SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. PAUL WESLEY BAKER, Defendant/Appellant.	No: S170280 APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY
SUPERIOR COURT CASE NO. LA045977-01

THE HONORABLE SUSAN M. SPEER, JUDGE

LAW OFFICES OF JOHN F. SCHUCK
John F. Schuck, #96111
885 N. San Antonio Road, Suite A
Los Altos, CA 94022
(650) 383-5325
schuckappeal@hotmail.com
Attorney for Appellant
PAUL WESLEY BAKER
(Appointed by the Court)

SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. PAUL WESLEY BAKER, Defendant/Appellant.	No: S170280 APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY
SUPERIOR COURT CASE NO. LA045977-01

THE HONORABLE SUSAN M. SPEER, JUDGE

LAW OFFICES OF JOHN F. SCHUCK
John F. Schuck, #96111
885 N. San Antonio Road, Suite A
Los Altos, CA 94022
(650) 383-5325
schuckappeal@hotmail.com
Attorney for Appellant
PAUL WESLEY BAKER
(Appointed by the Court)

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES — PAGE NO.

STATUTES

TABLE OF AUTHORITIES

STATUTES — PAGE NO.

TABLE OF AUTHORITIES

STATUTES PAGE NO.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

OTHER — PAGE NO.

TABLE OF AUTHORITIES

OTHER — PAGE NO.

TABLE OF AUTHORITIES

OTHER — PAGE NO.

I. STATEMENT OF APPEALABILITY

This appeal is automatic because a judgment of death was rendered. (Penal Code sec.1239, subd.(b).)

II. INTRODUCTION

Appellant Paul Baker's trial was decidedly unfair and violated fundamental notions of due process. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." (*Lisenba v. California* (1941) 314 U.S. 219, 236, 62 S.Ct. 280, 290.) "A fair trial in a fair tribunal is a basic requirement of due process." (*In re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625.) Here, appellant did not have a fair trial.

The unfairness in appellant's trial commenced with the denial of his *Wheeler/ Batson* motion made after the prosecutor peremptorily excused two African-American prospective jurors. The evidence shows no proper nondiscriminatory reason for the challenges. The trial court further skewed jury selection through its disparate treatment between the jurors challenged by the prosecution and those challenged by defense counsel regarding their attitudes about the death penalty.

The injustices of the trial continued when the trial court erroneously allowed the prosecutor to introduce an unwarranted amount of uncharged offenses and conduct. Many of the events occurred several years prior to the charged crime and were not similar to the charged crime . This unnecessary and inflammatory evidence prejudiced the jury

against appellant.

Given the law in effect at the time of trial, that a burglary with the intent to kill or commit a sexual assault will not support felony-murder or burglary or rape special circumstance findings, the trial court committed prejudicial error by instructing to the contrary. And, under that law, there is insufficient evidence to support the special circumstance findings made by the jury. As to the rape conviction and special circumstance finding, there is insufficient evidence that appellant ever attempted or completed a rape.

The trial court further violated appellant's right to a fair trial when it allowed a DNA expert to testify as to the accuracy and reliability of reports prepared by others for the express purpose of appellant's trial. This unfairness was exacerbated when the trial court allowed the prosecutor to introduce the hearsay DNA reports into evidence for the truth of the matter asserted therein. The analysts who had actually prepared the reports did not testify. And, there was no evidence they were unavailable.

In the penalty phase, over appellant's objection, the trial court allowed the prosecutor to introduce evidence that, when he was a boy, appellant mistreated cats. This evidence was so inflammatory, so extremely prejudicial, it should have been excluded.Finally, at the conclusion of the case, the trial court erroneously denied appellant's motion to modify the death penalty. The evidence and argument fully justified granting the motion and imposing a sentence of life without possibility of parole.

The capital conviction and death sentence of appellant Paul Baker were the product of numerous prejudicial errors which deprived appellant of his fundamental constitutional rights to due process, a fair trial, trial by an impartial jury, a reliable determination of guilt and penalty, protection from cruel and unusual punishment, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 15, 16, 17, and 28 of the California Constitution. Appellant's conviction and sentence are the direct result of constitutionally deficient proceedings. Reversal is therefore required.

III. STATEMENT OF THE CASE

On February 25, 2008, after a preliminary examination (2CT 129-398),[1] a second amended information was filed against appellant Paul Wesley Baker. The alleged victim in counts 1, 2, 3, 4, 5, and 15 was Judy Palmer. In count 1, appellant was charged with a violation of Penal Code section 187, subdivision (a), murder. As to count 1, three special circumstances were alleged: that the murder was committed during a rape (sec.190.2, subd.(a)(17)(C), a burglary (sec.190.2, subd.(a)(17)(G)), and sexual penetration by a foreign object (sec.190.2, subd.(a)(17)(K)). In count 2, appellant was charged with a violation of Penal Code section 261, subdivision (a)(2), rape. In count 3, he was charged with a violation of Penal Code section 459, first degree burglary. In count 4, he was charged with a violation of Penal Code section 487, subdivision (d)(1), grand theft. In

[1] "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

count 15, he was charged with a violation of Penal Code section 289, subdivision (a)(1), sexual penetration by foreign object. Appellant was also charged with the following offenses:

Count 6 - Penal Code section 261, subdivision (a)(2) - Forcible rape (alleged victim - Kathleen S.)

Count 7, - Penal Code section 286, subdivision (c) - Sodomy by Use of Force (alleged victim - Kathleen S.)

Count 9 - Penal Code section 286, subdivision (c)(2) - Sodomy by Use of Force (alleged victim - Laura M.)

Count 10 - Penal Code section 286, subdivision (c)(2) - Sodomy by Use of Force (alleged victim - Lorna T.)

Count 11 - Penal Code section 261, subdivision (a)(2) - Forcible Rape (alleged victim - Susanne K.)

Count 12 - Penal Code section 261, subdivision (a)(2) - Forcible Rape (alleged victim - Monica H.)

Count 13 - Penal Code section 286, subdivision (c)(2) - Sodomy by Use of Force (alleged victim - Laura M.)

Count 14 - Vehicle Code section 10851, subdivision (a) - Unlawful Driving or Taking of Vehicle (alleged victim - Bob Main).

As to counts 2, 6-13, 15 and 16, pursuant to Penal Code section 667.61, subdivisions (a),

(b), and (e), it was alleged that appellant committed the offenses against different victims. (Sup. III CT 93-107.)[2] Appellant entered not guilty pleas to all charges. (5CT 1126.)

On February 8, 20007, the prosecution filed a notice of factors in aggravation pursuant to Penal Code section 190.3. (3CT 696-700.)

On July 19, 2007, pursuant to Penal Code section 995, appellant filed a motion to dismiss the three alleged special circumstances and counts 2, 3, and 15. (4CT 837-848.) The prosecution filed opposition. (4CT 982-995.) On November 9, 2007, the motion was denied. (5CT 1002; 2RT 274-277.)

On November 28, 2007, December 2, 2007, and January 25, 2008, pursuant to Evidence Code sections 1101, subdivision (b), 1108, and 1109, the prosecution filed motions to present evidence of uncharged acts and offenses. (5CT 1019-1044, 1049-1089, 1198-1200.) After a lengthy hearing, the motions were granted in part. (10RT 1816-1874)

On November 26, 2007, the guilt phase of the trial commenced. (5CT 1015; 2RT 359.) Jury selection was conducted, in part, pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr.128. (See, 5CT 1094.) On December 12, 2007, appellant's *Wheeler/Batson*[3] motion was denied. (5CT 1127; 9RT 1724-1740.)

On December 13, 2007, the prosecution filed points and authorities in support of a

---

[2] The second amended information did not contain a count 8.

[3] *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr.890; *Batson v. Kentucky* (1986) 426 U.S. 79, 106 S.Ct. 1712.

motion to admit evidence of statements by victim Judy Palmer, allegedly reflective of her state of mind. The motion was granted. (5CT 1128-1143.)

On February 25, 2008, count 8 from the first amended information was dismissed pursuant to Penal Code section 1285. On count 12, appellant was acquitted pursuant to Penal Code section 1118.1. (5CT 1265-1266; 38 RT 6239-6240.)

On March 19, 2008, the jury found appellant guilty on count 1. The special circumstances of murder in the commission of rape and murder in the commission of burglary were found true. The sexual penetration by a foreign object special circumstance was found not true. On count 2, appellant was found guilty and the allegations of commission during a first degree burglary with intent to commit rape and during a burglary, and that there was more than one victim, were found true. Appellant was found guilty on counts 3, 4, 5, and 14. On counts 6 and 7, appellant was found guilty and the great bodily injury and multiple victims allegations were found true. On counts 10 and 16, appellant was found guilty and the multiple victims allegations were found true. Appellant was found not guilty on counts 9, 11, 13, and 15. (6CT 1397-1410, 1427-1433; 49 RT 7648-7655.)

On March 24, 2008, the penalty phase commenced. (6CT 1438-1439; 52 RT 7804.) On April 9, 2008, the jury rendered its verdict of death. (6CT 1504, 1506-1507; 61 RT 8630-8632.)

On June 9, 2008, appellant filed a motion to modify the penalty. (6CT 1508-

1518.) On June 10, 2008, the prosecution filed opposition to the automatic penalty modification motion. (6CT 1519-1525.) Appellant filed a response. (6CT 1567-1574.) On June 18, 2008, the prosecution filed a sentencing memorandum/statement in aggravation. (6CT 1528-1556.) A sentencing addendum regarding appellant's "other crimes" was filed by the prosecution on July 9, 2008. (6CT 1559-1562.)

On July 11, 2008, pursuant to Penal Code section 1368, a doubt was declared as to appellant's competency. Two doctors were appointed to evaluate appellant. (6CT 1563-1566, 1575-1578; 61 RT 8662-8690.) On November 14, 2008, pursuant to the two reports from the doctors (6CT 1579-1589), appellant was found competent. (6CT 1596-1597; 61 RT 8699-8703.)

On January 16, 2009, the motion to modify the penalty of death was denied. (62RT 8707-8714.) Appellant was thereafter sentenced to death on count 1. On the remaining counts, the following sentences were imposed:

Count 2 - stayed

Count 3 - stayed

Count 4 - 3 years (upper term)

Count 5 - stayed

Count 6 - 25 years to life (sec.667.61)

Count 7 - 8 years consecutive

Count 10 - 15 years to life (sec.667.61)

Count 14 - 8 months consecutive (1/3 mid-term)

Count 16 - 15 years to life (sec.667.61.)

(36 CT 9463-9480, 9483-9485; 62 RT 8704-8734.)

A $10,000 restitution fine was imposed. A $10,000 parole revocation fine was imposed and suspended. Other fees were assessed. Restitution was ordered. Appellant received 1,704 days actual custody credit. (36 CT 9463-9480, 9483-9485; 62 RT 8704-8734.) The commitment and judgment of death was filed on January 16, 2009. (36 CT 9430-9438.)

This appeal from the judgment is automatic. (Penal Code sec.1239, subd.(b) .)

IV. STATEMENT OF THE FACTS

A. THE PROSECUTION'S CASE

1. The Judy Palmer case

a. Judy Palmer's disappearance

Tammy Gill, 38 years old, was very close to her mother, Judy Palmer. and kept in frequent touch with her. They would typically talk on the phone twice a day. Palmer lived in a studio apartment at 7841 Reseda Boulevard, about three miles away from Gill, and would visit Gill three to five times a week in Gill's mobile home. Palmer spent a lot of time with Gill's two young sons. She was reliable and would "always call" if she was going to miss a scheduled visit with the boys. (11RT 2091-2095, 2099-2109, 2250-2252, 2256-2258.)

Palmer was "very tidy." (11RT 2099.) Her carpets, windowsills, and kitchen were always clean, as were her clothes. She always promptly took out the trash. Twice a week, Palmer would bring her laundry over to Gill's home to be washed by Gill.

During the weeks before April 17, 2004, Palmer was "really cleaning her apartment." On April 17, 2004, Gill returned clean laundry to Palmer. (11RT 2109-2115.)

Palmer had quit smoking around 1998. She thought cigarettes "stank" and would empty ashtrays at Gill's house. (11RT 2115-2116.) Gill and others, including appellant, smoked in the outside hallway when she visited Palmer. Appellant smoked cigarettes with brownish-colored filters. (12RT 2259-2261, 2303-2304.)

Palmer wore glasses to read, knit, and drive. (11RT 2117.)

Palmer was a recovering alcoholic and had been sober for 28 years. Alcoholics Anonymous ("A.A.") played a "big role" in her sobriety. Palmer attended the Valley Club in Northridge and The Nest in Van Nuys. She helped many people get sober. She tried to help appellant. She felt both alcohol and narcotics were bad. Palmer met appellant through A.A. (11RT 2117-2119; 12 RT 2264-2265.)

In early 2004, appellant was in a relationship with Judy Palmer. (11RT 2040, 2051-2053, 2060-2061, 2088-2090.) Appellant was around 43 years old. Palmer was 60. (11RT 2064.) Robert Remp, Palmer's son, "wasn't really happy" with the relationship. Appellant had said "...stuff...that made [him] worry about the relationship." (11RT 2065.)

Remp did not feel safe around appellant, who said that all his jobs "went wrong" and that he would go back and "steal stuff from them or tear the work apart." Remp eventually stopped going to family gatherings when he knew appellant would attend. (11RT 2066-2067, 2074-2076, 2083.)

Appellant did not talk to Gill about his family. (12RT 2252-2254.) According to Gill, appellant felt more comfortable around her sons than he did with the adults. (12RT 2252-2255.)

Palmer and appellant first met in 2000 and began dating in 2001 or 2002. They lived together in 2002 in Palmer's small apartment. (11 RT 2095-2099, 2119; 12RT 2164-2165, 2167, 2248-2250, 2262-2264.) In late 2003, Palmer told Gill that she was having a hard time. She thought that, because appellant would leave for days at a time, he was doing drugs and seeing someone else. Palmer had asked appellant to leave the apartment. However, because she felt sorry for him, they got back together. She tried to help him get sober. (11RT 2119-2123; 12 RT 2186.)

On March 11, 2003, there was a birthday celebration for Palmer at Gill's home. Family members (except for Robert Remp) and appellant were there. At some point, while Palmer was sitting at a table, appellant came up behind her, "...laid his forearm and his fist in front and squatted down beside [her]..." Palmer flinched. Appellant said, "I know you want to marry me." Palmer replied, "The hell I do." Appellant got up and laughed. He walked around the table and said to Palmer, "Why don't you tell her what I

got you for your birthday?" When Palmer remained silent, appellant said, "Come on. Come on. Tell her what I gave you. It's pretty and its pink." Appellant walked outside. Palmer was crying. She and appellant left shortly thereafter. (11RT 2123-2126; 12RT 2185-2186, 2255-2256.)

Gill testified that Palmer was "grossed...out" by pornography and sex toys such as dildos -- "the pink gift" appellant had mentioned -- because "they demeaned the act of making love." (12RT 2191-2193, 2269.)

Regarding Palmer's and appellant's relationship, there were times when "...they were together and then they were not together ...kind of thing." Then, the relationship "was just over." (11 RT 2067, 2088.) At one point, they started couples counseling; but then it stopped. (12RT 2171-2173, 2298-2299.)

Appellant moved out of Palmer's apartment a couple of days after the March 11, 2004 birthday party. He was "out on the street." (12RT 2269, 2271, 2301.) After moving out, appellant continued to telephone Palmer, "bang[ ] on her door," and "show[ ] up at places she was at." (12RT 2272-2273.) He said he would commit suicide if he could not be with her. Palmer did not want him back. (12RT 2301-2303.)

April 3, 2004, was Tammy Gill's birthday. She and her husband were preparing to go out. Palmer was there to watch Gill's sons. Appellant telephoned, "frantic" to speak to Palmer. Gill answered. Palmer was "trying not to be around him" because he kept showing up at places where she would go. Therefore, Gill told him that under no

circumstances was he going to talk to Palmer and not to call back. After Gill hung up, appellant called on Gill's cell phone, again "frantic" to talk to Palmer. Gill told him not to call anymore. Gill looked at Palmer, who nodded and said, "I wish the asshole would leave me alone." Palmer did not use profanity unless she was very angry. (12RT 2186-2190, 2300-2301.)

Gill testified that she had seen appellant working on some wooden stairs in her mobile home park. In staining the wood, appellant used clear latex gloves. (12RT 2210-2211.)

In February and March of 2004, appellant, a handyman, was doing tile work for Robert Remp at Remp's house. They agreed on $500 as payment for the work. But, as the work progressed, it became apparent that a tile saw was needed. Remp bought a saw for $500. He and appellant agreed that appellant could keep the saw as payment for the job. Remp gave it to appellant. (11RT 2040-2043, 2052-2055, 2065-2066, 2076-2080.)

Appellant, however, was not happy with the tile saw. "..He wanted the best which ran about $700..." Appellant was "pretty upset" and told Remp that "...he could really hurt my mom." (11RT 2043-2044, 2055, 2080-2083.) Appellant "...kind of dis-appeared..." and never finished the tile job. Remp saw appellant once thereafter. (11RT 2055-2057, 2060, 2085.)

On April 5, 2004, around 6:00-7:00 p.m., Officers Giron and Mesa responded to a domestic disturbance at 7841 Reseda. However, they did not respond to a particular

apartment. They left. (17RT 2887-2888, 2897, 2901-2904.)

Later that evening, at around 10:00 p.m., in response to another domestic disturbance call, Officers Giron and Mesa and two additional officers again responded to 7841 Reseda, this time to apartment 308, Judy Palmer's apartment. Palmer was outside trying to get into her apartment. She said that her ex-boyfriend had forced himself into the apartment, breaking the doors (which did not appear to have been damaged), and was refusing to let her in. She wanted him out. She mentioned that, earlier that day, she had taken two sets of keys from him. The officers knocked on the door without a response for about five minutes. The apartment manager gave them some keys and the officers opened the door. (17RT 2888-2892, 2904-2905, 2908, 2909-2910.)

Inside the apartment, the officers found appellant in the bedroom. Appellant pulled a narcotics pipe out of his shorts pocket. A set of keys to the apartment was found in his underwear. He was arrested. (17RT 2892-2986, 2905-2908.) Appellant was released from custody nine days later on April 14, 2004 at 4:01 p.m. (17RT 2912.)

In early 2004, Remp was providing Palmer with a white, 1999 Ford Escort. He and Palmer had the keys. Remp had not specifically given appellant permission to drive the car, but never told appellant he could not drive the car and did not object when he saw appellant driving it. (11RT 2044-2046, 2057-2058.)

On Thursday, April 15, 2004, Palmer called Remp saying that the Escort was missing and that she wanted make a report. The two of them went to the police station,

where Palmer filled out a report. On the evening of the next day, Friday, April 16, an officer called Remp and said the car had been recovered. Remp called Palmer and they made arrangements to pick up the car on Sunday, the 18th, or Monday, the 19th. On Saturday, April 17, 2004, they agreed to meet at the police station on Sunday at 10:00 a.m. (11RT 2046-2050.) Later, Palmer was supposed to take her grandsons to play. (12RT 2197-2198.)

On April 15, 2004, because the Escort had gone missing, Robert Main, vice president of Canoga Rebar, Inc., Palmer's employer, let her use a company truck, a white 2002 Ford Ranger. The Ranger had a chrome or diamond-plate metal toolbox in the back, behind the cab. He gave Palmer one set of keys. (11RT 2051; 12RT 2138-2141, 2145, 2148.) Main testified that Palmer was an "exemplary, reliable, punctual, just exemplary" employee. (11RT 2139, 2150.)

In the weeks before April 17, 2004, Palmer discussed with her good friend, Judi Chapman, her relationship with appellant. Palmer believed that appellant, for purposes of revenge, had taken the Escort. Palmer said that the relationship "was not ongoing." Palmer told Judi that, after the breakup, appellant broke down her door and ripped the phone out of the wall. Appellant had been taken into custody as a result. After appellant was released, Palmer told Judi that she was afraid of appellant and that if anything happened to her "...to look at him, that he did it." (12RT 2156-2162, 2167-2168, 2175.)

