of it, a young woman jumped out, ran towards his vehicle and shouted that she had been raped. (31 RT 7258-59.) He got her into the rear of his car and followed the van which was driving away, but eventually lost it. (31 RT 7260.) He informed the Long Beach Police of the incident and then went back to look around the Navy base where he found George Williams; Williams was turned over to the Long Beach Police when they arrived. (31 RT 7261-62.)

Kenneth Iwashika was a Long Beach police officer at the time of this incident and took a statement from Sandra Stephens consistent with the testimony she gave on the witness stand, except that he added that she said that Williams put a pillow over her face while he was assaulting her. (31 RT 7268-7269.) Iwashika took Stephens to the hospital for a rape examination and then released custody of Stephens to her mother. (32 RT 7270.) He then went to Williams' home where he took custody of Williams from the shore patrol officer, took him downtown and booked him. (31 RT 7271.) He noticed the smell of alcohol on Williams' breath and offered him a breathalyzer test, but Williams refused. Iwashika then gave Williams a field sobriety test which he passed. (31 RT 7272-7273) Dr. Ralph Simonian performed a rape examination on Sandra Stephens in the early morning hours of November 14, 1981 and found abrasions on her neck and evidence of vaginal penetration but no semen. (31 RT 7287-7288.)

2. Valender Rackley

Valender Rackley testified that she was in the Navy with George Williams in June of 1984 when she want out clubbing with him and another man in Oakland (31 RT 7293.) When the other man left, Williams drove her to a poorly lighted spot under a freeway overpass and told her he wanted to have sex with her. (31 RT 7294-7295.) When she refused, he forced himself on her, tying her up with some shoestrings and his belt. He tied her hands behind her back and took her clothes off, undressed below her waist and put his penis in her vagina. She did not fight him in any way. (31 RT 7296-7297.) She did not report the incident right away because she was absent without leave and she feared getting into trouble, but later reported it to her commanding office and to the police about one year later. (31 RT 7298-7299.) She was quite drunk that night and her only memory of the incident was from reviewing a statement she made to the police on June 20, 1985, over a year after the incident (RT 7300-7302.) Officer Dennis Shen, then of the Oakland Police Department, took Rackley's statement on June 20, 1985 and confirmed that exhibit 65 was the statement he took from Rackley. (31 RT 7306-7309)

3. Alicia Conrad

On August 18, 1986, Alicia Conrad, then six years old, was awakened by a black man who shook her, put a sock in her mouth and told her to be quiet and not say anything. (31 RT 7316.) The man tied her hands in back, she could not get away and she did not resist because he told her not to wake her sister. (31 RT 7317.) He took her in the bathroom and penetrated her both vaginally and anally. She knows he penetrated her because it hurt; she still has scars from the vaginal penetration today. (31 RT 7218-7319.) Afterwards, she was taken to Children's Hospital and examined, including blood work and a lot of poking and other examination. She stayed in the hospital three nights. (31 RT 7322.) There was tearing and bleeding and she ended up contracting herpes which she still has. When she went to grade

school she had a lot of outbreaks of herpes and had to put ointment on during school; she did so secretly so no one would know. (31 RT 7322.)

Dr Marilyn Kaufhold examined Alicia Conrad immediately after the incident. During the examination of Alicia, she found bruising of the area between the labia and the vestibule and the hymen had a tear completely through its lower portion and into the vaginal wall (31 RT 7333.) The tear caused substantial bleeding, but stitches were not necessary (31 RT 7336.) She came back six days later with a history of two days of fever and very painful blisters in her genital area which were a result of herpes infection. This was likely caused by sexual contact. (31 RT 7337.) Herpes can never be eradicated and Alicia Conrad will have it her whole life. (31 RT 7338.)

4. Leon Fuller

Fuller is George Williams' younger cousin; on February 13, 1998, he was visiting at the home of George's mother, Lela Drw. (31 RT 7340-7341.) He was there with his cousins, George Williams, Jr. and Mark King; he was about 14; they were hanging out and then went to bed at 3:30 am in the den. (31 RT 7342.) He was awoken by a pain in his rear end; George Williams Sr.'s hand slipped out of his pants. (21 RT 7344.) He did not do anything right away and pretended to be asleep until George Williams, Sr. was gone. (31 RT 7344.) He then went to the bathroom to check himself out and there was moisture coming out of his rear end. (*Ibid.*) He told his cousin Mark about it; George Williams, Jr. was his favorite cousin and Fuller couldn't tell him. Eventually Fuller went to the police and he believes the state took up the matter. (31 RT 7345-7346.) Fuller has seen George Williams, Sr, in Indiana, but has never discussed the matter with him. (31 RT 7345.)

B. Victim Impact Witnesses

1, Alicia Blake Aldrich

Rickie Blake's sister Alicia testified that she very affected by Rickie's death She does not trust anybody; she was treated differently by her friends and neighbors after Rickie died, a lot of people couldn't handle what happened and she lost a lot of friends. (31 RT 7328.) When she was young, Rickie could be a pain to Alicia; she would always want to be around her and would invade Alicia's space and was a pesky brat. Their relationship was just starting to change when Rickie died. Alicia misses fighting with Rickie, and the way Rickie was with the animals they had; she would play with them and dress up the cat in doll clothes. (31 RT 7325.)

When Alicia was married, Rickie's cabbage patch doll was at the wedding. (31 RT 7325.) Rickie's mother took the death very hard, but did not show it. But at times when she would sit in the living room and start to day dream and talk about Rickie. (31 RT 7327)

2. William Blake

William Blake, Rickie's father, testified that he and his wife were sad all the time since Rickie's death. (31 RT 7372-7273) His wife was devastated; she went to pieces and wasn't herself She would get up and go to work and that was just about it; they would talk about Rickie while watching TV, and on holidays or birthdays, they would go to visit her grave. (31 RT 7373.) When Rickie died, neither he nor his wife could speak at her funeral and it was too hard for them to clean out her room so his aunt did it. (31 RT 7372-7373.) After a while, both Blake and his wife would individually go to Rickie's room and just sit in the room. (31 RT 7374.) Holidays like Mother's Day and Father's Day were not the same as when Rickie was alive; every holiday was sad. (31 RT 7374) When he and his wife heard that somebody was arrested 17 years later, he was happy and relieved; she was ecstatic and was herself again. Rickie's death had left a void; part of his heart is gone and

will never be there again. 31 (RT 7375) His wife told him on her deathbed to just see things through. Before she passed, he heard his wife talked to Rickie on her deathbed. (31 RT 7375/)

DEFENSE PENALTY CASE

The penalty defense was in essence that there were two George Williams: (1) the good George Williams who overcame a toxic childhood environment of illegitimate birth, a dysfunctional family situation (including a family history of alcoholism), physical and sexual abuse, exposure to adult sexual activity, poor school record and life in a gang-dominated ghetto community in a particularly economically depressed Indiana city, to become a highly successful soldier in the United States Army whose service to his country was commended in glowing terms by his superior, and who was generally kind and helpful to others and his family and was not drinking; and (2) the bad George Williams who joined the U.S. Navy after his honorable discharge from the Army and got caught up in the Navy culture of drinking to the extent that he became alcohol dependent, was unable to function successfully in the Navy, suffered a head injury in 1981 while driving drunk and committed a series of sex crimes between 1981 and 1986, all of which occurred while he was under the influence of alcohol.

The specific evidence adduced by the defense included (A) an extensive family history of poverty, alcoholism, violence, sexual, physical and emotional abuse, and chaotic living conditions; (B) difficulties in school from an early age with no parental assistance to try to overcome the problems; (C) a history of excellent service in the United States Army; (D) drinking problems that began when he entered the Navy and were the precursor to his criminal activity which began only after his alcohol abuse and a hear injury; (E) evidence of head injury shortly before acts of criminal sexual abuse began; (F) Good work and helpfulness and kindness when he was sober; (G) Expert testimony (1) that childhood sexual abuse,

childhood physical and emotional abuse, alcoholism, and brain damage are factors which increase the likelihood that an individual will become a sexually violent offender and (2) that George Williams' history is consistent with a head injury in 1981and alcohol abuse which began in the early eighties being substantial causes of his criminal sexual misconduct thereafter; and (3) that George has all the major risk factors for alcohol abuse and for becoming a sexually violent offender; (H) Expert Testimony that Good George would do well in a structured environment in prison, away from alcohol and would not be any danger to the staff or other inmates. The evidence supporting each of these points is summarized in turn below.

A. An Extensive Family History of Poverty, Alcoholism, Violence, Sexual, Physical and Emotional Abuse, and Chaotic Living Conditions;

The evidence of George's family history began in the early 1940's when his maternal grandparents who had been sharecroppers living in a shack (32 RT 7481-7483) moved from rural Arkansas to Gary, Indiana in the hopes of finding jobs in the steel mills there. (32 RT 7492) Their children, Lelar (George's mother), Earl, and Yvonne came up north in that time period as well. (*Ibid.*) George's grandfather found work in a steel mill and his grandmother worked as a maid. (32 RT 7491, 7493.) They lived in extreme poverty and when her grandmother had a stroke, they couldn't take her to the hospital in Gary because the hospital would not take blacks. (32 RT 7494.) When George's grandmother died of that stroke, George's mother, aunt and uncle were left with his grandfather who was a notorious alcoholic and gambler who abused them and spent welfare money and took the money they earned picking berries in Michigan on alcohol, women and gambling. (32 RT 7499-7501.) George's grandfather abused them so much that they eventually went back to Gary, Indiana to get away from him, but he came back and got them and took them back to Michigan. (32 RT 7502, 7600.) George's grandfather eventually abandoned George's mother and her siblings and returned to

the South; George's mother and her siblings was left to live with her uncle for a few months and then he sent them left to live with Aunt Francis Abant, a highly abusive woman with nine children of her own who did not want George's mother and her siblings there. (32 RT 7602 -7603.) Aunt Francis would beat Lelar and her siblings with extension cords; they were told to wash dishes for 10-15 people with a minimal amount of soap and Francis would inspect the dishes; if there was any grease, they would be whipped. (32 RT 7605.) They were not given adequate food and Lelar's brother Earl would hide food in the backyard to feed the three of them. (32 RT 7606, 7608.) Eventually, Earl was sent to reform school which he was happy to get to. (32 RT 7608Yvonne got out of the house by marrying a man she did not love. (32 RT 7608.)

About the same time, Lelar met George Williams, Sr., a married man who would bring her home by 10:00 p.m. sober, but then went out drinking. (32 RT 7609.) George Sr. got Lelar pregnant when she was 18 and when Aunt Francis found out about it, she beat Lelar with an extension chord and threw her out on the street. (32 RT 7611.) With her mother dead and her father in the South, Lelar was pregnant without a place to stay. George Williams Sr.'s brother put her up for 3 months, but then kicked her out without any explanation. (32 RT 7612.) Then, Aunt Tiny put her up for a while, but told her she had to leave because Aunt Tiny could not afford the doctor and hospital bills for the birth. (32 RT 7612.) Her uncle H.B. would not put her up, but the tenants in her uncle's basement put her up until George was about three weeks old when the husband started hitting on Lelar, so the wife threw Lelar and George out. (32 RT 7614.) With Lela out on the street with an infant and no income of her own, her niece Lessie and aunt Daisy prevailed on her uncle H.B. to allow Lela and George to stay with them even though her uncle H.B. didn't want her there because he thought she was a disgrace to the family because she had gotten pregnant out of wedlock. (32 RT 7617.) Lelar and

George stayed with her aunt Daisy for two years in these circumstances until H.B. locked Lelar out when Daisy was out of town. (32 RT 7623.) At this point, Lelar was 20 and George was 18 months old; she was receiving welfare of about $64 per month. (32 RT 7624.) George was locked inside the house and so Lelar pushed her way through a heating vent and got George. (*Ibid.*) She then found a place to stay with her auntie Mae Jones, her father's aunt. (32 RT 7625.) Auntie Mae Jones had so many children in the house, Lelar couldn't state all of their names: four of her own children and about 10 grandchildren living with her. (32 RT 7626.) They stayed there about three weeks until Lelar found some work and welfare to support them. (32 RT 7627.) They were then able to move to a boarding house across the alley from Auntie Mae Jones where the "bed" was a box spring without a mattress. (32 RT 7628,) Lelar found work washing dishes for $45 per week and then they cut her off welfare. (32 RT 7631.) For a while, Lelar would walk George across the alley to her Auntie Mae Jones to be looked after when she went to work. (32 RT 7631) But then George said he was a big boy and could take care of himself. So he became a latch key child on his own when he was six years old. (*Ibid.*)

About this time, Lelar became the mistress of John Small, a married man. (32 RT 7633.) Small provided for Lelar and George, buying them furniture and George clothes. (32 RT 7634. But the relationship was violent. (32 RT 7636.) George witnessed the fights between his mom and Small, but she told him not to jump into it. (32 RT 7636.) In one fight that George witnessed, Lelar slapped John Small, he hit her back hard, she hit him with an ashtray in his face causing extensive bleeding, but she kept beating him and he pulled his knife. (32 RT 7637-7638.) George was eight at the time of this fight. (32 RT 7638.)

B. Adjustment Difficulties From An Early Age with No Parental Assistance to Try to Overcome the Problems

George entered kindergarten at age 6 and did not do well from the beginning. When he was 7, his teacher referred him to the school psychologist because "George is an overactive, impulsive child with an exaggerated curiosity about sex matters, Teacher suspects that student has observed adult sex activity." (35 RT 8628; quoting report in Exhibit 102.) He was tested and they concluded that he had average intelligence, establishes positive relationships easily and was cooperative. The problem, they concluded, was not psychological, but "a family social adjustment problem." (35 RT 8530.) e school psychologist felt that George's abilities were normal, but there was something environmental going on. It was suggested that the school work with the family to help George adjust. Nothing in school records ever indicated any meetings with the family took place. The next year, school records had a note that George's mother was working nights and could not attend. (Lelar was working the swing shift from 3 pm to 11 pm.) (35 RT 8631 relying on Exhibit 103.) George's father was an alcoholic who didn't see him much. (32 RT 7619.)

After this, George and his mother moved frequently; John Small's wife found out about his relationship Lelar and that was the cause of one move; for a while she was moving every time she had to pay the rent; sometimes she moved because of squalid conditions. This meant he had to change schools frequently.(*Ibid.* By the fourth grade, he was left back. George's problems were exacerbated when his mother became ill with a bowel obstruction and had to be in Chicago for treatment. (32 RT 7652.) George went to live with his Uncle Earl with seven adults and 7 or 8 children. (34 RT 8265.) The children all slept on the floor in different rooms in the house. (34 RT 8265.) There was not a lot of food in the house because there were so many of them. (*Ibid.*) They used food stamps to

purchase food for the house sometimes; they ate pork and beans, hot dogs and baloney. (34 RT 3266.)

All of the adults in the house were drinkers every day (34 RT 8266.) Her father, her uncle, her aunt Delores were all drinkers. (34 RT 8474-8476.) And they would fight amongst themselves over nothing while drinking; they would call each other "bitch" and "low life motherfucker." (34 RT 3267.) They were also verbally and physically abusive to the children. The boys were called "ugly motherfucker" and "black bastard." (*Ibid.*) They called the girls "bitch"; Sheila Drew was 19 before she realized that her name was not "bitch." The adults in the house hit the children. (34 RT 8269.) They used to hit George and his cousin Sheila when George would go to the store and steal some baloney to feed her. (*Ibid.*) Sheila got "whooping" every day. (*Ibid.*) Her father would put her head between his legs and lock it there and then hit her with an extension chord. (34 RT 8270.) George and the other kids in the house received the same kind of whoopings from her father. (34 RT 8272.) In addition to being beaten for stealing food for Sheila and himself when there was nothing to eat, George was beaten for things the other kids did because he was the oldest. (*Ibid.*) George didn't react when he was hit; he would just take it. (34 RT 8273,) The adults would also strike and slap Sheila because children were supposed to be seen and not heard; they would give her the back of their hand. (*Ibid.*)

Her aunt Delores was mean; she would grab the girls' breasts and the boys' genitals; she would say things to the girls like "you're having sex.... Your little titties are growing, bitch." (34 RT 8287.) Sometimes she was drunk when she did this and sometimes she wasn't. (*Ibid.*) With the boys, she would come up from behind and grab the stuff between their legs and say "you fucking?" (34 RT 8288.) There were times when George's mother was staying in the house and she would ask Sheila's father to whoop George. (34 RT 8289.)

The most horrifying incident that occurred was the one where Sheila and her cousin Pepper were hung in the basement. (See 34 RT 8289-8292) She and Pepper were getting into it, and Sheila' father and Pepper's stepfather told them that if they got into a fight again, they would hang us. (34 RT 8290.) The next day when the two girls got into a spat, Earl took Sheila down to the basement and Pepper was taken by her dad. And they took cord of some sort and they made a noose of it and they threw it over a pipe in the basement and they took two chairs . (*Ibid.*) And they put Sheila on one of the chairs and put Pepper on the other of the chairs. And they put the noose around their necks and were laughing and they said. "Now don't get tired and fall off the chair. You will see what happens." And they walked back upstairs.(34 RT 8291.) George's was down the basement witnessing this. (34 RT 8290.)

At one point Pepper asked what would happen if she got tired and stepped off the chair and Sheila said, not knowing. "I don't know. Step off." So Pepper did and she starts hanging and Sheila started to scream and her father and stepfather came charging down the stairs, laughing when Pepper was hanging there; they cut Pepper down and said to Sheila that she see what happens if she got tired and stepped off the chair. After this, they started laughing and they walked up stairs with Pepper. Eleven -year-old George was in the basement on the floor looking up and saying "please don't get tired, Sheila. Please don't get tired." (34 RT 8279-8282)

George was Sheila's protector. (34 RT 8282.) He cared more about other people than he cared for himself; he would hold stuff in and would tell her all the time that this was going to be all right, hold your head up. (*Ibid.*) He was a source of emotional support for Sheila. (34 RT 8283.) He was five years older and was 10 years old when they first lived together. (*Ibid.*) When Sheila was whooped, George would stand in the corner and not say anything. (*Ibid.*) He would just stand in the

corner until Sheila went to go get him. (34 RT 8284.) These beatings occurred over a period of five years at different homes. (*Ibid.*)

When George was 12, he was referred to a school psychologist who was concerned that he is having hostile fantasies and that are of a sexual nature and concerns that he is not achieving as expected; the school psychologist attributed his poor performance not to his ability but to the environment he was living in. (35 RT 8634.) She recommended investigation and that George need assistance at a mental health clinic, but he never received the intervention or assistance that was recommended. (35 RT 8634.) Years later, George told a jail psychologist that between the ages of 10 and 13 he was molested by an older male when he stayed overnight at the Boys' Club. (33 RT 8038.) At about age 12, George started to run away from this brutal house and because he had nowhere else to go, he would get picked up by the police and returned to the home. (32 RT 7651.) His mother ultimately refused to have the police return him, told a judge to take George because she was ill and had no money. (32 RT 7652.) So he was placed in foster care. (35 RT 8635.) This did not work out well and in 1968, he was placed in a school for boys where he did poorly scholastically. (35 RT 8636.)

In June of 1968, his mother got a permanent job at a biscuit factory in Chicago; she went back to Gary and got George and moved into a place in Gary where she and George could stay and she could commute to Chicago where her job was. (32 RT 7663.) But she was still not around or involved in his life. (32 RT 7663.) George went to Beckman Junior High School, but because of her schedule, his mother was never around. He was still performing as a borderline student who kept on getting promoted to the next grade. He then entered Roosevelt High School without the foundation to succeed in high school. He got left back in ninth grade and was struggling.

C. Overcoming the Ravages of Poverty and Gang Activity to Join the Army and Perform Excellent Service for our Country.

There were two bright spots for George in high school: joining ROTC and being the mascot for the basketball team. Despite all of the chaos of his formative years, these helped George overcome not only his toxic home environment, but also the economic depression and poverty in Gary, Indiana during the late 1960's. (34 RT 8366-8367.) When Sergeant Louis Stewart arrived to be an ROTC instructor at Roosevelt High School in 1968, the area round the school was rife with drugs, gangs and soaring crime rates. (34 RT 8361.) Stewart's creed was that the kids had two choices – either belong to the gangs or join ROTC; anyone who was gang affiliated was out of the program. The projects right around the school were particularly associated with gang activity and they recruited by intimidation – if the kids didn't join the gang they were beaten. (34 RT 8361-62.) George had to navigate through gangs just to get to school. But he persevered. Instead of wearing gang colors, he wore a panther uniform and cheered and tumbled at school basketball games. (33 RT 7835.) When George was in ROTC he did much better in grades than in other subjects and became an MP, a trusted position emblematic of good deportment. (34 RT 8371, 8373-74) Sergeant Stewart acknowledged that George did get some low grades when he got into a fight in school, but said that those kinds of problems which were common among the kids in his program. (34 RT 8381.)

George never graduated high school, but he joined the Army and served his country admirably. Sergeant Erthel Bennett testified that Bennett was a section chief of an air defense military battery in South Korea. (33 RT 7870.) George came in and was assigned to his section for duty; George was one of the very few people who came in at that time with the dedication and responsibility to do the things that he said he was going to do when he took his oath to come into the

army. (*Ibid.*) We were in a situation where a lot of people are coming in to go overseas and draw a check and say I'm doing this and doing that, but they really didn't apply themselves. George was a different person; he came in and was very grateful for learning his job. (*Ibid.*) He was someone you could trust. He was always asking questions about what things were for and why we were doing it. He was a quick study. He picked up on this job and he did it real well, he was a launcher crewmen , which entails preparing nuclear missiles for assembly, preparing missiles for firing. You have to be able to go from blue status to firing a missile within 15 minutes. Bennett's s crew could do it in eight and one half minutes. (33 RT 7871.)

George was one of the shining stars in the Army that time; when Bennett was very pessimistic about where the army was going, George made the witness feel better: the army was not going to go down because George was such a good person. (33 RT 7881.) George had problems in his background that Bennett thought he could never reach, but he developed a father/son relationship with George; it was the only time he hadever done that in all his years in the army. (33 RT 7882.) When he evaluated George, he rated him outstanding in attitude, outstanding in initiative, outstanding in leadership, outstanding in "duty performance" and excellent in adaptiability and responsibility. Bennett only gave an outstanding rating if the soldier was better than every other soldier; he gave excellent ratings when the soldier was one of the top soldiers in the unit in all categories . (33 RT 7899-7901.) Bennett's comments on George Williams were that George "shows an outstanding attitude in the performance of all of his duties. His excellent initiative sets a great example for his superiors and subordinates." (33 RT 7902-7003.) Barnett was not alone in his high appraisal of George: George was selected for leadership schools designed to advance him in his Army career path. On completion of a year of service in Korea, George received a commendation

from his battery commander in which he indicated to George that he was "truly professional soldier in every sense of the word.....[his] specific actions during the battery posture PS annual service practice led to us being designated as an honor battery and firing at 98.4%." (33 RT 7907.) Captain Thomas, who wrote this letter, did not give out these letters easily. Williams' platoon leader, Lieutenant Fall, commended George for his determination and inner strength that carried him through a challenging year., indicating that "from being your platoon leader, I can see that your attitude and determination will make you a success in the Army or any other field you enter. Thanks for the job well done." (33 RT 7009-7010.) When he returned to the States from Korea, George was stationed at Fort Bliss and there participated in Operation Santa Claus, a program to bring toys and company to kids at Christmas He was discharged from active duty and stationed back in Gary, Indiana where he was assigned to a clerical position in a combat support hospital. (33 RT 7912.)

In summary, Bennett said, George Williams was a shining star. George restored his optimism for the Army. George showed that it does no matter how far you are down, there will be somebody to stand up and say "I am better than that. So if I am better than that, we can do well." (33 RT 7916.)

D. Drinking problems that began When He Entered the Navy and Were the Precursor to his Criminal Activity which Began Only After He Became Dependent on Alcohol

Up to the point that George joined the Navy, he had no history of criminal behavior: no juvenile convictions, no disciplinary actions of any kind in the Army (30 RT 7425 .) After he was discharged from the Army, he spent two years back in the Army and then volunteered for the Navy. Although he did good service in the Navy as well, this was where his troubles began. Between 1979 and 1981, George was cited in three disciplinary actions in the Navy, minor infractions for

abusing alcohol and drunk on duty. (36 RT 8841-8842; 1 Exhibit 146.) In 1981, at the age of 26 years old, those three minor administrative incidents represented the sum and substance of this man's criminal history. (30 RT 7426.) George's apparent susceptibility to alcohol abuse interacted with the a Navy culture that encourages drinking – alcohol is regularly served at promotion parties, liquor is sold at very cheap prices on Navy bases, there is a tradition of heavy drinking when in port. (35 RT 8539-8540.) For example, when defense expert Dr. Minigawa served in the Navy in Spain and his ship came into port, his staff, the shore patrol and local Spanish authorities would get ready for a surge in the number of alcohol-related cases and incidents they would have to deal with. (35 RT 8540.) Shipmate Aaron Pratt confirmed that the same practice of drinking was prevalent in the Navy when he and George were on ship together in the 1980's: Pratt testified that "you weren't a sailor if you didn't drink ... you had to consume a lot of alcohol to be looked at as an A-1 sailor while on liberty." (36 RT 9028.) At that time, the Navy pretty much encouraged us to have a good time after so much time at sea; ill behavior was considered good behavior when in port. (36 RT 9028-9029.) Dr. Minigawa testified that when George got into the Navy, this is the first time George became dependent on alcohol and his bad behavior follows: non-judicial punishments, one court martial, DUI's, charges of sexual assault, convictions of sexual assault. (35 RT 8623, 8641.)

Dr. Minigawa testified that George Williams is a different person when he is sober than when he is using alcohol. When he is sober, he is able to hold down a job and provide for his family and he is high-functioning worker who honors his obligations. (35 RT 8624.) Aaron Pratt confirmed George's excellent service to the Navy and his kindness and supportiveness during those Navy years. (See section F., immediately below.) But when George drinks, he can't stop drinking.(35 RT 8624.)

E. Head Injury Shortly Before Acts of Criminal Sexual Abuse Began

Closely related to George's abuse of and dependence on alcohol was his record of driving under the influence. Among his disciplinary infractions was a DUI in 1981. Dr. Dean Delis testified that George Williams told him that in August of 1981, while driving drunk from Long Beach to San Diego, George fell asleep at the wheel and was in an auto accident in Oceanside in which he was ejected from is car, was unconscious and was hospitalized overnight. (35 RT 8477.) Dr. Delis observed an indentation on George's head that was consistent with a head injury that occurred from this accident, but he was furnished with no medical reports or police accident reports to verify the accident or its consequences. (35 RT 8515.)

Dr. Delis testified that he gave George a battery of tests and concluded that George had mental deficits consistent with left frontal lobe and general damage; the results were also consistent with the kind of head injury George described to him: being thrown from his car and sustaining a head injury which left an indentation on his skull. (35 RT 8493) The frontal lobe is the portion of the brain that controls acting on impulses and there is a striking relationship in time between the 1981 head injury reported by George and the beginning of his criminal behavior. (34 RT 8500.) .

F. Good Work, Good Works and Helpfulness When Sober.

George's Aunt, Yvonne King testified that she has known George since he was born and loves him. She testified that George is a very kindhearted individual who would do anything for anyone. (34 RT 8382.) He has all kinds of skills and would help anybody. He can hook up stereos, phones, everything. He knows how to do a bunch of things. George would help people out, family members with projects around the house. He was called upon to do that a lot. He would do it and he would not ask for money. He had a very good attitude about helping out; we did not even

have to ask him; if he saw that it needed to be done he would come over and fix it for you. (34 RT 8392-8393.)

George Williams joined the Navy in August of 1978. (36 RT 8843) and was discharged in March of 1981 so he could re-enlist, which he did on March 13, 1981. (36 RT 8847.) He was eventually discharged in 1985. (36 RT 8708.) Aaron Pratt was George's shipmate and testified that George was a "brother" to him and his only friend in the Navy. (36 RT 9022.) He testified that George "had a personality that was lovable, caring, consistent and true" (*Ibid.*.) No one else on that ship cared about anyone's well-being except George. But George was supportive and took an interest in Pratt's life at a time when Pratt was going through a lot of struggles. (*Ibid.*) Pratt wasnew to the military and as an African American felt inadequate and alone. George knew how to lead men and how to befriend men. Pratt needed that. And once they became friends, George showed Pratt how he could improve his life as a sailor. (36 RT 9023.) When Pratt needed financial help and neither of them had much money, George lent him money and willingly sacrificed his own financial needs to help Pratt. (36 RT 9024.) Emotionally, George gave of himself to help Pratt through difficult times. Pratt testified to countless nights when he couldn't sleep and countless drills or real action during which Pratt was afraid. But George was always there to help him through it. (*Ibid.*) They talked about their families and his kids. George loved his sons and daughter and spoke of them quite often. (*Ibid.*).

In terms of his service to the Navy, Pratt nicknamed George "Taz," short for the cartoon character the Tazmanian Devil because George was constantly in motion, had great energy and was always ready to do more work no matter how long he had already been working. George took great pride in his work and everyone noticed that. He was very valuable to the engineering department because he was ready to do tasks that no other sailor wanted to do: he was always able to go

into small compartments, bilges, and to find a reason to do thngs that other sailors had too much pride to do. George didn't have a prideful attitude, He had a "I-want-to-get the job done attitude. (36 RT 9025.)