Robert Main, Palmer's employer, had given Palmer two theater tickets for a

musical show on the weekend of April 17, 2004. (11RT 2151-2153.) In the late afternoon of April 17, 2004, around 4:00-5:00 p.m., Palmer asked Judi if she wanted to go to the show. Judi declined. Palmer also said that she was afraid of appellant, that he might come and hurt her, and that she was thinking about going to a motel. (11RT 2161-2162, 2169-2170, 2174-2176.)

On the evening of April 17, 2004, Palmer went over to Gill's house for dinner, arriving around 6:00 p.m. Palmer drove the white Ford Ranger over to Gill's. Palmer mentioned that, because the Escort had been stolen by appellant, she was not parking the Ranger in her place at her apartment, but was parking it out front. (12RT 2193-2196.) Prior to coming over to Gill's, Palmer went to Wal-Mart and bought some yarn. (12RT 2196-2197.)

When Palmer arrived at Gill's for dinner, she was happy that the police had found the Escort. However, she was quiet and "not herself." She was convinced that appellant had taken the Escort. She was crying. Palmer left between 8:00-8:45 p.m. in the Ford Ranger. Gill had given her $200 for a planned trip to Disneyland. She was tired and wanted to watch a show on television that started at 9:00 a.m. She had been wearing her glasses. (12RT 2196-2200. 2279-2281, 2304-2305, 2308-2310.)

On Sunday, April 18, 2004, Remp was at the police station at 10:00 a.m. to pick up the Escort. Palmer never showed up. Remp called his sister, Tammy Gill, in an effort to find out where Palmer was. He eventually got the Escort out of the impound yard. (11RT

2050-2051, 2058, 2091.)

On Sunday morning, April 18, 2004, Gill did not receive her usual 8:30 a.m. telephone call from her mother. Gill's sister-in-law called and said she had been calling Palmer, but there was no answer on her house or cell phones. Gill made phone calls in an unsuccessful attempt to locate her mother. (12Rt 2200-2201.)

At around 10:00 a.m., Gill and her husband drove over to Palmer's apartment. They did not see the Ford Ranger. Although the apartment complex is gated, Gill merely "wait[ed] for somebody to go out and they let you in." Because she did not have a key to Palmer's apartment, Gill knocked on the door and yelled. There was no response. (12RT 2201-2203, 2284.)

Gill then went to the Valley Club. No one had seen Palmer since Friday morning. Someone gave Gill a copy of a six or seven page restraining order that Palmer had filled out. Gill then went to the police department, arriving around 12 noon. She told an officer about Palmer's disappearance, the restraining order, and that Palmer had been "fearing her boyfriend." The police put out an "A.P.B." for Palmer, appellant, and the Ford Ranger. Gill then went home and "started making phone calls." She could not find Palmer. (12RT 2203-2208.)

Later on the evening of the 18th, Gill contacted the manager of Palmer's apartment complex. A locksmith was able to open the door to Palmer's apartment. The door appeared to have been previously damaged and repaired. (12RT 2208-2209, 2284, 2286.)

When Gill entered Palmer's apartment, she noticed that the kitchen was not as Palmer usually kept it. The apartment had a strong smell of Pinesol. There was a Pinesol bottle in the apartment. Palmer's flip-flops were side-by-side under the coffee table. Her folded-up glasses were on the table. This was unusual because Palmer would keep them open, without the earpieces folded, so that she could put them on with one hand while crocheting. Under some books on the table was a restraining order. (12RT 2209-2215, 2286-2290.) The television and all the lights were on. A floor fan was going, which was unusual because the window was closed. (12RT 2244-2246, 2297-2298.)

In Palmer's bedroom, Gill did not see the blue/mauve/tan quilt she had given Palmer for Christmas. The new tan sheets were missing and old ones were on the bed. A pink dildo was on the counter in the bathroom. Gill was embarrassed and did not want anyone to see it. Therefore, she put it in the cabinet under the sink. (12RT 2217-2223, 2289.) She subsequently told the police about the dildo. (12RT 2243, 2246-2247.)

Gill's brother and his wife entered Palmer's apartment after Gill left. (12RT 2291-2294.)

On her computer, Gill made missing-person flyers bearing Palmer's picture. The next day she posted them and sent copies to law enforcement. She spoke with Detective Perez from missing persons. (12RT 2242-2243.)

On a later occasion, Gill and her sister-in-law, Vicky Remp, went back into Palmer's apartment. Remp found a crack pipe on or in the couch. (12RT 22162217,

2306-2308.)

Theresa and James Hoeft manage the Storage USA storage facility in Chatsworth. They lived in an apartment at the facility. James "did mostly maintenance." Starting on September 15, 2003, appellant and Palmer rented a storage locker. Theresa would see them when Palmer came to pay the bill. Their locker, no. 704, was near the apartment. A log was kept regarding the unit. (13RT 2332-2336, 2351-2353, 2367-2369.)

Once, Theresa saw appellant at the facility in the company of a "very unkempt" woman. (13RT 2350-2351.)

Theresa Hoeft saw appellant at the storage locker "pretty much every day since he rented it." He would bring his dog, a Jack Russell terrier, with him. Once, prior to March 11, 2004, appellant came without the dog. When Theresa inquired, appellant said he did not have the dog. Later, when she again inquired, appellant said, "She's got it and if I ever want the dog back, I'll probably have to kill her to get it." Theresa thought he was referring to Judy Palmer. (13RT 2338-2341, 2361.)

The last payment on Palmer's and appellant's locker was made in person by Palmer on March 11, 2004. As Theresa was asking Palmer about the dog and appellant's "kill [her] for it" comment, Palmer started shaking. Appellant walked into the office, grabbed Palmer by the elbow and pinched her "real hard." She looked at Theresa "real scared." (13RT 2340-2342, 2362.)

The next payment on the unit 704 was due on April 1, 2004. Because the rent had

not been paid, appropriate notices were sent to Palmer and appellant. (13RT 2342-2344, 2397, 2354.) Access to the facility via a four digit number on the facility's entrance key pad was cut off. (13RT 23345-2346, 2352.) However, people could still get in by following someone whose number was still valid. (13RT 2346-2349, 2355-2356.)

The records from Storage USA for April 17, 2004 showed that appellant was trying to get out of the facility at 5:01 p.m. and again at 6:07 p.m. (13RT 2349-2348.)

On April 19, 2004, James Hoeft noticed that there was no lock on unit 704. (13RT 2344, 2358, 2371-2373, 2377.)

b. Subsequent investigation

On April 21, 2004, at around 10:00 p.m., Officer Ortiz went to the Townhouse Motel at 6957 Sepulveda Boulevard, room 104. The motel was south of Roscoe Boulevard. Appellant answered the door. He seemed surprised to see the police. Appellant had scratches on his face. (17RT 2937-2942, 2950-2954.) Appellant was detained and taken to the Van Nuys police station. (17RT 2949.)

Officer Perez responded to the police station at around 1:30 a.m. and saw appellant. Appellant "was a lot thinner and more muscular and a little younger" than at trial. He had three scratches on his left cheek. There were two scratches to his inner left arm. (17RT 2954-2960.) Appellant was released on April 22, 2004. (17RT 2962.)

On April 26, 2004, Detective Rains went to Palmer's apartment "just to see the apartment, the layout..." He did not see any sign of forced entry. The apartment appeared

"very orderly and cleaned and neat." He returned later that day with Tammy Gill and Detectives Park and Swanston. (35 RT 5874-5878; 37RT 6054-6057, 6060-6062, 6080, 6103-6105, 6128-6130; 39RT 6328-6332.) Gill noticed that pillows were missing from Palmer's bed. (12RT 2220-2221, 2290-2291, 2294-2297.)

c. Palmer's apartment, the Ford Ranger, and appellant's Bronco.

On May 6, 2004, at about 9:45 a.m., criminalist Eugenio went with Detective Rains to 7841 Reseda Boulevard, apartment 308, Palmer's apartment. (17RT 2988-2998.) The living room window was closed. (17RT 3023.) Photographs were taken. After moving the coffee table, Eugenio saw a stain on the carpet. Evidence tags were placed next to items of evidence such as stains. Evidence from blood stains was collected from one place on the wall in the living room, and one place on a piece of furniture. Pieces of the carpet containing blood stains were cut and collected. Folded reading glasses were on the coffee table. (17RT 3000-3106; 18RT 3158-3173, 3178-3179, 3182-3184; 26 RT 422-4224, 4239, 4245-4246, 4253; 35RT 5878-5889; 36RT 5991-5990; 37RT 6062-6065.) Other items of evidence were photographed and collected. (24RT 4235-4238.)

Eugenio also checked the bathroom in the apartment. A toothbrush and a hairbrush were collected for possible DNA comparison. (17RT 3016-3020; 18RT 3174, 3185.) There were no odors in the apartment. (24RT 4223-4224, 4226-4227.) A picture was taken showing Eugenio holding the dildo over the sink in the bathroom. (17RT

3020-3022; 18RT 3173-3174, 3181-3182.) The dildo had been located underneath the sink in a cabinet. Eugenio placed it "back where it was." (18RT 3177, 3179-3180, 3182; 24RT 4224-4226; 36RT 5993-5994.)

On May 13, 2004, Eugenio returned to Palmer's apartment with Detective Park and a photographer, this time "to look at the scene with respect to a possible sexual assault." He was looking for serology-type evidence, i.e., bodily fluids, semen, blood. (18RT 3124-3126, 3185-3190; 24 RT 4227, 4239-4245; 36RT 5996-5999; 37RT 6065-6066, 6076-6077.) Using a lumilight and special goggles, Eugenio picked up the presence of semen on the couch and the rug. The areas tested presumptively positive for semen; therefore, a cutting was made of the pad under the area where a carpet sample had previously been taken. (18RT 3135-3138; 24RT 4231-4232, 4238, 4242, 4254.) A "pink novelty item," i.e., the dildo, was also collected. (18RT 3178-3139, 3193-3195.) Other evidence was collected. (24RT 4248-4249.)

Pictures of a truck similar to the white Ford Ranger were on "wanted posters." (36RT 6017-6018.)

On June 4, 2004, Officer Galvan received a call regarding a stolen and abandoned vehicle. He went to Haskell Avenue, south of Roscoe, and saw the white 2002 Ford Ranger. It was next to the Anheuser-Busch factory. Galvan impounded the truck, which was taken to the impound yard. (16RT 2842-2846, 2850-2852.) There is a Motel 6 located just north of the location where the Ranger was parked on Haskell. (33RT 5519-

5521, 36 RT 6014-6016.)

At the impound yard, inside the Ranger, Detective Rains saw what "...looked like the pine needles or what I later...learned were Tamarisk trees from the crime scene." Similar plant material was in the truck's bed. Rains saw and collected similar plant material at the location where Palmer's body had been found. (36RT 6006-6013; 37RT 6892-6897.) There were markings on the Ranger as if there had been a tool box on the bed. (36RT 6016-6017.)

From May 21, 2004 through June 1, 2004, the Ranger had received nine citations for parking and registration violations. All the citations were for parking in the 8200 block of Haskell. (24RT 4190-4205, 4209, 4214-4215.) The Ranger had been parked on the side of Haskell that did not have address numbers. Therefore, the citing officer would enter on the citation the number of the building across the street from the vehicle or the block of the street upon which the vehicle was located. If different officers wrote the citations, the addresses used might be different. (24RT 4203, 42120-4214; 33 RT 5501-5510, 5514-5519, 5522-5526, 5533.)

On June 4, 2004, criminalist Eugenio searched the white Ford Ranger. Plant material was found in the bed inside the cab on the floor between the door and the passenger seat. (18RT 3037-3043, 3046-3048, 3103-3104, 3158.) Eugenio also found a cigarette butt, an empty bottle, and a moving blanket. In the bed of the truck, although there was no toolbox, there were screw holes where there could have been a toolbox.

There was damage to the driver's side door. (18RT 304-3105.) There was no blood stain or odor of Lysol in the Ranger. (24RT 4220-4222.)

When Robert Main recovered his company's white Ford Ranger, it was not driveable. "[I]t had a lot of damage, scratches on the side..." The toolbox was missing. A blue mover's blanket was in the bed. Main did not recover the keys to the truck. (12RT 2142-2145, 2148-2149.)

Dr. James Bauml, a botanist (18RT 3051-3055, 3072), testified that the plant material found in the white Ford Ranger was from the tamarisk tree, *tamarix aphylla*, a wild plant. He has never seen the tree growing in the Los Angeles area. It is generally found in the desert region, including Riverside County. The available information does not show tamarisk growing in the San Fernando Valley. (18RT 3055-3067, 3083, 3087-3091, 3096–3097.) Tamarisk generally grows at an elevation of roughly 200 meters, or 630 feet in arid zones. (18RT 3067-3069, 307703080.) Vegetation located by some railroad tracks near where Palmer's body had been found "looks like it could be Tamarisk." (18RT 3085-3086, 3095; Defense Exhibit E2.)

On April 27, 2004, appellant's Bronco was searched at the crime lab's vehicle processing facility. Photographs were taken. There was no odor of Lysol. In the back of the vehicle were, among other things, a shovel, a wrench, construction material, towels, maps, and an order of probation dated April 7, 2004 referencing appellant. No blood was found in the Bronco. One of the maps was open to an area "that was out in the

desert...east of LA." (18RT 3109-3122, 3142-3155; 24 RT 4219-4230; 35RT 5859-5874; 37RT 6066-6074, 6083-6089.) In the front seat, a telephone card, address book, and cassette tapes were located. (18RT 3122-3124.) On June 4, 2004, Eugenio collected some pine needles from the top of the Bronco. (18RT 3155-3156.)

On April 22, 2004, Eugenio collected evidence from room 246 at the Motel 6 regarding four red stains that tested presumptively positive for blood. (18RT 3139-3142; 24RT 4217-4218, 4249-4250.)

In late 2007, criminalist Eugenio revisited Palmer's apartment with the prosecutors. He subsequently returned. Diagrams of the apartment were made. (17RT 2998-3004.)

d. Palmer's body is found in the desert on May 11, 2004.

On May 11, 2004, Jason Warfield and his partners, paramedics with American Medical Response, were at an AM/PM mini-mart on Gene Autry Trail by Interstate 10 in the Palm Springs area. As they were waiting to respond to a call, a Hispanic male approached. Although the man was not fluent in English, "it was pretty well [sic] to understand." (28RT 4723-4726, 4742.) The man asked them to take him to "the dirt road by some trees." The paramedics drove as directed and got out of their vehicle. (28RT 4727-4729.)

As Warfield approached on foot, he smelled "something...rotting." He got close and saw a body under some vegetation bundled up inside a foam mattress bound with

rope. Warfield contacted his dispatch and told them to notify the police. When the police arrived 15-20 minutes later, Warfield pointed out the body. (28RT 4729-4733.)

At about 9:13 a.m., Officer Vega, a Palm Springs police officer, responded to the area of Gene Autry Trail and Salvia regarding "a possible dead body." The area was "mostly open desert" by some railroad tracks. There are tamarisk trees nearby. There was a raised sand berm by this vegetation. When Vega arrived, personnel from American medical Response were there. Francisco Correa, whose Spanish was "not perfect, but good," was also there. (27RT 4512-4519, 4537-4538; 28RT 4859-4862.)

At about 9:44 a.m., Palm Springs police officer Troy Castillo arrived at the area of Gene Autry Trail and Salvia. There were strong winds and the "sand was blowing very bad." The wind promptly blew away any tracks left in the sand. His description of the area was similar to Officer Vegas'. A man named Correa and Officer Vega were there. The roadway and surrounding area were soft sand. (27RT 4525-4544, 4640-4647.)

Officer Vega showed Officer Castillo a body, which was under some vegetation. (27RT 4536, 4544-4545, 4645-4648.) There was a "toppled over" shopping cart nearby. (27RT 4546, 4588, 4605.) "Egg crating material" and a blue sleeping bag were wrapped around the body and tied with rope. Castillo saw "a set of hands" inside. The body was clad in jeans, which had been pulled down to the upper thigh area. The underwear was "fully on." He testified, "...there was a dead body in there...the person was dead." Evidence markers were placed at the scene. Evidence was collected and booked.

Photographs were taken. (27RT 4581-4587, 4614-4615, 4621-4622, 4649-4653, 4671-4675.)

The evidence that was collected included: the foam egg crate material, sheets, a stick, a blue sleeping bag, water bottles, a white plastic bag in the bottom of the shopping cart, a white towel in the shopping cart, a second white plastic bag, a "printed letter," a plastic bag in the victim's hands, a black T-shirt, a bra, a piece of latex, a laundry tag, rope, yarn. (27RT 4587-4591, 4603-4618, 4653-4664, 4676-4690; 28RT 4734-4738.) These items were delivered to criminalist Alicia Lomas-Gross at the Department of Justice lab in Riverside. (27RT 4618-4633; 28RT 4744-4747.)

Gill identified the blue quilt found at the scene as the one she had given Palmer. (12RT 2228-9.) She recognized other items found at the scene as belonging to Palmer -- pillowcases, towels, washcloths, sheets, an "Indian blanket," a throw blanket, a blue sleeping bag, foam "egg-crating" material. (12RT 2229-2239.) Four torn-up photographs found at the scene were of appellant's Jack Russell terrier, Rudy. (12RT 2240-2241, 2263.)

Rains testified that several items at the scene where Palmer's body was discovered matched items in her apartment -- a pale green Cannon brand washcloth and blankets. (36RT 6000-6006.)

Detective Rains testified that it was about 120 or 130 miles from the police station to where Palmer's body was found. (36RT 6000.)

On May 12, 2004, Dr. McCormick conducted an autopsy on Judy Palmer's body. He testified that the body was wrapped in a number of covers and was bound with rope, which was also wrapped around the body. The rope, wrappings, clothes, and other items were removed from the body and collected for the police. (30RT 4989-5001, 5016-5017.)

As to the body itself, only 10-20 percent of the soft tissue was intact. The body had undergone extensive decomposition and was a "largely skeletonized body." There were two small fractures of the left seventh rib, likely suffered shortly before death. (30RT 5001-5007, 5041, 5047-5048.) Because of the condition of the body, Dr. McCormick could not determine the cause of death or the time of death. The condition of the body is consistent with being dumped in the desert shortly after April 17, 2004 and being found on May 11, 2004. Dr. McCormick did not believe that Palmer died from natural causes. "Homicidal violence" was not ruled out. (30RT 5009-513, 5022-5023, 5038, 5048-5049, 5052-5053.)

Officer Castillo attended the autopsy on May 12, 2004 and watched as evidence was collected. The evidence was given to Castillo after the autopsy. It was delivered to criminalist Lomas-Gross. Photographs were taken. (27RT 4623-4640, 4675, 4690-4697; 28RT 4758-4774, 4747-4748.)

e. Appellant's arrest and his shopping carts in the park

On May 20, 2004, at about 1:00 p.m., Officer Terrazas and his partner arrested appellant, who was on foot. Detectives Park and Rains arrived and took appellant into

custody. (24RT 4185-4189.)

Later, Detective Park asked Officer Habibi to transport appellant from the West Valley Station to the jail at the Van Nuys station. Park asked Habibi to stop by Louise Park on the way. When Habibi got to the park with appellant around 5:00 p.m., he stopped. Detective Hickman and another officer were there, standing next to two shopping carts. One cart contained a green duffel bag; the other a black leather duffel bag. Appellant indicated that the bags were his. (37RT 6022-6026.)

At the request of Detectives Park and Rains, Detective Hickman had gone to Louise Park and taken possession of the green and black duffel bags that belonged to appellant. The bags were in two shopping carts. (28RT 4864-4867, 4900-4902.) There were numerous items in the black leather duffel bag, including papers bearing appellant's name, one of which was an "LACDMH notice of privacy practice, acknowledgment of receipt," a "missing adult" flyer regarding Judy Palmer, and two pairs of white Champion brand socks. (28RT 4869-4885.)