Marvin Rowe knew George Williams from 1994-1997 (RT .) Rowe had a business rehabilitating houses and employed workers with troubled backgrounds. George Williams was one of those workers. George was a good worker, a good problem solver and had a good attitude. Rowe never saw George drink or be drunk on the job (33 RT 8032); some days he might have appeared hung over. (33 RT 8031.) George was particularly effective in working with customers who needed repairs of the work done by Rowe's business. Rowe would take George with him to such customers, go over their "punch list" of items that needed to be corrected and then leave George to work with the customers. He never received any complaints about George's performance or about any inappropriate behavior or language by George. (33 RT 8030-8031.) Rowe still misses George because he was a good worker, especially effective at working with customers on their punch list of complaints; George was a good guy. (33 RT 8032.)

G. Expert Testimony: The Relationship Between Family History, Alcohol Dependence and Criminal Behavior.

1. Risk Factors for Alcohol Abuse and Sexually Violent Offenses in General. Dr. William Tucker, a psychiatrist who specializes in diagnosing and treating sexually violent offenders (33 RT 8061) testified to the state of psychiatric knowledge about the factors which create higher risks of sexually violent conduct (and not about George Williams personally). (33 RT 8076.) Specifically, he testified the following were factors which made it significantly more likely that an individual would become a sexually violent offender: childhood sexual abuse (33 RT 8072), childhood physical and emotional abuse, alcoholism and brain damage. (33 RT 8072-8075.) Moreover, Dr. Tucker pointed out that these factors interact

with each other to increase the effect: for example, alcoholism tends to lead to brain injury because people with alcohol problems tend to get into more automobile accidents and bar-room fights. (33 RT 8074-8075.) The more risk factors an individual has, the more likely they are to commit sexually violent offenses. (33 RT 8102.) Studies show that alcohol is involved with over half of rapes and about half of all sexually violent offenses. (33 RT 8075-8076.) Although there is no scientific study that establishes this, the general consensus is that the alcohol causes disinhibition – it tends to impair judgment, reduce your ability to control impulses and desires, leads to impulsive behaviors and lead to whatever is lying underneath that we inhibit throughout the day to emerge. (33 RT 8077.) Dr. Tucker testified that the risk factors for alcohol dependence are 60 per cent genetic and 40% environmental. (33 RT 8081.) The genetic component has concrete physical consequences: the children of alcoholics are less affected physically by alcohol and enjoy it more. (33 RT 8082.) The genetic component also relates to the ability to break down alcohol in their digestive system; people who metabolize alcohol slowly get sick from it and are not attracted to using alcohol (33 RT 8083.) The EEG patterns for people who are at risk for alcoholism are different from those of people who are not. (33 RT 8084.) A family with numerous alcoholics in it suggests a genetic link. (*Ibid.*)

Anything that isn't genetic, is environmental – anything impinges upon you while you're growing up. (33 RT 8086.) This includes everything from problems caused by your mother's use of alcohol or drugs when she is pregnant to abuse and neglect (*Ibid.*) Abuse can be physical, or emotional or verbal; neglect is inadequate parenting and can start with poor prenatal care. (33 RT 8087.) Although it is hard to create a scientific study of how abuse and neglect contribute to alcoholism, there are plausible hypotheses as to what the mechanism is. (33 RT 8089.) Neglect and abuse lead to greater levels of depression, anxiety, eating disorders, self-esteem

problems, and lack of behavioral control. (33 RT 8089-8090.) Drinking alcohol helps these people cope with the effects of these problems in social situations and becomes a kind of self-medication; the immediate benefit outweighs any possible risks down the road. (33 RT 8090.)

Another way the environment affects children is role modeling. Kids learn how to be in society from their family when they socialize with them. The family is a medium for mediating social values, mores, behavioral norms for children. When your role models are alcoholics or out of control in some other way with substance abuse or domestic violence, they are modeling behavior that you may adopt. (33 RT 8091.) Kids who see their parents drinking form the opinion that that's the way you're supposed to make your way through life. Moreover, there are some cultural norms, which equate drinking with masculinity. Commercial advertising exploits this, for example, in the commercials during football games, but also there's the military culture of drinking.. So the fact that you have an alcoholic father is a very influential role model. . In addition there are larger social values that fit in: interacting with peers, listening to advertisements. And there are some subcultures more than others where male drinking is a sign of normal behavior. So the combination of dysfunctional families and the larger social trends play a role. These culturally unhealthy influences are magnified in families where there are alcohol abuse problems. (33 RT 8092.) Kids who have adults acting as negative role models may be more susceptible to cultural factors. People who have both the negative role models and the genetic predisposition are at even greater risk. (33 RT 8093.)

Being an alcoholic is a risk factor to become a sexually violent offender. Not everybody who has a lousy childhood and a genetic predisposition has a problem with alcohol as an adult. Smoking and cancer is a good analogy. Most people who smoke don't get lung cancer. Only 40% or so of smokers die of smoking-related illness. It's not as though smoking kills most smokers. It kills an

awful lot of them. If you smoke, you are at much greater risk of developing cancer and a variety of illnesses. In the same way, it is not as if everyone who has a genetic predisposition ends up abusing alcohol. A child a with genetic risk for alcoholism will not inevitably become an alcoholic. . It's just that there is a much greater likelihood that they'll go on to become an alcoholic and then go on to offend sexually. (33 RT 8094.) Impulsiveness and aggressiveness are risk factors for becoming a sexually violent offender. (33 RT 8099-8100.) Sexual abuse is a also a risk factor for becoming a sexually violent offender because it has a ripple effect on self-esteem, your sense of your own personal safety, your physical and psychological boundaries with other people and your ability to control other people just doing what they want with you. (33 RT 8100.) Sexual abuse tends to sexualize children and gives them sexual feelings before they have the psychological ability to handle or interpret that. (*Ibid.*)

Another risk factor for becoming a sexually violent offender is head trauma and certain types of brain damage. (34 RT 8202.) There are a variety of hypotheses about why this so, but the consensus is that damage to the frontal lobes, which have to do with judgment, control of behavior, decsion making, and integration of emotion and feeling, is a risk factor in sexually inappropriate behavior and causes disinhibition of underlying impulses. (34 RT 8202.) Damage to the temporal lobes where sexuality resides, may result in aberrant sexual behavior. (34 RT 8303.) A combination of alcohol abuse, sexual abuse as a child , and brain damage interact with each other to accentuate disinhibition and reduced behavior control and sometimes social judgment when there is frontal lobe damage; and when there is temporal lobe damage, there are problems with sex-drive or sexual-attraction-arousal pattern (34 RT 8205-8206.)

There are also "resilience factors" which allow people to overcome the "risk factors" for alcoholism. (33 RT 8095.) These resilience factors might be able to

protect from the risk factors for sexual violence. Treatment is a resilience factor and has a significant effect in preventing a sex offender from re-offending (33 RT 8096.) Temperament is an important protective or resilience factor. Temperament is genetic. People who have a calm, deliberative temperament can overcome risk factors whereas those who are impulsive cannot. (33 CT 8097-8098.)

2. Evidence that George Williams Had Frontal Lobe Brain Damage.

Dr. Dean Delis, Professor of Psychiatry, a neuropsychologist specializing in diagnosing brain dysfunction, administered a battery of neuropsychological tests which showed that although George had average to below-average intelligence, he performed extremely poorly on tests which measured frontal brain functioning, the area which controls emotions. These test scores are consistent with frontal lobe injury and general brain injury; the area of the injuries is consistent with the dent in George's head which he described as having resulted from an automobile accident in 1981 in which George was thrown from his car and knocked unconscious when he fell asleep while driving under the influence. (35 RT 8493.) The history of such an auto accident accounts for the deficits shown on the tests. (35 RT 8494.)

Dr. Delis found it significant that although George showed highly ambivalent or hostile fantasies from age seven when school officials suspected that he had been exposed to adult sexual behavior, the first report of George acting out and hurting people was in 1981 when he was reported to have raped a young woman. What was significant is that there was a period of time when there was no record of acting out. (35 RT 8498.) The incident of the head injury in August 1981 followed by the first reported incident in November of 1981 is a striking sequence of events suggesting a relationship between a head injury to the frontal lobes which are critical for controlling behavior, and sexually violent behvior. (35 RT 8500.) The combination of abnormal childhood sexual impulses, heavy drinking in the early 1980's, an accident associated with his drinking, and the head injury affecting the

frontal lobes, is significant. It suggests the possibility of the of a connection between his neurological deficits and his criminality. (35 RT 8500.

3. Evidence that George Williams was Alcohol Dependent and the Effect that His Childhood, Filled with Neglect, Physical and Sexual Abuse, Exposure to Alcohol and Alcohol Use Had on His Psychological Well Being.

Dr. Rahn Minigawa, clinical psychologist with an expertise in child psychology, child abuse and domestic violence (35 RT 8532) and alcoholism, particularly in the military. (35 RT 8538.) The Navy has a culture that encourages drinking – alcohol is regularly served at promotion parties, liquor is sold at very cheap prices on Navy bases, there is a tradition of heavy drinking when in port. (35 RT 8539-8540.) When Dr. Minigawa served in the Navy in Spain and the ship came into port, his staff, the shore patrol and local Spanish authorities would get ready for a surge in the number of alcohol-related cases and incidents they would have to deal with (35 RT 8540.)

Dr. Minigawa studied records of George Williams' previous crimes and other psychological evaluations of him. Dr. Minigawa reached some conclusions about Williams' social history and its impact on his psychological well being. His childhood was a disaster filled with neglect, physical, sexual and emotional abuse, abandonment, exposure to tremendous amounts of domestic violence, and exposure to excessive alcohol use by family members. He didn't know his father and there were questions about his mother's ability to parent. There was a concern by school officials that he may have been exposed to sexual practices at a young age and at a stage of development that he would not understand. His history is just filled with trauma.

With respect to alcohol, Dr. Minigawa's diagnosis is that George Williams is alcohol dependent, a specific diagnosis in the DSM which indicates a persistent

pattern of abuse which leads to significant problems and is a pattern the individual is unable to stop.(35 RT 8609-8610.) .Alcohol dependence is more severe than alcohol abuse. Dr. Minigawa based on his conclusion on genetics – a family history of dependence – plus his social history of being around alcohol abuse, physical and sexual abuse as a child, and his inability to stop drinking after it had bad consequences (35 RT 8613-8615.) Dr. Mignawa also diagnosed George Williams as a pedophile, rather than a person having antisocial personality disorder. (35 RT 8615.) Dr. Minigawa explained that early instances of bad conduct are explainable by concrete reasons (such as running away from home because of abuse or stealing food because you are not being fed), are not evidence of a conduct disorder. (35 RT 8618-8620.)

Specifically in this case, Williams was running away from foster homes and running away from his aunt and uncle where he was being abused. (35 RT 8622/) Dr. Minigawa found George Williams' behavior in the Army, where he was a very good performer and then when he got out supported his family and eventually enlisted in the Navy and had a good first tour without alcohol abuse, as inconsistent with anti-social personality disorder. George's second tour in the Navy was marked by alcohol abuse and alcohol dependence. This is the first time he became dependent on alcohol and his bad behavior followed: non-judicial punishments, one court martial, DUI's, charges of sexual assault, convictions of sexual assault. (35 RT 8623, 8641.) Williams is a different person sober than when he is using alcohol. When he is sober, he is able to hold down a job, is able to provide for his family and he is a high-functioning worker who honors his obligations But when he drinks, he can't stop drinking. This is an individual who needed an intervention long ago. (35 RT 8624) It is also significant that he does not have incidents of drug or alcohol abuse while in prison; he does well in a structured environment, but lacks the internal ability to control a lot of his behaviors; he relies on external

forces to provide a structure. When he is not drinking he can do fairly well, but when alcohol is available, then he drinks and cannot control himself. (35 RT 8625.)

Dr. Minigawa found a link between alcohol use and criminality – alcohol played a role in every instance where criminal behavior was involved and he showed no planning or self-preservation in any of these instances. (35 RT 8627-28.) When George Williams left the Army, he did so with all the risks associated with sexually violent offenders: exposure to domestic violence; exposure to physical and sexual abuse; being victim of physical abuse; use of alcohol and exposure to alcohol. But he did not act out violently until 1981 when alcohol use became much more severe. When he drank, all the behaviors came forward. This results from disinhibition and impaired judgement. (35 RT 8641.

Dr. Minigawa formed a diagnostic impression that George was the victim of sexual abuse by someone at the boys club who orally copulated him and by his aunt who grabbed him by the testicles and squeezed. Being the victim of sexual abuse increased the risk of substance abuse and dependence and of aggressive "acting out" behaviors later on in life. Sexual abuse also increases the possibility of sexual identity confusion and of difficulty relating to others, trusting others and being able to form appropriate relationships. George may have become fixated at an immature level of sexual development because of his early exposure to sex at a time when he was not ready to deal with it. (35 RT 8642.) This abuse can affect you for the rest of your life. In addition, denial is a common pattern for alcoholics and persons who were victims of sexual abuse. Alcohol abusers think they are in control, Those sexually abused are often too ashamed to discuss it. 42% of victims of sexual abuse do not report it. (35 RT 8644-8645.) From documents George Williams wrote during his previous imprisonment, Dr. Minigawa is of the opinion that George Williams has remorse and insight into what he had done. He acknowledges a drinking problem for which he needs help, wants to change his

behavior while in prison and has done bad things when he was intoxicated. (35 RT 8647-8648.)

H. Expert Testimony that George Would Not Be Dangerous in Prison

Defense witness James Esten, an expert in future dangerousness while in prison, and concluded that George Williams would not be dangerous if he was sentenced to life without parole. Mr. Esten reviewed Williams' prison records in both California and Indiana (36 RT 8888) and found only three relatively minor infractions: possession of a school calculator which he took back to his cell to practice his arithmetic, jerry-rigging an antenna for the tv in his cell, and displaying pornographic materials in his cell. (36 RT 8878.) He saw reports that George had an excellent attitude and got along well with peers and staff. (36 RT 8874.) He also interviewed George Williams twice. (36 RT 8669-8670.) On the basis of this information, he concluded that George would not be a future danger to inmates or staff. (36 RT 8679.) George consistently sought to be employed in some way or another during all of his incarcerations. (RT 8888.) He has proven himself to adapt well in penal institutions. While in prison, he has done everything asked of him and poses no future threat. (36 RT 8889.) This was especially true with respect to life without parole because institutions which house such prisoners are level 4 prisons which have such a high level of security that escape is impossible – there is double fencing with a lethal electric fence in between. (36 RT 8882-8885.)

Prosecution Penalty Phase Rebuttal Evidence.

Prosecution called four rebuttal witness: Dr. Mark Kalish, a psychiatrist who performed a psychiatric evaluation on George Williams in 1986; probation officer, Clifford Merrill and Nancy Bailey; and Dr. Park Deitz, a psychiatrist.

Dr. Mark Kalish was allowed to testify as a rebuttal witness will be permitted to talk about the facts which he elicited in a 1986 examination of George Williams, specifically with respect to the history of the onset of sexual activity, with respect to

the history of sexual abuse and with respect to the history of prior physical abuse, but was not allowed to give his diagnoses. (36 RT 8923.) Kalish was hired by a defense attorney in 1986 to do a psychiatric evaluation of George Williams; he had no independent memory of the interview he did with Williams and relied totally on what it said in his own report.(36 RT 9003-9004.) His report indicates that George Williams admitted to the basic facts of the police report concerning the sexual assault on Velma Williams except that he denied forcing his way into her apartment and denied any recollection of sexual acts with the six year old. (36 RT 9116-9117.) In Dr. Kalish's 1986 report, there is no mention of any history of abuse, neglect or molestation (36 RT 9011); however Dr. Kalish was embarrassed that the report did not indicate whether he had asked Williams whether he had been abused, neglected or molested. (36 RT 9015) The report does state that George had his first sexual experience at age 10 or 11 and that this indicated a lack of supervision in the home. (36 RT 9006) It also states that he denied any homicidal or suicidal thoughts. (36 RT 9010.) The report indicated that in response to questioning about psychiatric or medical history, Williams did not identify any significant treatment. (36 RT 9007.) And the report stated that a mental status examination was performed and that George was logical and coherent (36 RT 9008. 9010), but on cross-examination, he admitted that he did not do any standard neurological testing of George Williams (36 RT 9014) and that he was embarrassed by his report because it did not contain material that should be in his report. (36 RT 9015.)

Probation officer Clifford Merrill from Solano County testified that he interviewed George Williams in 1985 as a result of George's molestation of his daughter. (36 RT 9051.) Merrill testified that George indicated that he was raised by his aunt and mother, and that his mother struggled but did the best she could to provide. He described his childhood as happy. He did run away three times and was placed in foster care for a period of time. He indicated that he had not been subject

to abuse or neglect or sexual abuse, and he also indicated that he maintained a good relationship with his mother apparently and had had little contact with his father; he had only seen his father 5 to 6 times. He said he ran away from home on about three occasions. This is when he was about 11 years old to 13 years old and that he ran away from home to explore. George indicated that he had not been sexually molested or neglected as a child. George described his wife as both outstanding in understanding and said she was a good wife. The witness does not recollect whether George had any physical or emotional problems leading up to the crime. (36 RT 9053-9054.) George indicated that he did not think he had an alcohol problem and that he had cut down to one fifth of hard liquor and two six packs of beer per week. (36 RT 9056.) Merrill recommended alcohol treatment and a counseling program for sex offenders and their families. (36 RT 9057.) On cross-examination, Merrill stated that George had told him he was drunk when he rubbed lotion on his daughter's vagina , that he felt really bad about it, and that he would have to stop drinking to prevent something like this from happening again. (36 RT 9059-9060.) George also told Merrill that during his early service years, he began drinking more, eventually consuming two to three fifths of hard liquor plus two cases of hard liquor weekly. (36 RT 9065.)

Probation Officer Nancy Bailey testified that she was the probation officer assigned to George Williams when he moved to San Diego in 1986; this was a transfer of the probation from the molestation of his daughter. (36 RT 9070.) During the period George was assigned to Bailey, he re-offended – the Velma Williams and Alicia Conrad case. (36 RT 9071.) George admitted the truth of the allegations against him in the Williams-Conrad case except that he denied that he had used force to get into the apartment, and denied he had a weapon (36 RT 9073.) During his interview with Bailey, George stated that he never been abused, neglected or sexually molested, that his parents were unwed, that he only saw his

father five or six times and that he had a happy childhood. (36 RT 9074.) Based on discussions with the court and cross-examination, it appeared that the information that Bailey testified to concerning George's parents, his "happy childhood" and not being molested or physically or sexually abused came verbatim from the report previously prepared by prosecution witness Clifford Bailey, the probation officer from Solano County. (See 36 RT 9076-9079 [discussion with court]; 36 RT 9085-9089 [testimony of Bailey].)

Dr Park Dietz, a forensic psychiatrist, testified that he diagnosed George Williams with four psychiatric disorders: (1) pedophilia (37 RT 9110 [persistent attraction to pre-pubescent children]), (2) sexual sadism (37 RT 9111-9112 [persistent desire to cause the suffering of a sexual partner]); (3) paraphilia not otherwise specified (37 RT 9113-9114 [here sexual attraction to someone past puberty, but not yet an adult]; (4) alcohol abuse (37 RT 9119-9120 [because of lack of evidence of withdrawal symptoms, felt that George abused alcohol, but was not dependent on it; disagreed with defense expert Minigawa who testified that George was alcohol dependent and agreed with defense expert Dr. Delis who found George's condition was alcohol abuse]); (5) antisocial personality disorder (37 RT 9119-9126 .)

According to Dr. Dietz, there is no known effective treatment for antisocial personality disorder. (37 RT 9124-9125.) Dietz examined George's childhood and found "quite a bit" of childhood adversities. (37 RT 9125.) The adversities included a history of alcoholism in the family (*Ibid.*), being born out of wedlock, (37 RT 9126), parental abandonment (*Ibid.*), maternal neglect (37 RT 9127), being in foster care and a boys home (37 RT 9128), possibility that he may have been molested when he was 10-13. (37 RT 9128-9130 [reported late in life and effects are variable, but does lower self-esteem and affect sexual adjustment in adulthood and some studies suggest increased likelihood of sexual offending, but none of the

effects are made "probable," they are just made more likely]), physical abuse, including being whipped with belts, sticks and extension cords (37 RT 9131 [although George repeatedly denied such abuse, there is evidence that it did occur]), evidence that George had witnessed physical violence among adults in whose home he was living (37 RT 9131), witnessing physical fights in which his mother was involved (37 RT 9132) and frequent changing of schools (37 RT 9132.) The presence of childhood adversities does not necessarily mean that someone is going to commit crimes as an adult, but any one of them can increase the odds of difficulty in adulthood. All of them together, with that bad a childhood, certainly increased the odds of a bad outcome. (37 RT 9133.)

With respect to brain injury, Dr. Dietz conceded that Dr. Delis's neurophsychological testing showed deficits that were consistent with a "mild neurocognitive disorder," but without an abnormal MRI or other physical scan of George's brain, it was not possible to reach that diagnosis. Because of the lack of police or hospital records, Dr. Dietz also raised questions about whether the car accident George indicated he had been involved had occurred. (37 RT 9136.) Dr. Dietz also testified that a mild brain disorder of this kind might not go undetected and have no influence on behavior and that even if it existed there was nothing to indicate it played a role in defendant comitting the crimes he did.

Dr. Dietz testified that in his opinion George understood the criminality of his behavior and knew the difference between right and wrong (37 RT 9138.) Dr. Dietz defined "free will" with a test that determines whether the person would engage in the same behavior if a policeman were standing there. If they would not, they performed the action of their own free will. (37RT 3139.) Because George Williams stopped molesting his daughter when she said "Daddy stop," he had performed the molestation of his own fee will. (*Ibid.*) Dr. Deitz also testified that people who are intoxicated are still capable of thinking and planning; but it may not

be a very good plan. (37 RT 3140.) None of the conditions with which Dietz diagnosed George Williams was a mental disease, with the possible exception of alcohol abuse. (37 RT 9141- 9142.) There is little that will stop George Williams from having sexual fantasies. (37 RT 9142-9143.) On cross-examination, Dr. Dietz conceded that George seeing adult sexual activity at age seven had a negative impact on him and that he never had any counseling, even though he was evaluated twice by school officials. (37 RT 9144.) Dietz testified that by age 12 George's sexual fantasies and his personality may have been so warped that it would be very hard for mentall health professionals to do anything about it , but he wasn't so far gone that he lacked the ability to decide will I do it or won't I do it. (37 RT 9146.) Dietz conceded that it was not defendant's choice that got whipped by extension cords and vacuum cleaner cords, that he had an alcoholic father, that he had certain genes, that he had a father who abandoned him, or that he saw his cousin hung in the basement of the home he was staying in. (37 RT 9146-9147.)

Dr. Dietz also conceded that physical abuse (37 RT 9147) increased the risk of criminal behavior, but did not think the evidence was there to conclude that sexual abuse or emotional abuse did so. (37 RT 9147-9148.) Dr. Dietz agreed with Dr. Minagawa that George Williams is a pedophile. (37 RT 9153.) Dr. Dietz agreed that George fit the diagnosis of alcohol abuse and would not quarrel strongly with a diagnosis of alcohol dependence, but did not see the evidence there to conclude that George was dependent as opposed to abusive because of the lack of evidence of withdrawal symptoms. (37 RT 9153-9359.) However, Dr. Dietz conceded that a substantial minority of the people who are alcohol dependent never experience clinically relevant levels of withdrawal. (37 RT 9156.) He also conceded that all or most of the reports he read indicated that George reported blackouts (37 RT 9158) and that he may have been alcohol dependent and in remission when in prison. (37 RT 9158.) Dr. Dietz questioned whether the term

"alcohol dependent" should have been applied during the period he was in the Navy (and all of his crimes were committed) (37 RT 9159.) Dr. Dietz also conceded that there was evidence of alcohol involvement and bad judgment in the sexual assaults on his nephew, Velma Williams and her daughter, Sandra Stephens, and Valendar Rackley. (37 RT 9168-9169.)

ARGUMENT

GUILT PHASE ISSUES

I.

THE FAILURE OF THE TRIAL JUDGE TO GRANT A MISTRIAL AFTER KEY EVIDENCE WAS DISCLOSED ONLY AFTER THE DEFENSE OPENING STATEMENT DENIED APPELLANT A FAIR TRIAL AND VIOLATED HIS RIGHTS TO DUE PROCESS, TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND TO RELIABLE DETERMINATIONS OF GUILT AND SENTENCE

A. Introduction

After defense counsel had presented his opening statement, made in reliance upon counsel's reasonable understanding of the prosecution case against appellant, the prosecutor disclosed key evidence (which had been in its possession for years), designated an expert as a case-in-chief witness, and revealed a devastating change in the coroner's expected testimony on a key issue. Defense counsel moved for a mistrial based on the lateness of these disclosures. The trial court denied the motion, and by doing so deprived appellant of his rights to a fair trial, to the effective assistance of counsel, and to reliable determinations of guilt and sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments.

This was a cold case, a murder committed in 1986 in which a DNA match to appellant was made in 2003, seventeen years after the crime. The prosecution case was grounded on DNA evidence – defendant's DNA was in a sperm sample found inside the victim and this was the only concrete evidence linking defendant to the crime . The central defense was that although defendant's DNA was found in the

victim, the condition of the sperm was such that intercourse with the defendant must have taken place at least 48 hours prior to the victim's death and thus did not place defendant with the victim at the time of her death; furthermore, the lack of genital injury suggested that the sex that took place two days before her death was voluntary. A second and complementary line of defense was that a third party – neighbor George Cardenas Bell – was the killer.

But the condition of the sperm found in the autopsy was the critical issue in the case because it had the power to either incriminate appellant or exonerate him. If the deposit found contained intact sperm, then it would place the defendant with the victim near the time of her death; if the sperm found had degenerated so that only occasional heads were visible, then the intercourse that occurred was most likely more than 48 hours prior the death and would eviscerate the prosecution case.

B. The Record of Non-Disclosure and Prejudice

Dr. John Eisele, the San Diego County Coroner at the time of Rickie"s autopsy, wrote in his autopsy report that there were only occasional sperm heads in the swab taken from the victim's vagina at the autopsy (and no intact sperm). (8 CT 1848 [Defense memo; autopsy report was never made a part of the record].) Until the defense did so on December 10, 2003, no one asked Dr. Eisle when the victim had had sexual intercourse; but when the defense spoke with Dr. Eisle on that date, he gave his opinion that intercourse had occurred 48 to 72 hours prior to Rickie's death. (8 CT 1848, 1849, 1858.) When the defense spoke with Dr. Eisle on December 10, 2003, he gave his opinion that intercourse had occurred 48 to 72 hours prior to Rickie's death. (8 CT 1849, 1858.)[16] From this date forward, for eight critical months of pretrial preparation, the heart of the defense was that defendant had consensual sex with the victim two days before she was killed. The

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[16] At trial, he confirmed that he had told the defense that his estimate of when she last had sex was 48 to 72 hours prior to death. (22 RT 4650.)

lack of intact sperm and Dr. Eisle's opinion became a centerpiece of the defense opening statement on September 2, 2004. (17 RT 2534.)

The defense preparation for trial was based not only on Dr. Eisle's statements to them, but also on the reports furnished to the defense as part of statutorily required discovery. The defense had specifically requested "all laboratory reports as well as reports of any examination of the physical evidence" and "[a]ll reports, logs, handwritten notes, and any other records made by police officers or investigators at or near the time of arrest and during the investigation" (1 CT 168); the prosecution turned over all of those records except the bench notes of William Loznycky. (8 CT 1851.) The records provided to defense counsel contained the autopsy notes of Dr. Eisle, but not the Loznycky notes. (21 RT 4257) Unbeknownst to the defense, at the autopsy in 1986, William Loznycky, a criminalist for the San Diego Police Department (SDPD) had obtained a swab from the victim and viewed his own slides of the samples taken from the victim. He observed what he believed was one intact sperm. He recorded his observations in bench notes; those bench notes were not turned over to the defense until September 8, 2004, six days after the defense made an opening statement that promised the jury that Dr. Eisle would testify that sex between appellant and the victim occurred more than 48 hours prior to her death. (8 CT 1850-1851.) Loznycky's notes came as a complete surprise to the defense, which had proceeded for the eight months immediately prior to trial on the incomplete evidence made available by the prosecution. (21 RT 4258-4259.)

On August 24, 2004, five days after the trial had begun and was in the jury selection phase (11 CT 2435), the prosecution disclosed that Dr. Glen Wagner, the current San Diego Medical Examiner, was a possible rebuttal witness; the prosecution (8 CT 1849.) Even though Dr. Wagner was designated only as a rebuttal witness, the defense interviewed Dr. Wagner on August 24, 2004, Dr.

Wagner told the defense that he had seen an intact sperm on the slide of the vaginal swab taken from the victim and that his opinion was that sexual intercourse took place at the time of the physical assault that resulted in Rickie's death. (8 CT 1849.) Dr. Wagner took photographs of the slides he examined and gave them to the defense. On September 3, the defense sent the photographs given to them by Dr. Wagner to Dr. Eisle and asked him to review them to determine whether he could see any intact sperm in the photos. (8 CT 1849.) Dr. Eisle responded that he did not see any intact sperm, only occasional sperm heads. (8 CT 1849-1850.)