The green duffel bag had "Baker, P.W." and "U.S." stamped on it. (28RT 4885-4886.) Forensic technician Wilson, who spent 26 years in the Navy, testified that it was a standard issue United States Navy duffel bag. (29RT 4944-4945.) The green duffel bag contained clothes, including white Champion brand socks. Other items were found in the shopping carts which had contained the duffel bags. (28RT 4886-4900.) Detective Hickman did not see any blood on any of the items. (28RT 9907-4909.)

Some of the items in appellant's duffel bags were similar to items found in Palmer's apartment and where her body was located, including a blue sleeping bag, paperwork, and washcloths. (37RT 6105-6111.)

f. Criminalist Alicia Lomas-Gross

Alicia Lomas-Gross is a criminalist at the Department of Justice lab, also known as the Jan Bashinski lab. She has worked in the DNA data bank section. She also had crime scene training. In 2004, she was working in the forensic biology section. (19RT 3200-3207; 23RT 4019-4020.) She has training regarding detecting blood and semen and taking samples of blood and semen-related evidence. (19RT 3207-3215.)

On May 11, 2004, Lomas-Gross went to where Palmer's body had been discovered. Riverside County coroner's office personnel and other law enforcement personnel were there. It was "very warm and very, very dirty, windy." Sand was blowing around. There was not "much of anything besides sand." There was some vegetation in the area. (19RT 3215-3220, 3367-3381, 3383.)

Palmer's body was wrapped in a yellow foam pad. The body was badly decomposed. (19RT 3386-3388, 3390.)

Lomas-Gross watched as evidence was collected by others. There was a shopping cart containing a white towel nearby. A white plastic bag was on the bottom of the cart. There was a second white plastic bag. Also at the scene were foam egg-crating material, a blue sleeping bag, plaid pattern sheets, a wooden stick, a native American-type

patterned blanket, a black plastic bag, water bottles. (19RT 3221-3231, 2388-3396, 3401-3408.) The shopping cart was swabbed. (19RT 3395-3396.)

Palmer's body was found inside the egg crate material and sleeping bag. A plastic bag was underneath her hands. Palmer was wearing an opened bra. Other items were found: a portion of a latex glove, a blue laundry tag. (19RT 3231-3234, 3239, 3240, 3397-3400; 2RT 386-3787.)

Lomas-Gross and others attended the autopsy of Palmer's body on May 12, 2004. The body had decomposed and weighed only 22 pounds. Fingernail clippings were collected. She observed the procedure and saw evidence being collected. (19RT 3241-3243, 3339, 3409-3415; 22RT 3754-3755.)

On May 13, 2004, at the lab, Lomas-Gross began examining items from the scene. (19RT 3241, 3243.) She did not find any evidence of semen stains on the foam egg-crate material. (19RT 3234-3236.) Nor did she find any semen or blood on the native-American patterned blanket or blue sleeping bag. (19RT 3237-3238.)

Lomas-Gross examined the white plastic bag (no. 441-10) found on the bottom of the shopping cart located at the scene. (19RT 3243-3248; 22RT 3756-3763.) There were numerous items in the bag. A white pillowcase with a pillow inside and two separate pillowcases tested "weakly positive for blood." These items were negative for semen. (19RT 3348-3257l 22RT 3897-3906.) Three balls of yarn and a white plastic garbage bag were in the white bag, as was a dental chart for Judy Palmer. Also in the bag were an

ankle sock, a notepad, a broken chapstick tube, balled up/stuck together rubber gloves, three paper towels, one of which screened positive for blood, additional pillows in pillowcases, which were positive for the presence of blood. Some of these items were swabbed. (19RT 3257-3264, 3268-3274, 3280-3281.)

Also in the plastic bag (no. 440-10) were two dish towels, a floral one and a yellow one, held together by tape such that "...one could stick your foot in there," like "booties." The yellow towel screened positive for semen or seminal fluid. A piece of the towel was cut out and DNA was extracted. Sperm cells were observed. (19RT 3274-3280; 22RT 3774-3778; 23RT 4050-4051.)

Lomas-Gross also looked at the items in the second plastic bag found at the scene (no. 441-11). Inside the bag was an aqua-colored blanket, several areas of which screened positive for blood and semen. Cuttings were made and sperm cells were extracted. (19RT 3282-3290; 23RT 4051.) Also in the bag were women's crocheted gloves and two dirty Champion brand socks, all of which screened positive for blood. (19RT 3391-3295.) A pair of Fila brand shoes was found in the bag, one of which screened positive for blood. (19RT 3300-3302.) Other items found in the bag screened positive for blood. (19RT 3310-3311, 3316-3317, 3324-3325, 3335-3339.) Four photographs, each torn into four pieces, were found in the bag. (19RT 3330-3331.) Also in the bag was a photograph of appellant and a dog with a dedication or inscription on the back which read, "Judy, I'll always love you, no matter what. I miss you very much.

Love, Paul B." Another photograph did not have anything written on it. (19RT 3331-3334.) A "LACDMH notice of privacy practices" bearing appellant's name was found in bag 441-11. (19RT 3299.) Other items were found in the bag including three cigarette butts, yarn, a phone card, and three latex gloves. (19RT 3292, 3298, 3299-3300, 3202-3331, 3335-3338.) Some items in bag 441-11 were swabbed by Lomas-Gross in 2007. (19RT 3308-3310, 3319, 3727-3328.)

After the autopsy, Lomas-Gross received evidence from the coroner: a white sock, which screened positive for blood, a woven blanket, a blanket with a tiger pattern, yellow nylon rope with red and greet accents (the rope had been removed from the body), water bottles (which were swabbed), a gray U.C.L.A. sweatshirt with uneven sleeves, two washcloths, a bra, yarn and a paper towel from the right hand of Palmer, an unripped pair of jeans, underwear. (19RT 3339-3357, 3415-3420; 27RT 3766-3772, 3793-3820.) The crotch area of the underwear screened negative for seminal fluid. (19RT 3358-3359, 3420; 22RT 3779-3786.) Sperm was found on cuttings from an aqua-colored blanket. (22RT 3823-3839.) Other items were examined. (22RT 3839-3873, 3883-3291; 23RT 3939-3942, 3951-3964, 3967-3879.) A blood stain was found on a sneaker and a watch and some socks. (22RT 3841-3873, 3883-3891; 23RT 3917-3942, 3951-3964, 3967-3879.)

After examining the evidence, Lomas-Gross prepared documentation for items that were going to be sent to other entities for further analysis and evaluation. (23RT 3942-

3949, 3980.)

Three years later, in 2007, Lomas-Gross again examined the underwear that Palmer had been wearing. She screened two other portions of the underwear and saw a "purple color change." She "concluded it was inconclusive." The two areas were cut out of the underwear, properly sealed in an envelope, and sent to the lab. The cuttings were later sent to the Orchid Cellmark lab in Texas. (19RT 3359-3366; 23RT 4003-4011, 4022-4023, 4032-4034. In 2007, the jeans screened negative for seminal fluid. (19RT 3357; 23RT 4102-4014.) Other items were also re-examined in 2007. Swabs were obtained from three latex gloves and two other latex gloves. Some items were prepared for shipping to another lab. (22RT 4014-4019.)

g. DNA evidence

Angela Zdanowski is a criminalist at the Los Angeles Police Department in the serology DNA unit. She received and reviewed in 2004 and 2005 various items of evidence. She shipped the items to the Department of Justice lab. (23RT 4064-4076; 24RT 4125-4164.)

Zdanowski also tested various items of evidence that had tested positive for blood -- a cutting from a rug, a cutting from a rug pad, and two swabs. Cuttings from a couch and rug, and a swab from the dildo tested positive for sperm and epithelial cells. The swabs and rug pad cuttings were sent to Cellmark's lab in Germantown, Maryland. (23RT 4076-4088.) Zdanowski requested that the lab do a DNA profile on Palmer and

compare it to DNA on the items of evidence. (23RT 4088-4090.) Buccal swabs collected from appellant on October 24, 2004 were sent to the lab. (23RT 4090-4091; 37RT 6029-6030.)

Other items were subsequently tested. A knife and its sheath were negative for the presence of blood. (24RT 413404140.) Carpet cuttings screened positive for blood. (24RT 4140-4151.) One of the carpet cuttings was positive for semen and sperm cells. (24RT 4152-5155.) Swabs tested positive for blood. (24RT 4148-4151.) Rug padding screened positive for blood. (29RT 4155.) Items were sent to the Orchid Cellmark lab. (24RT 4161-4164.) A dildo tested positive for sperm and epithelial cells. No cells were found on a cigarette butt. (24RT 4164-4177.)

In 2007, reference samples/swabs were sent to Orchid Cellmark. (24RT 4173-4174.)

Theresa Pollard is a senior criminalist at the Department of Justice/Bashinski lab. She conducts DNA short tandem report ("STR") analyses. She is familiar with how the department works and how it receives and logs in evidence. The evidence is documented. The evidence samples are kept safe -- "Our lab is very secure." (21RT 3597-3610, 3681-3685.) There are protocols in place to maintain the integrity of the evidence and to guard against cross-contamination. (21RT 3610-3614.)

Pollard testified regarding sperm and epithelial cells and extracting DNA from buccal swabs. She testified that separate DNA profiles can be extracted from a mixture of

two persons' DNA. She uses Profiler and Cofiler kits to amplify the DNA. Profiler uses nine loci, cofiler six. Only identical twins have matching DNA. Statistics are used to calculate probabilities of a person having a particular profile. (2RT 3614-3619.)

Pollard obtained Palmer's fingernail cuttings and extracted Palmer's DNA profile. An allele at locus 18 did not come from Palmer. Appellant had an 18 at that locus. However, Pollard could not say that it was, in fact, appellant's DNA. The report was sent to Lomas-Gross. (21RT 3619-3631, 3687-3697.)

Appellant's DNA profile was obtained from a buccal swab. His DNA profile did not match swabs taken from a shopping cart. (21RT 3702-3703.) He was excluded as to the DNA on the water bottle. (21RT 3702-3703.) Appellant's DNA matched sperm and non-sperm DNA fractions found on a cutting from an aqua-colored blanket. Another person, not Palmer, was a minor contributor to the non-sperm fraction. There was sperm on the blanket. (21RT 3638-3642, 3703-3707.) Appellant's DNA matched DNA on two out of three cigarette butts. (21RT 3642-3649, 3678-3679, 3709-3711, 3715.) Palmer's DNA profile matched that found on a Champion brand sock. (21RT 3699-3651.) A sperm and non-sperm DNA fraction were found on cuttings from a "towel bootie" and a dish towel found with Palmer's body. Appellant's DNA profile matched the sperm fraction but there was a possibility that there was another source on the bootie. Appellant was a major contributor to the non-sperm fraction; Palmer was a minor contributor. Sperm was found on the towel. (21RT 3651-3656, 3679, 3715-3717.) The odds that

some male other than appellant contributed to the DNA were astronomical. (21RT 3679-3681.)

The Bashinski lab does not perform YSTR testing, which was a relatively new form of DNA testing. It is generally used when there is an overwhelming amount of female DNA "so that [the] male gets drowned out." (21RT 3656-3657, 3674, 3675.)

Pollard testified that a woman's underwear can be a source of DNA evidence. Pollard extracted partial STR sperm and non-sperm fractions from two cuttings from Palmer's underwear. The sperm fraction was consistent with appellant; he could not be excluded. The non-sperm fraction was consistent with Palmer. Pollard suggested that the cuttings be forwarded to another lab for YSTR testing, because her lab did not do such testing. YSTR testing is helpful where "...the victim is female and there is the presence of a male that was detected with the STR...YSTRs, it's perfect for that type of case because it is only going to detect the male." (21RT 3657-3662, 3675-3676, 3719-3732, 3745-3747.)

Pollard tested swabs taken from the inside of two latex rubber gloves and three other latex gloves. Low level DNA from an unknown male was found. DNA from the three gloves was consistent with appellant. She again recommended YSTR testing. (21RT 3662-3667, 3674, 3676-3677, 3736-3738.)

Other items that were tested bore Palmer's DNA and male DNA. (21RT 3667-3670, 3732-3736, 3738-3740.)

h. Dr. Rick Staub - DNA

Dr. Rick Staub is the senior manager and laboratory director of Cellmark Laboratory in Dallas. He is a genetic and DNA scientist. Cellmark does forensic DNA testing. The Cellmark lab in Germantown, Maryland closed as a result of financial and business decisions. Staub was not the director of the Germantown lab nor did he have any administrative, management or quality control responsibilities. He did not supervise any of the testing or analyses at the Germantown lab. (20RT 3425-3427, 3433-3434, 3439, 3537-3539; 36RT 5906, 5932-5933, 5985.)[4]

Staub discussed how a person could leave his or her DNA at a crime scene and from what type of cells DNA can be obtained. A person's blood is an "excellent source" of DNA. Saliva also has "a lot of D.N.A. in it." DNA is found in semen and sperm. In a sexual assault, it is common that the man's sperm will be mixed with biological matter from the woman. In such a case, two distinct DNA profiles may be obtained. (20RT 3427-3433.) Staub testified regarding the decomposition of DNA. He testified that a man's blood DNA profile matches his semen DNA profile. Staub explained DNA profiles. (20RT 3451-3455, 3580-3581.)

Staub testified about how DNA samples are received, documented, and logged in

---

[4] Staub testified that Sara Blair, an analyst at the Germantown, Maryland lab had been terminated for falsifying information. She did not work there when the analysis in this case occurred. There were no similar problems at the Dallas lab. (20RT 3539-3540; 36RT 5893-5894, 5963-5964.)

at the Dallas lab. Staub claimed that the Germantown lab typically followed the same documentation and screening protocols. He knew "a pretty good amount" about what "went on" in the Germantown lab. Staub testified that evidence specimens are tested before reference specimens. (20RT 3433-3441, 3446-3449.) The Germantown lab records regarding the instant case were properly maintained. (20RT 3449.) Regarding the analysis at Germantown, Staub claimed he "looked at their entire case file, except E-data." He relied on the entire case file in testifying. (36RT 5890-5893.)

In Germantown, Catherine Leisy was assigned to the instant case. Staub reviewed her documentation (People's Exhibit 313), which referred to "Paul Baker," and claimed it had been properly maintained. However, Staub did not personally do any analysis nor did he supervise anyone doing the evaluations at the Germantown lab. He had no personal knowledge of the analyses. (20RT 3449-3457, 3541-3545.)

Reviewing analyst Leisy's documentation dated January 24, 2005, Staub testified regarding how Leisy conducted her analysis. She used Profiler Plus and Cofiler DNA kits. Appellant's DNA profile was obtained. (20RT 3455-3464.) From a different sample taken from a portion of a rug from Palmer's apartment, Leisy found a non-sperm DNA fraction and a sperm fraction. Both fractions were from appellant. (20RT 3466-3473, 3536-3537, 3555.) A female DNA fraction was found. From the January 24, 2005 report, there was no information as to who left the female DNA. (20RT 3472-3478, 3489; 36RT 5970.)

On March 15, 2005, Leisy examined and analyzed DNA found on the pink dildo, described in her documentation (People's Exhibits 316, 317) as "vibrator." Appellant's DNA and the DNA of someone else was found on it. (20RT 3478-3484.)

On March 30, 2005, the Germantown lab received from the Jan Bashinski lab a DNA profile for Judy Palmer. The analysis had been conducted by Theresa Pollard. There was a 1 in 76 billion chance that this was not Palmer's profile. After receiving Palmer's DNA profile, Leisy conducted a re-examination. (20RT 3484-3487.) Staub reviewed Leisy's records and claimed that Palmer's profile had been properly received by the lab. (20RT 3487-3490, 3533-3534, 3552; 36 RT 5899-5900.)

Staub testified that, after Leisy re-examined the evidence, Palmer's DNA matched the DNA profile for the blood spot found on the wall of her apartment, and on the carpet padding and rug from her apartment. (20RT 3490-3493; 36 RT 5971-5973.)

Regarding the sperm and non-sperm samples from the dildo that Leisy analyzed, Palmer's DNA was present. Appellant's DNA was also present on the dildo. (20RT 3493-3497, 3534-3535, 3553-3557.) But, the presence of appellant's DNA could have been from a prior, undated contact. Also, there was a single allele that did not match appellant. (36RT 5894-5897, 5900-5903, 5905.)

Staub testified regarding YSTR testing for DNA, which is a relatively new form of analysis. It allows an analyst to extract a small amount of male DNA from a large amount of female DNA. The YSTR testing in this case was done in Cellmark's Dallas lab by

Cassie Johnson, who was supervised by Staub. He consulted with her while she was conducting her analysis. Melissa Benavides also conducted the YSTR analysis. Staub claimed the Dallas lab properly received the evidence to be analyzed. A defense expert was present for most of the testing. (20RT 3497-3508, 3517-3518; 36RT 5905-5907, 5912.)

Dr. Staub testified that appellant's DNA had been obtained from a buccal swab. A complete YSTR profile was obtained. (20RT 3504, 3506, 3507, 3520; 36RT 5907-5913.) From a cutting of Palmer's underwear and two latex gloves and three other latex gloves, DNA was extracted. However, only partial profiles were obtained. (20RT 3508-3511, 3514-3517; 36"RT 5914-5935.)

Using a Montage filter,[5] the samples from the gloves and underwear were amplified and evaluated. The defense expert was not present for the evaluation. The DNA samples were improved and better results were obtained. (35RT 3581-3590; 36RT 5937-5948, 5962-5963, 5976-5984, 5987-5990.)

According to Staub, at seven loci, appellant's DNA matched DNA on the three latex gloves. At some loci, the alleles were below threshold. Staub opined that it was possible that appellant had worn the gloves and that appellant's DNA was actually on the gloves, but the YSTR analysis results were inconclusive. Staub could not draw a

---

[5] Many jurisdictions and labs do not employ a Montage filter. In Los Angeles County, the Sheriff has not validated it. (36RT 5938-5940.)

conclusion. (20RT 3530-3536; 36RT 5935-5937.)

Regarding the two latex gloves found at the scene, they had the DNA profiles of two males. One of the profiles at six loci matched appellant. (20RT 3536-3538.) It is possible that appellant wore these gloves. (20RT 3531-3522, 3590-3591; 36 RT 5946-5961, 5973-5976.)

Regarding the cuttings from Palmer's underwear, sperm cells and epithelial cells were obtained, Dr. Staub testified that the YSTR testing showed that, as to the epithelial cells, appellant matched at one allele or marker. As to the sperm cells found on the underwear, appellant's DNA matched at nine loci. There were no inconsistencies between the two DNA profiles. When the database of 3,561 males was searched, none matched. This indicated a "higher likelihood" that the sperm DNA was from appellant than from an untested male. (20RT 3528-3532, 3577, 3591-3592; 36RT 5948-5949.) Staub conceded that, regarding the epithelial cells, there had been problems regarding quantification and amplification. (20RT 3567-3577.)

Staub agreed that, even though a person's DNA may be present, the date of contact cannot be determined nor can it be determined whether the contact was consensual. (20RT 3547-3549, 3553-3554.)

///

//

/

I. Daniel Mengoni[6]

Daniel Mengoni,[7] an alcoholic, met appellant in late 2003-early 2004 in connection with "drug use, partying on the side of the freeway." Mengoni used cocaine and alcohol with appellant a dozen or more times. Appellant had Mengoni's phone number. (13RT 2378-2381, 2407-2409; 14RT 2425, 2467.)

Mengoni, who was homeless, would generally "hang out" near Interstate 405 and Sepulveda. There was a Motel 6, a Burger King, and a Budweiser plant in the area. Juan Calhoun, a friend of Mengoni's, was around "all the time." Calhoun had a car, a Volvo, and was Mengoni's driver. (13RT 2381-2384; 14RT 2428, 2447; 16RT 2761-2762.)

On April 15, 2004, at around 10:00 10:30 a.m., appellant called Mengoni and said he had a car for him. Mengoni agreed to pay for the car "in drugs." Mengoni's friend, Robert, drove him to meet appellant, who was in his own vehicle, a white Ford Bronco. (13RT 2385-2388, 2406.) Mengoni and Robert followed appellant to the car's location.

---

[6] Mengoni moved to Chicago around August 2004. He came back for the preliminary examination. He had been arrested but was released. For trial, a district attorney investigator picked him up at the airport. Mengoni was flown out for both proceedings. The investigator gave Mengoni $10 and Mengoni was getting $20 a day as a per diem witness fee. The detectives each gave him $5.00. (14RT 2455-2460, 2464.) Mengoni had not received any help for his current drug court warrant. (14RT 2457, 2460.)

Mengoni had been served with a petition for the attendance of an out-of-state witness signed by a judge. (14RT 2461-2464, 2466.)

[7] Mengoni has numerous convictions. He admitted he had "been arrested for everything," including felon theft. (13RT 2384-2385.) He dealt drugs. (13RT 2411.)

The car was a white Ford Escort Although they had agreed on $30 worth of crack cocaine, Mengoni gave appellant $50 worth. Mengoni wanted to keep the car for "a day at least." However, appellant never said he wanted the car back. To Mengoni, this was "a little bit" strange. Mengoni got the Escort around 12:00 noon. There were women's clothes and A.A. materials in the car. Mengoni drove the car away. (13RT 2388-2393, 2412; 14RT 2428-2429.)

The next day, around 3:00 or so, Mengoni was driving the Escort through the parking lot of the Motel 6 when he saw Calhoun's car. Mengoni tooted the horn and Calhoun and appellant came out of one of the rooms. There was a woman with them. Mengoni talked with Calhoun and left. (13RT 2395-2396; 14RT 2449-2450; 16RT 2770-2771.)

Later that day, around 9:00 p.m., Mengoni was driving the Escort. Van Cornelius was a passenger. Mengoni was pulled over by the police in the Burger King parking lot. The police arrested him for possessing a stolen car. Mengoni was unhappy and told the police he had not stolen the car. (13RT 2388, 2393-2394, 2396, 2411-2412; 17RT 2914-2929.)[8]

Mengoni told the arresting officers that he had gotten the Escort from appellant the day before. Mengoni said, "It's Paul's car." When saying this, he pointed to the Motel 6.

---

[8] Mengoni had a crack pipe on him at the time. Crack and speed were found adjacent to the Escort at the time of the arrest. (13RT 2413.) Van Cornelius "took the beef" regarding the drugs. (14RT 2448-2449, 2452-2453.)

(14RT 2451-2452; 17RT 2931-2937.)

Mengoni was in jail for 21 days; he was released on May 7, 2004. While in custody, Mengoni learned that the Escort may have had some involvement in a homicide. (13RT 2396-2398; 14RT 2434.)[9] After his release, Mengoni was using drugs. (16RT 2763-2764.)

A few days after his release from jail, Mengoni had a conversation with his friend, Juan Calhoun. Regarding a night he had spent with appellant, Calhoun said that appellant came back with scratches on him. " The term "wife" may have come up in Mengoni's conversation with Calhoun. Calhoun also said that appellant returned with a bag of women's costume jewelry. (13RT 2405; 16RT 2755-2758, 2761-2762.) A few weeks after his release from jail, Mengoni was walking on the side of the freeway with his girlfriend, Billie Joe, when the encountered appellant. Billie Joe "was pissed" and confronted appellant. Mengoni, who was upset about having been arrested and in custody, talked with appellant about the situation. Appellant said not to worry about it, that the charges would be dropped because "nobody would show up to court." Because Detective Rains had informed him that a woman was missing and to let them know if "anything came up," Mengoni said to appellant, "You did a good job and I ain't worried about...somebody showing up. I might have to ask you about...some help in the future

---

[9] Mengoni had been charged with felony joyriding. But, the charges were dismissed. Supposedly, neither the police nor the prosecution did him any favors in connection with the case. (13RT 2403-2405; 14RT 2431-2433.)

about my woman troubles." Appellant shrugged and said, "Don't even ask." (13RT 2398-2403; 14RT 2429-2433, 2439-2440, 2441, 2453-2455.) Mengoni subsequently told the detective and the prosecution about this conversation with appellant. (14RT 2441-2446.)

j. Juan Calhoun

In April 2004, Juan Calhoun, who has a criminal record for theft, was addicted to alcohol and drugs. At the time of trial, he had been sober for three-and-a-half years. (14RT 2482-2483; 15RT 2519, 2527, 2528; 16RT 2721-2722.) Calhoun is a good friend of Mengoni's. (16RT 2751.)

In April 2004, Calhoun, who had a 1969 Volvo, frequented the area around the Burger King and Motel 6 near Interstate 405. At times, Calhoun would rent a room at the Motel 6 to get high or entertain women. (14RT 2483-2485; 15RT 2528-2529.)

In April 2004, Calhoun knew appellant. They got high together. The first time was at the Motel 6. (14RT 2481-2482, 2486.) Appellant mentioned that he and his wife were not together and said he was mad at her because he thought she was playing around on him. (14RT 2500; 15RT 2511.) Calhoun and appellant had previously rented a room there with some prostitutes. (15RT 2525-2526.)

On the morning of April 17, 2004, Calhoun ran into appellant who was in his Bronco. They agreed to "buy some drugs and get a few girls and get high in the room" at the Motel 6. Using Calhoun's identification, they got a room and checked in around

4:00-6:00 p.m. "[T]wo young ladies" were there also. Calhoun left around 7:30 p.m., but returned around 9:00 p.m. Appellant was still there. Appellant left around 12:00-12:30 a.m. Calhoun remained in the room. (14RT 2486-2490, 2494, 2495; 15RT 2508-2510, 2531-2540.)

Calhoun testified that appellant returned to the room at the Motel 6 around 4:30-5:00 a.m. Appellant had "a couple of scratches or some type of blood marks on his face" that had not been there before he left. (14RT 2495-2498; 15RT 2510-2511, 2540; 16RT 2727; People's Exhibit 72.) Calhoun testified that, when he asked appellant what had happened to his face, appellant said, "...he had went to his wife's house and he made a comment that he had beat the pussy up or something like that..." Calhoun believed appellant's exact words were, "I went and I beat the pussy up." Calhoun claimed that, in street slang, this meant he "...might have had aggressive sex with his wife or whatever." Calhoun, "just left it alone." (14RT 2498-2499; 15RT 2511-2513.) Appellant may have said that he had to break into the apartment. (14RT 2501; 15RT 2513.)

Sometime later, Calhoun saw appellant at a swap meet. According to Calhoun, appellant was "acting radical" and was "in desperate need of selling the Bronco that he had." Appellant had a bag containing women's jewelry. (15RT 2514-2515, 2546.) At some point, appellant was trying to sell his Bronco for $500. (16RT 2725-2726.)

On May 11, 2004, Calhoun, who was in his Volvo with Mengoni, met and talked with Detectives Park and Rains in the Burger King parking lot. Calhoun told the

detectives that he and appellant had rented a room at the Motel 6 on Saturday, April 17, 2004. They checked in between 4:00 p.m. and 6:00 p.m. Calhoun said that appellant left and came back. Calhoun told the detectives that appellant had fresh scratches when he returned. (14RT 2434-2435; 15RT 2513, 2515-2517, 2541-2545; 16RT 2696-2699, 2704-2708, 2732, 2747-2748, 2751-2752.)

Calhoun and Mengoni went to the police station on May 17, 2004 and again spoke with the two detectives. Calhoun told them appellant had said he was upset and jealous because he thought his girlfriend was having a relationship with another man. Appellant left the motel room around 12:30 for a few hours, returning at 4:30-5:00 a.m. When appellant returned, he had scratches or blood marks on his face.(15RT 2517-2519; 16RT 2700-2704, 2764-2767, 2708-2713, 2722-2723.) Calhoun may have told the police that appellant said he had to break into Palmer's apartment. (16RT 2730, 2750.) Mengoni and Calhoun also talked with the police about what they knew about appellant and Judy Palmer. (16RT 2764-2767.)

At the preliminary examination, Calhoun testified that appellant left the motel room for four or five hours. Calhoun also testified that, when appellant returned, he said he had to break into his wife's or girlfriend's apartment.Appellant mentioned trying to sell women's jewelry at the swap meet. (15RT 2520-2524; 16RT 2720-2721.)

Detective Rains testified that he interviewed Calhoun in the Burger King parking lot on May 11, 2004. Calhoun said that he had shared a motel room with appellant on

Saturday night, April 17, 2004. Calhoun said that, when appellant returned, he had fresh scratches on his face. (37RT 6030-6033.)

On May 17, 2004, at the police station, Detective Rains again spoke with Calhoun. (37RT 6033-6034.)

Calhoun never saw appellant do anything inappropriate with anyone. (16RT 2743.)

k. John Woodard

John Patrick Woodard met appellant in the late 1990's through A.A. Appellant drove a Bronco. Appellant helped Woodard part-time with home remodeling and repair. Appellant would sometimes sell his tools to Woodard, who usually just kept them because appellant never bought them back. Woodard agreed he was essentially acting as a pawn shop for appellant. (15RT 2655-2658; 16RT 2793-2796.) At some point, appellant gave Woodard a tile saw as collateral for a $250 loan. However, appellant never repaid the loan; therefore, Woodard kept the saw. (15RT 2662-2663; 16RT 2796-2798.)

Woodard would see appellant at the A.A. meeting places with a woman named Laura. Appellant would talk with Woodard in front of Laura "about the anal sex" he had with her. Appellant frequently went into detail about "his sexual stuff" and that he sometimes forced anal sex on women. (15RT 2659-2600.)

Woodard testified that about a week prior to April 17, 2004, appellant confided in him about his relationship with Judy Palmer. Appellant "had a lot of anger towards her"

and was "angry that he was being mistreated." Woodard claimed appellant called her a cunt. (15RT 2658, 2662.) Appellant sold some tools to Woodard. (15RT 2662.)

On the evening of Saturday, April 17, 2004, about 9:30 p.m., appellant showed up at Woodard's house driving a late-model white Ford Ranger with an "aluminum tool box on the back." Appellant had never before driven that truck. (15RT 2661; 16RT 2793.) Instead of parking in the parking area, appellant parked the truck behind a large oleander bush. Appellant wanted to trade the tool box for the tile saw. Woodard declined. Appellant left. Appellant did not mention Judy Palmer. (15RT 2665-2674; 16RT 2777, 2809-2813, 2816-2817, 2833-2835.)

A few days after April 17, 2004, in the morning, appellant again visited Woodard. Appellant seemed very upset and said that he was going to be on the news. On subsequent visits, almost daily, appellant asked for money. On a later date, appellant arrived at Woodard's with a shopping cart. Appellant said he had sold the Bronco. It was obvious to Woodard that appellant did not have a vehicle. (15RT 2674-2677; 16RT 2782-2787, 2800-2801.) Appellant left some possessions in a shopping cart at Woodard's (16RT 2786-2787, 2791, 2814-2815.)

After appellant mentioned that he was going to be on the news, Woodard talked to his friend Carol about the comment. A few hours later, Carol called Woodard. (15RT 2677-2678; 16RT 2785.) She called back later in the week "...screaming..., 'He's on the news and its because of Judy missing.'" (16RT 2788, 2802, 2829.) Woodard called the

police. (16RT 2788-2792.) An officer responded and Woodard related what he knew about appellant. (16RT 2802-2807.)

Appellant was arrested. When he was later released, he told Woodard that he had been cleared. Appellant kept returning to Woodard's on a regular basis. He did not have a vehicle. (16RT 2807-2809.)

About a week later, Woodard saw a flyer and became aware that the white Ford Ranger might have been involved in a serious crime involving Judy Palmer and that appellant "really had no business being in her truck." (16RT 2777-2782, 2829-2830.)

On April 29, 2004, Woodard, in a lengthy interview with Detective Rains, told him about appellant's visits. (16RT 2792-2793.) Woodard said appellant had been at his house on Saturday night, April 17, 2004 around 9:30 p.m. in a white Ford Ranger. Woodard had mentioned this in an earlier telephone conversation with the police. (37RT 6034; 39RT 6332-6345, 6351, 6403-6404.) Woodard subsequently gave Rains a bayonet and sheath that appellant had left at his house. (37RT 6052-6054;39RT 6345-6350.)

l. Rick Stoiberg

Rick Stoiberg owns Rick Stoiberg Auto Sales, which sells used vehicles. On April 20, 2004, Stoiberg purchased appellant's Bronco from him for $500. A month earlier, appellant had wanted $1,000. (17RT 2859-2867, 2872-2875.)

During the sale transaction, appellant sounded depressed. He was upset and said he wanted to kill himself. Appellant took his property out of the Bronco. He took some

of it with him and left the rest on the side of the building. Two or three weeks later, Stoiberg threw the property in a dumpster. (17RT 2867-2871.)

On April 21, 2004, Stoiberg got a call from the police, who subsequently came and picked up the Bronco. They also took photographs and looked at the pile of appellant's possessions. The possessions were not seized. (17RT 2871, 2876-2882; 17RT 2965-2977.)

On April 24, 2004, Detectives Park and Rains returned to Stoiberg's car lot. Detective Park got into the dumpster and retrieved appellant's discarded belongings. (17RT 2882-2885; 34RT 5667-5670, 5679-5687, 5695; 37RT 6035-6045.) The items found in the dumpster included documents bearing appellant's name and a receipt from Home Depot dated March 27, 2004 at 8:33 p.m. The description on the receipt for the item purchased was "multi-color." (34RT 5670-5678, 5687, 5688, 5696-5697, 5698; 37RT 6048-6052, 6115-6117.)

m. Knots and fingerprints

Forensic technician Garry Wilson was in the Navy for 26 years. He is familiar with the various knots individuals learn in basic training. He attended the autopsy and observed the knots in the rope which bound Palmer's body. (29RT 4919-4926, 4944.) He testified that the body was bound with two types of knots -- a basic overhand knot, which is "part of seamanship class and also part of Boy Scout training," and a double clove hitch, which is taught in the Navy, but not the Boy Scouts. Wilson conceded that

these knots were not sophisticated knots. At the autopsy, Wilson collected the rope, and other items of evidence, including the underwear Palmer was wearing (29RT 4926-4938, 4946-4954, 4958-4961) and fingernail clippings. (29RT 4939-4940.)

After taking the fingernail clippings, Wilson cut off Palmer's fingers for purposes of rehydration in an attempt to obtain fingerprints. After the fingers were successfully rehydrated, fingerprints were rolled and compared to the D.M.V.'s fingerprints for Palmer. (29RT 4940-4941, 4954-4955.) The fingerprints matched Palmer's D.M.V. fingerprints. (29RT 4962-4975.)

n. <u>The rope</u>

On November 20, 2007, Detective Park reviewed the March 27, 2004 Home Depot receipt for the "multi-color" item. The receipt had been found in the dumpster at Stoiberg's car lot. Park called Home Depot, inquired about the item, and visited the store. (34RT 5698-5700.)

In 2004, Vincent Alcala was the garden department manager at Home Depot store no. 6661. At that time, in the hardware department, there was an abundance of 3/8" diamond braided poly rope stacked in the aisle. There were different colors of rope, one of which was yellow with red and green "stitches" in it. The "multi-color" on the March 27, 2004 Home Depot receipt referred to the poly rope, but did not specify the color. The cost was $10.97, paid in cash. (35RT 5726-5736, 5739-5744.) In February 2008, Detective Park purchased similar rope at Home Depot. The manufacturer of the rope was

Lehigh. (35RT 5736-5738, 5741-5742, 5751-5754, 5761-5762, 5783-5784.)

The rope that bound Palmer's body was booked into evidence. In February 2008, Detective Park contacted Fred Keller from the Lehigh Group in Pennsylvania. Keller sent Park a box of rope similar to that which had bound Palmer. Park compared the two ropes. He cut a 4-inch section from the crime scene rope and sent it to Keller for comparison. (35RT 5757-5774, 5778-5783.)[10]

Fred Keller is the president and chief executive officer of the Lehigh Group, a which manufactures and distributes the rope which was sent to him by Keller. . He is familiar with the company's product lines, which does not include climbing rope. One of the company's major customers is Home Depot. (35RT 5790-5797.) He testified about some of the various types of ropes manufactured by the company, and about tensile strength of rope. (35RT 5797-5802, 5826-5833, 5848-5849.)

Keller testified that the UPC code on the March 27, 2004 Home Depot receipt refers to a diamond braided product code of MFP8100A. The rope was being manufactured by Lehigh in late 2003. The company made similar rope of different colors, including a yellow rope with red and green traces. Keller testified regarding how and where the rope is manufactured. (35RT 5802-5816.)

Keller received from Detective Park four strands of rope cut from the rope which

---

[10] Detective Park initially thought the rope might be mountaineering rope. His subsequent investigation showed that it was not. (35RT 5775-5778, 5785-5787.)

had bound Palmer. He looked at the rope strands and concluded that the rope had been manufactured by Lehigh. (35RT 5816-5823, 5833-5835, 5840-5844, 5849-5850.) Keller reviewed company records and testified that, in January and February 2004, Lehigh distributed such rope to Home Deport store no. 6661 as well as all Home Depot stores in the United States. He could not tell whether the rope that bound Palmer had actually been purchased at store no. 6661. (35RT 5823-5826, 5836-5839.)

2. Other charged cases

a. Kathleen S. -- counts 6, 7, 16 [11]

Kathleen S. met appellant in late 1996, early 1997. They were both homeless. Appellant was living in his van. He was "very sweet and caring" and concerned about her welfare. Kathleen S. was having issues with alcohol and drugs.[12] Kathleen agreed to stay in appellant's van. They had an intimate relationship. They both attended A.A. meetings and both used drugs and alcohol. (32RT 5390-5394, 5428-5437.)

Sometime in April or May 1997, at night, appellant and Kathleen were in appellant's van laying next to each other. They were clothed. Appellant said he "wanted from behind," which Kathleen knew meant "he wanted to anally penetrate me." She told him she did not want to engage in such activity. Appellant then flipped Kathleen over

---

[11] Regarding Kathleen S., appellant was found guilty of forcible sodomy (counts 7, 16) and forcible rape (count 6.)

[12] In 1990, Kathleen S. had convictions for forgery. In the early 1990's and in 2004, she had convictions for prostitution. (32RT 5392, 5470-5472.)

onto her stomach and got on top of her. He pinned one of her arms and put his arms around her neck. In a loud voice, she said, "Paul, no, no." Appellant pulled down her pants, unzipped his pants, and put his penis in her anus. She "felt a lot of pain," as if she "was being ripped open." She screamed. Appellant "seemed like a different person, very vicious and controlling." Appellant ejaculated. Afterward, appellant "was just Paul I knew before that happened." They went to sleep. (32RT 5394-5400, 5437-5442.) Kathleen did not report the incident to the police. (32RT 5402.)

Regarding sodomy, appellant at some point said to Kathleen that "he does this to all his women." (32RT 5400.)

On May 7 or 9, 1997, Kathleen S., while in the van, told appellant that she was going to leave him. She got out of the van and started to cross the street. Appellant ran after her, caught her in the middle of the street, grabbed her hair or head, and threw her down to the asphalt. At that moment, two police officers drove up. They handcuffed appellant and put him in their patrol car. As a result of this incident, appellant was convicted of battery. (32RT 5403-5407, 5442-5446.)

After this incident, Kathleen reconnected with a past employer and got a job as a dog groomer. She was attending A.A. meetings. So was appellant. They reunited. Kathleen's employer hired appellant. Her employer subsequently learned that appellant had a "background of working on homes." He suggested that Kathleen and appellant could live in his garage if appellant would do some weekend work on his house. They

agreed. (32RT 5407-5410, 5446-5452.)

Around June 3, 1997, appellant and Kathleen moved into the garage, which was attached to the house. (32RT 5410-5411, 5408.)