On September 2, 2004, defense counsel made his opening statement in which he told the jury that law enforcement assumed that the sperm in the victim and on her clothing was deposited at the time of her death, but no one had ever asked Dr. Eisele when it was deposited. Counsel declared that the answer the police would have gotten was "Dr. Eisele's opinion, after looking at the slides, seeing only occasional random heads of sperm, was that this was the result of sexual intercourse took place 48 to 72 hours before Rickie Blake died."[17] (17 RT 2534.)

Dr. Eisele was to testify at 1:30 p.m. on September 7. On that morning, the prosecutor informed the defense that Dr. Eisle had been asked to review the slides with different lighting and from different angles and saw an intact sperm. (8 CT 1850) On the basis of this new view of the evidence, Dr Eisele's opinion had

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Before stating this central tenet of the defense, counsel went out of his way to laud Dr. Eisele's expertise:

> "An autopsy was done. The doctor who did it was Dr. John Eisele. I mention that because Dr. Eisele's credentials, his expertise, is second to none. He has done nearly four thousand autopsies. He has testified as an expert over six hundred times, the majority of those assisting deputy district attorneys, like Mr. Dusek [the prosecutor], get convictions." (17 RT 2532-33.)

changed and he now believed that sex took place 24 to 48 hours before the *autopsy* (not death).(8 CT 1850 [defense motion for mistrial].) This was a complete surprise to the defense and the trial judge delayed Dr. Eisle's testimony. The next day, on September 8, 2004, the prosecution informed the defense of William Loznycky's 1986 bench notes and turned a copy over to the defense. (8 CT 1850.) On September 10, 2004, the defense filed a motion for an evidentiary hearing, sanctions for discovery violations and for a mistrial asserting that the prosecution's long delay in providing Loznycky's notes and the very late change in Dr. Eisle's opinion denied defendant fundamental fairness. (8 CT 1847).

In the subsequent hearing on the defense motion, the court found that despite "choices which ... were reasonably prudent ... on the defense side, ... in light of the opening statement, there is clearly some damage that is going to be inflicted on the defense position and the defense counsel's credibility in front of this jury." (21 RT 4278:11-21). Nonetheless, the trial judge denied the defense motion for a mistrial because (1) he did not see any sanctionable discovery violation in the prosecution's delay in waiting until the day Dr. Eisle was to testify to confront their own witness, the county coroner, with evidence contrary to his autopsy report – "it is part of one of the basic laws of human nature ... we let things go and procrastinate until we have to really finally crystallize" (21 CT 4278: 5-6); and (2) he did not see there is "anybody to assign blame .... the defense has been handicapped not by the lawyerly skills or tactical decisions that they made, but because of the intellectual and professional limitations of the Medical Examiner." (21 RT 4279). The trial judge found nothing sanctionable or fundamentally unfair about the disadvantages imposed on the defense in this case.

C . The Trial Judge Ignored the Impact of the Prosecution Discovery Violation on the Ability of the Defense to Fairly Prepare for Trial.

The issue is thus whether the defendant in a capital case is entitled to a

mistrial when the prosecution violated the discovery rules by failing to disclose critical evidence requested by the defense until after the trial started and where procrastination of the prosecution and the intellectual and professional limitations of the prosecution's law enforcement team inflicted "damage ... on the defense position and on the credibility of defense counsel in front of this jury." (21 RT 4278:11-21). The trial judge erred in concluding that the damage done to the defense by the prosecution team did not entitle the defense to a new trial. The judge's reasoning was flawed in at least two respects: (1) after the prosecution agreed that it would not present William Loznycky's testimony, the trial judge ignored the impact of the clear discovery violation by the prosecution in failing to disclose Loznycky's notes until after the trial began and (2) instead of focusing on whether the defense was prejudiced by the prosecution's actions (and inactions), the trial judge considered only whether the procrastination by the prosecutor was a sanctionable discovery violation. Each of these errors is discussed in turn below.

The prosecution failure to disclose Loznycky's bench notes which were in its possession since 1986 was such a clear violation of penal code Section 1054.1 that both parties and the court agreed that Loznycky's testimony and notes concerning the sperm would be excluded. (21 RT 4269 [defense]; 4270 [prosecutor]; 4276 [court].) In view of the damage done not only to the defense ability to prepare their case, but also to the credibility of defense counsel with the jury, it violated fundamental fairness to deny the defense motion for a mistrial .

The trial court erred in applying the wrong standard to assessing whether a mistrial should be ordered. The proper standard is "'a mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Hines* (1997) 15 Cal 4th 997, 1038 citing *People v. Woodbury* (1970) 10 Cal.App.3d 695, 708 and quoting *People v Haskett* (1982) 30 Cal.3d 841, 854.) In particular, in matters of discovery, this Court has stated that

"'[i]t is the defendant's burden to show that the failure to timely comply with any discovery order is prejudicial and that a continuance would not have cured the harm.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 950 [defendant failed to show prejudice at trial from failure to disclose inculpatory evidence prior to the preliminary hearing where defense had a year and one half after disclosure to prepare for trial]) quoting *People v. Pinholster* (1992) 1 Cal.4th 865, 941 [court granted continuance after disclosure during trial of two witnesses who testified to prior consistent statements by government informant; no showing of prejudice). Although the issue of whether to grant a mistrial is normally committed to the trial court's discretion (see *Haskett, supra*), here, the trial judge clearly failed to properly exercise that discretion because he ignored the prejudicial impact on defense trial preparation caused by the prosecution's failure to timely disclose the Loznycky evidence and focused solely on who was at fault for the timing of the change in Dr. Eisele's testimony, rather than addressing whether the prejudice caused to the defense by the combination of the tardy disclosure of Loznycky's notes and the late change in Dr. Eisele's testimony was curable *after* the defense had made its opening statement relying on Eisele's statements to them.

That prejudice was clear – the trial judge explicitly found that damage would be "inflicted on the defense position and the defense counsel's credibility in front of this jury." (21 RT 4278.) The judge's conclusion was understated: placing defendant with the victim at the time of her death was devastating to the defense that he had consensual sexual intercourse with her two days prior, but was not with her when she was killed. Moreover, the defense preparation for trial and defense strategy and tactical decisions were all based on incomplete and misleading information about the prosecution case. And defense counsel's credibility was severely damaged by an opening statement which promised evidence counsel believed he had, but could not deliver because of subsequent surprises.

Given all that damage, the proper inquiry for the trial judge was whether the damage was curable by a continuance, admonition or instruction. Instead, the trial judge focused solely on whether either party was to blame for the admitted damage to the defense case and the credibility of defense counsel. It is well settled, however, that neither party need be at fault for events at trial for prejudice to result and an admonition or mistrial to be considered. See e.g. *People v Williams* (1997) 16 Cal.4th. 153, 211 (Where witness improperly volunteers information that has been excluded by a prior court ruling, court should consider whether admonition or mistrial are the proper remedy even though there was nothing to suggest any improper intent on the part of the prosecutor or the witness); *People v. Wharton* (1991) 53 Cal.3d 522, 565-566) (same); *People v. Rhinehart* (1973) 9 Cal.3d 139, 152 (same).)

In this case, the damage worked by the combination of the tardy disclosure of Loznycky's notes and the late and surprise change in Dr. Eisele's testimony was incurable. The heart of defendant's defense was that the physical evidence that defendant had sex with the victim placed him with her two days before the crime and did not place him with her at the time of her death. This was a cold case and without the DNA connecting to the victim at the time of the crime, the prosecution had no evidence placing that defendant with the victim when she was killed. Had the prosecution turned over the Loznycky notes at the outset, the defense would have had the opportunity to prepare differently for trial and adopt a different trial strategy. Even though the Loznycky notes were not introduced, the misleading state of the evidence disclosed to the defense and not corrected for over eight months, the late designation of Dr. Wagner as a witness, and the surprise change in Dr. Eisele's testimony clearly damaged the heart of the defense. Had trial counsel been informed of the change in Dr. Eisele's testimony prior to the commencement of the trial, counsel could have adopted an entirely different trial strategy and

requested a continuance if needed to pursue that strategy. Counsel certainly would not have opened with a promise that Dr. Eisele's testimony would show that the vaginal slides contained no intact sperm and accordingly that defendant's sexual intercourse with the victim occurred two or more days before her death. And once the opening statement was made, no continuance could repair the damage to the credibility of the defense.

In that sense, the prejudice in this case is strikingly similar to that in *United States v. Kelly* (2d Cir. 1969) 420 F.2d 26, 29. In *Kelly*, the prosecution failed to turn over the results of tests that tied the narcotics in that case to another batch of narcotics that the government had seized; Kelly and Imp, two New York City narcotics detectives, were themselves convicted of narcotics trafficking. They had allegedly retained some of the cocaine they had seized in a police raid (on one Toni Troy) and made arrangements with a double agent informer, Gonzalves, to sell it for them. Gonzalves, however, while pocketing some of the narcotics for himself, turned the rest of it over to U.S. Treasury Service officers. As the court noted:

> The government had quite substantial evidence from which the jury might well have found that the narcotics turned over by Gonzalves and those delivered by Kelly and Imp to the Police Department came from the same batch. It chose to bolster this already quite strong case by a concededly new and, to any trier, quite dramatic demonstration of a method of determining trace elements in a substance by bombardment of the substance in an atomic pile and identification of the trace elements by measurement of the half-life of each element over a period of time .... The determination not to abort the trial, which had already consumed much time and expense, is understandable in the light of the strength of the government's case, but we think in the circumstances here the other choice was the proper one. The course of the government smacks too much of a trial by ambush, in violation of the spirit

of the rules.

(Ibid.)

The decision in *Kelly* is consistent with a long line of federal decisions which have granted mistrials to avoid "trial by ambush." In *United States. v. Camargo-Vargara* (11th Cir. 1995) 57 F.3d. 993, 998-99, the defendant was charged with conspiracy to import and distribute cocaine. His trial strategy emphasized his statements that he wanted nothing to do with the cocaine offered him. During direct examination of a DEA agent, the prosecutor elicited that defendant had touched the kilos and said "they were strange." *United States v. Camargo-Vergara*, supra, 57 F.3d at 998.) This post-arrest statement had not been disclosed to the defense. The court found withholding this statement substantially prejudiced defendant's defense and reversed.[18] "Agent Schultz's testimony eroded the effectiveness of this trial strategy when she unexpectedly testified that [defendant] also said in his post-arrest statement that the kilos 'were strange.' If [defendant] had known the government would present such testimony, he could have changed his trial strategy." (Id. at 999).

In *United States v. Noe* (11th Cir. 1987) 604, 607), the undisclosed evidence was used to attack defendant's alibi. Defendant denied his involvement in drug transactions, testifying he was visiting family in Costa Rica at the time the events were alleged to have taken place. On rebuttal the government offered a tape recording of a conversation between defendant and DEA agents, in which they

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[18] As the court explained, defense counsel, in his opening statement, had announced his intent to use the defendant's previously disclosed post-arrest statements "to convince the jury that [the defendant] had no experience with and wanted nothing to do with the proffered kilos of cocaine. Agent Schultz's trial testimony that [the defendant] said the kilos were 'strange' after touching them, shattered this defense because a person would not know a kilo of cocaine felt strange unless the person had some experience with the feel of real packages of cocaine." (*Id.* at 999.)

agreed to meet the next day in a bar in Atlanta. The recording was made during the time defendant claimed to be in Costa Rica. Defendant objected to admission of the tape on the grounds the government had failed to disclose the tape before trial. (Id. at p. 606.) The reviewing court reversed. The purpose of the discovery rules was " 'to protect defendant's right to a fair trial.' [Citation.] And, contrary to the government's contentions, the degree to which those rights suffer as a result of a discovery violation is determined not simply by weighing all the evidence introduced, but rather by considering how the violation affected the defendant's ability to present a defense. [Citations.]" (Id. at p. 607.) The court noted the undisclosed evidence "attacked the very foundation of the defense strategy." (*Ibid.*) Under the government's theory, "the prosecution, by design or inadvertence, could withhold discoverable inculpatory evidence until the defendant asserted a defense strategy based on the apparent nonexistence of that evidence, thus foreclosing other, possibly viable, defense strategies." (*Id.* at p. 908.) The court refused to adopt such a rule as it would encourage " 'trial by ambush.' "(Ibid.)

Similarly, In *United States v. Lanoue* (1st Cir.1995) 71 F.3d 966, 976, the failure to disclose defendant's recorded statements prejudiced defendant by depriving the defense of the opportunity to design an intelligent litigation strategy that responded to the statements and required a mistrial. "[T]he government was able to destroy, with the defendant's own statements, the credibility of the only defense witness who testified to the defense theory other than the defendant himself." . . . ¶ . . . [A] mistrial was the only appropriate remedy." (71 F.3d at 978;.See also *United States v. Thomas* (2nd. Cir.2001) 239 F.3d 163, 168 [new trial ordered where prosecution failed to disclose transcript of defendant's prior testimony on key issue; prejudicial because a competent defense counsel would have been unlikely to advise defendant to testify given admission in transcript]; *United States v. Alvarez* (1st Cir.1993) 987 F.2d 77, 85 [failure to disclose evidence

linking defendant to crime "sabotaged" defense and deprived defense of opportunity to design intelligent litigation or plea strategy that responded to evidence]; *United States v. Rodriguez* (11th Cir.1986) 799 F.2d 649, 652-654 [error not to grant mistrial where failure to disclose materials taken from defendant's wallet deprived him of chance to prepare his case to meet evidence]; *United States v. Pascual* (5th Cir.1979) 606 F.2d 561, 565-66, [prosecution failed to turn over a letter from defendant that was tantamount to a "written plea of guilty to the allegations in the indictment." "It would be hard to make an argument with any degree of plausibility that the use of this letter without prior production did not seriously prejudice defendants in exercising their option to plead not guilty and in the preparation for trial" (*Id.* at p. 565), and even though, "with this nail in the coffin lid," a verdict of not guilty seemed unlikely, the court had no choice but to reverse. *Id.* at p. 566]; *United States v. Padrone* (2d Cir.1969) 406 F.2d 560, 560-61 [narcotics violation conviction was reversed because the prosecution, through inadvertence, failed to disclose to the defense, as ordered by the court, a statement from defendant taken by an Assistant United States Attorney. At trial defendant denied any connection with the narcotics sale. On cross-examination, the prosecutor asked questions based on defendant's statement, in which he provided information concerning the source of the cocaine. The defense objected and the court forbad further use of the statement, but did not strike the questions based on it. The Second Circuit reversed. "We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial."]

In view of this substantial body of authority, the need for reversal in the instant case based solely on failure to turn over the Loznycky bench notes is clear.

As in every one of the cases cited above, the prosecution here failed to turn over highly damaging inculpatory evidence which, if known to the defense, would have dramatically altered defense trial preparation and strategy. And here the unfairness of not disclosing this evidence until trial was even worse because the defense relied on the disclosure of Dr. Eisele's observations and his subsequent statement that intercourse occurred 48 to 72 before death to construct their trial strategy, not knowing that all the while the prosecution had evidence in its possession which undermined Dr. Eisele's exonerating evidence. As in all these cases, the defense here built its strategy unaware of evidence possessed by the prosecution which could be used to attack their defense from ambush at trial. As the court in *Noe* noted, new trials in such circumstances must be ordered; otherwise, "the prosecution, by design or inadvertence, could withhold discoverable inculpatory evidence until the defendant asserted a defense strategy based on the apparent nonexistence of that evidence, thus foreclosing other, possibly viable, defense strategies." (*Id.* at p. 908.)

It is, of course, true that in almost all of the cases cited above, the undisclosed evidence was admitted at trial whereas here Loznycky's testimony about his bench notes was not admitted into evidence. This is a difference between our case and some of the cases cited, but it is not one that should lead to a different result. All of the cited cases were concerned with the fact that evidence which could undermine a potential defense was not disclosed at the time when the defense could not only prepare to meet that evidence, but also could determine how to plead, how to shape its case and what trial strategy to pursue. This is exactly what happened in the instant case. Not allowing Loznycky's testimony and notes into evidence did nothing to cure the prejudice that resulted from the defense being deprived "of the opportunity to design an intelligent litigation or plea strategy that responded to the [evidence]." (*United States v. Alvarez*, *supra*, 987 F.2d at 85.)As

the Second Circuit stated in *Padrone,* even when the statement itself is not admitted at trial, "We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial." (*United States v. Padrone, supra*, 406 F.2d at 561.)

Indeed the prejudice here was exacerbated by the prosecution's late designation of Dr. Wagner as a prosecution witness (an earlier designation would have shortened the time the defense was misled by the failure to turn over the Lozncyky notes) and the post-opening statement change in Dr. Eisele's expert opinion damaged defense counsel's credibility with the jury. As the trial judge acknowledged, the fact that defense counsel had made an opening statement heavily dependent on the assertion that Dr. Eisele would testify that sexual contact between the victim and the defendant occurred at least two days before she was killed meant that the change in Eisele's opinion would seriously damage defense counsel's credibility with the jury. A critical part of the defense opening statement was that it was Dr. Eisele's opinion that because there were no intact sperm on the vaginal slides, sex occurred at least 48 hours prior to death and that representation by counsel would prove incorrect only because of Dr. Eisele's eleventh hour change in testimony. For defense counsel to lose credibility damaged the defense not only on this issue, but on every issue of both the guilt and penalty phase. It is well recognized that opening statements are critical to effectively representing clients. The failure to keep a promise to the jury made during opening statement impairs personal credibility, and the jury may view unsupported claims as an outright attempt at misrepresentation. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW DESK BOOK § 1506[3], at 15–18 (LexisNexis, 2008). As the Supreme Court of North Carolina has noted, "[a] cardinal tenet of successful

advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." (State v. Moorman(1987) 320 N.C. 387, 400 (defendant was denied effective assistance of counsel as a result of defense counsel's failure to present evidence of a complete defense to rape as promised in his opening statement, a failure which severely undercut not only counsel's credibility, but the credibility of the actual defense evidence offered at trial, including the defendant's own testimony); see also, *People v. Corona* (1978) 80 Cal.App.3d 684, 725-726 (finding ineffective assistance of counsel based in part on counsel's failure to produce evidence promised in his opening statement).

In the present case, counsel's failure to produce the crucial evidence promised in his opening statement was not the result of any lack of preparation or diligence by counsel. But the result was the same. The failure to disclose Loznyky's notes and disclose Dr. Eisele's change of opinion until after the defense opening statement resulted in the undercutting of counsel's credibility and, more generally, the credibility of defense evidence, thereby violating appellant's right to the effective assistance of counsel under the Sixth Amendment. By so doing, the disclosure delays also undermined the heightened reliability required by the Eighth and Fourteenth Amendments for a constitutionally valid capital conviction and sentencing determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38 (heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense); *Zant v. Stephens* (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination).

Further, the failure to convey key pieces of the prosecution case until after the defense opening statement, a failure which misled the defense as to the nature of the evidence it would have to counter and caused the defense to undermine its

own credibility, resulted in a proceeding so fundamentally unfair and unreliable as to deprive appellant of due process in violation of his rights under the Fourteenth Amendment. See, e.g., *Lindsay v. Smith* (11th Cir. 1987) 820 F.2d 1137, 1151 (although a defendant does not have a federal constitutional right to the discovery of inculpatory evidence, a trial may "be rendered fundamentally unfair if a defendant justifiably relies on a prosecutor's assurances that certain inculpatory evidence does not exist and, as a consequence, is unable effectively to counter that evidence upon its subsequent introduction at trial"); *Mauricio v. Duckworth* (7 Cir. 1988) 840 F.2d 454 (failure of state to disclose identity of its rebuttal witness, despite court order to do so, deprived petitioner of due process; the fact that accused did not seek a continuance to investigate the credibility of the surprise witness did not preclude a finding of a due process violation, because the accused was entitled to an opportunity pretrial to make a fully informed decision as to whether or not to present an alibi defense). Cf. *Grey v. Netherland* (1996) 518 U.S. 152, 164 (prosecutor's deliberate misleading of the defense about the evidence it intends to produce may violate the Due Process Clause).

No admonition could have cured the damage. The defense had lost eight months of time to prepare its case without knowledge that the prosecution had evidence of an intact sperm. Counsel's tactical decisions on how to shape the defense and whether or not to attempt to negotiate a plea in the case were all affected by the state of the evidence revealed to the defense. As the trial judge found, through no fault of defense counsel, counsel presented an opening statement which relied on Dr. Eisele's former opinion. The heart of the defense was broken and the credibility of defense counsel and defense evidence was severely damaged. Nor was an admonition a practical remedy for this prejudice; any statement by the trial judge would have called attention not only to defense counsel's failure to deliver the evidence he had promised, but also to the potentially damning quality of

the DNA evidence. In these circumstances, only a mistrial could have cured the prejudice and only a reversal can remedy the violation of fundamental fairness.

II.
THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT WHEN HE SUGGESTED TO THE JURY THAT DEFENSE COUNSEL HAD LIED TO THEM AND CONCOCTED A "SECONDARY DEFENSE" BECAUSE THE FIRST ONE THE DEFENDANT WANTED TO USE "DOESN'T WORK."

A. The Record

A core issue in this case was whether the sperm found within the victim and on her clothing were intact at the time of the autopsy. As discussed in Issue I, *supra*, the coroner who conducted the autopsy had examined slides of the sperm and found that there were only occasional sperm heads in the swab taken from the victim's vagina at the autopsy (and no intact sperm). (8 CT 1848 He concluded that sexual intercourse had occurred 48 to 72 hours prior to the death of the victim. (22 RT 4650.) This was highly significant because it undermined the prosecution theory that this was a rape murder; if sexual intercourse had occurred at least 48 hours prior to the victim's death, then it could not have been a killing in the course of a rape and there was no evidence to connect the defendant to the victim at the time she was killed.

George Williams did not take the witness stand. However, during the trial, the prosecutor played a tape of the defendant being interrogated in which he said he "didn't do anything" in response to police interrogation some 14 years after the crime. (37 RT 3702; Exhibit 39A.) The prosecutor used this statement as part of a not so subtle theme suggesting that defense counsel was complicit in concocting a defense. The theme began with the coda to the prosecutor's first closing argument:

> now he has the nerve to say it was love, consensual sex, and George Bell

did it.[19]

But actually he didn't say that. He said "I didn't do anything." That is his defense.

He lied the first time. Don't let it happen a second time.

(27 RT 6456-6457.)

The prosecutor amplified the theme of a concocted trial defense in the very first paragraph of his rebuttal closing argument: :

Prosecutor: After listening to what you were just presented with, for about 45 minutes or so, not one mention , not one mention of what the defendant said about why he's not guilty. He says he is not guilty because he didn't do anything. That's his choice, his defense, his words on tape. Everything else is a secondary defense.

What can *we* find, because that first one he wants to use doesn't work. *We* got to scramble to find something else. And that is what we heard about from the defense, the second best defense. Jesus, Williams why didn't you come up with the best one the first time? I thought I did. But he didn't.

Defense Counsel: I would object that that is improper argument.

The Court: Overruled.

(28 RT 6634-6635.)

Armed with court approval of this line of argument, the prosecutor returned to the theme that defense counsel was concocting a defense as the last thing the jury heard from him:

> His first defense fails. His second defense, stand-by defense, cannot be supported by the evidence. He's guilty of all the charges.

(28 RT: 6655-6656.)

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[19] Because appellant did not testify, the only person who said anything about consensual sex was defense counsel.

B. Argument

It is well settled that statements impugning the integrity of defense counsel are prosecutorial misconduct. (*People v Hill* (1998) 17 Cal.4th 800, 832; *People v. Thompson* (1988) 45 Cal.3d 86, 112; *People v. Bain* (1971) 5 Cal.3d 839, 847.): "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of accepted doctrines of ethics and decorum, ... it is never excusable." (5 Witkin & Epstein, Trial, section 2914, p.3570 [citations omitted], quoted with approval in *People v. Hill*, *supra*, at 832.)

Here the prosecutor's argument not only improperly impugned the integrity of the defense and and severely prejudiced appellant by using accusations of impropriety to belittle a key defense, but it was also particularly unfair because the prosecutor was well aware that his own witness, Dr. Eisele, the coroner who conducted the autopsy, was the source of crucial evidence which provided the basis for that defense and undermined the prosecution's rape-murder theory.

1. The prosecutor impugned the integrity of defense counsel.

The conduct of the prosecutor impugned the integrity of counsel three times, suggesting that one of the two pillars of the defense case[20] was fabricated. First, when he closed his initial penalty phase argument with the words "He lied the first time. Don't let it happen a second time. (27 RT 6456-6457), the prosecutor was suggesting that the defense lied; because the defendant had not testified and the only person who argued that defendant had had consensual sex was defense counsel. (17 RT 2548.). This was the first suggestion by the prosecutor that defense counsel had lied. Then when he opened his rebuttal argument, the prosecutor went further, suggesting that the defense that the sexual intercourse was

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[20] Appellant's second and complementary line of defense was that a third party – neighbor George Cardenas Bell – was the killer. (See Statement of Facts, supra, pages 23-28.

consensual and took place before the day of the homicide was a "secondary defense":

> He says he is not guilty because he didn't do anything. That's his choice, his defense, his words on tape. Everything else is a secondary defense.

(28 RT 6634.) The prosecutor then goes right on to suggest that defendant conspired with his counsel to concoct this secondary defense:

> What can *we* find, because that first one he wants to use doesn't work. *We* got to scramble to find something else. And that is what we heard about from the defense, the second best defense.

(28 RT 6634.) Who else other than defense counsel was the other person in the "we" used twice in the argument? One of the persons concocting the defense was the defendant, but the other was his defense counsel who had just spent the last 45 minutes arguing what the prosecutor had said was that phony "secondary defense." It is hard to fathom why the judge did not sustain defendant's objection to this improper line of argument. But the prosecutor was not done, he placed the coda on his rebuttal closing argument by returning to his theme of a "secondary defense." (28 RT: 6655-6656.)

Although this more nuanced thematic attack was not as blatant as the conduct which lead to reversals in *Hill* and *Bain*, the conduct of the prosecutor in this case was nevertheless highly improper. In both *Hill* and *Bain*, there were rancorous exchanges between the prosecutor and defense counsel whereas here there was a more subtle impugning of counsel. But it happened three times at three of the most strategic points in the penalty trial: (1) the prosecutor's last words to the jury in opening argument; (2) almost his first words to the jury in rebuttal argument; and (3) his last words to the jury before the judge's instructions. This was not a casual, off-hand remark in the midst of long argument. This was a planned theme to discredit the substance of the defense by discrediting the integrity

of defense counsel and his client.

This planned prosecution theme that the defense that the sex was consensual and took place before the day of the homicide was a secondary defense, concocted by defense counsel and defendant when Williams' denial that he did anything didn't work was particularly unfair and inappropriate because it was the prosecution's own witness who provided powerful evidence that sex took place 48 hour to 72 hours before the death of the victim; evidence which, if correct, undermined the prosecution's whole theory of the case that this was a murder in the course of a rape. The prosecutor was well aware that his own witness later changed his story at the behest of the prosecutor and, even after being confronted with slides showing conflicting sperm evidence still gave a time of sex further out from the death than would have proved rape-murder beyond a reasonable doubt.[21] The prosecutor was well aware when he made this argument that given the evidence that the prosecutor had furnished the defense, it would have been ineffective assistance of counsel to not call into question the timing and nature of the sexual encounter between defendant and the victim. Such behavior by the prosecutor who is supposed to be not only an officer of the court, but also whose job it is to do justice, not just win a case by any means necessary,[22] is clearly misconduct.

2. The Misconduct by the Prosecutor in Falsely Suggesting that the Defense Fabricated A Secondary Defense Was Highly Prejudicial Constitutional Error

A prosecutor's misconduct violates the due process clause of the Fourteenth

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[21] While Eisele had changed his view as to the presence of intact sperm, and his ultimate view as to the timing of the sexual interaction was less clear than counsel had anticipated in opening statement, on cross-examination, Eisele agreed that the evidence is still more consistent with sex having taken place more than 48 hours before death. (22 RT 4680)

[22]See, *Berger v. United States* (1935) 295 U.S. 78, 88.

Amendment to the United States Constitution when it undermines the defendant's right to a fair trial. (*People* v. *Clark* (2011) 52 Cal.4th 856, 960; *United States v. Agurs* (1976) 427 U.S. 97, 108; *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Here the prosecutor's improper remarks, not only violated due process, but by baselessly impugning the integrity of defense counsel, violated appellant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel and to a full and fair opportunity to present his defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 686; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325 (Sixth and Fourteenth Amendments guarantee criminal defendants "a meaningful opportunity to present a complete defense"). Being forced to present a defense through a representative whose integrity has been unfairly tarnished by prosecution misconduct is hardly consistent with those constitutional guarantees.[23]

As noted above, the false suggestion that the defense concocted one of its two primary defenses went to a key issue at trial. In this cold case, the sperm evidence was the only evidence linking defendant to the victim at the time of the crime and the only evidence connecting the sexual encounter with the victim's death. The defense was squarely based on the testimony of a prosecution witness, the coroner, Dr. Eisele. To suggest that the evidence was a made up "secondary defense" is so at odds with the facts in the record as to offend fundamental fairness and due process. Certainly, the prosecution cannot meet its burden to show the misconduct harmless beyond a reasonable doubt.

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[23] Such attacks on the integrity of defense counsel "are improper because a prosecutor's comment 'carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.'" (United .States. v. Holmes (8th Cir. 2005) 413 F.3d 770, 775, quoting *United States v. Young* (1985) 470 U.S. 1, 18-19.)

III.
THE EXCLUSION OF CRITICAL EVIDENCE OF THE GUILT OF A THIRD PARTY, RESTRICTIONS ON CROSS-EXAMINATION AND REFUSAL OF INSTRUCTIONS ON CONSCIOUSNESS OF GUILT DEPRIVED APPELLANT OF THE RIGHT TO FULLY DEFEND HIMSELF AND DUE PROCESS OF LAW

Although appellant was allowed to put on evidence that George Cardenas Bell killed Rickie Ann Blake, appellant's ability to put on a defense was severely restricted by three sets of ruling: (A) the trial judge erroneously excluded the testimony of FBI Agent Jack Kelly that in August of 1996, ten years after Blake's death, Blake's mother called Kelly to report that Bell had called the previous Friday night at 12:20 a.m. and made highly suspicious statements that suggested he was the killer; (B) the trial judge erroneously restricted the cross- examination of Bell particularly about that 12:20 a.m. call; and (C) the trial judge erroneously refused to give pinpoint instructions requested by the defense which were necessary for the jury to properly evaluate the evidence of (1) Bell's giving a false alibi; and (2) Bell's failing to deny that he murdered Rickie Ann Blake when directly asked on separate occasions by his wife and a neighbor . (RT 4885 [Testimony of Bell's wife Gloria Zertuche] ; RT 5343-44 [Testimony of Greg Richardson].) Individually and collectively these rulings denied appellant due process of law, the right to confront witnesses against him, and the right to put on a defense. Each of these sets of errors and the prejudice caused by them is discussed below.

A. The Exclusion of Evidence That George Cardenas Bell Had Made Statements to the Victim's Mother Suggesting Consciousness of Guilt Denied Appellant Due Process

1. The Record. Prior to trial, on the basis of a defense offer of proof that Bell had lied about his whereabouts on the night of Rickie's disappearance, choked his girlfriend in a manner similar to the way Rickie had been choked to

death, made statements about the manner in which Rickie's body was found that only someone who had been there could make, and had made a number of statements demonstrating a consciousness of guilt, the trial judge allowed the defense to put on evidence of third party liability. Thereafter, the defense moved for the admission of a hearsay statement from the victim's mother who was awakened by a 12:20 a.m. phone call from Bell over ten years after her daughter's death.(7 CT 1642-1657). The Monday after the phone call, Mrs. Blake called FBI agent Jack Kelly to inform him that Bell had made the call and said words to the effect that "I can't live this way anymore. I can't hurt you anymore. I need to talk to Olias [the San Diego Detective originally assigned to the case]." (7 CT 1657.)

The defense motion, filed on August 8, 2004, was to admit this evidence of Bell's statements in support of its case that Bell was the actual killer. The defense argued in motion papers and in court that under the line of cases beginning with *Chambers v. Mississippi* (1973) 410 U.S. 300, hearsay evidence must be admitted as a matter of due process where it is highly reliable and essential to the defense case. The evidence was offered to show Bell's consciousness of guilt. The defense argued that Bell's statement itself wasn't hearsay because it was introduced to show consciousness of guilt, not to prove that he couldn't live this way anymore; it further argued that although Kelly's testimony about what Mrs. Blake told him Bell had said was hearsay, that critical, damning testimony could be admitted no other way because of Mrs. Blake's death. The trial court denied the motion stating "I do not believe that the circumstances such that this evidence is reliable, critical, necessary within the meaning of those cases, and accordingly the defense request is denied." (RT 944.)[24]

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[24] After the defense motion was denied, the court held an evidentiary hearing on a defense motion to have Bell's admission to Kelly that he had called Mrs. Blake admitted as adoptive admission. At that hearing, agent Kelly testified that he did interview Bell about the phone call and that Bell admitted making the phone call, but that Kelly did not

At trial, the prosecution called Bell to testify and he denied killing Rickie Ann Blake. On cross- examination, Bell admitted that he called Mrs. Blake at 12:20 a.m. on August 19th 1996. (26 RT 5713:8-11 ("well it [Kelly's written report of Mrs. Blake's statement to Kelly] proved to me that I did.").) He was more equivocal about what he said to Mrs. Blake on that date. He first answered that "yes", he had said "I can't live like this anymore. I can't hurt you anymore." (26 RT 5713:14-18 ["Yes. I don't remember it. But I did eventually, yes."]), but then said "No" it did not sound like something he might have said." (26 RT 5713: 19-20).

2. Kelly's Testimony Concerning Bell's Damning Admission to Mrs. Blake Should Have Been Admitted Because It Was Highly Reliable and Critical to the Defense

It has long been settled that state evidentiary rules that exclude reliable and critical exculpatory evidence violate a defendant's constitutional rights. (See *Washington v. Texas* (1967) 368 U.S. 14 [enforcement of state rules making felons incompetent to testify violated constitutional right to compulsory process]; *Chambers v. Mississippi* (1973) 410 U.S 300 [compulsory process violation to exclude reliable out-of -court admissions by co-defendant that co-defendant was the real killer]; *Green v. Georgia* (1979) 442 U.S. 95 [violated due process to exclude, on hearsay grounds, admissions by a defendant who was tried separately that he was the actual killer].) *Chia v. Cambra,* (9th Circuit 2003) 281 F.3d 1032 *vacated sub nom McGrath v. Chia* (2003) 538 U.S. 902 *reaffirmed on remand* (9th Cir 2004) 360 F.3d 997 [conviction for conspiracy to rob and kill federal agents vacated on federal *habeas* where trial court excluded four hearsay statements of conspirator admitting he had committted crime, but indicating defendant did not

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inform Bell of the words Mrs. Blake ascribed to Bell. (17 RT 4323.) The trial judge then denied the motion based on adoptive admission and reaffirmed his earlier ruling excluding Kelly's testimony about what Mrs. Blake had said. (17 RT 4327.)

participate].) As the Supreme Court said in *Chambers*, the courts cannot apply the hearsay rule "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi, supra,* 410 U.S. at 302.)

In the instant case the trial court refused to admit the hearsay statement of Mrs. Blake setting forth the highly incriminating words spoken by George Cardenas Bell, words which were crucial to appellant's defense that Bell was the actual killer. Bell's statement that "I can't live this way anymore. I can't hurt you anymore" made to the mother of the victim in a 12:20 a.m. phone call ten years after the crime was reliable evidence of Bell's guilt. It is highly unlikely that Bell would have made such a statement to the bereaved mother of the victim if that was not how he felt, and even more unlikely (especially in view of Bell's admission that he made the call) that Mrs. Blake would have given false information to those investigating her daughter's death. Kelly's description of the call would have provided a uniquely clear picture of Bell's consciousness of guilt, which was highly probative that Bell, not appellant, killed Ricky Blake.

Although it is true that Bell testified and admitted making the phone call at 12:20 a.m. in 1996, he was equivocal about whether he said the words ascribed to him by Mrs. Blake. The following colloquy on cross-examination of Bell left the jury with an unclear record:

Q: Sir, isn't it true that you did call Mrs. Blake up August of 1996 at 12:20 a.m., late night/early morning?

A: Well, it [Kelly's report of Mrs. Blake's call] proved to me that I did.

Q: You did do it, didn't you?

A: Yes.

Q: *And when you called up Mrs. Blake you told her, "I can't live*

like this anymore. I can't hurt you anymore," didn't you.

A: *Yes. I don't remember it, But I did eventually, yes.*

Q: Sound like something you might have said?

A: *No.*

(26 RT 5713:8-20 [Emphasis added].)

Bell first appeared to admit making the statement and then backtracked. When the defense sought to clarify Bell's meaning, it was met with a "misstates the evidence" objection which the trial court sustained:

Q: Okay. Did you tell her you wanted to talk to Olais after you said.

"I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais"

Mr. Dusek [prosecutor] Objection. Misstates the evidence.

THE COURT: Sustained.

(26 RT 5713:21-26)

And when the defense later in the cross -examination sought to return to the subject of what was said to Mrs. Blake, the trial judge sustained an "asked and answered" objection, further preventing clarification. (26 RT 5838:6-15.)

The net effect of this testimony was to leave it muddy whether Bell said the words. "I can't live like this anymore. I can't hurt you anymore." These words said to the mother of the victim were powerful indications of Bell's consciousness of guilt.

The testimony of FBI Agent Jack Kelly would have given the jury a contemporaneous record of what Mrs. Blake heard and how she reacted to Bell's statements – calling the FBI to report on what could have be interpreted as a virtual confession of guilt. Allowing the jury to hear Agent Kelly's testimony and review his report of what Bell said would not only have allowed the jury to decide the significance of this statement, but also enabled the jury to better evaluate Bell's

credibility. Accordingly, the failure to admit Kelly's testimony about Bell's highly incriminating statements denied appellant due process of law. (*Washington v. Texas, supra*; *Chambers v. Mississippi, supra*; *Green v. Georgia, supra*; *Chia v. Cambra, supra.*) The erroneous exclusion of this very material evidence prejudiced the defense by denying it the ability to let the jury know exactly what was said so that they could consider this important evidence in deciding whether the prosecution had proven appellant's guilt beyond a reasonable doubt.

B. The Error In Excluding Kelly's Testimony Was Exacerbated by Erroneous Rulings by the Trial Judge Improperly Restricting Cross-Examination of Bell.

The trial judge exacerbated the prejudice from failing to admit Kelly's testimony about Bell's highly incriminating statements to Mrs. Blake, by inappropriately restricting Bell's cross- examination. Two of the restrictions related directly to clarifying the ambiguity in Bell's admission that he made the call to Mrs. Blake at 12:20 a.m.; as discussed above, Bell clearly admitted he made the call, but equivocated over whether he spoke the very guilty-sounding words:

Q: *And when you called up Mrs. Blake you told her, "I can't live like this anymore. I can't hurt you anymore,"* didn't you?

A: *Yes. I don't remember it. But I did eventually, yes.*

Q: Sound like something you might have said?

A: *No.*

(26 RT 5713:8-20 [Emphasis added].)

So, on the one hand Bell admitted to saying the words, but on the other he said they did not "sound like something [he] might have said." Left with that ambiguity, the defense twice sought to nail him down. The first instance was immediate. Defense counsel asked Bell exactly what he said, but the prosecution's objection and the trial judge's ruling prevented that clarification:

Q: Okay. Did you tell her you wanted to talk to Olais after you said,

"I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais"?

Mr. Dusek [prosecutor] Objection. Misstates the evidence.

THE COURT: Sustained.

26 RT 5713:21-26) Neither the prosecutor nor the trial judge stated what was misstated. Defense counsel accurately quoted Kelly's report of what he heard Mrs. Blake tell him. The possible problem with the phrasing of the question was that, literally, it could be interpreted to ask whether Bell told Mrs. Blake he wanted to talk to Olais *twice*, once when he spoke the full quoted language ("I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais" and once *"after"* he said those words. If that was the basis for the objection, there was no misstatement of the evidence. Rather, the question was not worded particularly well. It appears that defense counsel was just trying to confirm the full quote from Agent Kelly's report of the interview. But even if literally interpreted as asking whether Bell asked about Olais twice, it never misstated any evidence. So, the grounds stated for the objection were not meritorious and the objection should have been overruled. But more importantly, the trial judge should have been facilitating the clarification of what Bell said, not contributing to the ambiguity by allowing the prosecutor's word games to restrict defense counsel's important and legitimate inquiry.

Defense counsel cross-examined Bell on other aspects of his direct and then later returned to the subject of his call to Mrs. Blake:

Q. Isn't it true that when you would get liquored up or get high on drugs, you'd start talking about what happened with Rickie Blake, isn't it?

A: Only when I was by myself, not jibber jabber with everyone. Just mental things, kicking back, drink a couple of beers,

think and praying, you know.

Q: And then you'd decide to call Mrs. Blake at 12:30 at night 10 years after this accident?

MR. DUSEK: Asked and answered.

THE COURT: Sustained.

(26 RT 5838:6-15.)

The trial judge's ruling ended that line of inquiry and these two rulings by the trial judge had the effect of precluding the defense from clarifying one of the most suspicious things Bell had said.

In a third ruling, the trial judge restricted the defense from inquiring into Bell's mental state in 1986, which was an important part of the defense case that Bell may have killed Rickie Blake while under the influence of drugs and/or alcohol. The colloquy was as follows:

Q: Back in 1986 weren't there times where you would do or say things and not remember them because of alcohol or drugs?

A: Can you repeat that again?

Q: Sure. You would because of alcohol and drugs, you would do or say things and then later on not remember them?

MR. DUSEK: Calls for speculation.

THE COURT: Sustained.

(26 RT 5814:17-25.) The objection that the question "calls for speculation" was not valid. Bell was a substance abuser in rehabilitation. (See 26 RT 5814:3-8; 5838-39.)

Blackouts (saying and doing things and later not remembering them) and memory loss are a well-recognized symptom of alcohol abuse. (See, e.g., National Institute on Alcohol Abuse and Alcoholism (No. 63 October 2004) available online at http://pubs.niaaa.nih.gov/publications/aa63/aa63.htm .) Bell, as one who was in

rehabilitation for alcohol and drug abuse (24 RT 5025), would be aware of blackouts. Indeed, blackouts are an iconic reason for seeking treatment for alcoholism. (See, e.g,. Charles Jackson (1944) *The Lost Weekend* [made into an Oscar-winning movie in 1945] and The Hangover, a 2009 movie about not being able to remember a drunken night. En.wikipedia.org/wiki/The_Hangover .) Being aware of blackouts is not a subject of speculation. It is something Bell, an admitted alcoholic (26 RT 5804), would be keenly aware of if they occurred. The question called for a "yes" or "no" answer and it would not require any speculation of any kind. Thus, the trial judge's ruling was clearly wrong. More importantly it cut off a line of inquiry very helpful to the defense. Exploring whether Bell was aware he had blackouts during the period when Rickie Blake was killed was an important link in the chain of evidence connecting Bell's statement showing a consciousness of guilt and his obsessive discussion of the crime, including his hypothesis that the death of Rickie might have been "an accident." (See 26 RT 5817-5818). Because of the culturally iconic nature of blackouts as something jurors could relate to, the judge's ruling deprived the defense of an important piece of evidence which could have helped persuade the jury that there was a reasonable doubt over who killed Rickie Blake.

Thus, each of the above rulings restricting defense cross-examination was not only erroneous as a matter of evidence law, but also, individually and collectively, the rulings effectively denied appellant his constitutional rights to confront an important witness against him and to make a full defense. (See *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057 [in homicide case in which the defendant had raised a claim of imperfect self-defense, it was error that justified *habeas* relief and violated the right to make a defense to exclude the victim's diary and defendant's testimony about what was in that diary which caused her to fear the victim); *People v. Murphy* (1963) 59 Cal.2d 818 [defense must be given wide

latitude in cross-examining witnesses; restrictions on impeachment of prosecution witness's ability to perceive and recall were reversible error]; *Davis v. Alaska* (1974) 414 U.S. 308, 316 [improper restriction on impeachment of prosecution witness requires reversal].)

Independently and collectively, the restrictions on cross-examination are prejudicial error requiring reversal. But when combined with the erroneous exclusion of Agent Kelly's testimony about what Mrs. Blake told him about Bell's late-night call, they make clear that appellant was prejudiced by a series of rulings which deprived him of his ability to support the defense that Bell, not appellant, was the killer. The restrictions on the defense ability to clarify with Cardenas his words to Mrs. Blake deprived the defense of a clear record of what was said. Remembering that the defense's only burden was to create a reasonable doubt as to who was the killer, this deprivation was highly significant, particularly when the trial judge would not let Agent Kelly testify as to what Mrs. Blake told him Bell had said.

The restriction on the blackout line of inquiry helped undermine the defense's ability to make their reasonable-doubt case over who actually killed Rickie Blake because that line of inquiry not only had the power to explain Bell's erratic behavior (obsessively exploring what had happened), but also had a unique power to communicate with the jury. As in *DePetris*, *supra*, reversal is required.

C. The Error in Excluding Kelly's Testimony Was Further Exacerbated by the Trial Judge's Improper Refusal to Give Instructions Requested by the Defense on Consciousness of Guilt and Giving False Statements.

The erroneous rulings undermining the defense's ability to support its case that there was a reasonable doubt as to who killed Blake did not end with the exclusion of Kelly's testimony and the restrictions on the cross-examination of Bell

. The trial judge further erred by refusing defense requests for pinpoint instructions which would have assisted the jury in evaluating the significance of evidence showing that George Cardenas Bell at least twice gave a demonstrably false alibi for his whereabouts on the night of Blake's disappearance (instruction on wilfully false statements as evidence of consciousness of guilt requested by defense) and twice failed to reply when others asked him if he had killed Blake (instruction on failure to deny accusation when given opportunity to reply). These erroneous rulings prejudiced appellant separately and collectively and combined with the other errors in excluding key evidence and restricting cross-examination undermined his ability to fully make the defense that Bell committed the crime.

1. The Record

a. False Statements As Indicative of Consciousness of Guilt

At trial, Greg Richardson testified that Bell claimed that he was with his girlfriend, Tink Armstrong, the night Rickie Blake disappeared. (RT 5341, 5143). Bell himself testified that he told Richardson he was with Armstrong that night. (26 RT 5807) However, Armstrong testified that she was in Los Angeles at a funeral that night and spoke with Bell by phone; she was not with him at all that night. (25 RT 5421)

Based on this strong evidentiary record, defense counsel asked for an instruction explaining to the jury that if they found that Bell lied about his whereabouts that night, they could infer that Bell did so because he was conscious of his guilt and this could lead them to have a reasonable doubt about whether Bell, not appellant, killed Blake. The exact instruction requested was:

> If you find that before and during the trial George Cardenas Bell made willfully false or deliberately misleading statements concerning the crime for which defendant, George Williams is now being charged, you may consider those statements as raising a reasonable doubt as to the guilt of the defendant

in that they tend to prove a consciousness of guilt on the part of George Cardenas Bell.

However, its weight, and significance, if any are matters for your determination.

(9 CT 1968 [based on CALJIC 2.03(Consciousness of Guilt – Falsehood)].)

The trial judge refused to give such an instruction (9 CT 1964, 1969.) The trial judge did, however, give CALJIC 2.03 with respect to *falsehoods uttered by defendant*:

> If you find that before the trial defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(9 CT 1981.)

b. Bell's Failure to Deny He Killed Rickie Blake When Asked

The defense introduced evidence that because Bell talked about the crime so much and as if he was there, that his then wife and a friend, Nolan Richardson, each asked him on separate occasions whether he had killed Blake. Bell did not deny it or answer in any way. (23 RT 4885 [Testimony of his wife, Gloria Zertuche]; (25 RT 5345 [Testimony of Greg Richardson].) Based on these two instances, the defense requested the following instruction based on CALJIC 2.71.5 (Adoptive Admission – Silence, False or Evasive Reply to Accusation):

> If you should find from the evidence that there was an occasion when George Cardenas Bell, under conditions which reasonably afforded him an opportunity to reply; failed to make a denial in the face of an accusation expressed directly to him, charging him with the crime for which the

defendant is now on trial, or tending to connect him with its commission and that he heard the accusation and understood its nature, then the circumstance of his silence on that occasion may be considered against him as indicating an admission that the accusation was true.

If you find that this circumstance occurred you many view that evidence as raising a reasonable doubt as to the guilt of the defendant, George Williams.

However, its weight and significance, if any, are matters for your determination.

(9 CT 1970.)

2. Argument

a. It Was Error To Deny Pinpoint Instructions Requested by Defendant

It is settled law that a defendant is entitled to pinpoint instructions on request:

> Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case.... *They are required to be given upon request when there is evidence supportive of the theory.*

(*People v. Rogers* (2006) 39 Cal.4th 826, 878 citing *People v. Saille (1991)* 54 Cal.3d 1103, 1119 [emphasis added].)

Here it is undisputed that the defense requested pinpoint instructions with respect to the false alibi given by Bell and his failure to deny he killed Blake when directly accused of committing the crime by both his wife and Greg Richardson. Nor is there any doubt that there was evidence introduced to establish the predicate for each of the pinpoint instructions: Bell testified that he was with his girlfriend on the night of Rickie Blake's disappearance and he told the same story to Greg Richardson, but his girl friend Tink Armstrong testified that she was in Los Angeles at a funeral that night. Bell's wife, Gloria Zertuche, and Greg Richardson each

testified that they asked him whether he killed Blake and he remained silent. Therefore, the trial judge erred when he failed to give the pinpoint instructions requested by the defense.

b. The errors in failing to instruct the jury were prejudicial and the court's lack of evenhandedness violated due process

The effect of these two erroneous refusals was prejudicial because it left the jury without instructions as to how to use this evidence. The refusal to give the instructions on false statements was particularly prejudicial because the trial judge did give CALJIC 2.03 with respect to appellant George Williams. Thus, the jurors were specifically told by the trial judge that they could treat any false statements made by appellant "as a circumstance tending to prove a consciousness of guilt" by him, but the trial judge refused give them a parallel instruction with respect to the false alibi given by Bell. Given that the theory of defense was that Bell was the killer and that this left the jury with a decision to make about whether Bell or appellant had committed the crime, the lack of evenhandedness tipped the scales against appellant and was therefor highly prejudicial. The failure to instruct on the significance of Bell's failure to deny his guilt when directly asked on separate occasions by his wife and by Greg Richardson added to the prejudice because it failed to let the jury know that such behavior is suspicious as a matter of law; so that jury, if they found that Bell engaged this behavior, would did not know that it could give weight to that evidence.

It is true that the jury was instructed generally about the significance of the evidence that Bell committed the crime: "If after considering the evidence regarding George Cardenas Bell and all of the other evidence in this case, you have a reasonable doubt whether the defendant was the person who committed the crime or crimes, you must give the defendant the benefit of the doubt and find him not guilty." (9 CT 2002.) So the legal significance of the defense theory of the case

was explained to the jury, but the legal significance of Bell's false alibi and failure to deny the crime when asked if he did it was not explained to the jury. This diminished appellant's ability to put on a defense and weakened the probative impact of exculpatory evidence he had presented.

The trial court's lack of evenhandedness – giving the prosecution the benefit of an instruction authorizing an inference of consciousness of guilt on the basis of any false statement by appellant, but denying the defense the benefit of such an instruction vis-a-vis the false alibi statements by the third party suspect – was also fundamentally unfair and inconsistent with the requirements of due process under the Fourteenth Amendment. Certainly there was no rational basis for deeming Mr. Bell's false statements concerning the crime any less probative of consciousness of guilt than any such statements made by appellant. In *Wardius v. Oregon* (1973) 412 U.S. 470, 474-475, the U.S. Supreme Court, explained that the Due Process Clause "does speak to the balance of forces between the accused and his accuser, " and 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* itself involved discovery, but the same principle applies to jury instructions. (See *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony].) Thus, "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) The lack of instructional evenhandedness was both prejudicial and constitutionally improper.

D. The Prejudicial Impact of the Three Groups of Errors Cumulated to Deny Appellant an Opportunity to Present a Complete Defense.

"'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense.'" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-25.) Although appellant was allowed to put on evidence and argue that Bell was the actual killer, the trial judge's erroneous rulings combined to so obstruct and weaken that defense that appellant was denied his constitutionally guaranteed opportunity to fully present his case.

This case is much like *DePetris v. Kuykendall, supra*, 239 F.3d 1040, in which the trial court had allowed a defendant charged with murdering her husband to mount the defense of imperfect self-defense, but had barred her from presenting evidence of her husband's diary which documented his violence toward others and from testifying as to the effect of those diary entries on her state of mind at the time of the shooting. The Ninth Circuit held that the exclusion of the diary and the defendant's testimony about it deprived the defendant of her constitutional right to fully present a defense and required reversal of her conviction:

> We hold that the erroneous exclusion of both the journal evidence and any reference to it – especially petitioner's own testimony about – unconstitutionally interfered with her ability to defend against the charges against her. The preclusion of this highly probative evidence went to the crux of the case, and the harm caused by its exclusion was not cured by the receipt of other evidence that was significantly less compelling. Petitioner has shown that her trial was substantially and injuriously affected by the erroneous ruling, and therefore, the writ of habeas corpus should have been granted.

(239 F.3d at 1065.) Just as in *DePetris*, appellant here was allowed to make the defense that George Cardenas Bell committed the crime, but then was denied crucial means of proving that defense by trial court errors barring the crucial evidence of Bell's guilty statements, restricting cross-examination about these guilty statements and refusing pinpoint instructions on the legal significance of Bell's false alibi and repeated failure to deny that he killed Blake. These errors individually, and all the more clearly in combination, violated appellant's constitutional right under the Sixth and Fourteenth Amendments to fully present his defense and were highly prejudicial. Further, because the errors directly affected the jury's resolution of the question of appellant's guilt or innocence, they also violated the Eighth and Fourteenth Amendment mandate requiring fair and reliable guilt and sentencing determinations in capital cases. *(Beck v. Alabama, supra,* 447 U.S. at 637-38 (heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense); *Zant v. Stephens*, 462 U.S. at , 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination).) Accordingly, the judgment of conviction and sentence must be set aside.

IV.
THE ADMISSION OF OTHER ACTS OF SEXUAL ASSAULT AS PROPENSITY EVIDENCE AT APPELLANT'S CAPITAL MURDER TRIAL WAS UNDULY PREJUDICIAL, VIOLATED DUE PROCESS, AND SHOULD HAVE BEEN BARRED UNDER EVIDENCE CODE SECTION 352; TO THE EXTENT IT PERMITS SUCH EVIDENCE, EVIDENCE CODE SECTION 1108 IS UNCONSTITUTIONAL

A. The Record

Prior to the guilt phase trial, the defense moved to exclude evidence of prior sexual crimes by defendant on the grounds that the evidence to be introduced for the purpose of demonstrating the defendant was "a rapist," was relevant only as

propensity evidence, was inadmissable under evidence code 352, and that the admission of the evidence would violate the due process clause. (3 CT 622-641) The trial judge denied the motion in its entirety. (11 CT 2421.)

At trial evidence was introduced that defendant had molested his daughter in 1984 (20 RT 3885-3889) and raped Velma Williams and her daughter in 1986, one week after the death of Ricky Blake. (20 RT 3933-3957). During the trial, it was undisputed that Rickie Ann Blake had had sexual intercourse with defendant. The key issue was the timing of that intercourse. The prosecution contended that evidence established that intercourse took place shortly before Blake's death and was forcible. The defense contended that the evidence was consistent with the sex taking place 48 to 72 hours prior to her death and being consensual. In regard to the murder charge, the timing was critical because if intercourse took place two or more days before Blake's death, then there was no evidence that defendant killed her; the only evidence linking defendant to Blake on the night of her death was the sperm evidence. If the sperm evidence did not put defendant with her at the time of her death, the prosecution had no murder case.

The prosecutor began his guilt phase closing argument to the jury with a guilt-by-propensity theme, asking the jury to rely on common sense to select from among three possible scenarios, each framed by (1) Williams' 1984 molestation of his daughter and (2) the rape/sodomy of Velma Williams and her daughter one week after Rickie Blake's death. The only variable was the intervening event: Did Williams rape and kill Rickie Blake? Did Williams have nothing to do with Rickie Blake? Did Williams have consensual sex with Rickie Blake and nothing more? (28 RT 6406-6407) The prosecutor's view, quite clearly, was that the evidence of the sexual crimes before and after Blake's death gave rise to an inference that the true scenario was the first one, i.e., that Williams had raped and killed Rickie Blake. (*Ibid.*)

The prosecutor returned to this guilt-by-propensity theme in his rebuttal argument, responding to defense counsel's argument that the three offenses were dissimilar, i.e. they did not share a common modus operandi. The prosecutor said there is no "rule book . . . that says they all have to be the same. You're a rapist. You have to do this, this and this every time, or you can't do it anymore." (28 RT 6652-6653) This was a pure propensity argument. Although he mentioned that alcohol was common to all three incidents, the essence of the prosecutor's argument was that Williams "progressed" in sexual offenses from the less violent molestation of his daughter in 1984 to the more violent offenses committed in 1986. The prosecutor was not relying on a distinctive *modus operandi*, but instead on a claim that Williams had a disposition to commit sexual assaults and that therefore he committed a sexual assault on Blake.

The jury was expressly authorized in the jury instructions to rely on the evidence of prior sexual offenses to infer that Williams had disposition to commit sexual offenses:

> If you find the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the sex crime of which he is accused.

(9 CT 1991 [CALJIC 250.01 in relevant part]).

B. Argument

The issue before this Court is whether the admission pursuant to Evidence Code section 1108 of the evidence that defendant molested his daughter and raped Velma Williams and her daughter combined with an instruction which expressly authorized the jury to find that defendant "had a disposition to commit sexual offenses" and use that finding to "infer that he was likely to commit and did commit

the" rape of Ricki Blake was prejudicial error in violation of Evidence Code section 352 and the due process clause of the Fourteenth Amendment. In *People v. Falsetta,* this Court found that section 1108 did not violate due process in a case in which the defendant was charged with forcible oral copulation and assault to commit rape. Evidence that the defendant in that case had plead guilty to a prior rape was admitted to show his disposition to commit such crimes and to therefore be some proof that he had sexually assaulted the victim in the case at issue. (*People v Falsetta* (1999) 21 Cal. 4th 903.)