The day appellant and Kathleen moved into the garage, they went to a nearby corner bar where they played pool and had a few drinks. An ex-boyfriend of Kathleen's showed up. She had remained friends with him. She called him over to the bar and bought some marijuana from him. Later, Kathleen told appellant that he was an ex-boyfriend. At some point, Kathleen and appellant left the bar and returned to the garage. (32RT 5411-543, 5452-5455.)

In the garage, Kathleen and appellant continued drinking. She smoked half a joint. Appellant approached Kathleen from behind. He was screaming and yelling. Appellant was a jealous man. Kathleen asked, "Why are you so insecure?" She put her hand up to avoid the spit coming out of appellant's mouth. (32RT 5413-5415, 5455-5458.)

Appellant yelled, "insecure," grabbed Kathleen's thumb, and bit it "all the way to the bones." She found herself on the other end of the mattress. Her face was starting to swell because appellant "had beat [her] face." When she kicked a lighter that was on the floor, appellant came running from behind and tossed her through the air into the garage door. Kathleen felt pain in her anal and vaginal areas and was under the impression that she had been sexually assaulted.[13] Kathleen kicked at appellant. He punched her in the

---

[13] However, Kathleen did not "remember any of the sexual assault." (32RT 5466.)

stomach, saying that he was "...gonna take me out to the desert and tie me up and have his friends rape and kill me." When she asked, "Why are you doing this to me?", appellant replied that "...he does it to all of his women." Appellant grabbed Kathleen's foot and started to drag her out of the garage. Appellant said he was going to take her into the house and show her what he had done to her. Kathleen testified, " I knew he would kill me if he took me in that house." (32RT 5415-5419, 5421, 5458-5465, 5478-5479.) The house was unoccupied. (32RT 5346-5347.)

As appellant was dragging Kathleen, she managed to break free and ran. She could not see very well because it was dark and her eyes were swollen shut. (32RT 5419, 5463.)

Meanwhile, at around 3:15 a.m., Thomas and Sara Dobbs were awakened by barking dogs. Sara went outside and walked to the house from where she thought the barking was coming. She found out it was coming from a different house. (32RAT 5330-5332, 5365-5368.)

On her way to the other house, Sara passed the garage where appellant and Kathleen were staying. She testified, "...I heard noises and a woman -- well, sounded like she was getting her butt kicked." She heard the woman's "...reaction to being hit. I could hear the punches." She heard, "Please stop." Sara heard a male voice coming from the garage. Sara went to the house where she thought the barking dog was located and told the residents to call the police. (32RT 5368-5374, 5377-5378, 5386-5307.)

On her way home, Sara met up with her husband, who, when he went out to look for his wife, had heard the assaultive noises and voices from the garage and had called the police. (32RT 5332-5340, 5348-5352, 5361-5364, 5374.)

Officer Dunlop and three other officers arrived. They were directed by the Dobbses to the garage. As the officers approached, Officer Dunlop heard a large object slamming into the inside of the garage. He then heard a fist striking flesh and a woman scream, "Please stop. Please quit hitting me. Please stop beating me." He heard glass breaking as a man say, "Why did you break my fucking glasses?" The officers ran around to the side of the garage. (32RT 5340-5341, 5355-5356, 5379-5380; 34RT 5620-5628, 5637-5643.)

As the officers came around the corner of the garage, Kathleen S. ran out, followed by appellant, who was chasing her. Kathleen S. was hysterical and screaming. Her face was swollen, her eye was swollen shut, and she was bleeding. She screamed, "Don't let him get me again. Don't let them take me to the desert." Two other officers restrained her as she continued to scream. She said, "He fucked me in the ass. Don't let him take me." She said that appellant had beat her up. Kathleen was taken to the hospital. Appellant was arrested. (34RT 5628-5634, 5636, 5643-5650, 5661.) Officer Dunlop went into the garage. No one was in it. (34RT 5665.)

Kathleen S. did not appear to be under the influence of glue. (34RT 5653-5655.) She testified that, during the incident, she lost consciousness. (32RT 5477.)

Dr. Harold Lowder, an emergency room physician, has conducted hundreds of sexual assault examinations. He treated Kathleen S. at Northridge Hospital in the early morning hours of June 3, 1997. He met her at 5:05 a.m. (28RT 4812-4817.)

When Dr. Lowder first saw Kathleen S., she was in leather restraints, which were removed. She had been drinking alcohol and there was an odor of alcohol about her. She was "disheveled, tearful, cooperative." She complained of pain in her face and jaw. She had facial swelling and blood in her eye. She said that, earlier that night, appellant had choked and raped her and that he "...tied her up, both hands and feet, 'punched and kicked me all over,' put his penis in her mouth, vagina, and rectum multiple times." There was an injury to her thumb, which looked like a bite mark. Kathleen S. said she had had consensual sex with appellant two days earlier. (28RT 4817-4821, 4832, 4830-4835, 4839, 4848-4851, 5853.)[14]

A pelvic exam revealed a small bruise outside the vaginal opening and a superficial abrasion around her rectum. She had other bruises on her body. A rape kit was prepared. (28RT 4821-4822, 4835-4844; 34RT 5656.) Her teeth were broken. (2RT 5421-5422.) Dr. Lowder opined that Kathleen S.'s injuries were consistent with both physical and sexual assault. (28RT 4823-4825, 4851-5852.) A "rape kit" was also performed on appellant. (34RT 5656-5657.)

---

[14] Although the emergency room records stated, "chief complaint...ingesting cleaning fluids," there was no evidence thereof. (28RT 4822-4823, 4827-4830.)

After the incident in the garage, Kathleen went back to work. She rented a room from a couple she knew. On August 31, 1997, as she was leaving her house, she saw appellant coming toward her. She was terrified. She hurried and got into her truck. Appellant, who was yelling, grabbed the truck's antenna. As Kathleen started to pull away, appellant hit the windshield with the antenna and cracked it. Kathleen report the incident to the police. As a result, appellant was convicted of vandalism. (32RT 5423-5426, 5468-5470.)

b. Laura M.– counts 9, 13[15]

Laura M. met appellant in 1996. They attended A.A. meetings, got to know each other, and started dating. They dated on and off through 2001. Laura was an alcoholic and drank a lot. Appellant would become upset with her as a result of her drinking. (30RT 5059-5061, 5092-5102, 5116-5117; 31RT 5172.)[16]

In 1999, Laura M. was staying with appellant in a camper. Once, when Laura had been drinking, appellant forcibly sodomized her. On another occasion, they got into an argument about "him forcing [her] to have anal sex, him doing it against my will." She got scared and ran to a nearby A.A. clubhouse. However, she soon got back together with appellant. At the time, she did not speak to the police about the incident. (30RT 5072-5075, 5102-5107, 5109-5112, 5120, 5123.)

---

[15] Appellant was found not guilty of the charges involving Laura M.

[16] Laura M. has convictions for D.U.I, false report to a police officer, and assault. A restraining order was placed against her in 2002. (30RT 5061-6063, 5156-5157.)

Sometime in 2000, appellant and Laura went to Las Vegas in her car. While driving, appellant said something, a threat, that scared her. She jumped out of the car. Appellant left her there, "stranded in Las Vegas" and drove home. She found another way to get home. (30RT 5083-5084; 31RT 5176-5178, 5210-5215.)

On December 1, 2000, Laura M. went with appellant to the Hilton Hotel in Burbank and got a room. Laura had been drinking heavily. She testified that, without any discussion and against her will, her arms and wrists were tied, possibly with a telephone cord, and she was forced to have anal sex with appellant. She struggled and screamed. She had always refused to have anal sex with him. When she "came to," appellant had gone. She felt "pain in that area." (30RT 5064-5067, 5071-5072, 5127-5134, 5207-5208.)

After waking up, Laura screamed. A hotel employee unlocked the door and untied her. The police were called. They took her home and questioned her. She was angry about having been violated and told them what had occurred. (30RT 5067-5071, 5134, 5142, 5148-5150; 31RT 5165-5169.)

At some point after the Hilton Hotel incident, she and appellant got back together. On January 14, 2001, Laura and appellant and her roommate's dog went to the beach. Laura was drinking. They returned in the afternoon to her townhouse. Laura got into the shower with the dog to wash off the sand. Appellant pulled Laura out of the shower, threw her on the floor, and forcibly sodomized her. Laura was bleeding. Appellant left.

Because she was afraid, Laura also left and went to the home of Aram Zouloumian.[17] She told Zouloumian what had occurred. The police were called. (30RT 5075-5080, 5120, 5150-5155, 5156, 5210.)

After this assault, Laura stayed away from her home for two weeks. She planned to move. After she returned, appellant called and said, "I'm outside your door, I'm gonna burn your house down." Laura was terrified. Later, when she was in the garage preparing to move, appellant entered unexpectedly and unannounced. When he saw that Laura was with someone else, he left. (30RT 5081-5083; 31RT 5190-5191.)

Because Laura knew appellant was violent and had threatened to burn her house down, she did not want to go through with any prosecution regarding the incidents. (30RT 5080-5081; 31RT 5184-5185.)

During the course of their relationship, appellant once punched Laura in the face and in the stomach. He stole her pager, money, camera, and phone books. (30RT 5085-5087.) In 1999, he stole her car, which she never got back. (30RT 5087-5090; 31RT 5178-5182.) In 2001, appellant burned her by taking a lit cigarette and pressing it into her hand. (30RT 5090, 5155.)

Despite their problems, Laura continued the relationship with appellant because, when they were sober, "...it was good. He wasn't all bad. Nobody's all bad...I loved him

---

[17] Zouloumian was the victim in Laura M.'s assault and false police report convictions. A restraining order was issued against her. (30RT 5157-5158; 31RT 5193-5194.)

at that time." (30RT 5090; 31RT 5174-5176.)

On April 5, 2004, Laura received a telephone call from appellant. He had gotten her number from the phone list at the Valley Club. In a "roundabout way," he asked her out. When she asked, "aren't you seeing Judy [Palmer]?", appellant replied, "We're not seeing each other anymore." Laura did not agree to see appellant. (30RT 5090-5092.)

Laura M. recalled once meeting John Woodard at his residence when she went there with appellant. (31RT 5170-5171.)

c. Lorna T. -- count 10[18]

Lorna T. met appellant in 1994 at an A.A. meeting.[19] She is an alcoholic. Appellant was "...very nice, and kind of aggressive, though." They began dating and having an intimate relationship. The relationship was "off and on." (31RT 5219-5222, 5243-5247, 5251-5253.)

During their relationship, Lorna observed that appellant had an interest in pornographic movies depicting "whips and chains...those black things you wear with the spikes." He was particularly interested in anal sex. (31RT 5222-5223, 5273-5274.)

In 1995, a couple of weeks before Christmas, Lorna was going to go to a party with a female friend. Around 6:00-7:00 p.m., prior to going, she and appellant were laying on the bed, talking. She was naked. Appellant had on his underwear and a T-shirt.

---

[18] Regarding Lorna T., appellant was found guilty of forcible sodomy (count 10).

[19] Lorna T. Has two theft convictions. (31RT 5221.)

Lorna's friend arrived and knocked on the door. Lorna tried to get up; however, appellant pinned her down and prevented her from doing so. (31RT 5223-5226, 5252-5255, 5258-5259.)

Appellant said, "Give me some from the back." Lorna knew this meant anal sex. She said, "No. I don't want to do that." Appellant said, "Come on. Let's try it." Lorna kept saying "no." Appellant pushed Lorna down, held her down by the back of her neck, and sodomized her "more than once." Lorna testified, "It hurt like he was just ripping me, ...just forcible..." (31RT 5223-5229, 5274, 5255-5257, 5279.) Appellant then got up, put on his clothes, and left. (31RT 5274-5235, 5257.) Lorna did not call the police or seek medical attention. (31RT 5235, 5257.)

Lorna testified that appellant was"abusive...with other people." He spent his money on drugs "instead of paying his bills." In June 1996, appellant took her credit and debit cards, rented a room, and took about $2,000 out of her bank account. She contacted the police. They found the card on appellant. He was arrested. (31RT 5226-5243, 5250, 5270-5272, 5275-5276; 34RT 5595-5600, 5613-5614.) Lorna also mentioned to the police that appellant had sexually assaulted her and had beat her with his fists. (31RT 5278-5279, 5284-5286.)

Lorna continued to maintain an off-and-on relationship with appellant. They once had sex. (31RT 5261-5263.)

Lorna broke off the relationship because of appellant's drug use and her belief that

he was having another relationship. (31RT 5250-5251.)

d. Susanne K. - count 11[20]

Susanne K. met appellant in February 2001 at the Valley Club, an A.A. clubhouse. On Memorial Day in 2001, they went on their first date. Afterward, they went to Susanne's residence. Despite having told appellant more than once that she did not want to engage in sexual intercourse, appellant forcibly had sexual intercourse with her against her will. The incident stopped when Susanne's ex-boyfriend broke the window, entered, and beat her up. Appellant left. She did not report the incident to the police because her ex-boyfriend was a Hell's Angel. (31RT 5289-5295.)

After this incident, Susanne continued to see appellant and have sexual relations with him. (31RT 5295-5297.)

3. The uncharged conduct introduced at trial

Michelle W. was appellant's ex-wife. She testified to uncharged instances of domestic violence and sexual offenses occurring as long as 22 years before Palmer's death. In 1982, appellant choked her and spit in her face. He hit her in her nose and lip. When she threatened to leave, appellant attacked and kicked her. (25RT 4275-4286.) In 1986, after they got married, appellant continued to drink and use drugs. He was violent and choked, hit, and beat Michelle. (25RT 4288-4292, 4358-4365.) In 1988 or 1989, he

---

[20] Regarding Susanne K. (count 11), appellant was found not guilty. Because Susanne K. was unavailable, her preliminary examination testimony was read to the jury. (Sup. III CT 17-31.)

forcibly raped and sodomized her and threatened to kill her. (25RT 4297-4307.) In 1994, after their divorce, appellant threatened Michelle by holding a lit cigarette up to her eye. He also cut her then-boyfriend's ear with a knife. He threatened her with financial ruin. (25RT 4317-4321, 4416-4418.)

In 1994, ten years before Palmer's death, appellant lived with Sandra B. for about three weeks. When he moved out, they argued. Appellant became violent and threatened her. (25RT 4430-4433.) In July 1995, he became enraged and threatening when he saw her with an ex-boyfriend. (25RT 4433-4438.) Appellant subsequently stalked Sandra and left threatening messages. He made demeaning and degrading comments to her and threw a cup of coffee at her. Sandra obtained a restraining order against appellant. (26RT 4450-4464, 4479-4486.)

In late 2003, Theresa Tannant met appellant at a "crack hotel." They used drugs together. In November 2003, he had vaginal intercourse with Theresa against her will. (15RT 2587-2592.)

Kathleen S. testified to uncharged conduct allegedly committed by appellant. She claimed he once threw her down in the middle of the street, which led to a conviction for battery. (32RT 5403-5407, 5442-5446.) In August 1997, appellant broke her vehicle's antenna and hit the windshield, cracking it. This resulted in a vandalism conviction for appellant. (32RT 5423-5426.)

Laura M. testified that, in 2000, appellant threatened her and stranded her in Las

Vegas. (30RT 5083-5084; 31RT 5176-5178.) She testified to three acts of sodomy (30RT 5064-5080), whereas only two such acts were charged (counts 9, 13). She claimed appellant threatened to burn down her house. (30RT 5081-5083; 31RT 5190-5191.)

Lorna T. testified that, in mid-1996, appellant stole her credit card and that he was arrested. (31RT 5226-5243; 34RT 5595-5600.)

B. THE DEFENSE CASE

1. The Palmer investigation

Detective Perez of the missing persons unit initially ran the investigation into Palmer's disappearance. Around April 20, 2004, she made a missing person flyer and gave it to Tammy Gill. Perez kept a chronological log of her investigation. (39RT 6284-6291, 6293-6307.)

In April 2004, Detective Winze was working as a missing persons detective. He received reports that Judy Palmer was missing. Winze subsequently met Detectives Rains and Park. They discussed handing over the case to the two homicide detectives. (43RT 6890-6892.)

While at the police station, Winze and Rains had a telephone conversation with John Woodard. Rains was trying to get Woodard to tell appellant to "come in." (43RT 6893-6899.) During the conversation, Woodard said, "I never reported scratches on his face." (43RT 6931-6932.)

Officers Rains and Park took over the Palmer investigation from the missing

persons detectives around April 23, 2004. A report was prepared for them. (38RT 6166-6174, 6182-6186; 39RT 6320-6322; 41RT 6624-6626, 6642-6647.) Flyers were circulated regarding the case. (39RT 6323-6328.)

Detective Rains made a"very brief visit" to Palmer's apartment on April 26, 2004. The apartment maintenance man opened the door with a key. There did not appear to be any damage to the door. The apartment appeared to be neat and clean. No investigation occurred during this initial visit. (38RT 6187-6191; 39RT 632806332; 40RT 6552-6553.)

Rains returned to Palmer's apartment later on April 26, 2004, around 5:15 p.m. He was with Tammy Gill and Detectives Park and Swanston. Tammy opened the door with her key. The officers looked through the apartment. Papers were collected. At some point, Gill mentioned a strong smell of Pine Sol. (38RT 6191-6206, 6219-6220; 40RT 6553-6555; 41RT 6626-6636.) Gill told Rains about the dildo. (40RT 6555-6556.)

Detectives Rains and Park "canvassed" Palmer's apartment building on May 3, 2004. They checked the air conditioner in her apartment. It did not work. (40RT 6468, 6470-6471; 41RT 6633-6634.)

Detective Rains next visited Palmer's apartment on May 6, 2004. Criminalist Eugenio was with him. Photographs were taken. (38RT 6204-6216, 6218; 41RT 6606-6607.) Carpet cuttings were taken. (38RT 6224-2665; 41RT 6657-6659.) A bottle of Pine Sol was collected. (38RT 6233-6334.)

Detective Rains talked with Mengoni on April 29, 2004 after his arrest for driving

the stolen Escort. Rains asked Mengoni to help him regarding the Judy Palmer case. (39RT 6352-6356, 6361-6363, 6405-6414, 6424-6430; 40RT 6436-6437, 6538-6548; 41RT 6586-6590, 6603.)[21] He later spoke with deputy district attorney Susan Navas about Mengoni, although Rains was unsure of the context. (39RT 6422-6423; 40RT 6438-6440, 6548-6549.)

Detective Rains did not do anything to assist Mengoni with his legal problems arising out of the arrest for driving the Escort. (40RT 6438, 6548.)

Detective Rains processed appellant's Bronco and the Ford Ranger as evidence. (38RT 6225-6227; 41RT 6637-6639; . 41RT 6657.)

Detectives Rains and Park received evidence collected at the location where Palmer's body had been found. Park was unable to pinpoint the time or cause of Palmer's death. (38RT 6227-6232; 41RT 6660-6661.)

Detective Rains testified that Detective Park went into the dumpster at Stoiberg's car lot to retrieve evidence. (38RT 6235.)

Detective Rains was involved with interviews with John Woodard. (38RT 6236-6238; 39RT 6308, 6332-6340.) In the first, on April 23, 2004, a telephone interview, Woodard said that appellant had been at his residence almost every day, including April 17, 2004 at about 9:30 p.m. in the white Ford Ranger. (39RT 6340-6343.) Rains went to

---

[21] Rains also spoke with Van Cornelius, who was in the Escort when Mengoni was arrested. (40RT 6462-6466.)

Woodard's residence and collected a bayonet and sheath, some clothes, and other items belonging to appellant. (39RT 6344-6350; 40RT 6556-6557.)

On April 29, 2004, Rains interviewed Woodard at the police station. (39RT 6342.) Woodard again said that appellant had come to his residence on April 17, 2004 around 9:30 p.m. (39RT 6351-6352.)

Rains interviewed Judi Chapman. However, in his report he mistakenly switched her name and Palmer's regarding the musical show tickets Palmer had received from her boss. (40RT 6472-6478, 7519-9552.)