Falsetta acknowledged that the rule against admitting propensity evidence was over three centuries old. (21 Cal.4th at 914; see generally Natali & Stigall, "*Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause* (1996) 28 Loy. U. Chi. L.1, 14.) The United States Supreme Court long ago summarized the reasons why propensity evidence is not admitted:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt . . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge

(*Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

This Court in *Falsetta,* however, stated that even " if the rule [against admitting propensity evidence] were deemed fundamental from a historical

perspective, we would nonetheless uphold section 1108 if it did not unduly "offend" . . . fundamental due process principles" (21 Cal.4th 915) because "the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge." (21 Cal.4th at 917). Thus, under this Court's *Falsetta* analysis, the constitutionality of section 1108 requires vigilant use of section 352 to guard against the danger of undue prejudice that is inherent in propensity evidence.

Appellant demonstrates below that (1) it was error under section 352, and violated appellant's rights to due process and to reliable capital guilt and sentencing determinations, to allow the use of other sexual crimes as propensity evidence in a capital trial when the central factual issue vis-a-vis appellant's liability for murder was the timing of the act of sexual intercourse; and (2) if Section 1108 is interpreted to allow such evidence, this Court should reconsider its holding in *Falsetta*, and find that section 1108 violates due process.

1. It Was Error to Admit Evidence of Other Sexual Crimes as Propensity Evidence in this Capital Murder Case

The trial judge erred in denying the defense motion to exclude evidence of other sex assaults by defendant under Evidence Code section 352. Whatever the merits of admitting other sexual assaults when the defendant is on trial solely for a sexual assault, it is far too prejudicial where the defendant is also charged with murder and there is a grave danger that the jury may convict the defendant of murder because they are convinced by the evidence of sexual assaults that he is a rapist and are therefore biased against him on the murder charge. This is particularly true in the instant case where the key issue in the murder charge was the timing of the sexual intercourse, not whether it was forcible or consensual. The jury could easily be distracted from the critical issue of whether the defendant was with the victim at the time of her death by the issue of whether prior sexual assaults suggested that

defendant raped Blake. Even if he had raped Blake, if it was two days before her death, there would no evidence demonstrating that he was with her when she died. There was too great a probability that the other sexual assaults evidence would be used by the jury, or would improperly affect its deliberations, in determining whether appellant was responsible for Blake's death, and it therefore should have been excluded under section 352. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738 (Reversing a conviction for sex offenses where the probative value of a prior sex crime was limited because it was not similar to the crime charged and the inflammatory effect of introducing the prior offense outweighed that limited probative value.)

Falsetta is no bar to this result. Indeed, this is the case envisioned by Falsetta in which section 352 should have played its protective role. *Falsetta* itself is factually very different from the current case. In *Falsetta* the sexual offense was used only to prove that another sexual offense had been committed. Whereas, here, the prior sexual offenses could have been used by the jury to prove not only that appellant had raped Blake, but that he had killed her as well. This distinction is significant because neither section 1108 nor the *Falsetta* opinion abrogate the longstanding principle generally barring the use of propensity evidence to support a criminal conviction. Section 1101(a) of the Evidence Code specifically prohibits use of propensity evidence – specific acts of the defendant offered to prove defendant's conduct:

> Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Other than section 1108, none of the exceptions apply in appellant's case.

Section 1108 carves out a limited exception for the use of other sexual offenses to prove the sexual offense for which the defendant is charged and *Falsetta* is clear that the use of one sexual offense to prove another sexual offense presents a special exception to the propensity rule. (See 21 Cal.4th at 914, 915).

But here the introduction of prior sexual offenses was inextricably linked not only with the theory of proof that appellant raped Blake, but also that he was responsible for her death. Thus, the prosecution theory of proof went beyond what is authorized by section 1108 – the use of a prior sexual offence to prove the sexual offense charged – and sought to use the other sexual offenses to prove appellant had killed the victim of a sexual assault. That after all, was the "common sense" scenario offered by the prosecutor in closing argument on the basis of appellant's sexual offenses against his own daughter and against Velma Williams and her child, i.e., that between those two offenses appellant "raped and killed Rickie Blake." (28 RT 6406-6407.) And certainly the jury, if led by the other crimes evidence and the argument of the prosecutor to think of appellant as "a rapist," was likely to have been unable to fairly and impartially evaluate the crucial question of the timing of appellant's sexual interaction with Ms. Blake. Moreover, even if admission of other sexual offenses were authorized by section 1108, it should not have gotten past the bar of section 352. The potential spill-over effect of other sexual crimes evidence on to the capital murder count constituted a risk of prejudice so great that it outweighed any value the other sexual crime evidence had on the rape count. Allowing the other crimes into evidence, and permitting the jury to infer therefrom that appellant was a rapist, was also inconsistent with fundamental fairness and the reliability essential to capital guilt and sentencing determinations, in violation of the Eighth and Fourteenth Amendments. (*Beck v. Alabama,* 447 U.S. at 637-38 (heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense); *Zant v. Stephens* 462 U.S. at 879 (Eighth and Fourteenth Amendments

require reliable, individualized capital sentencing determination). Accordingly, it was error to admit the other sexual crimes.

2. If Section 1108 is interpreted to allow such evidence, it violates due process.

a. The Admission of Other Sex Crimes to Prove Not Only Rape But Homicide Violates Due process.

As discussed above, the *Falsetta* decision and other decisions which have upheld recent changes in evidentiary rules which allow other sexual assaults to be used to show a disposition to commit other sexual crimes have been based on what this and some other courts have viewed as the unique appropriateness of using propensity evidence in sexual assault cases as opposed to other kinds of criminal prosecutions. See *Falsetta, supra,* 21 Cal.4th at 914-915. The instant case is an example of "the camel's nose under the tent." Though styled as a rule creating an exception to the general rule against the use of propensity evidence in cases of sexual assaults, here section 1108 was used to help prove the prosecution's case that appellant killed Blake. If section 1108 can be used to help convict a defendant of homicide, the supposed justification that the rule was limited to the use of other sex crimes to prove the charged sex crime will disappear and prosecutors will be free to introduce other sexual assaults to prove any other crime; this would abrogate a core rationale for rule 1108.

In *Falsetta*, the Court reasoned that any unduly prejudicial effect of introducing other sex crimes to prove the sex crimes charged could be cured by exclusion under Evidence Code 352. This reliance on rulings under section 352 to cure the problems with using the propensity inference to prove bad acts has proved to be overly optimistic. (See Jennifer Dukarski, *The Sexual Predator's Scarlet Letter Under The Federal Rules Of Evidence 413, 414, And 415: The Moral Implication Of The Stigma Created And The Attempt To Balance By Weighing For Prejudice* (2010)

87 U. Det. Mercy U. L. Rev 271, 282-287 [hereinafter "*The Sexual Predator's Scarlet Letter*"]). If the instant case is deemed not to qualify for Evidence Code 352 exclusion, then the rationale that the inherent prejudice from admitting other sexual crimes is circumscribed by both the requirement that it be used to prove only a propensity to commit sexual assaults and that discretionary section 352 rulings will cure all undue prejudice does not hold up. Here, the proof of other sex crimes was used to support the inference that appellant not only raped Blake but that he also killed her. Under well settled principles, this extended use of character evidence it not only exceeds the authorization of rule 1108, but also it violates due process, and, in a capital case, the Eighth Amendment as well.

b. The Propensity Inference Violates Due Process.

If this Court does not find that the use of other sexual crimes introduced as propensity evidence as part of a chain of inference to prove homicide violates section 1108 and section 352, then it should reconsider its ruling in *Falsetta* and hold that section 1108 violates the constitution as two other state Supreme Court cases have done. (*State v. Cox* (Iowa 2010) 781 N.W. 2d 757 [statute authorizing use of other sex crimes to prove disposition to commit sex crimes violates due process clause of Iowa constitution]; *State v. Ellison* (Mo. 2007) , 239 S.W.3d 603 [statute admitting other sex crimes with a child under 14 violates state constitutional provisions that guarantee a defendant has "the right to be tried only on the offense charged."]; *State v. Burns* (Mo. 1998), 978 S.W.2d 759, 760 [same].)

Although these cases were decided under provisions of state constitutions, their reasoning reflects the common theme in Anglo-American jurisprudence that the admission of propensity evidence prevents a fair trial and thus violates the Due Process Clauses of the Constitution. Thus, this Court should hold section 1108 unconstitutional under the due process clauses of both the California Constitution and the U.S. Constitution.

From the Sixteenth Century to the present time, there has been a firm rule against using other crimes to prove that a defendant had a disposition to commit the crime he is charged with. (See generally, Natali & Stigall, *supra, How Sexual Propensity Evidence Violates the Due Process Clause,* 28 Loyola U. Chi. LJ. at t 8-14 [recounting the centuries-old history of the rule against propensity evidence].) In California, Evidence Code 1102 and in the Federal Rules of Evidence, Rule 404, the rule against the propensity evidence remains firmly established in cases other than those involving sexual assaults.

In the 1990's there was a movement toward the departure from the propensity rule in cases where it was contended that the commission of certain sexual offenses was probative of a disposition to commit additional sexual offenses. Section 1108 and Federal Rules of Evidence 413-415 were part of this movement. Federal Rules 413-415 were passed by Congress over the vigorous and virtually unanimous opposition of the judges, law professors and attorneys who sit on the Advisory Committee on Evidence Rules, Advisory Committee on Criminal Rules, and the Advisory Committee on Civil Rules , and believed that these provisions "could diminish significantly the protections that have safeguarded persons accused in criminal cases." (Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases (submitted to the Congress in accordance with section 32O935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322), reprinted in 159 F.R.D. 51. 53 (1995).) As the Judicial Conference noted:

> These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

Ibid. See generally *How Sexual Propensity Evidence Violates Due Process, supra,* at

5-8 [history of broad opposition to Federal Rules 413-415].)

Given this history, it is not surprising that this Court assumed in *Falsetta* that the rule against propensity evidence was fundamental from an historical perspective. But, as noted above, the Court nonetheless decided that even if the rule barring reliance on propensity evidence was a fundamental part of due process, section 1108 did not offend it because of the limitations placed on section 1108 through the application of section 352. (*Falsetta*, *supra*, 21 Cal.4th at 915.) But this Court should reconsider *Falsetta* because as this case demonstrates, section 352 is not an adequate protection against the dangers to fairness and reliability inherent in permitting jurors to rely upon propensity evidence. Indeed, as a matter of logic, a section 352 analysis conducted in light of Evidence Code section 1108 and an instruction like CALJIC 250.01[25] cannot remedy the due process problem since that analysis will now assume, contrary to our longstanding traditions, that propensity evidence is a proper basis for conviction, and hence accord probative value to a theory of proof that should not be permitted at all.

Apart from the special exception for crimes of sexual assault, the United States Supreme Court has maintained the rule against the use of propensity evidence. As the Court stated in *Brinegar v. United States* (1949) 338 U.S. 160, 174 :

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.

In *Old Chief v. United States* (1997) 519 U.S. 172, 180 the Supreme Court reiterated

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[25] CALJIC 250.01, which authorizes a jury to infer and rely upon a defendant's "disposition to commit sexual offenses," was given in this case (9CT 1991), and in relevant part is quoted above at page 108, *supra.*, of this brief.

that "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged" constitutes unfair prejudice, and explained that "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." In this context, the Court reaffirmed its prior language *in Michelson v. United States, supra*, which appellant has set forth above. And in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 235 the Court noted once again that it had "long recognized" that "the introduction of evidence of a defendant's prior crimes risks significant prejudice," citing its decision in *Old Chief v. United States, supra.*

Thus, although the U.S. Supreme Court has never directly ruled on whether use of the propensity inference violates due process (see *Estelle v McGuire* (1991) 502 U.S. 62), the decisions discussed above indicate that it will do so and hold that section 1108 violates due process because of its use of the propensity inference. (See Sheft, *Federal Rule 413: A Dangerous New Frontier* (1995) 33 Am. Crim. L. Rev.57, 77-82.) Nor will the "special exception" for sex crimes stand up to scrutiny. The assertion that sex crimes are different and that a propensity inference from other sexual acts is justified to support proof of the sexual crime charged was criticized by the Judicial Conference as "unsupported by empirical evidence." Judicial Conference Report at 53. See also Myrna S. Raeder, American Bar Association Criminal Justice Section Report to the House of Delegates, in (1995) 22 Fordham Urb. L.J. 343, 345-46; See also *Dangerous New Frontier, supra,* 33 Am. Crim L Rev at 75 [reviewing study which showed a lower recidivism rate for rape than all crimes other than murder and concluding that there is no evidence to support reliance upon a propensity inference to prove rape as opposed to any other crime].) And a recent commentator condemned the special exception for sex crimes as among other things,

a "'once a thief, always a thief' mentality" no more valid for sexual offenses than other offences. (See *The Sexual Predator's Scarlet Letter*, *supra*, at p. 281.)

This Court should join the Supreme Court of Iowa in holding that the admission of other sexual assaults to prove a general propensity to commit such acts violates due process and the defendant's right to be tried only on the offense charged, a fundamental due process right (see *State v. Cox*, *supra,* 781 N.W. 2d at 769) and the Supreme Court of Missouri in holding that such general disposition evidence deprives the defendant of the right to "to be tried only on the offense charged." (*State v. Ellison*, *supra*, 239 S.W.3d at 606; *State v. Burns, supra*, 978 S.W.2d at 760.) Further, in light of the long recognized dangers of permitting jurors to rely upon propensity evidence as a basis for conviction, allowing such evidence and authorizing such inferences also undermines the reliability required by the Eighth and Fourteenth Amendments for constitutionally valid capital conviction and sentencing determinations. (*Beck v. Alabama, supra*,447 U.S. at 637-38; *Zant v. Stephens*, *supra*, 462 U.S. at 879).

3. The Error in Admitting Propensity Evidence Was Prejudicial

The reason why propensity evidence is excluded is because of the potential prejudice from hearing evidence of other crimes. As the D.C. and Fifth Circuits have put it, "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is." (*United States v. Foskey*, *supra,* 636 F.2d at 523 (quoting *United States v. Meyers* (5th Cir. 1977) 550 F.2d 1036, 1044.) In a case in which a constitutional violation has been committed, settled law requires the state to demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 385 U.S. 18, 24.) In a case in which there was substantial evidence that a third party committed the crime, and the prosecutor heavily relied upon the erroneously admitted propensity evidence to argue that appellant had raped and killed the victim, the state cannot meet this burden and the verdict of guilt must be reversed.

PENALTY PHASE ISSUES

V.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, TO PRESENT A PENALTY DEFENSE, AND TO A RELIABLE PENALTY DETERMINATION WHEN IT (1) EXCLUDED THE VIDEOTAPED STATEMENTS OF TWO IMPORTANT, BUT ILL, DEFENSE PENALTY PHASE WITNESSES, (2) REFUSED TO ADJOURN THE TRIAL TO TAKE THEIR TESTIMONY, AND (3) SUSTAINED A PROSECUTION OBJECTION TO A DEFENSE EXPERT'S USE OF A STATEMENT BY ONE OF THEM AS A BASIS FOR HIS PROFESSIONAL OPINION

A. Background

1. Sophie Williams' Videotaped Statement

In her videotaped statement, Sophie Williams, no relation to appellant George Williams, spoke about George's very positive behavior after he returned to Indiana after being incarcerated in California. She told how George Williams was like a son to her and her husband calling them "Mom" and "Dad." George came to Sophie's husband and asked him to teach George to be a carpenter. George was a willing and able student and was always available to help her husband with whatever tasks her husband needed. George built them a porch at their home with her husband watching and giving him pointers if he needed them. After George's initial carpentry lessons, he asked Sophie what color her bathroom was; she told him and he soon came back with a pretty wooden accessory for the bathroom; the item was, she believed, George's first carpentry project on his own. Before and after Sophie's husband died, George helped with various other projects: he assembled their sound system, he fixed the gutters at the church and came right over to fix her lawnmower when she called him for assistance with it. Sophie and her husband built such a close relationship with George that when her husband was dying he asked George to look after Sophie after his death. George followed through and always called her (two to four times a week) and looked in on her after her husband died in 2001.

Sophie Williams' statement was significant to the defense penalty phase case because the prosecution called Dr. Park Dietz to testify that George was a sociopath(37 RT 9119) and the prosecutor argued that George was just evil. (38 RT 9302.) His exemplary and caring behavior years after the crime for which he was charged was committed and after years of incarceration was a powerful rebuttal to the claim he was a sociopath and purely evil.

2. Annie Whitfield's Statement

Because this was a cold case brought 17 years after the crime, the defense team had an even more formidable task than in the typical death penalty case of finding evidence concerning appellant's background. Appellant's father left when he was young and his mother testified that she turned him over to foster care because she was unable to care for him when she was ill. The records of the foster care system so many years later had been destroyed. Nevertheless, the defense was able to locate Annie Whitfield, an aging black woman in Indiana who had provided foster care to George Williams when he was about ten years old. Ms. Whitfield estimated that during 43 years of providing care, she had fostered over 100 children (30 Supp. CT 5973, 5974), but she remembered George Williams well. And, crucial to the penalty defense, she had information about young George and his mother that no one else had: Whitfield gave a statement to defense investigators that young George was an extremely respectful and happy child when he was with Whitfield, but that George's mother had repeatedly called Whitfield while drunk, that George's mother was harsh and cruel to George in Whitfield's presence (even slapping him in the face right in front of her), that George came to her at age 10 with scars from physical abuse, that George had been deeply upset when his mother took him back from Ms. Whitfield and that young George would repeatedly come back to her house after he was forced to go back to living with his mother.

Defense counsel represented to the trial court that Whitfield was "perhaps

the most single most important mitigation witness for the defense." (29 RT 6826.) This was true for at least four reasons. First, Whitfield painted a very sympathetic picture of young George who responded well to an affectionate, stable environment and this couldn't help make a reasonable person wonder what George's life would have been like if he had remained in a compassionate home like Ms. Whitfield's. Second, because the prosecution attempted to minimize the impact of George's toxic childhood situation by pointing to George's mother, Lelar Drew, as someone who "worked her butt off and made a decent life so that she could support her son" (RT 9274), the information about her bad behavior toward her son (as observed by his foster mother) was highly relevant in showing that his mother was herself an abusive factor in his development. This evidence undermined the prosecution suggestion that even though the rest of the family situation was horrific, George's mother did provide stability.

Third, Whitfield statements included her eyewitness observation of George's mother hitting George and emotionally abusing him and her observation of scars from physical abuse George had suffered before he reached ten years of age. Whether George had been physically abused was a point of contention between the defense and prosecution during the penalty trial. (See 36 RT 8814, 8817 [Prosecution objects to testimony by defense witness Susan Mangum that scars shown in photo of George's back were from physical abuse, but she is allowed to testify that in her opinion the items pictured were scars, but it not allowed to testify as to their cause]; See also 37 RT 9131 [Prosecution expert casts doubt on whether George was physically abused because George denied "many, many times"].) Whitfield's statements would have helped the jury resolve this conflict.

Fourth, an important part of the penalty phase defense was that George Williams was alcohol dependent and his aberrant behavior occurred only when he was under the influence. The information that Lelar Drew drank heavily was

significant because, as testified to by defense expert Dr. Rahn Minigawa, alcohol abuse by the mother added to the risk factors for sexually violent behavior. (35 RT 8613-8615.). In addition, a major lynchpin of the case for life was that George had so many risk factors for sexual deviance that it was understandable and perhaps less morally condemnable that he failed to avoid that result. These risk factors included alcohol abuse and dependence, history of childhood sexual abuse, history of physical abuse and neglect (the neglect leads primarily to the alcohol dependence, which itself leads to the risk of sexually offending) and brain damage to frontal and/or temporal lobes of the brain. (35 RT 8074.)

While he was in the Navy, George became alcohol dependent. All of George's criminal behavior, including the capital offense, post-dated his years in the Navy and occurred while he was under the influence of alcohol. One of the risk factors for alcohol dependence was alcohol abuse by the parents. Everyone agreed that George's father was an alcoholic, but George's mother and other members of the family had testified that she (Lelar Drew) did not drink. (See e.g. 32 RT 7655 [testimony of Lelar Drew]; 35 RT 8431 (Testimony of Yvonne Drew King [Sister of Lelar Drew]; But see 35 RT 8532 (Yvonne King saw Lelar drink a fifth of vodka once, but this was only once during the period when Lelar was in the hospital in Chicago which was the time George was staying with Annie.Whitflied.) Annie Whitfield's statements showing that Lelar drew was drunk frequently were an important piece of the puzzle on which defense expert Dr. Rahn Mingawa relied in arriving at his conclusion that Williams became alcohol dependent in 1981 after service in the drinking culture of the Navy. The combination of Whilfield's statements of Yvonne King's testimony demonstrates that Lelar's story that she never drank was not true and suggests Lelar has alcohol problems, as well.

B. The Record

The defense team located Annie Whitfield and Sophie Williams as part of their penalty phase investigation in Gary, Indiana where George was raised and

where he returned after imprisonment in California. Because of the poor health of Ms. Whitfield, defense counsel videotaped interviews of her in June of 2004. (30 RT 6826.) Sophie Williams was expected to testify, but a short video interview was made of her statement as well. Defense counsel attempted to have Annie Whitfield and Sophie Williams, both Indiana residents, along with 15 other residents of Gary, Indiana, subpoenaed to testify at trial. The Lake County, Indiana court ordered that all the California subpoenas were be honored except those to Annie Whitfield and Sophie Williams, which were denied because of the poor health of each of these two women who were both in their seventies. (30 RT 6825.)

The defense had contacted the prosecutor and invited him to conduct his own interviews of these two witnesses; but the prosecutor responded by letter saying asking the defense to ask questions for them. Defense counsel replied suggesting that the prosecutor do it himself so that he could be assured that questions were asked in the right fashion and information the prosecution wanted from these witnesses could be presented to the jury. Although the prosecutor knew about both witnesses for months (and of the defense's intention to present videotaped statements from them), the prosecutor did nothing to interview or contact them. (30 RT 6829.)

1. **Preliminary Ruling Admitting the Videotaped Statements.** On September 30, 2004, in proceedings after the guilty verdict, but prior to the start of the penalty trial, the defense sought permission to play videotaped recordings of the statements of each of these witnesses to the jury at the penalty phase. (30 RT 6825-6632.) In those proceedings, the prosecutor did not contest that the defense had given him the tapes, the contact information for Whitfield and Williams, or that the defense had invited him to interview the witnesses and videotape them himself. (30 RT 6827-6828); rather, the prosecution objections were two-fold: first that the videos were hearsay, not at all admissible, and second that "many things in both interviews ... need to be excised because these ... two ladies do not have personal knowledge of the events." (30 RT 6828.)

After argument, the trial judge ruled that he would "permit the recorded statements to be presented in evidence." (30 RT 6832.) The trial court found as follows:

> The court does find that it's relevant to Factor K in terms of mitigating evidence, and considering the hearsay nature of the testimony ... I think the evidence ... is highly relevant to the issues before this Court. I think there are substantial reasons, given the way the evidence has been produced, to consider it reliable and an absence of compelling reason to consider it to be unreliable.
>
> .... These witnesses for all purposes are unavailable to this court for live testimony.
>
> Subject to any other evidentiary objections to be made to the content of these witnesses's statement, the objection on a hearsay ground will be overruled.

(30 RT 6831-6832.)

After this ruling, the prosecutor handwrote objections on the transcripts of the videos indicating which portions of the transcript he objected to and why; the transcript of Ms. Whitfield's interview with the prosecutor's handwritten objections on it was marked as Exhibit H and can found in the record at 30 Supp. CT 5972-6004[26]; Ms. Williams' transcript with the prosecutor's handwritten objections on it was marked as Exhibit J and can be found in the record at 30 Supp. CT 6005-6015.[27]

The penalty phase commenced with prosecution evidence on Monday, October 4, 2004; at the close of that day, after discussions with counsel on scheduling, the trial judge informed the jury that the trial would resume with the defense penalty case on Tuesday, October 12. (31 RT 7377.) The record contains nothing concerning the presentation of the Whitfield and Williams videotapes

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[26] The court identified Exhibit H as containing the prosecutor's objections to portions of Whitfield's statements marked on the transcript. (36 RT 8949.)

[27] The Court identified Exhibit J as containing the prosecutor's objections to portions of Sophie Williams' statements marked on the transcript. (36 RT 8950.)

between Thursday, September 30 when the court ruled that the tapes could be presented and Tuesday, October 12 when the defense began to put on their penalty phase case.

2. A Surprise Reversal of Course by the Court

First thing in the morning of October 12, prior to calling in the jury for the defense opening statement in penalty phase (and after an eight-day break during which the defense was preparing its penalty case with the ruling that the videotapes of Whitfield and Williams were admissible and the only issue open being whether portions of the tapes would be redacted), the trial judge announced that he had reconsidered his ruling on the tapes. The trial judge indicated with respect to the Sophie Williams's statement:

> I am looking at some residual due process exception to the hearsay rules, which requires some reliability. And upon reflection, it seemed to me that we get all caught up on the right to confrontation and the right to cross-examination and the thing about cross-examination is that period of time in which a lawyer gets to destroy another witness through impeachment, but it is also when the reliability of the evidence is demonstrated, when the context of the evidence is demonstrated; the true meaning of the evidence was demonstrated.

(32 RT 7414-15.) The judge stated that the tape did not indicate when Sophie Williams knew George, who Sophie Williams is, where she fit in to the case. (32 RT 7415.) Defense counsel explained that the video was made hastily by an investigator when the defense was surprised by the ruling that Sophie Williams was not in good enough health to travel to San Diego from Indiana. (32 RT 7415-7416.) Ms. Williams met George Williams in 1995 after he returned to Gary from being in prison in California. Defense counsel offered to have defense investigator Ann Bartoe testify as to those background facts which were missing from the hastily-made video. (32 RT 7416). Even without Ms. Bartoe's testimony, it was clear from the video that

Sophie Williams knew George Williams before and after October, 2001 when her husband passed away. (30 Supp. CT 6006.) This was the critical point for the defense because Sophie Williams' evidence showed that right up to the time of trial in 2004 and after he had been imprisoned for 10 years in California, the George Williams that Sophie Williams knew was a kind, loving person. (30 Supp CT 6014-6015.) The trial judge then excluded the Sophie Williams tape in its entirety: "we need to do something that is fair and reliable. And the Sophie Williams tape isn't." (32 RT 7415.)

As to the Annie Whitfield tape, the trial judge acknowledged that it is oriented in time and place, but described the contents of the tape pejoratively, denigrating her observations of George and his mother at age 10 as "talking about a little boy that spent a little bit of time with her before he went on to accumulate that majority of his life experiences which already have been the subject of the trial." (32 RT 7417.) The judge went on to state that "there are numerous parts of this do not represent firsthand knowledge, represent multiple layers of hearsay, and are inherently unreliable." (32 RT 7417.) And then the judge returned to his concern about "fairness" (apparently to the prosecution): "in the abstract, admitting a statement under these circumstances seemed reasonable, until you actually are confronted with the contents of this thing, which just strikes me as grossly unfair." (*Ibid.*)

Defense counsel pointed out that concerning fairness, "it is difficult ... to view the prosecutor when it comes to this tape as somehow an aggrieved party." (32 RT 7418). Defense counsel then proceeded to point out that when he realized that Ms Whitfield's health would likely prevent her from attending the court proceedings, he immediately notified the prosecutor by phone of the situation and of Ms. Whitfield's contact information, and invited him to "to ask her any questions they might want to ask her." (32 RT 7419). Defense counsel complained that the prosecution had

"unclean hands on this issue" because they didn't take any action to interview Ms. Whitfield (or Ms. Williams) themselves. They waited until the penalty phase and should not now be heard to complain that they didn't have an opportunity to cross-examine. (32 RT 7419-7421.)

The trial judge's concern for "fairness" did not extend to the concerns expressed about the prosecution taking advantage of the age and health of Ms. Whitfield and Ms. Williams to deprive the jury of key mitigation evidence. The judge ruled that "given the fact that it is an out of court, unsworn statement, given the multiple levels of hearsay that exist in the presentation, given the absence of any meaningful opportunity to cross-examine ... either as to context or as to reliability, let alone impeachment, I don't think the reliability of this sort of presentation has been established to satisfy any residual due process exception to the hearsay rule." (32 RT 7421.) He never mentioned the prosecution's behavior of ignoring the defense requests that they interview Whitfield and Williams and then protesting that they didn't have the opportunity to cross-examine.

3. Key Portions of Ms. Whitfield's Statement Were from Her Personal Knowledge and Not Objected to By the Prosecution

The trial judge's characterization of Ms. Whitfield's statement failed to acknowledge the numerous items of evidence she offered based on her first-hand knowledge of unique points which were central to the mitigation case and **which were not objected to by the prosecution in its handwritten specification of items within the statement that should be redacted if the statement was admitted.** The following excerpts are from the transcript of Ms. Whitfields' videotape statement submitted by defense counsel as the proponent of the evidence, copies of which were provided to opposing counsel and the trial court.[28]

[28] Citations to the Supplmenatal Clerk's Transcript are to the copy of the transcript of Ms. Whitfield's statement on which the prosecutor noted specific objections.

(a) ***Evidence of Neglect and Abuse of George*** :

(i.) The incident with the Easter suit:

[Ms. Whitfield] . . .[George's mother had] come here and she says now don't you buy him one, I'm gonna get him an Easter suit." .... But she didn't. She came over, she didn't have the suit, he started crying, oh mama, I don't know what I am going to do? the other boys have suits for Easter. Then she went on loud talking, said nasty words and so he started crying, and she hit him, well, don't you cry, don't you cry, I can't afford to get a new suit for you. So I says to her, I said that's okay. But don't hit him, don't beat him like that. So that evening my husband and I went out and we bought him a suit. Then she came over [the next day] and ... he told look, mommy, I got a suit. She started screaming at him again. So I just told her to get out, don't come back. (30 Supp. CT 5978-5979.)