Detective Park and Rains met with Calhoun and Mengoni in the Burger King parking lot on May 11, 2007. Calhoun said that when appellant returned to the Motel 6, he had scratches on his face. Calhoun said appellant said he had "fucked his wife" and "bang [sic] her up pretty good." Rains said he would like to conduct a more in depth interview. (40RT 6482-6483, 6495-6497, 6562; 41RT 6639-6640.)

Detective Rains interviewed Mengoni and Calhoun on May 17, 2004 at the police station. Calhoun appeared to be tired during the interview. (40RT 6478-6485, 6497, 6561.) Mengoni "seemed normal state of mind." (40RT 6497.) Calhoun said that he had been with appellant and a woman named Monique at the Motel 6 on April 17, 2004. Calhoun said he left for a short period of time and then returned. (40RT 6498-6505.) Calhoun "guesse[d]" that appellant left around 2:00 or 3:00 a.m., saying he was getting hot and restless and wanted to take a walk. Appellant returned at 5:00 or 6:00 a.m. and

said he had had sex with his wife and that he had to break in. Appellant said he fucked her hard and "beat it up some." Calhoun did "not really" notice anything different about appellant. Calhoun said he saw fresh scratches on appellant's face "'a couple of weeks after that.'" (40RT 6509-6522, 6561-6564.)

After talking with Calhoun, Detective Rains and Park interviewed Mengoni. (40RT 6525, 6527.) They discussed jewelry. (40RT 6528-6529, 6531, 6536.) Mengoni said that Calhoun had told him that appellant had left the motel room "'...and went and fucked her and came back, had scratches on him and a bag of jewelry" that he was going to pawn. (40RT 6535-6538; 41RT 6590-6595, 6621-6623.)

In conjunction with the preliminary examination, Detective Park arranged for Mengoni to fly out from Chicago. (40RT 6532-6535.) Accompanied by Park, Mengoni came to California for the preliminary examination. (41RT 6646-6650.) Park claimed that Mengoni had always shown a cooperative attitude about testifying in the instant case. (41RT 6661.)

Daniel Riehl, a district attorney investigator, participated in an April 15, 2005 interview of Mengoni by deputy district attorney Ann Marie Wise. The interview was held in a hotel in Los Angeles. Mengoni said that, after he was released from jail, he had contact with appellant. (43RT 6869-6872, 6887.)

Riehl was given a subpoena to serve on Mengoni. Mengoni was eventually located in Chicago, but Riehl was unsuccessful in serving Mengoni. (43RT 6884-6888.)

2. Theresa Tannatt

When Detective Park served Theresa Tannatt with a subpoena in 2008, she said that she and appellant "...were together off and on, had sex, until the time he forced himself upon her and forced his sex on her" at Palmer's apartment complex. She said they had been "partying,"i.e., using drugs and alcohol. She said that after appellant said, "Come on, girl, let's do it," she unzipped her pants out of fear. Appellant then forcibly engaged her in sexual intercourse. (41RT 6651-6656.) When Park had talked with Tannatt in 2004, she did not mention this incident. (41RT 6655-6656.)

3. Laura M.

On December 1, 2000, Officers Kaufman, Duran and Lloyd went to room 903 at the Hilton Hotel in Burbank. They were investigating a sexual assault/forcible sodomy report involving Laura M. as the victim. A forensic specialist was with them. The room was processed for evidence. (39RT 6367-6377, 6380-6381.) Officers Duran and Lloyd were subsequently sent to a residence on Topanga. (39RT 6377-6379, 6382-6383.)

At the residence, Officer Lloyd interviewed Laura M. She was paranoid and nervous and hesitant to discuss the incident. She did not trust the police. She nevertheless told the officers about the incident and described how it had occurred. She said that appellant had tied her up and forcibly sodomized her. Laura M. refused to go to a sexual assault center for an examination. Photographs were taken of Laura M. (39RT 6384-6393, 6394-6398.)

On December 2, 2000, Laura M. told Officer Miranda that appellant had forcibly sodomized her at the hotel. However, she also said she did not want any further investigation of the case. He told her the case was being closed. (34RT 6399-6402.)

On January 16, 2001, officers Schiff and Neighbors responded to a residence on Bickford Street in Tarzana in response to a report of a sexual assault involving sodomy that allegedly occurred on January 14, 2001. Aram Zouloumian and Laura M. were there. Laura was on the couch. She was "very lethargic," possibly under the influence of alcohol. Empty vodka bottles were nearby. Laura was uncooperative and said she just wanted to sleep. (43RT 6819-7822, 6825, 6827-6829.) Nevertheless, Laura said that she had had sex against her will with appellant. She said she had been burned by a cigarette by appellant on the back of her left hand. To Schiff, the burn did not appear to have been recent. (43RT 6822-6825, 6829-6831.) Laura refused to sign the face sheet of the police report and did not provide any details of a sexual assault. (43RT 6825-6827.)

On November 12, 2002, Officer Verna participated in the arrest of Laura M. At the police station, she said, "This is fucked up" and made a reference to burning down the victim's house. The victim was Mr. Zouloumian, who was 68 years old. (40RT 6489-6494.)

C. THE PENALTY PHASE

1. The prosecution's case

Detective Dunlop testified regarding the June 3, 1997 garage incident involving

appellant and Kathleen S. Photographs of her injuries were displayed for the jury. (52RT 7825-7828.)

Maria Victoria Remp is married to Judy Palmer's son, Robert Remp. Maria first met Palmer in 1988 when she and Robert were dating. Palmer helped them with their wedding arrangements and their wedding. Maria testified that it was "very nice" to have Palmer in her life and that she was closer to Palmer than her mother. Palmer would do "everything" with Maria's three children. Maria confided in Palmer. Maria testified regarding photographs of Palmer. (52RT 7829-7837.)

When Maria first met Palmer, Palmer gave her a job at a 12-step bookstore. Palmer was very helpful to all who came into the store with their addiction problems. (52RT 7835-7836.)

Palmer's death was particularly hard on Maria's 19-year-old daughter, who "totally shut down...She doesn't want to talk about it." Maria's other two children "...miss their grandma." Palmer's death was also "very difficult" for Robert: "He doesn't talk...buried himself in work..." (52RT 7837-7839.) Maria testified, "It's just like a roller coaster. You are happy thinking about her and then suddenly it's just this horrible thought coming to you, the way she went." (52RT 4738.) The holidays are not the same without Palmer. Easter "wasn't fun...Christmas is so difficult." Palmer and Maria used to have breakfast in a café. Driving by brought back memories. Maria misses Palmer's love and support. (52RT 7839-7840.)

Robert Remp, Palmer's son, testified that, during his childhood, Palmer "...was always loving and always took good care of me." She was "...very easygoing...and fun...really lighthearted..." and always supported Remp. She was a good listener. The "...extent of the tragedy...that kind of death..." makes the situation "...just really hard." Remp has difficulty talking about it. (52RT 7843-7846.) She was there for him after an accident. (52RT 7852-7853.)

Remp testified that Palmer was very generous to his children. Palmer's death as very hard on his daughter, Andrea, because "they were so close." The "mental impact of the tragedy" was significant. Andrea needs the support Palmer would have provided. Now, "she feels kind of all alone." (52RT 7846-7849.)

Palmer's death has made Remp a different person. He is less trusting and reluctant to engage in once-enjoyable activities such as camping. Given how Palmer died, it is hard for him to enjoy his memories of her. He misses visiting Palmer with Palmer and spending holidays with her. (52RT 7851-7853.)

Remp testified that Palmer was involved in A.A. and tried to help others find sobriety. (52RT 7853-7854.) Remp testified regarding a number of family photographs. (52RT 7849-7850.)

Fourteen-year-old Joshua Remp is Palmer's grandson. Palmer used to take him to the park and buy him Krispy Kreme doughnuts. She would attend his soccer games. He testified, "She was always fun and she just liked people happy." She loved Joshua, made

the holidays "special," and "...always kept the family together." Now, the holidays have gone "not really well." It is hard for him to enjoy his memories of Palmer knowing that she had been murdered. (52RT 7855-7858.) Joshua testified regarding a family photograph. (52RT 7856.)

Michael Gill was 10 years old when his grandmother, Judy Palmer, was killed. He testified that Palmer was a "very helpful grandmother" and was "right there at all times." She was understanding, a good listener, and would attend his and his brother's games. She took him and his best friend to the park and movies. She taught him about his Native-American heritage. (52RT 7859-7862.) It is "unthinkable" to Michael that Palmer was murdered. He misses "all the happy times." She was "the best." (52RT 7862-7863.)

Casey Gill is married to Palmer's daughter, Tammy. When Casey first met Palmer, she was "very open-minded, very just considerate." Palmer helped him and Tammy in many ways. Palmer was a "great mother-in-law." Casey was closer to Palmer than to his mother. He confided in her. She played a big role in his children's lives and was generous to them. She would often be at their house. (52RT 7864-7871.) She took a great interest in the boys' sports. (52RT 7871-7872.)

Casey misses Palmer's presence and family get-togethers. He is angry and hurt that she was murdered. His wife, Tammy, is hurting even more. (52RT 7872-7873.) Casey also testified regarding family photographs. (52RT 7862-7863, 7870-7871.)

Tammy Gill, Palmer's daughter, testified that, at the time of Palmer's death, Palmer "had a clean bill of health." Palmer "wanted to be around to watch her grandkids grow up, go to college." (52RT 7877-7879.) Palmer would spend a lot of time with Tammy's family, including dinners, birthday parties, and holidays. (52RT 7885.)

Growing up, Palmer played a "huge role" in Tammy's life. She taught Tammy many life lessons. As a teenager, Tammy went to Palmer for advice. Palmer was a good listener and was a "fun person," "laughing and joking." She had a sense of adventure with Tammy's two sons. Palmer "...had a special way of making every single person individually feel that special." (52RT 7879-7883.) Palmer taught Tammy how to be a "strong woman and an independent woman." Tammy could confide in Palmer. (52RT 7885-7886.)

Palmer played a big role in Tammy's wedding and "[e]ven when we had problems early." She would help with the children and treated Tammy's husband like a son. (52RT 7883-7884.)

When Tammy's then 12-year-old brother was hit by a car and killed, Palmer went into a deep depression. However, she stayed sober and eventually pulled out of it. (52RT 7884-7885.)

Palmer had many friends. She made contact with distant family members. She helped A.A. members and showed a lot of patience with them. (52RT 7886-7887.)

On April 18, 2004, when Tammy realized Palmer was missing, she was frantic and

angry, shaking. Tammy "knew something was wrong." It was very hard "to keep it together." Tammy could not sleep. Tammy's son was also angry. Her brother, Robert, Remp, was frantic and went into a deep depression. Once Tammy learned of Palmer's fate, she had a "lot of anger"; however, she tries not to focus on it. (T2RT 7887-7893.)

Tammy's life has changed dramatically since Palmer's death. Tammy had to move -- "she helped me decorate it. Like the garden. It was just too much." Tammy does not trust anyone. Tammy's memories of Palmer "always finish" with a "picture of her at the desert or how she was killed in her apartment." (52RT 7891-7893.) Tammy testified regarding family photographs. (52RT 7877-7878, 7879, 7883, 7889-7890.)

Stephen Bloch, a sober member of A.A., knew Palmer for over 20 years. He met her at an A.A. meeting. They became friends and traded advice. Palmer was very helpful to a lot of people who were trying to maintain their sobriety. She invested a "tremendous amount of time" in helping women and was an inspiration to others. People were adversely affected by her death. (53RT 7901-7905.)

Bloch testified that Palmer was "extremely nice, kind, gentle." She had a loving family. Bloch cried when he learned that Palmer had been murdered.. (53RT 7905.)

Judi Chapman met Palmer in 1999 at the Valley Club, an A.A. club. In A.A., Palmer was the "...most giving, understanding, dedicated, wonderful, generous, nonjudgmental, caring person." She went to great lengths to help the women in A.A. (53RT 7909-7910.)

Palmer was a good friend to Chapman -- "...words can't express what a wonderful person she was." Given the circumstances of Palmer's death, it was hard for Chapman. She was still grieving for Palmer and misses calling her and "see[ing] her smiling face." (53RT 7910-7911.)

Cathy Heyl met Palmer in 1985 at an A.A. meeting at the Valley Club. Palmer was a good friend. (53RT 7912-7913, 7914-7915.) Palmer sponsored a lot of women at A.A. and went above and beyond in providing them support. (53RT 7913-7914.) Palmer was "always fun and just cheerful and happy and she just loved her life." Heyl misses Palmer's enthusiasm and the example Palmer set. (53RT 7915-7916.)

The prosecution introduced documentary evidence of appellant's 1999 conviction for violating Health and Safety Code section 11350, subdivision (a), possession of cocaine base. (54RT 7923-7924.)

2. The defense case

a. Penny Gradwell

Penny Gradwell is appellant's oldest sibling. Next is Robert Ray Daley, Jr., then appellant, then their half-sister, June Louise Byrd. Appellant is three years younger than Penny. Their biological father, Robert Ray Baker, Sr., left home when Gradwell was around five years old. Their mother, Geraldine Millicent Russell, is on her fifth marriage. The children were raised by one of Russell's husbands, Clyde Elwood Penglase, Sr. They lived in Hatboro, Pennsylvania, a suburb of Philadelphia. (54RT 7953-7957, 8014-8015;

55RT 8110-8112.) She left home when she turned 18. Penny had not seen appellant in 23 years. The last time she heard from him he simply called asking for money. (54RT 8001-8003, 8007.)

Penglase, Sr. brought five children from a previous marriage into the household - Patty, William, Michael, Tina, and Diane. (54RT 7963-7964, 8020-8021.) Their mother and Penglase, Sr. had a son, Clyde, Jr. (54RT 7965, 8021.) Penglase, Sr. was a truck driver and was gone "a lot of the time." (54RT 7966.)

Gradwell testified that there was always alcohol -- beer and hard liquor -- around the house. She testified, "...You would see, you know, in the living room empty bottles and things..." The children would drink the alcohol. When their mother got "really drunk," she became abusive and "very mean." She was a "very angry drunk" and would hit the children with a wooden spoon, a belt, or a book. "[S]he would hit anywhere on the body of the child that she would be hitting." If the children did not confess as to which of them had done something wrong, all the children would be hit. Clyde Penglase, Sr. also hit them. He would "...take a strap to us." Pengalese Sr. would hit appellant would it and he received marks and bruises. (54RT 7959-7960, 7964-6966, 7977-7979; 55RT 8084-8086.) Geraldine testified to similar treatment. There were no "time-outs." (54RT 8020-8026, 8035-8036.)

Even when Panglase, Sr. was sober, he hit appellant. If he was drunk, the hitting was "...very harsh." (54RT 7967-7068.) Sometimes, the children would fall to the

ground as a result of the beating. (54RT 7968-7969, 7977-7979.)

The children tried calling the police regarding all the child and spousal abuse. But, because Penglase was an ex-police officer, the police did not help, even when they came to the house. (54RT 7960, 7961-7963.)

As appellant got older, he would try to avoid confrontation in order to preclude a beating by Clyde, Sr. Appellant would withdraw. (54RT 8050-8051.)

The family grew up poor. Even though both parents worked, it was tough financially. The children were never taken to the dentist. (54RT 7969-7970.) Sometimes there was not enough money for food, heat, or a telephone. At times, there was no electricity. In the winter, "it would be freezing." , They could only afford to bathe only once a week. (54RT 7987-7992; 55RT 8081.)

There was domestic violence and spousal abuse between Geraldine and Penglase, Sr. When their mother got drunk, she would "instigate" and she and Penglase, Sr. would argue, scream, and hit each other. Penglase "very often" beat up Geraldine. The children saw and heard the violence. (54RT 7960-7961, 8034-8035; 55RT 8078-8080.)

During the day, the children were not allowed to stay in the house. Penny testified, "...we were not allowed to stay. I mean we were told to leave and my mother would lock the door and tell us that we weren't allowed to come back unless we were bleeding." (54RT 7987.)

Neither their mother nor their step-father ever helped the children with their

homework or any school problem. They did not give the children any guidance. (54RT 7965-7968, 8000.) Appellant was never in any program such as Boys Club that might have provided guidance. (54RT 8002.) The only help appellant received was physical discipline at home. (54RT 8030.)

As their financial difficulty increased, the parents' drinking and fighting escalated. They would go to a bar after work, drink, fight, get kicked out, and finish the fight at home. (54RT 7992-7993.)

When the family watched television, Penglase, Sr. would put his hand down their mother's shirt and feel her breasts. This happened "pretty much the whole time that they were together." There were pornographic movies and sexually explicit magazines and books around the house. These were accessible to the children. (54RT 7994-7995;55RT 8137-8138. Penny testified that once, at Penglase's request, Geraldine had a sexual encounter with another man while Penglase watched. The incident occurred when the children were in bed asleep. (55RT 8074-8075, 8102-8103.)

Growing up, appellant was a bedwetter for as long as Penny could remember, at least until middle school. The sheets in his room were not changed on a regular basis and the room smelled all the time." Penny recalled that Geraldine claimed she cleaned the sheets every day. Appellant himself would "stink." When an alarm system regarding the bedwetting did not work, rubber sheets were used. Appellant never got any help for the problem. He would get "whooped" by his mother and step-father because of the bed-

wetting. (54RT 7973-7977, 8030-8034, 8048; 55RT 8081-8083, 8121-8122.)

Other children would ridicule and laugh at appellant because of his hair and the fact that he urinated in his bed. The children did not have new clothes. (54RT 7999-8000, 8047-8048.)

When he was young, appellant engaged in stealing. Once, Geraldine caught him and made him take the items back. Appellant was angry. Geraldine testified that appellant understood the difference between right and wrong. (55RT 8105-8108.)

When Penglase, Sr. left the family, Penny was 12, appellant 9. After he left, chores would not get done, clothes would not be washed, children would not be bathed. Their mother spent most of her time at the Skyway Bar, leaving the children at home unsupervised. The financial difficulties. (54RT 7998-8000, 8009, 8034, 8048-8049; 55RT 8076-8078.) Their mother drank daily. (54RT 8052-8053.) When Penglase left, he took his children, except for Clyde, Jr., who subsequently left. (55RT 8075-8076, 8103.)

When appellant was 14 years old, his mother took him to the police department and turned him in because he was incorrigible. She could not handle him. He had stolen tools from a neighbor, refused to return them, and threatened Geraldine and Penny. (54RET 8000-8001, 8052; 55 RT 8083, 8105-8107.) While in detention, appellant's sister brought him marijuana. (55RT 8139.)

At some point, Gradwell was unsure as to when she saw her mother bring men

other than her father into the bedroom. (54RT 7997-7998.) Geraldine confirmed that this happened. (55RT 8075-8076.)

After she left home at 18, Penny started a new life for herself. She is married with three children and is employed at a school district. She has properly raised her children. (54RT 8003-8004.)

b. Geraldine Russell

Geraldine Russell is appellant's mother. When she was pregnant with appellant, she drank alcohol. She had been brought up in a "household that drank." During the pregnancy, her husband, who also drank, was violent and hit her. Appellant had to be delivered by forceps at birth.. After he was born, Geraldine continued to drink. (54RT 8015-8016; 55RT 8102.)

Geraldine testified that, when appellant was small, he was very stubborn and would not do as he was told even when "threatened with mischief." (54RT 8016-8017.)

When appellant was young, his father, who was a drinker, would hit Geraldine and beat her up. Although she called the police, she never pressed charges because he was the breadwinner. Appellant's father would also hit him. (54RT 8018-8020; 55RT 8101.) Eventually, appellant's father left and had no contact whatsoever with the family. (54RT 8007-8028, 8087-8088.) Once, appellant's father visited for about 20 minutes. Geraldine did not know whether appellant knew it was his father. (55RT 8088-8092.)

When appellant was around eight years old, at the urging of school personnel, he

received counseling for perhaps a year. (54RT 8028-8030, 8051.) He was diagnosed as "emotionally unstable." (55RT 8083-8084, 8092-8903.) Appellant had a hard time in school. However, his parents could not afford a tutor. (55RT 8086-8087.)