Q: Did you actual [sic] see George's mom strike him?

A: [by Ms. Whitfield]: Yes, I did, right in ... the middle of this floor.

.....

I told her don't you hit him in the face anymore, and I mean it. And I really did.

....

He's in my care now and not yours. And she didn't like it.

(Id. at 5981-5982).

Q: How did she strike him, when you saw it? Was it with an open hand or ..

A: [Whitfield] With an open hand ... like a slap across the face.

Q: And who was present when she did this?

A: My other kids, which I don't think I even remember the kids this long time ... but I know my husband was. ... I says to her, you're not gonna hit him like that, not in my house. So my husband told her to get out. He says get out,

you're not gonna do him like that.

(Id at 5984-85.)

(ii) *Scars on George's Body*

Q: Before we started this recording, you, you were telling Ann and I about your belief that George had been physically abused before he came to you.

A: Yes.

Q: Could you describe why you felt that way and what you, what physical manifestations of that you saw on George?

A: Well, a lot if it, the day he starts out in my home, when we bring foster childrens into my home, the first thing we do we give them a bath, put them in clean clothes because most of the time they are filthy, nasty. And in giving him a bath, you see the scars where somebody had whipped maybe with a switch or belt, you know. And I don't know if you've ever look at something like that, but some of those scars never goes completely. And that is the way George appeared to be. (Id. at 5986) [29].

(iii.) *George not wanting to live with his mother.*

George would cry every time he see her come through the door. Because he was afraid at that time that that she was coming to get him and he didn't want to leave. Every time she'd come over, she would tell him like when I come back, I'm gonna take you home with me. And he didn't want to leave. Even when they took him out my home and give him back to her, he didn't want to leave.

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[29] In a portion of the transcript objected to by the prosecutor as "hearsay," Whitfield stated George attributed the beatings mostly to "some man, sometimes he would call a name" but "sometimes he'd even say my mom." (30 Supp. CT 5986). In another portion of the transcript objected to by the prosecutor as hearsay, George "would tell me that sometime when his mother go away... she would tell him to stay home and he didn't. He said I would go out on the street or wherever, playing with my friends, and I didn't get back or she would get back before I did and she'd pull my shirt off and she would whip my back.. (Id. at 5987-5988.)

(Id. at 5984.)

(iv.) *Impact on George*

Q: If there was on thing you would want the jury to know about George, either a character trait or something he did ...

A: He was very much torn apart, dying for the love and attention, for somebody just to reach out and say they loved him. And I don't feel that George got that. I really don't. Even when they moved George, from here, I felt like it was unfair. He loved it here, we loved him. ....

(*Id.* at 6003.)

b) *Repeated Incidents of Drunken Behavior by George's Mother*

Q: Were you able to tell whether she had been drinking?

A: Yes, most of the times.

Q: Okay.

A: She'd call midnights drunk. I want to talk to my son, this and that. So at that time when I was keeping him she was drinking heavily.

(Id. at 5982)

Q: Had she [George's mother] been drinking on that occasion before she got there?

A: Of course, yes.

Q: And you described there were a ... number of times she would call on the phone and she appeared to have been drinking.

A: Yes.

Q: Could you describe what you recall about the reason for those calls and generally what those calls were about?

A:: Well, she would be, say like where's my baby, where's my baby. And sometimes I'd say he's asleep. Well, get him up, I want to talk to him. I don't know if she had a reason. Just .. wanted to talk with somebody. I don't know.

Q: And what, did she ever call at strage hours, like early morning hours or ...

A: I guess that lady would call anytime she would wake up, you know. In the morning, late in afternoon, late at night. She would call.

....

I guess whenever she thought about it.

Q: Well, we have a phrase for that.... it's called drunken calling

A: Yeah. Yes. Yes.

(Id. at 5985).

(c) ***George's Relationship with the Whitfields***

(i) George came into my home, hugged my neck, can I call you mom, I said yes.

(30 Supp CT, 5977-5978);

(ii.) After keeping George for a couple of days, he became like a little loving doll. He's just mama, mama can I do this, mama will you do this .

(Id at 5978)

(iii) Q: What kind of relationship did George have with your husband, William?

A: He has a very good relationship with my husband. He liked to follow around and do things with him. And my husband was [inaudible] little kids. Sometimes he had a car full of all the boys riding them around, taking them to the park, taking them to ball games. And they [sic] would love taking him to McDonald's to get hamburgers.

(Id. at 5991.)

(d) ***Indications of Neglect of George after he went back to live with his mother.***

Q: You recall that after he left the home he would come back ....

....

A: Well, he would tell me, you know, he'd come up,

George, what are you doing here, you don't stay here no more, like [inaudible] tease him like. But, mom, I haven't had anything to eat all day. I know you got something in there done. ... feed him, give him something to eat. And he would eat. Before dark we'd make him go home where he went home. Sometime my husband would take him home so that he would, he wouldn't let him walk.

(*Id.* at 5988.)

4. Key Portions of Sophie Williams' Videotaped Statement Were From First-hand Knowledge and Not Objected to by the Prosecution.

The following excerpts are from the transcript of Ms. Williams' videotape statement aubmitted by defense counsel as the proponent of the evidence, copies of which were provided to opposing counsel and the trial court.[30]

(a) ***Relationship Between George and Sophie's Family***

I met George through my husband, James Williams [who] ... was ... rehabbing homes. And they would have these boys who were in trouble ... working for them.

When George went to work with him, George was like a laborer. He asked my husband if he would teach him to be a carpenter.(30 Supp. CT 6006)

George would call her husband dad. And after, he would call me mom. And he would come here and do things, you know, for my husband. ... my husband has a shop downstairs that they would use to make things. And I don't care how long he asked George to work or whatever. George would always go and work. And he would always come by here to see how we were doing at all times.

(*Id.* at 6007)

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[30] As was the case with the citations to Ms. Whitfield's statements, the citations to the Supplemental Clerk's Transcript here are to the copies of the transcript of Ms. Williams' statement on which the prosecutor noted specific hearsay objections.

(b) ***Things George Would Do for Sophie and Her Husband.***

Before her Husband Died:

i. *A Gift*

Q: You were telling me when I first arrived that George asked you what colors your bathroom were [sic]. Can you tell me that...

A: Yeah. Yeah. After, after George got to learn a little carpentry work with my husband, he came and asked me what color my bathroom was. He wanted to make me something that I could remember him by, that I always would have something he gave me. So he asked me what my color of bathroom. I told him ,,, my bedroom and bathroom was peach and green. And so one day he show up with it to go in my bathroom. This was the first thing, I guess that he made by himself as a carpenter. And I thought it was real nice. And it's still in my bathroom. It is pink and white. There's not green in here. But it's, it's very pretty, very pretty.

(*Id.* at 6013-6014).

ii and iii. *Constructing a porch and hooking up components*

Q: It sound like you and your husband really trusted George.

A: Of yes. Oh yes. George come here ... my husband wanted a porch and close off our bedroom . And all my husband did was sit there and George did it. And all my husband did was sit there and George did it. He did the whole thing himself. Only thing if he couldn't fix something he would say dad, how this go and James would tell him. And I, we needed a component part connected up. And George would come and do that. ... my husband and I was trying to connect it, and he said I know someone who can do it. And I think that was the first time that I really met, met George. He said I am going to call George. And he called, George came right over. And he connected our component parts in the family room. That was when I first met George.

....

And it's still working now. Just, it's just like he did it. It was no different. So that is when I found ... he's a very good young man..... And he [her husband James] just thought very highly of George. And I did, too. He always come by and, and see us and talk to us .... So I really miss George.

(*Id.* at 6008-6009.).

After Her Husband's Death.

Sophie Williams' husband James passed away in October of 2001.

(*Id.* at 6006).

iv. *Checking in on Sophie Williams' well being*

[After her husband passed]

He always calls and I .... say I am okay. He said well, I am just checking. And he always called me, two, three, four times a week

.... to find out if I need anything or whatever. And I said no, everything is okay. And I really appreciate that.

(*Id.* at 6006).

v. *Being on call: Helping her with her lawn mower*

One day my lawnmower stop on me. And I had to call and it wasn't a few minutes but a few minutes and he was there. And he told me what I had done wrong. And he fixed it and we got it all up to the house.

(*Id.* at 6007).

vi. *Fixing the gutters at Her Church*

Q: And you were telling me that you also referred George to do some work on your church.

A: Yes, yes he did.

Q: Could you tell me about that, please.

A: Yes, we needed some ... work done there, some gutters. And I said, well. I got the young man that could do it. So I asked George he want to come up and do it. And George did a very nice job. In fact, what we wanted done, George didn't think it would look good. He fixed it the way he thought it. And it really looked nice. He, he tried to hide the gutters as much as possible. He did a really good job. Everybody was satisfied with George.

(*Id.* at 6010-6011).

vii. *Cooking for a Holiday Barbecue*

Q: You also told me about a time when George cooked ...

A: Yes. It was was holiday.... Maybe it was Memorial Day. But he was gonna barbecue. And I said George, I didn't know you could cook. He said oh yeah. He said, you know, I had children, I had to cook for them. And he said, yeah, I can cook. So he said when I cook I'm gonna bring you a plate. And he brought me a big plate. In fact, I was really surprised because George had cooked greens that was really good. And the barbecue was good. But I was really surprised. He did a very nice job.

(*Id.* at 6011.)

(c) *Sophie Williams' assessment of George's character*: *"a loving, kind person."*

Q: Is there anything that you'd like the jury to know about, about your feelings for George and the man he is, what would you like them to know:

A: George is a very caring person. And he wouldn't, anything that he could do for anybody, he would do. And I know for a fact that he would do anything for James because he thought of James as a, as his father. And, as a father figure, I guess. Not as father, a father figure. And he, he, he trusted James, Anything that he wanted to know he would come and talk it over with James and James would sit down. Because James was a kind hearted person too. He

was very kind and very gentle. And he would talk to, to George, not raise his voice up. He would just talk to him. And I think that George is a, is a, is a nice person, a wonderful person. I would trust him in my home no doubt about. I don't think he would come in here and take advantage me or my husband. He that kind of caring person because he always come around and wanted to do something for us, or did we need anything he would do it. And I, [inaudible] really loved him for it. And I miss him.

....

Because right now there's things I could have had him doing for me, but he can't do. But, I know that, as we trust in God, put our faith, things will work for the best. And I hope they work out for the best for George because I think he's a loving, kind person. I don't think he would want to misuse or do anything to anyone.

(*Id.* at 6014-6015).

5. Trial Judge Sustains Objection to Defense Expert Using Ms. Whitfield's Statement as the Basis for his Opinion.

After the trial judge made a 180-degree turn and disrupted the defense in the morning right before its opening statement in the penalty phase by excluding the entirety of the Whitfield and Sophie Williams statements, he doubled down on his ruling on Whitfield by sustaining a prosecution hearsay objection to defense expert Dr. Rahn Mingawa's testimony that he based his conclusion that George's mother, as well as his father, was an alcoholic , on information "from interviews with family members, and also the impression of the foster mother who was taking care of Mr. Williams." (35 RT 8613) At that point the prosecutor objected and the court sustained the objection. (35 RT 8614.) In a sidebar conference, defense counsel pointed out that Ms. Whitfield had "indicated that George's mother ... would go home drunk all the time, show up at the house all the time drunk, and it is the basis of

his opinion. And for that reason he should be allowed to testify concerning it . That's what he's basing his opinion on is that woman's description of my client's mother's behavior." The trial judge sustained the objection without comment. (*Ibid.*)

In a later colloquy out of the presence of the jury in which the defense sought a conditional examination of Whitfield and Williams, defense counsel sought clarification on the trial judge's terse ruling:

> Defense Counsel: Dr. Minigawa told this jury that in his opinion, Mr. Williams mother was an alcoholic. He based that on viewing the videotape that we provided him of Annie Whitfield. And the Court sustained objections and it has 352 discretion to bar hearsay experts rely upon. And apparently the Court exercised that discretion
>
> The Court: I think that is inaccurate. I think there was an objection based on hearsay, and the Court has discretion in terms of how much hearsay is permitted. The Court ruled it was hearsay and excluded it. It is not a 352 analysis.

(36 RT 8945.)

Defense counsel then indicated that the exclusion of Ms. Whitfield's statements as the basis for Dr. Minigawa's opinion provided an additional reason for the jury to have the benefit of Ms. Whitfield's information. (36 RT 8945-8946.)

6. An Attempt to Meet the Trial Judge's Concerns About Lack of Cross-Examination and Reliability Concerns is Rebuffed

To provide the Whitfield and Sophie Williams information to the jury and remedy the blow to the defense case worked by the trial judge's surprise and late ruling excluding the videotapes of their statements, the defense moved for a brief recess of the penalty phase in order for the court and counsel to fly to Gary, Indiana to conduct conditional exams of witnesses Anne Whitfield and Sophie Williams. (9 CT 2143.) The defense offered to pay the costs of the travel. (9 CT 2144.) There is

no indication in the record that the prosecutor responded to this motion in writing. The motion was argued on October 19, 2004 in the midst of the defense penalty case. (36 RT 8945-8956.) Taking conditional exams in Indiana would allow the prosecutor both to cross-examine the women and object on the spot to any statements he contended were inadmissible.

The defense argument emphasized that the balance to be struck between the inconvenience of recessing the trial and importance of the Whitfield and Williams testimony to the defense mitigation case weighed heavily in favor of the motion to recess in order obtain their testimony:

> Defense counsel: But especially in light of Dr. Minigawa, if we weigh what is obviously an inconvenience and what obviously will result in a delay against the importance of these two witnessses to the defense mitigation case, especially in light of what transpired with Dr. Minigawa yesterday, I would urge the Court to view that balance, analyze that balance, and grant our motion, in light of the competing interests.
>
> A life and death decision should not be made on what is or isn't convenient, and I recognize it is not convenient. I also recognize that a life and death decision is a decision that has no greater decision than has to be made. And this jury should have all the information available to it.

(36 RT 8947.)

At that hearing the defense counsel not only asked for the conditional examination in Indiana, but also offered as an alternative to redact the transcript, limit it to matters of which Ms. Whitfield had personal knowledge and remove any statements based on hearsay and speculation, particularly those related to statements that George's mother may have been a prostitute. (RT 8950-8952.) Defense counsel begged the Court to allow him to get vital information from the videotaped interviews before the jury::

> Defense Counsel: I will represent to the Court that I will slavishly work as long as it takes on my own behalf to redact the transcript, eliminating any multiple layers of hearsay, any prejudicial material. I understand where the prosecution is coming from in hearing its argument, and I have heard the Court and I understand the Court's concern. And I think I can do that and present a redacted version of the transcript and the tape, and at least with that fall-back postion, we will have the evidence that Dr. Minigawa relied upon in stating that in his opinion the mother was an alcoholic; we'll have the foster mother's personal observations of the injuries and those are of what is of prime concern to the defense.

(36 RT 3952.)

The trial judge never ruled directly on this second request for redacted transcripts. His denial of the defense motion for a conditional examination of these two women was based on a myopic (and inaccurate) view of the evidence offered:

> As I looked at the proposed testimony of Sophie Williams, as it was presented to this court to present through a video statement, it comes down to, oh, I think what is admissible comes to expressions of what other people told her, including her husband, as basically that George Williams called, asked how she was doing and one day her lawnmower stopped, he fixed it, and that he called and checked on her occasionally. And I think she related the story that he cooked for her one time. That would be the extent of any relevant testimony.[31]

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[31] As section B.4, above, pp. 132-136.. demonstrates in detail key portions of Sophie Williams' statement were from first-hand knowledge and not objected to by the prosecution as based on hearsay and there was far more to Ms. Williams' statement than the trial judge's overly narrow characterization of it suggests. Appellant argues below that it reflected an impoverished view of the role of the proffered mitigation evidence which led the judge into prejudicial error, denying appellant's due process and Sixth and Eighth Amendment right to present a penalty phase defense.

That's already been the subject of testimony of any other number of witnesses who came from Indiana about what he was. It would be cumulative.[32]

As far as Ms. Whitfield is concerned, she has no idea what happened to him before he came to her house. And she even said at one point she had no idea of what happened to him after he left her house. Much of her testimony is hearsay of the most unreliable kind.

And to the extent that there is any direct knowledge, it is her speculation that some of the midnight calls were made in a drunken statement and she expresses an opinion that this woman was perhaps drinking at this time. And we have already heard testimony about her condition[33] from herself and her sister and from her family.

There is very little, if anything, in Ms. Whitfield's statement that are admissible, and if so, it is for a very limited period of time with very questionable foundation and a lot of speculation.

I think, frankly, the evidentiary material to the extent there is any evidence that is not cumulative or inadmissible, it so minuscule as to not warrant a conditional exam.[34]

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[32] Marvin Rowe was the only other witness who testified about George's good works after he returned to Indiana in the mid-nineties. (See Statement of Facts, p. 54, above.; 33 RT 8030-8031.)

[33] Lelar Drew testified that she was ill with a bowel obstruction when she refused to take custody of him and he went into foster care with Annie Whitfield. (32 RT 7652.) The testimony from her family was that Lelar did not drink. 35 RT 8431 (Testimony of Yvonne Drew King [Sister of Lelar Drew] But see 35 RT 8532 (Yvonne King saw Lelar drink out a fifth of vodka once, but this was only once during the period when Lelar was in the hospital in Chicago which was the time George was staying with Annie.Whitflied).

[34] As developed in section B.3 above, there was much more significant admissible mitigation evidence in Annie Whitfield's taped statement than the judge's

(36 RT 8955-8956.)

C. The Court's Total Exclusion of Important Penalty Phase Evidence Denied Appellant Due Process and the Right to Present A Penalty Defense.

The penalty phase of a capital trial is a unique proceeding: "underlying *Lockett* and *Eddings*[35] is the principle that punishment should be directly related to the personal culpability of the criminal defendant." (*Penry. v, Lynaugh* (1989) 492 U.S. 302, 319.) In no other criminal proceeding before a jury is the concept of relevance as broad:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

(*Ibid.*)

As United States Supreme Court has made clear, in order that the jury can carry out this function:

> the capital defendant generally must be allowed to introduce *any relevant mitigating evidence* regarding his character or record and any of the circumstances of the offense.' " *Eddings*, supra, 455 U.S., at 110, 102 S.Ct., at 874, quoting *Lockett*, supra, 438 U.S., at 604, 98 S.Ct., at 2964. Consideration of such evidence is a "constitutionally indispensable part of the process of

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jaundiced characterization suggests and for the reasons discussed section C. below, this inaccurate view of the evidence offered led the judge into prejudicial error, undermining appellant's constitutional right to present a penalty phase defense.

[35] *Eddings v. Oklahoma* (1982) 455 U.S.104.

inflicting the penalty of death." *Woodson v. North Carolina*, supra, 428 U.S., at 304, 96 S.Ct., at 2991 (opinion of Stewart, Powell, and Stevens, JJ.). (*California v. Brown* (1987) 479 U.S. 538, 541 [emphasis added].)[36]

Long-ago family history is often crucially important to developing the mitigation case, especially where childhood abuse is an issue. Finding witnesses with first-hand knowledge is difficult in any case and the defense's obstacles were exacerbated in this case by the fact that it was a cold case brought 17 years after the crime was committed and two of the witnesses found through extensive efforts were elderly and too ill to travel from Indiana. In an effort to deal with the constraints created by the physical unavailability of these two witnesses, the defense videotaped statements by each and sought to have the tapes played to the jury. In this effort, they were supported by U.S. Supreme Court precedent going back to *Green v. Georgia* which held that due process requires the admission of hearsay in the penalty phase where "the evidence [is] highly relevant to a critical issue in the punishment phase of trial ... [citations omitted] and substantial reasons exist[] to assume its reliability." (*Green v. Georgia, supra,* 442 U.S. at 97.)

This Court agrees:

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[36] See also, *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285 (internal citations omitted): " 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' " [Citation.] Thus, a State cannot bar "the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death."

Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. [Citation omitted.] . . ."We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death.... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."

due process requires the admission of hearsay evidence at the penalty phase of a capital trial, even though a state's evidentiary rules are to the contrary, " 'if both of the following conditions are present: (1) the excluded testimony is "highly relevant to a critical issue in the punishment phase of trial," and (2) there are substantial reasons to assume the reliability of the evidence.' " *People v. Champion* (1995) 9 Cal.4th 879, 938, 39 Cal.Rptr.2d 547, 891 P.2d 93; *see People v. Phillips*, *supra*, 22 Cal.4th at p. 238, 92 Cal.Rptr.2d 58, 991 P.2d 145.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 725.)

The trial court below erred not only in its application of the *Green-Morrison* standard by failing to appreciate the crucial role that the mitigation evidence it excluded played in the defense case for life, but also by failing to permit an alternative remedy – a conditional examination of the out-of-state witnesses which would have obviated any issues of hearsay or opportunity to cross-examine that the videotape evidence may have presented. The result was a penalty trial that denied appellant due process and a fair opportunity to present his penalty phase defense. Appellant demonstrates below that trial judge erred (1) by failing to admit redacted versions of the videos and transcripts; (2) by sustaining a prosecution hearsay objection to a defense expert stating that he relied on Ms. Whitfield's observation of appellant's mother's repeated inebriation in forming his opinion that she was an alcoholic; and (3) by denying the defense's request for a conditional examination of these witnesses in Indiana so that their important testimony could have been available to the penalty jury without having to apply an exception to the hearsay rules or denying the prosecution its right to cross-examine. These errors are reversible because the state cannot show that they were harmless beyond a reasonable doubt. Each of these points is discussed in turn below.

1. It was error to totally exclude the videotapes which contained evidence that was both from reliable, first-hand sources and was highly relevant to crucial issues in the penalty trial.

a. The Statements of Annie Whitfield and Sophie Williams Were Highly Relevant to Crucial Issues in the Defense Penalty Phase Case for Life.

At the heart of the trial judge's total exclusion of the videotapes was a jaundiced view of the significance of the evidence offered by Annie Whitfield and Sophie Williams. Even though the trial judge originally held that their statements were "relevant to factor K" (30 RT 6831-6832), he totally excluded this admittedly relevant mitigating evidence In fact, their statements were not just relevant, but highly relevant to crucial issues in the penalty phase of the trial.

The penalty defense was in essence that there were two George Williams: (1) the good George Williams who overcame a toxic childhood environment of illegitimate birth, a dysfunctional family situation (including a family history of alcoholism), physical and sexual abuse, exposure to adult sexual activity, poor school record and life in a gang-dominated ghetto community in a particularly economically depressed Indiana city, to become a highly successful soldier in the United States Army whose service to his country was commended in glowing terms by his superior, and who was generally kind and helpful to others and his family and was never in trouble with the law; and (2) the bad George Williams who joined the U.S. Navy after his honorable discharge from the Army and got caught up in the Navy culture of drinking to the extent that he became alcohol dependent, was unable to function successfully in the Navy, suffered a head injury in 1981 while driving drunk and committed a series of sex crimes between 1981 and 1986, all of which occurred while he was under the influence of alcohol. (See 38 RT 9168-9169 [Prosecution witness Dr. Park Dietz agrees that alcohol was involved in incidents of sexual assault

involving all these incidents with exception of the homicide charged where there was no evidence one way or the other].

Defense expert Dr. Douglas Tucker explained that the risk factors that predispose individuals to sexually violent offenses include alcohol abuse and dependence, history of childhood sexual abuse, history of physical abuse and neglect (the neglect leads primarily to the alcohol dependence, which itself leads to the risk of sexually offending) and brain damage to frontal and/or temporal lobes of the brain. (33 RT 8074). There was evidence that George Williams had every one of these risk factors:

- *alcohol dependence*: There was evidence showing alcohol dependence, including a father who was an alcoholic, exposure as a child to an extended family that abused alcohol, getting caught up in the Navy culture of drinking (35 RT 8539-8540.)
- *childhood sexual abuse*: George's school records showed that at age 7 he had made sexually inappropriate drawings which school officials attributed to him having witnessed adult sexual activity (35 RT 8628-8620); George Williams also reported being molested in boys club when he was thirteen (35 RT 8642.)
- *physical abuse and neglect*: There was a history of a chaotic and abusive family and some substantial neglect by these other relatives while George was in their custody (See Statement of Facts, *supra* pp. 41 to 47), but disputes about whether he had been physically abused and very little evidence that his mother had been abusive (other than Annie Whitfield's excluded statement) (36 RT 8814, 8817; 37 RT 9131);
- *brain damage*: Dr. Dean Delis, a psychiatrist and neuropsychologist who examined George for eight hours concluded that George Williams had a history of head trauma from an automobile accident and a pattern

of frontal lobe damage consistent with frontal lobe brain damage from that accident. (35 RT 8493)

The overall defense case was a potentially powerful penalty defense because it contained not only both the good things that George Williams had done, but an explanation of how he came to do the bad things he had done. Both aspects of the case are important. As one commentator noted

> A mitigation theory based on a defendant's positive qualities has a certain appeal because it readily recasts the defendant from an evil and unredeemable monster into a person who committed a serious crime but to whom the jury may still relate as a human being.

(Phyllis L Crocker, *Childhood Abuse and Adult Murder* (1999) 77 NO. CAR L.REV, 1143, 1154 [footnotes omitted]. The defense offered some such evidence, showing how George Williams had overcome extraordinary poverty, a toxic family situation, and life in a gang-dominated ghetto to join the U.S. Army and serve there with distinction.

But, as Professor Crocker goes on to explain that:

> A more promising form of mitigating evidence is that which provides an explanation for the defendant's commission of the crime.By presenting explanatory mitigating circumstances, the defense seeks to show why the defendant committed the crime and, in so doing, to transform the jury's understanding of the defendant and the murder. This kind of mitigating evidence is not offered to excuse the defendant's conduct or to undermine or negate the jury's guilt-phase determination of the defendant's responsibility for the crime. Instead, the defendant's goal is to demonstrate how he came to be the kind of person who committed the murder, that his judgment and behavior are not entirely of his own making, and/or that circumstances outside of his control contributed to

> and affected his conduct. This type of mitigating evidence is important because it allows the jury to understand the crime within the broader context of the defendant's life and may convince the jury that exacting the most severe punishment is neither appropriate nor necessary.

(*Id.* at 1154-1155 [footnote omitted].)

The defense case for George Williams' life had an explanation backed by expert testimony which linked the deprivations of George's life, his family history and other events in his life which combined to predispose him to sexual crimes. This is exactly the kind of case to which Professor Crocker and other commentators have indicated juries respond.

The statements of Sophie Williams and Annie Whitfield were highly relevant to both aspects of a strong penalty case. Sophie Williams provided compelling evidence of the "Good George," i.e., of a human being with a kind and loving nature and of the good things he had done. Annie Whitfield added important evidence of the risk factors of physical and emotional abuse, and maternal neglect and alcohol abuse which were crucial to painting the overall picture of the odds George Williams was unable to not overcome; Ms. Whitfield presented a very positive view of the person George Williams could have been but for the abuse and neglect he suffered.

i. *Sophie Williams had highly relevant information that George Williams was a loving, caring person even after 10 years of incarceration and gave a very positive view of George Williams close to the time of the penalty trial.*

Sophie Williams' statement was all about the good George who was still there even after 10 years in prison right up to the time of his arrest in the present case. This was the George William she had gotten to know many years after he had become alcohol dependent while in the Navy and had committed the capital crime and other sexual offenses, and had completed and perhaps learned something from a decade of incarceration.

Her video statement concluded with a statement that George was a "caring person because he always come around and wanted to do something for us, or did we need anything he would do it. And I, ... I really loved him for it. And I miss him (30 Supp CT 6015) and that George was "a loving, kind person." (*Ibid.*.) And, as we have seen, she cited examples from her own firsthand knowledge of George's care and concern for her. After her husband died, George would call two to four times *a week* to ask after her welfare, he came right away and fixed her lawnmower; he fixed the church gutters; he volunteered to cook at a holiday barbecue. (See section 4(b), supra, pp. 162-165, 30 Supp. CT 6006-6015.)

Some actual children do not take care of their aging parents the way George took care of Sophie Williams. Many would say that a family member who looked after an aging parent this way was an admirable son or daughter. For someone who was not a blood relative to do this went beyond the admirable to downright praiseworthy. It is the kind of evidence that jurors could find highly influential in "weigh[ing] the value of [Williams'] life against his culpability" (Hendricks v. Calderon (1995) 70 F.3d 1032, 1044) and deciding whether they should be merciful to him. It was a powerful rebuttal to the prosecutor's argument that Williams was just "evil" (37 RT 9302) and to the testimony of prosecution witness Dr. Park Dietz who opined that George Williams was a sociopath. (37 RT 9119.)

Yet, inexplicably the trial judge belittled the source and nature of this evidence in a way wholly inconsistent with the record:

> I think what is admissible comes to expressions of what other people told her, including her husband, as basically that George Williams called, asked how she was doing and one day her lawnmower stopped, he fixed it, and that he called and checked on her occasionally. And I think she related the story that he cooked for her one time. That would be the extent of any relevant testimony.

(36 RT 8956.) The trial judge's comments are wrong about the source of Sophie

Williams information; all of what was quoted and outlined above was from own first-hand personal knowledge and was **not** expressions of what other people told her. The trial judge omitted key facts from his summary:

- that George approached Ms. Williams and asked her the colors of her bathroom and then built a matching item and gave it her,
- that he built a whole porch for the Williams while James Williams was still alive,
- that he came over and hooked up the stereo component system,
- that he fixed the church gutters beautifully,
- that George was like a son to them and called them "Mom" and "Dad,"
- that George was a kind, loving person whom she loves and misses.

And when the trial judge did acknowledge some first-hand, non-hearsay fact, he minimized it in a way that was simply inaccurate. Here is the evidence that the trial judge characterized as "he called and checked on her occasionally" (36 RT 8955) :, "He *always* calls and I .... say I am okay. He said well, I am just checking. And *he always called me, two, three, four times a week* .... to find out if I need anything or whatever. And I said no, everything is okay. And *I really appreciate that.*(30 Supp CT at 6006 [emphasis added].)

But more than just the factual omissions and inaccuracies in the judge's summary of Sophie Williams' statements was his missing the whole sense of what Ms. Williams was saying: that George Williams was a kind, loving person who cared for her and her husband and after her husband died, looked after her. She "really appreciate[d]" this care and loved him for it. Moreover, this was true even not considering the portion of Ms. Williams' statement which stated that George had told her that her husband James had asked George to look after Sophie after James passed (which the prosecutor had objected to as hearsay and not from her personal knowledge). The prosecutor's hearsay/lack of personal knowledge objection was not

well taken because Williams' statement was admissible to show her and George's state of mind. Whether or not James had asked George to look after Sophie, George told her James had done so and he made her feel as though she was looked after. For a man who the prosecutor sought to have the jury see as an "evil" sociopath, this was powerful evidence that there was a really good, kind and certainly not evil George to whom the jury might show mercy.

ii. Annie Whitfield Had Unique First-Hand Information Crucial to Establishing Risk Factors Important to the Defense Case for Life.

Annie Whitfield was a witness to key evidence of the risk factors of abuse and neglect of George Williams by his mother. She actually saw George's mother not only verbally abuse and yell at George, but slap him in the face in front of Whitfield for crying when his mother failed to provide him with an Easter suit after promising to do so and the other children in the foster home had been bought suits by the Whitfields (who would have been happy to buy one for George, but did not do so because his mother said she would do it). George's mother was drunk during this incident. Ms. Whitfield was also a witness to the telltale signs of prior physical abuse of George; she observed, as part of her duties as foster mother, scars on George's body from physical abuse. She also was a witness to abuse of alcohol by George's mother, not only the drunken slapping of George over the Easter suit, but she also personally received numerous drunken phone calls from George's mother.

All of this information was from her personal knowledge. None of it was objected to by the prosecutor in his request for redaction of the transcript. All of it related to important and disputed issues in the trial: (1) the prosecutor contended that the physical abuse of George as a child was unproven (36 RT 8814, 8817; 37 RT 9131); (2) George's mother and other family members denied she drank (See 32 RT 7655 [Testimony of Lelar Drew]; 35 RT 8431 [Testimony of Yvonne Drew King, sister of Lelar Drew]: But see 35 RT 8532 [Yvonne King saw Lelar drink out a fifth

of vodka once, but this was only once during the period when Lelar was in the hospital in Chicago which was the time George was staying with Annie.Whitflied].). (3) the prosecutor tried to paint George's mother as someone who worked her butt off and made a decent life so that she could support her son (38 RT 9274) and (4) as discussed in point C.2. below, defense expert Rahn Minigawa relied on Whitfield's observations as evidence that George's mother was an alcoholic, which was a part of the evidence that George was alcohol dependent by heredity, a fact which would mitigate his alcohol abuse.

Despite these crucial pieces of first-hand knowledge by Whitfield, the trial judge characterized her testimony as follows:

> she has no idea what happened to him before he came to her house. And she even said at one point she had no idea of what happened to him after he left her house. Much of her testimony is hearsay of the most unreliable kind.

(36 RT 8956.)

This characterization is not supported by the record. Ms. Whitfield, a highly experienced foster mother who took care of over 100 foster children in a forty-three-year career , saw firsthand the indelible scars of physical abuse George had suffered before coming to her home. Contrary to the trial judge's assertion, she had a very good idea of what happened to George before he came to her – the scars she personally observed made clear that he had been beaten on numerous occasions. She also saw George's drunken mother yell at and slap George right in front of her , a good indication that Ms. Drew was also abusive, and likely more so, when no one was looking, before and after George fostered with Ms. Whitfield. This eyewitness observation of physical and emotional abuse of George was key testimony supplied by no other witness.

In addition, Annie Whitfield had helpful information about both George's

positive qualities and the impact on him of his deprived family situation. She described him as "like a little loving doll. He's just mama, mama can I do this, mama will you do this ." (30 Supp CT 5978) Whitfield saw George as a young man who was "dying for the love and attention, for somebody just to reach out and say they loved him. And I don't feel that George got that. I really don't. .... we loved him. (*Id.* at 6003.)

The trial judge was clearly wrong – Whitfield's statement was important to crucial issues in the case. Her statements clearly met the relevance prong of the *Green-Morrison* test,

In sum, then, the trial judge erred in not adhering to his original ruling under the first prong of the Green-Morrison test that the evidence proffered from both Sophie Williams and Annie Whitfield was "highly relevant to the issues before this Court." (30 RT 6831.)

b. There are substantial reasons to assume the reliability of the evidence.

Although the trial judge did have reasons to question the reliability of some of the evidence in Sophie Williams' and Annie Whitfield's statements, the unreliable evidence was not what was at issue because the defense agreed to redact any portions of the statements that were objectionable and none of the passages discussed in this brief were identified by the prosecutor when asked to propose redactions. For example, Annie Whitfield's statement included her speculation that George's mother was a prostitute given her manner of dress and the neighborhood she hung out in. The parties agreed that portions of the video and transcript should be redacted. (32 RT 6830 [Defense Counsel]; 40 RT 9464 [Defense counsel describing prosecutor's positoin].).

The portions of the video at issue are the statements this brief has discussed. All of them were from the personal knowledge and observation of these two women. None of it was objected to by the prosecution when the trial judge asked the

prosecutor to delineate all portions of the video which were objectionable and should be redacted. Sophie Williams experienced George's kindness and concern, she saw him build the porch, set up the component system, bring her a gift he had made for her bathroom, and fix her lawnmower; she got the phone calls two, three or four times a week to see how she was doing; and she experienced the love and concern that went into those deeds and those calls. From her knowledge and from her heart she appreciated what George did for her and her husband. These were not the sort of experiences she was likely to have forgotten and there was no reason to believe she had a motive to lie. Annie Whitfield saw the scars of physical abuse on George's body; she saw George's mother slap him in the face and yell at him. Again, these were memorable experiences, and there was no hint of a motive to lie. There were highly reliable statements, and the videotapes would at least permit some basis for appraising demeanor. How the trial judge could consider any of this information unreliable is hard to fathom.

One of the trial judge's statements in the record concerning Ms. Williams' tape suggests that he may have felt that the prosecution's inability to cross-examine either of these witnesses undermined the reliability of the statements:

> [C]ross-examination is that period of time . . . when the reliability of the evidence is demonstrated, when the context of the evidence is demonstrated; the true meaning of the evidence was demonstrated.

(32 RT 7414-15.)

But equating reliability with the ability to cross-examine proves too much. It would limit the *Green-Morrison* rule to only cases where the statements sought to be introduced were made in a context where cross- examination took place. This would read the *Green-Morrison* rule virtually out of existence. Moreover, in this case, the prosecutor did not come to court with clean hands; he was specifically informed by opposing counsel that the defense planned to use these statements and was invited to

interview both Annie Whitfield and Sophie Williams. The prosecutor did not take advantage of that opportunity and should not be heard to complain that he was denied the right to cross-examine these two women. Rather than doing his best to keep relevant mitigating evidence from the jury, the prosecutor should have been facilitating it. As the United States Supreme Court pointed out long ago, the prosecutor:

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, supra, 295 U.S. at 88; see also *People v. Hill* (1998) 17 Cal.4th. 800, 847 ["Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system."].) In particular, the prosecutor could have interviewed Whitfield and Williams, stipulated to certain portions of their testimony, or supported the defense request for a recess for a conditional examination that would have afforded the prosecutor full cross-examination. Instead, he obstructed in every way he could. Deficiencies in some of the detail and the background of the tapes should have been viewed in that light by the trial judge.

For example, it is true that Sophie Williams' statement did not include the exact period of time she knew George Williams. But her statement does indicate that her husband passed away in 2001 (30 Supp CT 6006.) and that George helped them before and after her husband died. So the timing of when she knew George Williams was pretty clear. And the defense offered to have its investigator testify to this. (32 RT 7416.)

To be sure, it would have been more desirable for the jury to have the benefit of cross-examination to clarify points in both women's testimony. But the court

denied the defense request to conduct of a conditional examination of these two elderly and infirm women in Indiana; such a procedure would have met the concerns the court had without denying appellant his due process right to have the jury hear "*any relevant mitigating evidence.*"(*Eddings*, supra, 455 U.S., at 110.) Here, the evidence offered by Annie Whitfield and Sophie Williams was not just relevant, but highly relevant to the penalty phase. The trial judge erred when he failed to find a way to facilitate getting this information before the jury – either by redacting the videotape or by conducting a conditional examination. Instead of focusing on how to protect the due process rights of the defendant to present important mitigating evidence and finding a way to get that evidence before the jury, he found ways to block the defense from presenting its case. This violated both the letter and the spirit of the *Green-Morrison* rule and of the Due Process clause of the Fifth and Fourteenth Amendments and the Eighth Amendment's concern for a reliable penalty phase, and violated appellant's Sixth, Eighth and Fourteenth Amendment right to present his penalty phase defense.[37]

2. **It was error to exclude defense expert Minigawa's testimony that Ms. Whitfield's observations of appellant's mother's repeated inebriation supported his expert opinion that appellant's mother was an alcoholic.**

Evidence Code section 802 provides in relevant part: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and

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[37] "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-25.) The Eighth and Fourteenth Amendments guarantee a capital defendant's right to present any relevant mitigating evidence.(*Lockett v. Ohio,*(1978) 438 U.S. 586, 604, *Tennard v. Dretke*, *supra*, 542 U.S. at 284-285.) And the Eighth and Fourteenth Amendments also require reliable, individualized capital sentencing determinations. (*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.)

the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based." This section has been interpreted by this Court to permit an expert witness to state the basis for his or her opinion even if that basis is inadmissible hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base opinion on reliable hearsay, including out-of-court declarations of other persons]; *People v. Shattuck* (1895) 109 Cal. 673, 678 [medical expert could testify to patient's complaints in order to give a clinical history of the case to understand the significance of her symptoms].)

In the instant case, Dr. Rahn Minigawa, defense expert, testified that the information that George's mother was an alcoholic came "from interviews with family members, and also the impression of the foster mother who was taking care of Mr. Williams." (35 RT 8614.) At that point the prosecutor objected on hearsay grounds and the trial judge sustained the objection (*Ibid.*) In a later colloquy with defense counsel, the trial judge made clear that he sustained the objection because the expert was testifying to hearsay and it was not a 352 analysis. (36 RT 8945.)

The trial judge's stated reason is not a legally adequate one. Under section 802 as interpreted by this Court in *Gardeley*, the basis for the expert's opinion is admissible unless the court finds that the information relied on is not of the kind that experts rely on. The information relied on was the video taped statement of Annie Whitfield (as well as interviews with other family members). Dr. Minigawa is a psychologist and the most basic kind of information he relies on is interviews with patients and family members. (35 RT 8544 .) The trial judge's ruling was error, and the error undercut Dr. Minagwa's expert opinion that there was a genetic basis for appellant's alcohol dependence and abuse, an important mitigating theme in a case

where the defendant's crimes were committed under the influence of alcohol.[38] The limitation on Dr. Minagwa's testimony, alone and in combination with the exclusion of the videotaped statements of Ms. Williams and Ms. Whitfield, undermined appellant's rights to introduce relevant mitigating evidence and to fully present a penalty phase defense, and precluded the reliability required for a capital sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

3. **It was error to refuse to grant the defense a conditional examination of Ms. Whitfield and Ms. Williams so that the jury would have the benefit of important mitigating evidence.**

In order to respond to the trial judge's concerns that the videotapes of Ms. Whitfield and Ms. Williams were not subject to cross- examination, defense counsel moved to recess the trial so that counsel and the trial judge could travel to Indiana and take a conditional examination of these two aging and ill witnesses who were unable to travel to San Diego to testify and offered to pay the costs of doing so. (9 CT 2143.) In oral argument, the defense based its request for the recess on practical due process considerations:

> A life and death decision should not be made on what is or isn't convenient, and I recognize it is not convenient. I also recognize that a life and death decision is a decision that has no greater decision than has to be made. And this jury should have all the information available to it.

(36 RT 8947.) This was a powerful argument considering the United States Supreme Court's established doctrine that

> the capital defendant generally must be allowed to introduce *any relevant mitigating evidence* regarding his character or record and any of the

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[38] In penalty phase closing argument the prosecutor sought to diminish the mitigating force of appellant's possible alcohol dependence by arguing that appellant had been warned of the dangers of his consuming alcohol, knew what it did to him, and could control his drinking. (38 RT 9283-9284.)

circumstances of the offense.' " *Eddings*, supra, 455 U.S., at 110, 102 S.Ct., at 874, quoting *Lockett*, supra, 438 U.S., at 604, 98 S.Ct., at 2964. Consideration of such evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, supra, 428 U.S., at 304, 96 S.Ct., at 2991 (opinion of Stewart, Powell, and Stevens, JJ.).

(California v. Brown, supra, 479 U.S. at 541 [emphasis added].*)*

The trial judge's ruling denying the right of the defense to present clearly relevant penalty evidence was based on his erroneous view that the potential testimony of Ms. Whitfield and Ms. Williams was of little significance to the trial:

> I think, frankly, the evidentiary material to the extent there is any evidence that is not cumulative or inadmissible, it so minuscule as to not warrant a conditional exam.

(36 RT 8965.) Section C.1 of this argument has already discussed how and why the trial judge was wrong in his assessment of which portions of the statements of Whitfield and Williams were from first-hand knowledge of information that was central to the defense penalty case for life: the telltale scars of physical abuse that Whitfield personally observed, the incident of George's mother slapping him and yelling at him in a drunken state that Whitfield personally witnessed, the repeated drunken calls at all hours of the night that Whitfield received from George's mother, and the loving kindness that Sophie Williams experienced from George Williams after he was released following ten years in a California prison. The statements of Sophie Williams and Annie Whitfield were central to the case of showing the kindness that the good George Williams was capable of after years of incarceration and near the time of trial when a jury was determining whether he should be put to death, and provided a unique look at his mother's role in contributing to the risk factors he could not overcome which ultimately, at least in part, led him to become the bad George Williams, an alcohol dependent sex offender. Sophie Williams' testimony alone could

have been enough to tip the balance in favor of life. The trial judge simply did not understand the significance of the testimony of these two women to the penalty case for life and therefore erred in not granting the recess for a conditional exam.

As discussed above, with George Williams' life on the line, the trial judge was faced with a choice of admitting the redacted tapes or holding a conditional exam to get important mitigating evidence in front of the jury which was deciding the appropriate sentence for the crime it had convicted him of. The choice of a conditional exam would have resolved all of the issues concerning hearsay, first-hand knowledge, and the perceived need for cross- examination. The redacting of the video and transcripts would have at least given the jury the core of the first-hand information the defense needed for its penalty case. The trial judge chose neither option, a resolution inconsistent with due process. The denial of a conditional examination, alone and in combination with the exclusion of the videotaped statements of Ms. Williams and Ms. Whitfield and the limitation on Dr. Minagwa's testimony, undermined appellant's rights to introduce relevant mitigating evidence and to fully present a penalty phase defense, and precluded the reliability required for a capital sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

4. The errors were prejudicial and the state cannot meet its burden of showing that they were harmless beyond a reasonable doubt.

The penalty phase in this case contained both substantial mitigating and aggravating factors. The defense case included admirable acts by the defendant (overcoming poverty and a toxic childhood to serve honorably and with distinction in the U.S. Army), a family history of alcoholism, abuse, and neglect and a head injury in later life, and a link between that family history and the risk factors for his alcoholism and sex offenses while under the influence. The prosecution case in aggravation included both the circumstances of the rape and murder of the victim and also five other sex crimes (all but one of which was committed between 1981 and 1986).

There was clearly evidence based on which the jury could have voted for life or death.

As shown above, the errors made by the trial judge in excluding and precluding use of the evidence provided by Sophie Williams and Annie Whitfield were errors of constitutional magnitude, and thus the burden is on the prosecution to show that these errors were harmless beyond a reasonable doubt. *Chapman v. California, supra,* 386 U.S. at, 24.)[39] This is a burden the prosecution cannot meet. In the context of this record, Sophie Williams testimony alone could have convinced a wavering juror that the good George Williams was still there and that he was still capable of enormous care and concern for an elderly woman who had lost her husband. It was critical evidence of what George Williams was like after 10 years of incarceration; and it reflected very favorably on George Williams – he did more for a non-family member, Sophie Williams, than many family members would do for their own parents. No other evidence was presented by the defense in the penalty phase concerning appellant's behavior after he left prison in California. No credible argument can be made that this evidence was cumulative. As discussed previously, it was a powerful antidote to the prosecution claims that George was just an evil sociopath.

Annie Whitfield's account of the scars of abuse on George's body, her personal witnessing of his mother's abusive behavior of slapping him and yelling at him right in front of her was unique evidence of abuse by his mother that no other witness had presented. Her view of the scars on young George's body was highly reliable evidence on whether he was physically abused as a child, an issue vigorously contested by the prosecution. ((See 36 RT 8814, 8817 [Prosecution objects to

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[39] The standard for appraising the impact of state law error occurring at the penalty phase, i.e., whether "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown* (1988) 46 Cal.3d 432, 448) – is essentially equivalent to the *Chapman* standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).

testimony by defense witness Susan Mangum that scars shown in photo of George's back were from physical abuse, but she is allowed to testify that in her opinion the items pictured were scars, but it not allowed to testify as to their cause]; See also 37 RT 9131 [Prosecution expert casts doubt on whether George was physically abused because George denied "many, many times"].) Whitfield's personal observation of George's mother's drunkenness during this incident and of her many calls while inebriated was evidence that was important to defense expert Dr. Rahn Minigawa. The exclusion of all of this evidence was prejudicial and cannot be demonstrated to be harmless beyond a reasonable doubt. Accordingly, appellant's sentence of death must be set aside.

VI.
THE TRIAL JUDGE DENIED APPELLANT DUE PROCESS AND A RELIABLE PENALTY PHASE TRIAL, WHEN, AFTER APPELLANT, A BLACK MAN, HAD BEEN FOUND GUILTY OF KILLING AND RAPING A YOUNG WHITE WOMAN, THE JUDGE REFUSED TO INSTRUCT THE JURY THAT THEY SHOULD NOT CONSIDER RACE IN ARRIVING AT THE PENALTY VERDICT

A. The Record

Rickie Ann Blake was white and the girls with whom she was close, Christina Webb and Ramy Ann Forrest, were also white. (See Exhibit 61). Her neighbor, George Bell, Cindy Bell's brother was also white. (24 RT 5146) Appellant George Williams is black. (24 RT 5110, 5115:14-18 5117 [Ramy testified that Rickie introduced her to her black boyfriend named George with big lips who resembles a photograph (Exhibit 60) of George Williams)].) Ramy was introduced to "George" at school (24 RT 5110) and Rickie told her that she was going to the skating rink with George and they danced and did flips together. (24 RT 5112.) Rickie asked Ramy to keep secret her relationship with George and she specifically asked Ramy not to tell Christina Webb about George because of the interracial nature of their relationship.(24 RT 5117, 5119.) There was also evidence of racial segregation and

hostility in the neighborhood: George Bell admitted that when he was informed that George Williams was a possible suspect he said: "no way a black dude in our neighborhood." (26 RT 5835.)

Aware that the United States Supreme Court had stated that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected" (*Turner v. Murray* (1986) 476 U.S. 28, 35), the defense sought to reduce the risk of such prejudice affecting the jury's determination of the appropriate sentence for appellant, a black man convicted of raping and killing a young white woman, by requesting the following instruction taken verbatim from the Federal Death Penalty Act (18 U.S.C. section 3593(f)):

> In arriving at a proper penalty in this case, you shall not consider the race, color, religious beliefs, national origin, sex or sexual orientation of the defendant or any victims, and you may not impose a sentence of death for the crimes in question unless you agree unanimously that you would impose a sentence of death for the crimes in question no matter what the race, color, religious beliefs, national origin, sex or sexual orientation of the defendant or any victims, may be.
>
> The jury shall return to the court a certificate, signed by each juror, and to be provided to you, that consideration of the race, color, religious beliefs, national origin, sex or sexual orientation of the defendant or any victims was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question, no matter what the race, color, religious beliefs, national origin, sex or sexual orientation of the defendant, or any victim, may be.

(10 CT 2240 [Defense Proposed Instruction no .5].) In a hearing on jury instructions, the prosecutor noted his objection to the second paragraph to "requir[ing] jurors to

sign anything" and cited *People v. Smith* (2003) 30 Cal.4th 581, 639, but did not raise any objection or argument regarding the first paragraph. . The trial judge, without discussion and without stating reasons, refused to give either paragraph of the instruction .(38 RT 9243.)

B. Argument

1. Appellant's Constitutional Rights Were Violated

The trial judge erred in summarily refusing the proposed instruction without comment or discussion. An examination of Supreme Court precedent, policy, and the particular circumstances of the instant case all lead to the same conclusion: George Williams' constitutional right to an impartial jury and a reliable penalty phase were violated by the refusal to instruct the jury to not consider the race of the defendant or the victim in arriving at their verdict.

a. United States Supreme Court Precedent

The United States Supreme Court in *Turner v. Murray, supra*, recognized more than 25 years ago that:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

(*Turner v. Murray, supra,* at 35 [footnote omitted].) *Turner* held that upon request of

the defense, "the defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."(*Id.* at 36-37.) The high court overturned the death sentence in that case because:

> the risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized. By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.

(*Id.* at 36 [footnotes omitted].) As the Court's opinion makes clear, in making its ruling, the Court engaged in a kind of cost-benefit analysis: the risk of prejudice was high – the discretion given to the jury presented a "unique opportunity for racial prejudice to operate, but remain undetected" and the cost of reducing that risk was low – the remedy of allowing the defense to request *voir dire* of jurors concerning their racial prejudice was "minimally intrusive." (*Id.* at 37)

The same kind of cost-benefit analysis which led the Court to allow the defense to request *voir dire* concerning racial bias for jurors sitting in a capital case involving inter-racial violence militates in favor of instructing those same jurors not to allow racial bias to infect their deliberations. *Turner* was aimed at the very same risk: the enormous discretion that penalty phase jurors must exercise, combined with the substantial potential for racial bias in a case of inter-racial violence. Thus, this is clearly a risk that courts must be vigilant to reduce, if not eliminate.

And the remedy requested in this case was even less intrusive than the measure approved by the Court in *Turner*. Here, the thrust of the defense request was a jury instruction not to consider race. An instruction is much less intrusive than *voir dire* because it does not require the juror to look the questioner in the eye and confront his or her own racial biases. The instruction operates primarily on the mind of the juror;

the instruction could only intrude further if it is raised in jury deliberations, but such an "intrusion" would be a beneficial prophylactic which would give jurors a vocabulary in which to discuss concerns about racial prejudice influencing the decision.

Although the requirement of a certificate from each juror that racial bias has not infected his or her decision-making is somewhat more intrusive than an instruction alone, it is still less intrusive than the *voir dire* required by the Court in *Turner*. It is also the remedy chosen by the Congress in passing the Federal Death Penalty Act, a strong indication that the Congress which passed the bill and the President who signed it did not see the requirement as overly intrusive. But even if this Court were to find that the certificate intrudes too far, that does not mean that the first paragraph of the instruction should not have been given. Trial courts have the responsibility to instruct accurately on the law and, once the defense raised the issue of an instruction covering racial bias, the trial judge had a duty to tailor the proposed instruction at that it is an accurate and constitutionally sufficient instruction. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 ["To the extent that the proposed instruction was argumentative, the trial judge should have tailored the instruction ... rather than deny the instruction outright]; *People v. Hall* (1980) 28 Cal.3d 143, 159 [Although the trial court did not err in refusing to give the instruction, it should not have refused to tailor the instruction to the facts of this case"].)

In sum, the reasoning of *Turner* leads inexorably to the conclusion that the trial judge erred in refusing the defense's request to instruct on racial bias and that this failure denied appellant his constitutional right to an impartial, properly instructed jury, to a reliable penalty phase and to due process of law in violation of the Sixth, Eighth, and Fourteenth Amendments. (*Turner v. Murray, supra*, 476 U.S. at 35-36 and footnote 9.)

b. Policy: Racial Disparities in the Capital Sentencing Process Have Not Been Cured by *Turner*

Turner's concern with biases against black defendants who are convicted of killing white victims is backed up an impressive array of social science research showing that black perpetrators with white victims are as much as 22 times more likely to be sentenced to death than white perpetrators killing black victims. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 286 (discussing the results of a "sophisticated" study by Professors David C. Baldus, George Palaski and George Woodworth analyzing 2,000 murder prosecutions in Georgia).) *McCleskey* held that the Baldus study was not proof of *purposeful* discrimination by the state as required to prove an equal protection violation under *Personnel Administrator of Massachusetts v. Feeney* (1979) 442 U.S. 256, 279 (statistics alone do not prove intent; challenger must show that state action was taken "at least in part 'because of', and not 'in spite of' its adverse effects on an identifiable group."). (*McCleskey*, 481 U.S. at 297.) But the *McCleskey* opinion did not dispute the accuracy of the gross disparity between the rates of death sentences for black defendants charged with killing white victims as compared to the rate for white defendants charged with killing black victims; it only held that such a disparity was not sufficient to prove a case of intentional racial discrimination in violation of the equal protection clause.

The past twenty-five years have produced a wealth of empirical data confirming the gross disparity in who receives the death penalty in interracial crimes and that disparity has not disappeared as result of the decision in *Turner*. (See Mona Lynch & Craig Haney, *Looking Across The Empathic Divide: Racialized Decision Making On The Capital Jury*, 2011 Michigan State L. Rev. 573, 575-577 [hereinafter "Racialized Decision Making on the Capital Jury"; see also U.S. Gen. Accounting Office, GAO/GGD-90-57 (1990) *Death Penalty Sentencing: Research Indicates Pattern Of Racial Disparities* for an early comprehensive review of state

level studies.) The most recent comprehensive study of the administration of the death penalty in California concluded that those who kill whites are 7.6 times more likely to be sentenced to death those who kill non-Hispanic African Americans and 11 times more likely to be sentenced to death than those who kill Hispanics. (Glenn L. Pierce & Michael L. Radelet, The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, (2005) 46 SANTA CLARA L. REV. 1, 37.)

Moreover, the United States Congress has recognized the dangers of racial disparity in the sentencing phase of a death penalty case by enacting into law the very instruction requested by the defense in this case. (See 18 U.S.C. section 3593(f).)

c. The Fact That This Was a Case in which a Black Man was Convicted of Raping a White Young Woman Made the Instructions Particularly Appropriate

Thus, there was a substantial basis in U.S. Supreme Court decisions, empirical data, and the federal death penalty statute for defense counsel in the instant case to be concerned with preventing racial bias against their black client who had been found guilty of murdering a white victim.[40] But the instant case, in which the defendant had not only been convicted of interracial murder, but also of having committed that crime in the course of raping a fourteen-year-old white girl, posed even greater risks of bias than other cases involving interracial violence. Since emancipation, the image of a violent black man from whom white women had to be protected was portrayed as a threat to the white race. (See, Forrest G. Wood, *Black Scare: The Racist Response to Emancipation and Reconstruction* (U. CA Press 1968) 143-144; David Pilgrim, *The Brute Caricature* (2000) Ferris State University Museum of Racist Memorabilia,

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[40] Defense counsel filed his packet of requested penalty phase instructions on 10/8/04 (CT 2235), after the jury had returned its guilt phase verdicts on 9/28/04 (CT 2493-98)}

http://www.ferris.edu/htmls/news/jimcrow/brute/ (The "terrible crime" most often mentioned in connection with allegedly violent black men was rape, specifically the rape of a white woman. At the beginning of the twentieth century, much of the virulent, anti-black propaganda that found its way into scientific journals, local newspapers, and best-selling novels focused on the stereotype of the black rapist. The claim that black men were, in epidemic numbers, raping white women became the public rationalization for the lynching of blacks.) The lynching of blacks was a significant part of this racist response: "[t]he racist myth of Negroes' uncontrollable desire to rape white women acquired a strategic position in the defense of the lynching practice." (Robert A. Gibson, The Negro Holocaust: Lynching and Race Riots in the United States,1880-1950 (1979.) http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html#b.)

2. *People v. Smith* is Distinguishable and Should Be Reconsidered

That racial stereotype persists to this day in popular culture, movies and literature. See Stacey Patton (December 3, 2012) *Who;s Afraid of Black Sexuuality*, THE CHRONICLE OF HIGHER EDUCATION. *chronicle.com/article/Whos-Afraid-of-Black/135960* Thus, the defense's concern in this case with protecting their client from racial bias was both justified and strong. The vehicle they chose to protect their client was to request the same instruction given to federal juries in death penalty cases. But the important and well supported request by defense counsel received short shrift. The prosecutor objected to the portion of the instruction that called on jurors to sign a certificate that racial bias did not affect their decision and cited this Court's decision in *People v. Smith* (2003) 30 Cal.4th 581, 619; the trial judge, without any further argument or explanation denied the request. (38 RT 9243.)