When appellant was 8 or 9 years old, he would have fits of rage and would sometimes throw things. He and his brother would dismember his sisters' barbie dolls and puncture the dolls' breasts and genitals with nails. Once, appellant got mad at his half-brother Clyde, Jr. and became violent. When Penny tried to restrain him, all three backed into a china cabinet, causing damage. They all received cuts from the broken glass. . Afterward, they were all beaten by Clyde, Sr. (54RT 8004-8006, 8008-8010.)

Geraldine testified that, when appellant was about 10, she got carried away in hitting him and "the rest of the kids and the dog" had to pull her off him. (54RT 8036-8037.) He was on the floor and she was on top of him, hitting him. She "lost control." Appellant did not cry, which annoyed Geraldine. (54RT 8036-8037, 8042-8047.)

Geraldine testified that Michelle W., appellant's wife, was a "nice girl" and that she "tried real hard" to stay with him. However, she could not do so because of his drug problems and inability to hold a job. After his divorce from Michelle, appellant and his then-girlfriend lived with Geraldine in Florida. They stole jewelry from her. (55RT 8103-8105.)

c. Judy Byrd

June Byrd is appellant's younger sister. She testified that her mother and

stepfather drank daily. She stated, "There was always a lot of arguing, fighting, lack of attention." Their mother would hit the children with wooden spoons -- "Time-outs were the spoon and sent to your room." Appellant would be hit more than the other children. Byrd testified, "My dad had a belt. He [appellant] got slapped around. Mom had a spoon." On one occasion, their mother went into a rage and "beat [appellant] up pretty bad." (55RT 8111-8116, 8119-8120, 8125.)

Byrd testified that the children's stepfather was "quite a bit" tougher than their mother. He would lock the children in their rooms, hit them with his hands and belt, and pick them up by the neck and put them up against the wall. He would then drop the child to the floor. He beat them hard enough with the belt so that they had welts . (55RT 8116-8119, 8146.) He was more violent after he had been drinking. (55RT 8125-8126.) Appellant's step-brother Michael would also hit appellant and beat him up. (55RT 8120-8121.)

Byrd testified that appellant would sleepwalk at night. He would take his clothes off, get a stuffed monkey, and go outside. Either the police would bring him back or the family would go find him. Sometimes, his parents would tie him up so he would not leave. (55RT 8122, 8141, 8145-8146.)

Byrd testified that, when appellant was young, he would "often" have seizures. (55RT 8135.)

Byrd testified that appellant, as a child, drank alcohol and Nyquil at home. He had

a drug problem that has "been trouble on and off through his entire life." (55RT 81388141, 8144.)

Her mother, while still with Penglase, Sr., would bring men into the house. The children could hear noises from the bedroom. This continued after Penglase left. (55RT 8135-8137.)

After Penglase Sr. left the family, Geraldine's drinking "became more frequent. More intoxicated." No one supervised the children. (55RT 8145.)

Prior to the trial, the last time Byrd had seen appellant was in 1993 or 1994 in conjunction with her divorce. He was supposed to mail her some of her "prized" personal possessions, but he never did. He contacted her after his arrest in this case and asked her to wire him some money. (55RT 8143-8144, 8148-8151.)

Byrd felt that appellant's wife, Michelle W. was good for him and was trying to "keep him on the right path." Byrd also tried to help him, but appellant was in and out of trouble and was using drugs. (55RT 8147-8148.)

Byrd ran away from home when she was 11 and left for good when she was 14. She "couldn't handle it anymore." (55RT 8123, 8141-8142, 8147.) Byrd eventually finished school and college. (55RT 8147.)

d. <u>Clyde Penglase, Jr.</u>

Clyde Penglase, Jr. is appellant's half-brother. Clyde is four years younger than appellant. Clyde testified that, when the children were young, his parents drank "quite a

bit" and "most of the time." The children would be hit, "usually with a belt, spoon, or just a fist or open hand." His father was the tougher one and would regularly beat appellant with a belt and fists. At times, the children receive black eyes. (55RT 8155-8158, 8164, 8167-8168.) If one of the children got into trouble, everyone got into trouble and the boys would be beaten. (55RT 8166-8167, 8175-8176.)

Clyde testified regarding appellant's bedwetting problem. Clyde slept on the bunk bed under appellant. "It was scary." The plastic sheets did not stop the smell. There was a stench in the room. The sheets were not changed regularly. No one ever got appellant any help. (55RT 8158-8159, 8176.)

"Everybody," including the older children and the "kids down the block," picked on appellant and beat him up. They made fun of him because of his "rat's nest" hair. He smelled of urine. No one at home ever told appellant to "clean up." 955RT 8159-8162.)

All of Clyde's memories of appellant are bad. Appellant picked on Clyde and pushed him around, twice breaking his nose. Whenever appellant got in trouble, Clyde was beaten. (55RT 8162-8163, 8189-8190.) At night, outside, appellant would tell Clyde "frightening things" and then run away, leaving Clyde alone in the dark, terrified. (55RT 8186-8187.) Clyde did not like appellant. (55RT 8175.) Appellant had no regard for what was right or what was wrong. (55RT 8187.) He was not a "good person and never has been." He is a "bad seed." (55RT 8192.)

When appellant was 10 or 11, he had seizures where he would "fly off the handle.

He'd become unruly, just go nuts." (55RT 8163-8164, 8169-8170.) Appellant also regularly walked in his sleep at night. The family or the police had to go find him. (55RT 8164-8166.)

Clyde heard domestic violence between his parents. Once, the police took his father out of the house. (55RT 8168-8169.)

Clyde testified that his parents were gone most of the time and the children "pretty much" had to raise themselves. They did not bathe regularly. At times, there was no food, heat, or electricity. When his mother was home, she did not want the children in the house. (55RT 8170-8172.)

Penglase, Sr. would fondle his wife's breasts in front of the children, including appellant. This was a commonplace event. The children would look at the pornography in the house. After Penglase, Sr. left, the children's mother would bring men to the house. (55Rt 8172-8174.)

When appellant was young, he would drink alcohol and Nyquil and would smoke marijuana. No one tried to get appellant any help. (5RT 8174.)

Clyde testified that he saw appellant and a few other children "getting ready" to tie together the tails of two cats and throw them up on a clothesline. (55RT 8179-8181.)

Once, when appellant threatened to kill Clyde, Clyde ran away to a friend's house where he stayed for two weeks. (55RT 8182-8183.) Clyde recalled an incident where appellant stole a lady's purse and got into a physical fight with his mother and sister.

They "...wrestled...and they went through the china cabinet." The police were called and took appellant away. (55RT 8183-8185.)

Clyde, Jr. went to college and received a degree in social work. He is studying for his masters degree. His children are in college. He has not seen appellant in a long time, 28 years. (55RT 8174-8175, 81818-8182, 8185.) Clyde acknowledged that appellant had a tough childhood and never got the help he needed. (55RT 8193-8194.)

e. Dr. Mary Jane "Jay" Adams

Dr. Mary Jane "Jay" Adams is an experienced clinical psychologist. (56RT 8220-8227.) She interviewed appellant in jail for three hours and reviewed numerous records pertaining to appellant, including a psychological social history report by licensed clinical social worker Angela Mason, who interviewed appellant and family members. After considering the evidence, Dr. Adams prepared a report. (56RT 8227-8231; 57RT 8340-8343, 8387.)

Dr. Adams was not asked to make a diagnosis of appellant. A diagnosis is a "label...that does not imply any etiology or any notion about what caused the person to have this label." (56RT 8231-8233; 57RT 8382-8383.)

Based on the information she reviewed and considered, Dr. Adams testified that appellant has suffered from recurrent major depression throughout his life. He suffers from polysubstance dependency as a result of his use of alcohol and various drugs. (56RT 8233-8236, 8276-8277; 57 RT 8411-8412.)

On August 3, 1999, at the Olive View facility, appellant was diagnosed with major depressive disorder with psychosis. He complained of feelings of hopelessness and of feeling worthless. He made an angry statement about his family – "They wouldn't piss on me if I were on fire." The records stated that he had made three suicide attempts and that he was experiencing auditory hallucinations. It was noted that he was a danger to himself. He was placed on anti-anxiety medication. He was detained. (56RT 8236-8241.)

On October 24, 2002, appellant again visited the Olive View facility. The records indicated that appellant had a history of bipolar disorder without medication. This is a "severe mental illness...thought to be caused by a brain imbalance and it involves alternating periods of severe depression with periods of severe mania." Appellant was stressed and feeling depressed. (56RT 8241-8247.)

On January 27, 2003, appellant was seen at the West Valley Mental Health Clinic. His complaints were "...difficulty making decisions, ...mood swings, something jittery, periods of depression when he has no motivation, listing of drug and alcohol abuse..." The psychiatrist to whom appellant spoke diagnosed appellant with mood disorder not otherwise specified. (56RT 8247-8251.)

Appellant's school records showed that he had "borderline intellectual functioning." Anyone with an IQ below 90 is "borderline." (56RT 8281-8282.)

Dr. Adams reviewed a number of interviews with appellant's relatives. His father

reported that appellant suffered from chronic depression. (56RT 8251, 8273-8275.) Other family members indicated that appellant began using alcohol and drugs by age 13. (56RT 8275-8276.)

From appellant's history, Dr. Adams felt that appellant might be suffering from dissociative disorder, generalized anxiety disorder, and traumatic stress disorder; however, she did not have enough information to make such a diagnosis. (56RT 8277-8281.)

Other mental health records showed appellant suffering from major depression, psychosis not otherwise specified, bipolar disorder, schizoaffective disorder, and malingering, which Dr. Adams said was, "pretending to have symptoms that you don't have." But, simply because a person may be may say they have symptoms that they do not actually have "...does not necessarily mean that they don't have other psychiatric disorders." (56RT 8290-8294; 57RT 8391-8393.)

Dr. Adams testified regarding the Adverse Childhood Experiences ("A.C.E.") study, which studied the long-term consequence of various forms of childhood abuse. Although it is not a forensic study, it does provide relevant information. Abuse has a relationship to outcomes such as chronic depression, alcoholism, suicide attempts, and job problems. "Adverse childhood experiences can be a prediction of criminality." (56RT 8297-8301; 57RT 8420-8421.)

A mother's alcohol use while pregnant and being the victim of physical abuse

while pregnant can adversely affect the development of a baby's brain. (56RT 8301-8303.) So does violence in the household after birth. The infant can become "hyperactive" and "emotionally distressed." Where the caregiver is being abused, he or she cannot respond properly to the needs of the child, and there will be a deficit in the attachment bond. The child does not receive proper care and comfort. The infant develops "disorganized attachment." In appellant's case, "...there's really an extreme problem with the attachment relationship..." As the child gets older, he is "...very overly reactive to emotional...and sexual arousal so he becomes more easily emotionally aroused. And once he's aroused, he has more trouble controlling that." He has trouble controlling feelings of anger and rage. The child becomes hypervigilant, aggressive, fails to learn normal coping skills, and fails to develop a strong sense of self. These aspects carry over into adulthood. Counseling is difficult. (56RT 8308-8322.)

Children who experience violence and abuse in the home typically blame themselves and say things like "I must really deserve this, I must really be bad, and I must have done things to bring this on myself." This leads to a strong sense of worthlessness and being out of control and powerless. The person may act out aggressively. Using alcohol and/or drugs lessens the ability to control the aggression and increases sexual impulsivity. (56RT 8323-8329.)

Dr. Adams described "hostile dependency" as the situation where a person feels he needs another person for emotional comfort while at the same time hating and fearing that

person. Dr. Adams opined that appellant's relationships with women reflect hostile dependency. She testified, "His experience in life has been that the primary mothering female figure in his life was someone that caused him a lot of pain and a lot of fear." He wants to be with women but hates women and fears that women in his relationships will hurt him. He would act impulsively and aggressively and might lash out if rejected. (56RT 8329-8331; 57RT 8347-8349.)

As a young child, appellant failed to establish a secure attachment relationship with his mother. As a result, appellant could be impulsive, aggressive, and would "easily become overwhelmed." (57RT 8343-8347.)

Dr. Adams reviewed police reports pertaining to the instant case. These played a role in her opinion of appellant. (57RT 8417-8420.) Jail records from 2006 and 2007 state that appellant has a long history of antisocial behaviors and "...appears manipulative and appears to be exaggerating symptoms." Mental health professionals noted that appellant was repeatedly malingering and feigning symptoms to evade punishment or get preferential treatment. (57RT 8443-8448.) But, merely because appellant may have been malingering does not mean he does not have psychiatric problems. (57RT 8449.)

Dr. Adams reviewed a May 31, 2007 memorandum prepared by licensed social worker John Gaynor of New Life Youth Agency, who had seen appellant at that facility 30 years earlier in 1977. Gaynor stated that, in 1977, appellant was generally friendly with authority figures, but that stress or confrontation of any kind resulted in emotional

and/or behavioral volatility. Appellant could not handle the stress and became overwhelmed. Appellant was always on edge and had a lack of trust. The social workers tried to help appellant regain control. Gaynor noted that appellant once put his hand through two panes of glass and pulled it out "with blood squirting." Appellant smiled. Dr. Adams opined that this was a "maladaptive coping strategy." Incentives were unsuccessful in getting appellant to modify his behavior. Gaynor's memorandum reflected that he was never able to get close to appellant. Dr. Adams testified that "...people in general who have been subjected to early and severe abuse at the hands of people that are supposed to be loving and protecting them...affects their ability to get close to other people and their fear of real intimacy." (57RT 8367-8368.)

At New Life in 1977, appellant had difficulty with his treatment plan. He was hostile to school. Tests showed the possibility of organic brain problems. Gaynor's 2007 memo noted that appellant had the potential for alcohol and drug involvement. (57RT 8368-8371.)

Dr. Adams also reviewed records pertaining to appellant's stay at the Yardville Correctional Facility in 1979. Dr. Jorn, a psychiatrist at that facility examined appellant, who related an extensive use of alcohol and drugs. Dr. Jorn noted that appellant "...will need special attention because he has been deprived and his acting-out tendencies can be controlled under guidance." The records indicate that appellant was suicidal and was taking an anti-seizure medication. (57RT 8371-8374.)

In July 1979, while still at Yardville, appellant was seen by Dr.Boyle, whose report noted that appellant's mother was "neglectful in respect to the supervision and guidance of the children." Appellant's "...antisocial behavior is an acting-out mechanism...of his unrecognized anger directed toward his parents, particularly toward his mother." Boyle stated that appellant's "...spontaneous, eruptive antisocial behavior resembles the behavior of a brain-injured person." Boyle concluded that appellant needed individual therapy, but might not be cooperative. (57RT 8374-8376.)

The reports from 1979 indicate that appellant engaged in manipulative conduct in order to avoid an academic program. The records indicate appellant is very manipulative. A report from psychologist Mastrocola stated that appellant "...seems to feel no remorse despite having the knowledge of right from wrong." (57RT 8440-8443.)

Dr. Adams testified that the reports of Gaynor, Jorn, and Boyle contributed to her opinion that certain of appellant's problems were consistent with a history of early and severe abuse. In Dr. Adams' opinion, appellant has a severe mental health problem. Therapy for the problem could be provided in prison. (57RT 8336-8379.)

3. Prosecution Rebuttal

In 1977, John Gaynor, who has a masters degree in social work, worked as a group care counselor at the New Life boys' ranch. Appellant, then 16 years old, arrived soon after Gaynor and stayed there six months. Gaynor was with him 40 hours a week. From the prospective of a social worker, Gaynor wrote a report in 2007 -- 30 years later --

regarding his experiences with appellant. He was confident that he remembered appellant. (57RT 8459-8460, 8462, 8464-8467.)

Gaynor felt that if there was enough motivation and a significant issue, appellant was "quite capable of controlling his behavior." If there were no incentives, it "would be difficult at times." Appellant "...made up his own mind in terms of what was important." Appellant had "little sense" as to how to control and manage his behavior. He was "...driven by what was important to him...what would make him feel good, what was gratifying for him." Gaynor was unable to persuade appellant to "develop sort of philosophical reasons just to be a good citizen." (57RT 8460-8464.)

V. ARGUMENT: THE GUILT PHASE

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR UNDER THE STATE AND FEDERAL CONSTITUTIONS WHEN IT DENIED APPELLANT'S *WHEELER/BATSON* MOTIONS.

1. Introduction

A prosecutor's use of a peremptory challenge to remove a prospective juror on the basis of the juror's race or gender violates a defendant's rights to due process, an impartial jury, a fair trial, a trial by jury drawn from a representative cross-section of the community, and fundamental fairness under article I, sections 15 and 16, of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, 148 Cal.Rptr.890, 902-903; *People v. Reynoso* (2003) 31 Cal.4th 903, 908, 3 Cal.Rptr.3d 769, 773.) Such discriminatory removal of a prospective juror also violates these same rights, as well as a

defendant's right to equal protection, under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Batson v. Kentucky* (1986) 476 U.S. 79, 86, 106 S.Ct. 1712; *Miller-El v. Dretke* (2005) 545 U.S. 231, 238-239, 125 S.Ct. 2317, 2324-2325; *Johnson v. California* (2005) 545 U.S. 162, 125 S.Ct. 2410; *United States v. Chinchilla* (9th Cir.1989) 874 F.2d 695, 697; *People v. Silva* (2001) 25 Cal.4th 345, 375-386, 106 Cal.Rptr.2d 93, 118-126.) African-Americans are a cognizable racial group as related to discriminatory use of peremptory challenges, under both state and federal law. (*People v. Catlin* (2001) 26 Cal. 4th 81, 116, 109 Cal.Rptr.2d 31, 57 ["African-Americans are a cognizable group for purposes of *Wheeler*...and *Batson*..."]; *Fernandez v. Roe* (9th Cir.2002) 286 F.3d 1073, 1077 ["...African-Americans constitute [a] 'cognizable group[ ]' for *Batson* purposes."])

During jury selection in this case, the prosecutor peremptorily challenged African-American prospective jurors, nos. 7731 and 9049[22] (9RT 1712, 1726), the "only two African-American jurors in the venire." (9RT 1740.)[23] Such a percentage is "striking" and raises a strong "inference of discrimination." (*Williams v. Runnels* (C.D. Cal.2009) 640 F.Supp. 2d 1203, 1213-1214; and see *Fernandez v. Roe, supra,* 286 F.3d at 1078-1079.) Appellant raised *Wheeler/ Batson* motion/objections based on the ground that the prosecutor had improperly challenged the prospective jurors. The trial court denied the

---

[22] Juror no. 9049 was a prospective alternate juror.

[23] Challenging only two minority prospective jurors does not negate a discriminatory inference. (*Wade v. Terhune* (9th Cir.2000) 202 F.3d 1190, 1198; *Williams v. Runnels* (9th Cir.2006) 432 F.3d 1102, 1108, fn.9.)

motion. (9RT 1726-1729, 1738-1740.)

However, the trial court's finding of no improper motive was wrong. As a matter of law, the totality of the circumstances, including the prospective jurors' questionnaires, voir dire answers and brief comments, do not support a non-racially motivated reason for the challenges. The trial court erroneously denied appellant's motions and thereby violated his rights to due process, a fair trial, a reliable determination of guilt and penalty, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Reversal is required.

2. Standard of review

When, as here, an appellant has made a prima facie showing of discriminatory use of peremptory challenges, this Court reviews the denial of a *Wheeler/Batson* motion for substantial evidence of the prosecutor's non-discriminatory intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196, 58 Cal.Rptr.2d 385, 409.) If substantial evidence is lacking even as to one juror, reversal is required per se. (*People v. Silva, supra,* 25 Cal.4th at 386, 106 Cal.Rptr.2d at 126.) As stated in *People v. Wheeler, supra*, 22 Cal.3d at 283, 148 Cal.Rptr. at 890:

> "The error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the Constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'"

Here, the trial court's denial of appellant's motion was unreasonable and not

supported by substantial evidence. This Court must therefore reverse appellant's conviction..