The *Smith* case was very different from the instant case in two significant ways: (1) although the defendant was black, the victim in that case was Japanese whereas the victim here was white; all of the research studies have indicated that the danger that

race will play a role in the defendant's receiving the death penalty is at its highest when the victim is white; (2) the defendant in *Smith* hurled racial epithets at the victim at the time of the crime (which were part of the circumstances of the crime) which made the instruction confusing on the specific facts of that case.

This Court's discussion of the issue in *Smith* was as follows:

> The court refused defendant's request to instruct the jury to disregard his and the victim's racial backgrounds and to require the jurors to sign a certificate stating that they had not considered race in their verdict. Stating that he is Black, and pointing out that his murder victim was Japanese, he argues the court's refusal to so instruct was error. We disagree. The requested instruction was drawn from a federal statute requiring that instruction and certificate in federal capital prosecutions. (18 U.S.C. § 3593(f).) But the instruction is not constitutionally required. Obviously, the jury may not consider the defendant's or victim's race in deciding whether to impose the death penalty. (The jury *was*, however, entitled to consider defendant's own racial epithets as circumstances of the crimes; see p. 626, *ante*.) But the court need not interject the issue of race itself and then tell the jury to disregard it, at least absent some indication the jury might improperly consider race. (See *State v. Roseboro* (2000) 351 N.C. 536 [528 S.E.2d 1, 13].)

(*People v. Smith. supra* 30 Cal.4th at 619.)

The North Carolina Supreme Court's analysis in *Roseboro* noted that it had previously ruled *Turner v. Murray* was not a precedent requiring jury instructions on racial bias and then stated that:

> Given this precedent, the trial court was not required to instruct the jurors that they should avoid giving any consideration to racial factors in defendant's sentencing. Contrary to defendant's position, *the instruction in this case would have, in effect, injected racial bias into the jurors' consideration of defendant's*

sentence and diverted their attention away from the more pertinent issues of defendant's character and the circumstances of the crime. Therefore, we conclude that the trial court did not err in refusing to give the requested instruction.

(528 S.E.2d at 13 [Emphasis Added].) In light of the fact that 13 years prior to the *Roseboro* decision, *McCleskey* had recognized the data documenting gross racial disparities between the rate at which blacks who kill whites than whites who kill blacks are sentenced to death and the social science research supported by a weath of empirical data showing a strong statistical connection between the vastly higher incidence of death penalty sentences for blacks who kill whites, the *Roseboro* court's suggestion that it was the instruction requested by the defendant that would have "injected racial bias into the jurors' consideration of defendant's sentence" could not be a stronger statement of why this non-binding authority should be given no weight at all. Like an ostrich with its head in the sand, *Roseboro* ignored the overwhelming evidence that race plays a critical role in whether or not a defendant gets the death penalty. *Roseboro*'s suggestion that an instruction designed to ameliorate the risks of racial bias at the penalty phase injected race into the proceeding was rejected 14 years earlier in *Turner v. Murray* which found that: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (476 U.S. at 35.)

Given the risks that the *Turner* Court cogently articulated and the fact that *McCleskey* held that the statistical evidence of racial bias is not a basis for proving that the discriminatory results were caused by unlawful intentional discrimination, *McCleskey* did nothing to remedy these disturbing connections between race and the death sentence. Rather than being taken as a "pass" for courts to ignore the problem, *McCleskey* should be an impetus to looking for ways to ameliorate this continuing stain of unfairness on our death penalty system. Neither *Roseboro*, nor *Smith* offer any

help on this important task.

Surely the *Smith* ruling deserves a fresh look in light of the lack of any indication that the troubling reality of a continuing pattern of racial disparities continues to this day. The problem of racial disparity in death sentencing has not been cured by *Turner voir dire*. The same reasoning which led the *Turner* court to recognize the constitutional right of the defendant in a death penalty case to choose to have prospective jurors in interracial capital cases questioned about racial bias leads inexorably to the conclusion that defendants in such cases should have the right, upon request, to have jurors instructed not to allow the race of the defendant or the victim to enter into their deliberations.

Indeed, given the subtleties of unconscious bias (See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* (1987) 39 STAN. L. REV. 317; Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* (2008) 40 CONN. L. REV. 931 (2008); Sherri Lynn Johnson, Unconscious Racism and the Criminal Law, 73 CORNELL L. REV. 1016 (1988)), the only question is whether the requested instruction in this case went far enough. All it did was to direct each juror not to let race play a role in his or her verdict and to affirm that he or she would have reached the same decision regardless of race. The requested instruction in *Roseboro* went further:

> MEMBERS OF THE JURY, I instruct you that you may *not* consider the race of the Defendant or that of the victim in making your determination about whether death or life imprisonment is the appropriate punishment for the Defendant. Because of the range of discretion that will be entrusted to you, there is a unique opportunity for racial prejudice to operate in this case. It remains an unfortunate fact in our society that racial prejudice can improperly influence a jury. Even subtle, less conscious racial attitudes must be eliminated

by you from your consideration of the appropriate sentence in this case. It would be a violation of your oaths and you[r] duty under the laws of the United States and the State of North Carolina for you to give any consideration whatsoever to racial factors in reaching your decision in this case.

(528 S.E.2d at 13.)

The authors of *Racialized Decision Making on the Capital Jury* recommend going even further:

> It is not difficult to envision the use of a "modern racism" judicial instruction that might be delivered in cases in which there are capital defendants of Color. Given what is known about the persistence of racialized decision making in death penalty cases (i.e., ignoring race when it should matter, being influenced by it when it should not), explicitly voicing concerns about the potential for pernicious race-based processes to distort judgments— processes that we know are most problematic when they operate at an implicit level—might serve as an effective antidote. An instruction that acknowledged the kind of burdens and obstacles that many Black defendants face throughout their lives—the biographical racism to which we earlier referred— and sensitized jurors against allowing unconscious prejudices to play any role in their decision making may serve as a useful prophylactic against forces and factors that we know are likely to operate in this context.

2011 Michigan State L. Rev. at 603 [Footnote Omitted]. Given the constitutional imperative for a remedy to deal with the risks of racial bias at the penalty phase and the minimal intrusion worked by a jury instruction available at the penalty stage on request of the defense, this Court should exercise its supervisory powers to craft an instruction that best serves the constitutional requirements for trial by an impartial jury, a reliable penalty phase, and due process as well as the policy concerns of doing so in a way that both gets at unconscious prejudices and is not overly intrusive on the jurors or the trial

process.

3. The Error in Failing to Instruct to Avoid Racial Bias Was Prejudicial Per Se and Not Harmless Beyond a Reasonable Doubt

In *Turner*, the Supreme Court reversed the conviction because the risk of racial bias infecting the trial was too great to insure that defendant there had the fair trial guaranteed by the Sixth Amendment. There was no way of telling what might have happened had the *voir dire* been permitted. Accordingly, the U.S. Supreme Court vacated the death sentence. For the same reasons, this Court should vacate George Williams' death sentence here. Because of the error of the trial judge in failing to take the minimally intrusive step of instructing to guard against a serious risk of racial bias, the process in this case was flawed in the same way as in *Turner,* and the same result should obtain: reversal without harmless error analysis.

Even if the Court finds harmless error analysis to be appropriate, it should reach the same result. Under *Chapman*, the burden is on the state to "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at, 24.)[41] Because it is impossible to tell what effect a proper instruction might have had on the penalty jury, the prosecution cannot meet this burden. Even if this Court were to weigh the evidence, the same result should obtain. Given the strong penalty defense which included not only negative mitigating factors such as his abusive and economically deprived childhood, his family history of alcoholism which put him at risk for both alcoholism and sexual violence, his head injury and other risk factors for sexually violent behavior, but also positive mitigating evidence

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[41] The standard for appraising the impact of state law error occurring at the penalty phase, i.e., whether "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown* (1988) 46 Cal.3d 432, 448) – is essentially equivalent to the *Chapman* standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).

including his exemplary service in the Army and his helpfulness with family members and others, there is no way the prosecution can show beyond a reasonable doubt that had the jury been properly instructed, the result would have been the same.

VII.
THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THAT "LIFE WITHOUT POSSIBILITY OF PAROLE" MEANS "DEFENDANT WILL BE IMPRISONED FOR THE REST OF HIS LIFE," PARTICULARLY WHEN THE COURT HAD ERRONEOUSLY SUSTAINED AN OBJECTION TO DEFENSE COUNSEL'S ARGUMENT THAT "NO REVIEWING COURT WILL SAY YOU GOT IT WRONG"

A. The Record

Prior to trial, the defense moved that in order to "correct common misconceptions concerning the sentence of life without parole" (2 CT 367), the defense moved to preinstruct the jury that

> The penalty of life imprisonment without the possibility of parole means exactly what it says: If you are called upon to decide the appropriate penalty and you decide life without parole is the appropriate penalty, defendant will never be paroled
>
> It would also be a violation of your duty to base your decision on the belief that your verdict will not be carried out. Should we get to the point where a penalty phase is necessary, you must assume that either penalty you impose will be carried out.

(2 CT 377; full motion and memo in support is at 2 CT 366-379). In that same motion, the defense also asked that the jury be instructed in the penalty phase instructions that:

> In deciding whether the sentence in this case will be life in prison without any possibility of parole or the death penalty, you are instructed that the penalty of life in prison without any possibility of parole means that the defendant will never be

paroled nor will he be eligible for parole.

You are also instructed that a sentence of death means that the defendant will be executed.

The death penalty is the most severe penalty that can be imposed. The second most severe penalty that can be imposed is that of life in prison without possibility of parole. It is your duty at this phase of the trial to decide between the two most severe penalties available.

(2 CT 378.) And the same motion also asked that the penalty phase instructions include the following:

It is true that the Governor is granted the power to commute a sentence of death to one of life in prison, with or without the possibility of parole. It is also true that the Governor is granted the power to commute a sentence of life without parole to life with parole. However, it would be a violation of your oath to base your decision in whole or in part on a consideration of the governor's commutation power.

(2 CT 375, 379.) The prosecution filed an opposition to that motion on May 7, 2004. (5 CT 1081-1087 On June 7, 2004, the Court deferred hearing on the motion until the penalty phase. (11 CT 2421.) On September 30, 2004, after the guilty verdict in the guilt phase, the trial judge denied the motion in open court without argument and without comment, even on the request for special penalty instructions. (30 RT 6819)

In addition to the preinstruction motion, the defense later requested a special instruction on life without parole:

You are instructed that life without parole means exactly what it says: The defendant will be imprisoned for the rest of his life.

You are instructed that the death penalty means exactly what it says: That the defendant will be executed.

For you to conclude otherwise would be to rely on conjecture and speculation

and would be a violation of your oath as trial jurors.

(10 CT 2238.)

The Court refused to give this instruction in open court without discussion or argument. (37 RT 9243.)

After that, during closing argument, defense counsel told the jurors the following:

> And when you make that decision, when you are finally alone together in the back room and you start talking about it, you must remember that you must assume that whatever punishment you reach will be carried out. In that sense, not only are you sixteen gods, you are sixteen supreme courts, you are sixteen appellate courts, you are sixteen trial courts. Because the courts, properly so, give great deference to the decision you make, because they recognize how hard it is and how hard you have worked. And it is difficult, if not impossible for them to look down on pieces of paper that have been compiled over the last two months and say, well, this jury got it wrong. They won't do that.

(38 RT 9308). At this point, the prosecution objected "improper argument" and the trial judge "sustained" the objection without further argument or comment. (*Ibid.*)

B. Argument

1. It was error not to give the jury instruction that accurately told the jury that they should act as if their sentence would be carried out and not speculate or conjecture on whether their sentence would be reviewed.

As the United States Supreme Court has stated:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised,

leaving them with substantial discretion .... Given such a situation, *the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.*

(*Caldwell v. Mississippi* (1985) 472 U.S. 320, 333 [emphasis addded].)

Any impression by a juror or jurors that the sentence will not be carried out can cause the minimization of its role prohibited by *Caldwell.* Indeed, as the U.S. Supreme Court said in *California v. Ramos* (1983) 463 U.S. 992, "jurors – informed that their decision was not final, might 'approach their decision with less appreciation for the gravity of their choice and for the responsibility as sentencers." (463 U.S. at 1011 quoted in *People v. Ramos* (1984) 37 Cal.3d 136, 151) This leaves the defense with a dilemma. On the one hand, if the jury believes that someone will review and change its death sentence, then it may not feel as reluctant to sentence to death. *People v. Ramos, supra,* 37 Cal.3d at 154. On the other hand, if the jury believes if it votes for life without parole, defendant may still be released by parole or commutation, it may vote for death even though it does not believe that is the appropriate penalty because it is the only way it can assure that defendant never gets out of prison. *Ibid.*

Defense counsel sought to deal with these dual problems with a balanced set of instructions which both told the jury that they should assume that either penalty would be carried out and also instructed them that: "For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors." (Defense Special Instruction No. 3, 10 CT 2238).

The trial judge's rejection of the request does have support in a number of decisions of this Court which reject an instruction which tells the jury that the sentence they impose *will be* carried out as inaccurate because it:

"[i]gnores the power of the superior court to reduce a sentence of death on review under section 190.4, subdivision (e). It ignores the Governor's power of

commutation.

People v. Thompson (1988) 45 Cal.3d 86, 131; Accord: *People v. Smith* (2003) 30 Cal.4th 581, 635; *People v. Arias* (1996) 13 Cal.4th 92, 172; *People v. Gordon* (1990) 50 Cal. 3d. 1223, 1277.)

Curiously, though all of these cases criticize the instructions the defense requested as inaccurate, none of them discuss the trial judge's duty to instruct on the law and to grant the substance of legitimate requests for instructions from the parties even when the precise wording of the instructions of the instructions has some inaccurate or misleading words in them. See *People v. Fudge, supra* 7 Cal.4th at 1110 ["To the extent that the proposed instruction was argumentative, the trial judge should have tailored the instruction ... rather than deny the instruction outright]; *People v. Hall, supra*, 28 Cal.3d at 159 [Although the trial court did not err in refusing to give the instruction, it should not have refused to tailor the instruction to the facts of this case"].)

Thus, in the instant case, in accordance with this Court's ruling in *Ramos,* the trial judge should have instructed the jury, at the defense's request that they include "a short statement indicating that the Governor's commutation power as to both sentences but emphasizing that it would be a violation of duty to consider the commutation power in reaching its decision." (*Ramos, supra,* 37 Cal.3d at 159 n.12.) One of the instructions requested by the defense asked for an instruction precisely complying with the suggestion in *Ramos*:

> It is true that the Governor is granted the power to commute a sentence of death to one of life in prison, with or without the possibility of parole. It is also true that the Governor is granted the power to commute a sentence of life without parole to life with parole. However, it would be a violation of your oath to base your decision in whole or in part on a consideration of the governor's commutation power.

(2 CT 375, 379.) Under a portion of *Ramos* which has never been repudiated by this

Court, it was the defense's option to request such an instruction and it was error to refuse that instruction.

Moreover, the special instruction no. 3 requested by the defense also included this concept and with minimal tweaking would be a correct statement of the law:

> You are instructed that life without parole means exactly what it says: The defendant will be imprisoned for the rest of his life.
>
> You are instructed that the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(10 CT 2238.) As worded, this instruction runs afoul of the inaccuracy criticized in *Thompson* and its progeny because there is no guarantee that either sentence "will be" carried out. But if the words "you should assume" were added to the instruction proposed it would have been accurate, balanced, and have served the purpose of impressing on the jurors their responsibility for their verdict. Thus an accurate instruction would have stated:

> You are instructed that *you should assume that* life without parole means exactly what it says: The defendant will be imprisoned for the rest of his life.
>
> You are instructed that *you should assume that* the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(10 CT 2238.)

It is curious that in the more than 30 years of litigation on this issue, the process of criminal justice in the State of California has not been able to sort out such a simple, fair and efficient solution to this recurring dilemma. It was error in this case for the trial judge not to give an accurate instruction incorporating defense counsel's legitimate

request for an accurate and balanced instruction that made clear to the jury that they should act as if their sentence would be carried out and not speculate on what else might happen.

2. It was Error to Sustain the Prosecution Objection to the Defense Closing Argument Without Instructing the Jury on What Life Without the Possibility of Parole Meant

The trial judge's error in not instructing the jury to ignore the possibility that defendant's sentence would be changed by a reviewing court was compounded and became more prejudicial because of what happened in closing argument. Defense counsel's argument colorfully, but accurately. impressed on jurors their duty to be responsible for their decision:

> Because the courts, properly so, give great deference to the decision you make, because they recognize how hard it is and how hard you have worked. And it is difficult, if not impossible for them to look down on pieces of paper that have been compiled over the last two months and say, well, this jury got it wrong. They won't do that.

(38 RT 9308.) Other than the objection "improper argument," the record is silent as to the basis for the prosecutor's objection or the trial judge's ruling. The trial judge's ruling seems erroneous. But even if it were correct that something in what defense counsel said was inartfully phrased enough to merit sustaining an objection, the interplay gave rise to the very inference prohibited by *Caldwell* – the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others – presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. (*Caldwell v. Mississippi, supra,* 472 U.S. at 333.) At that point, it was incumbent on the trial judge to give an accurate instruction to the jury that they should act as if their decision would be final and that to do otherwise would to be to engage in conjecture and speculation and violate their oath as jurors. In these circumstances, the trial judge gave

the jurors a legally incorrect impression that someone else other than they had responsibility for making their decision correct and violated *Caldwell* when he failed to instruct them otherwise. That impression was prejudicial and there is no way for the State to meet is burden that the prejudice was harmless beyond a reasonable doubt.

VIII. CUMULATIVE ERROR

Appellant has argued that a variety of errors involving both state law and federal constitutional errors occurred and that each of these errors was prejudicial, either *per se* or under the harmless error standards of *Chapman v. California*, *supra*, 386 U.S. 18,(See Arguments I through IV, above.)

If this Court does not agree that any of the errors in question requires reversal when considered in isolation, then it is incumbent on the Court to consider their cumulative impact. (*Taylor v. Kentucky*, (1978) 436 U.S. 478, 487 and n. 15; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors when considered cumulatively compel reversal of death sentence]; *People v. Hill*, *supra*, 17 Cal.4th at 844-47 [defendant was deprived of a fair trial in light of the cumulative impact of prosecutorial misconduct and other errors at both phases of the trial]; *Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1219 [the prejudicial nature of various errors so permeated the proceedings that death sentence must be reversed].) As the Ninth Circuit has suggested, in cases such as the present one "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

When the overall effect of the pervasive errors in the instant case are considered, the picture that emerges is a grossly unfair guilt and penalty trial in which errors infected every aspect of the case: (1) the prosecution ambushed the defense by failing to disclose crucial inculpatory evidence until after the opening statement was made depriving appellant of ability prepare for and present his defense and the trial judge refused to grant a mistrial (argument I); (2) the error in failing to grant a mistrial was exacerbated by

prosecutorial misconduct in which the prosecutor suggested to the jury that defense counsel had concocted a defense when he knew that disclosures by the prosecution about the sperm evidence had supported that defense (argument II); (3) the trial judge's refusal to allow the defense to introduce key reliable evidence pointing to the guilt of George Bell, then refusing to allow the defense to cross-examine Bell on precisely what he said to Mrs. Blake and refusing to instruct the jury about the significance of Bell's false alibi and consciousness of guilt (Argument III); (4) the trial judge's allowing the prosecution to introduce other sexual crimes evidence to suggest a propensity to commit murder (Argument V; (5) the refusal to admit relevant and reliable hearsay evidence in the penalty phase, and related errors Argument V; (6) in a case with strong racial overtones involving that alleged rape of a white girl by a black man, the trial judge erroneously refused to instruct the jury not to consider race in arriving at their penalty verdict (Argument VI); and (7) the trial judge refused to instruct the jurors to assume their penalty verdict would be carried out, violating *Caldwell v. Mississippi, supra.* Individually and cumulatively, these errors denied appellant his rights to due process of law, to the effective assistance of counsel, to a full and fair opportunity to present his guilt and penalty phase defenses, to present relevant mitigating evidence, to confront witnesses against him, to an impartial jury, and to reliable guilt and sentencing determinations in a capital proceeding, in violation of the Sixth, Eighth, and Fourteenth Amendments.

IX.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such

arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Appellant Williams has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[42] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

A. Factor (a): Section 190.3, subdivision (a) — which permits a jury to sentence a defendant to death based on the "circumstances of the crime" — is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accordance with this provision. (10 CT 2292 (CALJIC 8.85).) In addition, the jury was not required to be unanimous as to which "circumstances of the crime"

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[42] See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 108 Cal.Rptr.3d 87 at pages 169-170 and *People v. McWhorter* (2009) 47 Cal.4th 318, 377-379. See also, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 261; *People v. Thompson*, (2010) 49 Cal.4th 79, . 143-144; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307-309; *People v. Mills* (2010) 48 Cal.4th 158, 213-215; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811; *People v. Carrington* (2009) 47 Cal.4th 145, 198-199; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.

amounting to an aggravating circumstance had been established (10 CT 2293), nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[43] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins, supra*, 49 Cal.4th at 261; *People v. Mills, supra*,48 Cal.4th at. 213-214 ; *People v. Martinez, supra*, 47 Cal.4th at p. 967 ; *People v. Ervine, supra*, 47 Cal.4th at p. 810 ; *People v. McWhorter, supra*,47 Cal.4th at 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck, supra*, 37 Cal.4th at pp. 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

B. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (10 CT 2292 (CALJIC 8.85).) Evidence supporting this instruction had been admitted both at the guilt phase and the penalty phase, and the jury was authorized to consider such acts at the penalty phase pursuant to section 190.3, subdivision (b). The jurors were instructed specifically that there was evidence of the following crimes committed by George Williams: "copulation of Sandra Stephens, the rape of Velma Williams, sodomy upon Velma Williams, the rape of Alicia Conrad, sodomy of Alicia Conrad, and sexual assault upon Leon Fuller and which involved the express or implied use of force or violence or th threat of force or violence." (See 10 CT 2294 [CALJIC 8.87] The jurors were not told that they could rely on this factor (b) evidence only if they unanimously agreed beyond a reasonable doubt that the conduct had occurred (See 10 CT 2294 [CALJIC 8.87].) In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 and its progeny, the

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[43] *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at 261; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967,968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first - degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

C. Factor (c): During the penalty phase, the state introduced evidence that appellant had a prior felony conviction for a lewd act on his daughter, Idella. (See exhibit 45; 31 RT 7185.) This evidence was admitted pursuant to section 190.3, subdivision c. The jurors were instructed an individual juror could not rely on a prior conviction for a lewd act on his daughter Idella unless the fact of conviction had been proven beyond a reasonable doubt. (10 CT 2295 [CALJIC 8.86].) The jurors were told that they need not unanimously agree that defendant had suffered this prior conviction before they could rely on this aggravating factor. (*Ibid.*). In light of the Supreme Court decisions in *Ring*

v. Arizona (2002) 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 261; *People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at p. 170 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

D. Factors (b) and (c): The prosecution introduced evidence that appellant had committed sexual assaults on Velma Williams and her daughter Alicia Conrade (20 RT 3939-3959 [guilt phase]), appellant's daughter, Idella (20 RT 3862-3966; 3889-3898 [guilt phase]), and Leon Fuller (31 RT 7339-7347 [penalty phase]). Testimony was elicited as to the underlying facts of these assaults, each of which had previously resulted in convictions. (4 RT 642-643.) At the penalty phase, the jury was told it could consider this evidence in deciding whether petitioner should live or die. (10 CT 2292 [CALJIC 8.85].) The introduction of the facts on which the prior convictions were premised put defendant in jeopardy a second time for those offenses in violation of the Double Jeopardy clause of the federal Constitution. This Court has rejected this argument. (See, e.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, at pp. 134-135.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provision of the U.S. Constitution.

E. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (10 CT 2292 [CALJIC 8.85(I)].) This aggravating factor was unconstitutionally vague in violation of due process and the

Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Ray* (1996) 13 Cal.4th 313, 358.) These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

F. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (10 CT 2292) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation despite a defense request to instruct the jury that "A mitigating circumstance need not be proved beyond a reasonable doubt or even by preponderance of the evidence and each juror may find a mitigating circumstance to exist if there is any evidence to support it" (10 CT 2260; instruction refused, 37 RT 9247.) These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson*, *supra*, 49 Cal.4th at. 143-144; *People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 p. 170; *People v. D'Arcy*, *supra*, 48 Cal.4th at. 308; *People v. Mills*, *supra*, 48 Cal.4th at 214 ; *People v. Martinez*, *supra*, 47 Cal.4th at 968; *People v. Schmeck*, *supra*, 37 Cal.4th 304-305; *People v. Ray*, *supra*, 13 Cal.4th at 358-359; *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Carpenter* (1997) 15 Cal 4th 312, 417-418; *People v. Bonillas* (1989) 48 Cal.3d 757, 789-790) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

G. Failure to Narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. The defense made a motion to preclude capital punishment on this ground. (2 CT 259-272), but the motion was denied. (11 CT 2420). This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provision of the U.S. Constitution.

H. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. However, the jury in this case was not told that each of these three decisions had to be made beyond a reasonable doubt. The defense moved to preclude imposition of the death penalty on the grounds that these failures, along with others, violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the California Constitution. (2 CT 245; motion denied 11 CT 2420). The omission of the requirements numbered (1), (2) and (3) above violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v.*

Collins, *supra,* 49 Cal.4th at . 261; *People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at. 169; *People v. D'Arcy*, *supra*, 48 Cal.4th at 308; *People v. Mills*, *supra*, 48 Cal.4th at. 213 ; *People v. Martinez*, *supra*, 47 Cal.4th at 967 ; *People v. Ervine*, *supra*, 47 Cal.4th at 810-811 ; *People v. McWhorter*, *supra*, 47 Cal.4th at. 379; *People v. Schmeck*, *supra*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

I. Written findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The defense moved to preclude imposition of the death penalty on the grounds that these failures, along with others, violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the California Constitution. (2 CT 245; motion denied 11 CT 2420). This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, at p. 261; *People v. Thompson* (2010) 49 Cal.4th 79, at pp. 143-144; *People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

J. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See,

e.g., *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Carrington*, *supra*, 47 Cal.4th at p. 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

K. Unconstitutionally Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. The defense moved to preclude imposition of the death penalty on the grounds that these failures, along with others, violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the California Constitution. (2 CT 245; motion denied 11 CT 2420). This Court has repeatedly rejected these arguments. (*People v. Carrington*, *supra*, 47 Cal.4th at p. 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

L. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra,* 49 Cal.4th at p. 261; *People v. Thompson*, (2010) 49 Cal.45th 79 at pp. 143-144; *People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308-309; *People v. Mills*, *supra*, 48 Cal.4th at p. 214 ; *People v. Martinez*, *supra*, 47 Cal.4th at p.

968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

M. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at 261; *People v. Mills*, *supra*, 48 Cal.4th at p. 214 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968 ; *People v. Ervine*, *supra*, 47 Cal.4th at p. 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

N. International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at 261; *People v. Taylor*, *supra*, 108 Cal.Rptr.3d 87 at p. 170; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Carrington*, *supra*, 47 Cal.4th at pp. 198-199; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law. the U.S. Constitution, and international law.

O. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, *supra*, 49 Cal.4th at 143-144; *People v. Taylor*, 1 *supra*, 08 Cal.Rptr.3d 87 at p. 170 ; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

P. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

CONCLUSION

For all of the foregoing reasons, the guilty verdicts should be reversed, the special circumstances findings vacated, and the sentence of death vacated.

Respectfully submitted,

_____

PAUL J. SPIEGELMAN
Attorney for Appellant,
GEORGE WILLIAMS, JR.

CERTIFICATE PURSUANT TO CA. RULE OF COURT 8.630

I hereby certify that, according to my computer's word processing program, this brief, exclusive of tables, is 64,499 words, well within the 100,000-word limit specified in the California Rules of Court.

_____

Paul J. Spiegelman
ATTORNEY FOR APPELLANT

DECLARATION OF SERVICE BY MAIL
SERVICE ON TRIAL COURT

Re: *People v. Williams*, Supreme Court No. S131819

I, Paul J. Spiegelman, declare that I am over 18 years of age and am not a party to this action. My business address is P.0. Box 22575, San Diego, CA 92192-2575. I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on the following by placing same in an envelope: :

Office of the Clerk
Superior Court of San Diego
220 West Broadway, Room 3005
San Diego, CA 92101

Each said envelope was then, on November 21, 2013, sealed and deposited in the United States mail at San Diego, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California this 21st day of November, 2013.

PAUL J. SPIEGELMAN, DECLARANT

DECLARATION OF SERVICE BY MAIL

Re: *People v. Williams*, Supreme Court No. S131819

I, Ellen M. Magee, declare that I am over 18 years of age and am not a party to this action. My business address is P.0. Box 22575, San Diego, CA 92192-2575. I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following by placing same in an envelope addressed respectively as follows:

Mr. George Williams V-70703
SQSP 5EB70
San Quentin, CA 94974

Kamala Harris, Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Steven Parnes, Staff Attorney
California Appellate Project
101 Second Street
San Francisco, CA 94105

Each said envelope was then, on November 18 2013, sealed and deposited in the United States mail at San Diego, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California this 18th day of November, 2013.

/s/
ELLEN M. MAGEE, DECLARANT