3. The facts regarding the dismissed African-American prospective jurors.

a. Prospective Juror No. 7731

In her 45-page questionnaire (29CT 7629-7673), prospective juror no. 7731, a 51-year-old black woman, stated that she was an audio/video technician, married, with two young children. She gave her unremarkable business and education history and provided other facts about her life. (29CT 7630-7643.) The questionnaire informed her of the alleged facts and charges in the case and the prospective juror did not express any qualms or difficulty in being a juror in the matter. (29CT 7644-7654.) She stated, "I believe in the death penalty" (29 CT 7655) and that she was "moderately in favor of it." (29CT 7656.) She could impose the death penalty. (29CT 7658, 7660-7661.) Her written answers to the questions regarding the death penalty demonstrated that she could be a fair and impartial juror. (29CT 7654-7662.)

During voir dire, when asked by defense counsel "...if you reached the stage of addressing penalty in this matter, ...any favoritism towards life without possibility of parole or death?", the prospective juror answered, "Well, I could -- can't really answer that because I don't really know what's -- I haven't heard any facts." She agreed that she would listen to all mitigating and aggravating evidence and thought it "would help" to hear "information about somebody's life" in order to make the penalty decision. (4RT

880-881.)

When questioned by the prosecutor, no. 7731 confirmed that she was "open to both types of penalties." (4RT 881-882.) The following colloquy ensued:

> MS. FLOOD [Prosecutor]: Okay. I want you to imagine that you've gone through the whole trial, you've gone through the penalty phase, you considered the mitigating and aggravating circumstances and based -- based upon all of that you've determined that in this particular case death was an appropriate penalty. I want you to imagine that you're sitting in the jury box and look at the defendant and tell us if you would feel comfortable or that you could announce your verdict is death? Could you do that, looking at the defendant right here and now?
>
> PROSPECTIVE JUROR NO. 7731: I really don't know. I don't know if I'd be comfortable or if I'd be scared. I don't know.
>
> MS. FLOOD: Okay. Because you don't know, because you have those feelings, do you think it would be difficult for you to sit on a trial of this nature and impose the death penalty if you believe it is appropriate to do so based upon everything you heard?
>
> PROSPECTIVE JUROR NO. 7731: That's a possibility.
>
> MS. FLOOD: Do you think it would be impossible for you to impose the death penalty because of those feelings of uncertainty?
>
> PROSPECTIVE JUROR NO. 7731: No.
>
> THE COURT: All right. Juror 7731, are you then open to the possibility -- assuming that the defendant was convicted of murder with special circumstances -- are you open to listening to the factors in aggravation, factors in mitigation

that would present -- that will be presented at the penalty phase, weigh those factors, and reach an appropriate verdict?

PROSPECTIVE JUROR NO. 7731: Yes.

THE COURT: And could that verdict be life without the possibility of parole or the death penalty?

PROSPECTIVE JUROR NO. 7731: Yes.

THE COURT: Are you open to both as possibilities?

PROSPECTIVE JUROR NO. 7731: Yes, I am.

THE COURT: Okay. Thank you. Go back in the jury room. When you come back, you'll be in seat 5.

PROSPECTIVE JUROR NO. 7731: Thank you. (4RT 882-884.)

The parties "pass[ed] for cause" regarding prospective juror no. 7731. (4RT 884.)

b. Prospective Juror No. 9049

In his questionnaire (26 CT 7044-7088), prospective juror no. 9049, a 44-year-old married black man with three children, stated that he was working full-time with disabled children. He provided information regarding his education and other aspects of his life. He stated that religion was "very important" in his life. He had prior jury experience in two civil trials. (26CT 7045-7058.) He did not express any reservations about serving as a juror in this case. (26CT 7059-7069.) Regarding the death penalty, no. 9049 stated in his questionnaire, "I think in some cases of extreme violence it might be necessary." (26CT 7070.) He felt that life in prison was the "worse" penalty vis-a-vis death. (26CT

7072-7074, 7073.) When asked, "Do you think, depending on the circumstances of this case and the evidence presented in the penalty phase, if any, you could impose the death penalty in such a case?", he answered, "don't know." He said he would be "comfortable sitting as a juror on this case." (26CT 7073.) When asked, "Does your religious organization take any view on the death penalty?", he replied, "God is the only one to give life and take life." However, he stated he would not refuse to vote guilty, or find a special circumstance, or find for the death penalty if justified by the evidence. He checked the "no" box to the question, "Can you see yourself in the appropriate case choosing the death penalty instead of life in prison without the possibility of parole?" He agreed he could set aside his religious and personal views about the death penalty and render a verdict in accordance with the law. He stated he could be fair and impartial. (26CT 7074-7077.)

During voir dire, prospective juror no. 9049 explained his views on the death penalty to the trial court:

> THE COURT: Just come and have a seat anywhere. You are juror no. 9049?
>
> PROSPECTIVE JUROR NO. 9049: Yes, ma'am.
>
> ***
>
> THE COURT: ...You said to one of the questions that you didn't now whether you could impose the death penalty in this case –
>
> PROSPECTIVE JUROR NO. 9049: Right.
>
> THE COURT: Why is that?

PROSPECTIVE JUROR NO. 9049: I don't think -- I think that belongs to a higher authority than myself. I don't think I'm -- I should be one to decide a man's life.

THE COURT: All right. You said you believe that spending life in prison could be very difficult to the victim and their families?

PROSPECTIVE JUROR NO. 9049: Right.

THE COURT: But you are still -- are you against the death penalty?

PROSPECTIVE JUROR NO. 9049: Yes, I am.

THE COURT: You indicated in one question that "I think in some cases of extreme violence it might be necessary".

PROSPECTIVE JUROR NO. 9049: Yes.

THE COURT: But you could not impose it, is that what you are saying?

PROSPECTIVE JUROR NO. 9049: Well, It's sort of kind of a mixed feeling with it, you know. I'm kind of –

THE COURT: Do you think you could impose it in the appropriate case?

PROSPECTIVE JUROR NO. 9049: If somebody's found guilty beyond a reasonable doubt, I think maybe so, yeah.

THE COURT: You would never be able to even make that decision unless the defendant is convicted of a murder –

PROSPECTIVE JUROR NO. 9049: Right, unless –

THE COURT: -- With the special circumstances.

PROSPECTIVE JUROR NO. 9049: Right, exactly.

THE COURT: You would go into a penalty phase where you would hear good evidence in favor of the defendant and perhaps negative evidence about the defendant. They're called factors in aggravation and mitigation.

PROSPECTIVE JUROR NO. 9049: Right.

THE COURT: After hearing all those things, you'd weigh those factors and then the jurors, each of you, would have to decide whether death or life was the more appropriate penalty?

PROSPECTIVE JUROR NO. 9049: Right.

THE COURT: Could you do that in this case?

PROSPECTIVE JUROR NO. 9049. Yes, I could, ma'am.

THE COURT: You could impose death if it were appropriate?

PROSPECTIVE JUROR NO. 9049: If it's very appropriate.

THE COURT: You could impose life then as well?

PROSPECTIVE JUROR NO. 9049: Right.

THE COURT: Okay. Despite your religious view that God is the only one to give life and take life -- and you agree with that view -- you could still impose such a penalty if it were appropriate?

PROSPECTIVE JUROR NO. 9049: If it was appropriate, yeah.

THE COURT: Okay. (6RT 1182-1185.)

When questioned by defense counsel, no. 9049 confirmed that he would follow the law and, if appropriate "based on the evidence," could vote for death. Although his preference would not be for death, he "...would be open to it." (6RT 1185-1186.)

The following colloquy occurred between no. 9049 and the prosecutor:

> MS. FLOOD: Thank you. Good afternoon, sir.
>
> PROSPECTIVE JUROR NO. 9049: Hi.
>
> MS. FLOOD: As you probably know, where we're at now, there's no right or wrong answer.
>
> PROSPECTIVE JUROR NO. 9049: Right.
>
> MS. FLOOD: You may have these personal feelings about death penalty. You understand the notion of duty. You understand the notion of civic duty serving as a juror.
>
> PROSPECTIVE JUROR NO. 9049: Right.
>
> MS. FLOOD: But sometimes our personal feelings may be so strong that we can't be a juror on a particular case.
>
> PROSPECTIVE JUROR NO. 9049: Right.
>
> MS. FLOOD: So let's take death penalty down to a gut level.
>
> PROSPECTIVE JUROR NO. 9049: Uh-huh.
>
> MS. FLOOD: Assume that the defendant was found guilty of first degree murder with special circumstance.
>
> PROSPECTIVE JUROR NO. 9049: Right.
>
> MS. FLOOD: Okay? And further assume you have gone through the penalty phase and legally it appears that

death is the appropriate punishment.

Could you personally set aside whatever personal feelings you might have, look at this man and tell him your verdict is death?

PROSPECTIVE JUROR NO. 9049: If it's very appropriate, I think I could -- I could, yes, Ma'am.

MS. FLOOD: Okay. When you say if it's very appropriate -- you mentioned in your questionnaire that it might be appropriate in cases of extreme violence?

PROSPECTIVE JUROR NO. 9049: Uh-huh.

MS. FLOOD: In the questionnaire it described that this case is about murder committed during felonies; that is, burglary or rape.

PROSPECTIVE JUROR NO. 9049: Right

MS. FLOOD: Do you recall that?

PROSPECTIVE JUROR NO. 9049: Yes, Ma'am.

MS. FLOOD: And you indicated you weren't certain if you could impose the death penalty in that type of case. Is that still your response at this time?

PROSPECTIVE JUROR NO. 9049: Well, it's sort of kind of a mixed feeling with it. But, like I said, if somebody's found guilty beyond a reasonable doubt where there's no -- well, where it's really certain that he did what they convict him of, I think maybe in that case.

MS. FLOOD: Okay. Let me take this a little farther before I address the standard of beyond a reasonable doubt.

Assume -- first of all, under the law, murder committed during a felony does not require intent to kill –

May I proceed real quick?

THE COURT: If you'll finish this area.

MS. FLOOD: Murder during felony does not require intent to kill. In other words, the defendant could have killed the victim unintentionally, accidentally, by negligence.

Would you refuse -- after going through the penalty phase and hearing everything, would you absolutely refuse to impose death penalty if you believed the defendant did not intend to kill?

PROSPECTIVE JUROR NO. 9049: Right. In that case, I don't think death would be merited if it's unintentional.

MS. FLOOD: And regardless of what else is presented as aggravating or mitigating circumstances, that factor alone would prevent you from imposing death penalty, is that what you are telling us?

PROSPECTIVE JUROR NO. 9049: Yes, Ma'am.

MS. FLOOD: Okay, thank you. (6RT 1186-1188.)

The prosecutor challenged prospective juror no. 9049 for cause, claiming that, "[h]e indicated he would not impose death penalty if intent to kill was not established." (6RT 1189.) The trial court denied the challenge.

THE COURT: Again, I have a problem with the juror not being familiar with all the facts of the case, not having heard the case, not being given the full instruction under the law as to what felony murder is. I don't think I can excuse him for cause based upon that limited inquiry. I just think it would be improper. (6RT 1189.)

c. The trial court's denial of the *WheelerBatson* motion.

The prosecutor peremptorily excused prospective jurors nos. 7731 and 9049. (9RT 1712, 9049.) Appellant's counsel objected on *Wheeler/Batson* grounds:

> THE COURT: Go ahead, Mr. Kallen.
>
> MR. KALLEN: This is in the nature of a *Wheeler* motion. My recollection -- from my recollection and observations, there are only two black jurors in the venire and the prosecution has moved to excuse the two and I believe that qualifies as a cognizable group and they should have to show good cause as to why they would do such a thing. (9RT 1726.)

The trial court made the "same observations" and requested an explanation from the prosecutor regarding the two challenges:

> THE COURT: I'm making the same observations. There were two blacks left in the jury, one female and one male, both which have now been exercised and excused by the People, juror no. 9049, and juror no. 7731 who was a female.
>
> Based upon that, there are no additional black jurors left in the venire and these are the only two exercised by the People.
>
> The Court is going to find a prima facie case -- well, before I do that, I would like the People to offer an explanation as to the excuse for these two jurors. (9RT 1726.)

The prosecutor provided an explanation for her actions:

> MS. FORD: We weren't in the position to pull out their questionnaires to get verbatim quotes about what they had said. The Court's made a prima facie finding –

THE COURT: Not yet.

MS. FORD: Each of the two African American jurors who were excused expressed extreme difficulty in imposing the death penalty, which is a race neutral reason for exercising a preemptory.

The lady juror who was the People's -- the lady juror who was the People's fourth preemptory challenge, her body language was extremely unreceptive both to the prosecution and the idea of having to impose the death penalty and she expressed verbally that she'd have a great deal of difficulty in doing it.

With regard to the prospective alternate whom the People just kicked, I believe he wrote some extremely strong answers in his questionnaire in opposition to the death penalty.

The decisional law -- and I'm thinking of the case of *Ledesma*, L-E-D-E-S-M-A, and I have a series of other citations I can give -- makes it clear that the inability to impose the death penalty or even equivocation with regard to comfort in imposing the death penalty are race neutral rationales for kicking a juror.

It's probably also worth stating because there's not only that's in the *Wheeler* arena, but also a related arena under the Sixth Amendment it's worth pointing out to make a full record that the defendant is a non-Hispanic Caucasian and that same description describes all of the victims. They would be what you would call Anglo-Saxons with the exception of one woman who may be partly African American -- who is a trivial witness to the case -- I believe Lorna Thompson is. Everyone else appear to be a non-Hispanic Caucasian who is associated with this case as a witness.

I only point that out in case there's going to be some Sixth Amendment challenge also.

> And, by the way, I do apologize, your Honor, if the Court needs stronger basis for the reason for kicking those two jurors, I'd have to get out their questionnaires, which may take a moment or two, and it would have to happen in front of the jurors. If that needs to occur, perhaps we can ask the jury to step outside. (9RT 1727-1728.)

The trial court determined that a prima facie case of improper race-based exclusion had been established. Thus, the trial court "necessarily" found "a pattern of systematic exclusion of members of a cognizable group in the challenged excusals." (*People v. Taylor* (2010) 48 Cal.4th 574, 642, fn.18, 108 Cal.Rptr.3d 87, 152, fn.18.) Nevertheless, the trial court denied the *Wheeler/Batson* motion based on the prosecutor's explanations:

> THE COURT: The Court does find a prima facie case based upon the sheer numbers of both African American or black jurors being excused; however, in listening to the explanations given by counsel, I presume they would be the same.
>
> MS. FORD: Yes.
>
> THE COURT: They appear to be race neutral.
>
> There are no racial issues in this case that I am aware of, which doesn't necessarily defeat a *Wheeler Batson* motion, but I find that Ms. Ford is credible, that her observations are based on race neutral reasons that are proper challenges -- or proper preemptory challengers.
>
> MS. FORD: Your Honor, once the jury has been let go, can I ask to raise this topic again and bring out their questionnaires?
>
> THE COURT: Yes.
>
> MS. FORD: Thank you.

THE COURT: You can augment the record later.

MS. FORD: Thank you.

THE COURT: The *Wheeler Batson* motion is denied.
(9RT 1728-1729.)

The prosecutor subsequently reviewed the questionnaires of the two dismissed jurors to see if she could come up with new, previously unstated reasons for having challenged the jurors. Obviously, these new reasons were not on the prosecutor's mind when the jurors were challenged. . The prosecutor said:

> THE COURT: All right. The jurors and alternates have left the courtroom.
>
> Did you want to augment the record with regard to the *Wheeler Batson* motion?
>
> MS. FORD: I would, thank you.
>
> Your Honor, the People exercised our peremptories in this way: a white female; a white female; an Hispanic female; a black female; a white female; we passed twice; white female, Hispanic female; passed; white female; Hispanic male; we accepted the panel
>
> With regard to alternates, it was Hispanic male; African American male; Hispanic male; white male; white male, Hispanic male. I don't know that the record would otherwise have any references to that.
>
> And with regard to the first of the People's two excusals, from Group A -- and this would be our fourth preemptory challenge -- prospective juror 7731 had indicated on 12/4/07 that she would be very uncomfortable and scared to impose the death penalty. Which is -- you know, the Court's already ruled that that's a permissible basis for which

to exercise an excusal.

But she also physically manifested a very high level of discomfort with being questioned about this and it also appeared that her emotional tenor during questioning went from being in support of the death penalty, which is what is written, to feeling very uncomfortable having to be the person to impose the penalty, which I would stipulate is reasonable.

Occasionally, a juror will say although he supports it statutorily, for him it's an uncomfortable burden. And she was such a person when questioned in *Hovey*. She said it would be very difficult.

With regard to the second preemptory, an African American prospective juror, this would be our second among the alternates, from Group D, Juror I.D. number 9049.

This person is someone who we tried to challenge for cause on 12/6. He had indicated that only God can take -- can give and take life. This is actually a quotation: "God is the only one to give and take life."

He thought that life without parole was worse.

And in question 108 when he was asked if he could impose the death penalty, he said I don't know.

And his verbal questioning was in support of the idea that he's very uncomfortable with the death penalty.

And when questioned on 12/6 when he was asked about the felony-murder rule and whether he could impose the death penalty if it had not been established the killing was intentional, he said he would not.

And I think that if we carefully picked through the record -- which won't be necessary -- the Court and counsel would find that we have excused, I think, every single

prospective juror who stated that they would be unable to impose death under the felony-murder rule had the killing not been shown to be intentional. So there's legal consistency there, to the best of my knowledge.

THE COURT: The only reason I found a prima facie case was sheer numbers. There were only two African American jurors in the venire, but this is a race neutral case. There are no racial issues, to my knowledge.

I do accept the People's reasons for exercising peremptories as to these two jurors as being race neutral and properly and credibly founded. (9RT 1738-1740.)

4. Appellant's constitutional rights were violated by the trial court's erroneous denial of the *Wheeler/Batson* motions.

In *Rice v. Collins* (2006) 546 U.S. 333, 338, 126 S.Ct. 969, 973-974, the Court stated the inquiry the trial court must undertake when a *Batson* challenge is made:

> "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible,' so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" (Citations omitted.)

(Accord, *People v. Rushing* (2011) 197 Cal.App.4th 801, 808, 129 Cal.Rptr.3d 26, 31-

32.) If these three steps have been satisfied, the appellate court undertakes a similar review. (*People v. Silva, supra,* 25 Cal.4th at 384, 106 Cal.Rptr.2d at 124 ["Our concern...is... whether the record as a whole shows purposeful discrimination."]; *Snyder v. Louisiana* (2008) 552 U.S. 472, 484-485, 128 S.Ct. 1203, 1212.) When applying this standard to prospective jurors nos. 7731 and 9049, purposeful discrimination is clearly evident.

Regarding *Wheeler/Batson* review, the Court in *People v. Taylor, supra,* 48 Cal. 4th at 615, 108 Cal.Rptr.3d at131 stated that it was "significant...whether the prosecutor failed to engage the prospective jurors in more than desultory voir dire..." (Internal quotation marks omitted); accord, *People v. Kelly* (2007) 42 Cal.4th 763, 779, 68 Cal.Rptr.3d 531, 544; *Miller-El v. Dretke, supra*, 545 U.S. at 246, 125 S.Ct. at 2328 ["'[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'"]) Here, the prosecutor asked prospective juror 7731 only four questions. (4RT 881-883.) Although the prosecutor asked no. 9049 more questions (6RT 1186-1188), the trial court recognized that the questions regarding imposition of the death penalty where intent to kill was at issue had been a "limited inquiry." (6RT 1189.) Had the prosecutor truly and honestly been concerned about their responses, which supposedly formed the basis for their dismissals, she would have questioned them in depth in that regard. Her failure to extensively question the jurors

pertaining to her claimed concerns is powerful evidence that her alleged reasons were not sincere, and were pretextual.

The prosecutor's claim that the two dismissed African American jurors "expressed extreme difficulty in imposing that death penalty" (9RT 1727) is incorrect.. No. 7731 stated she was open to both types of penalties. Her answer that she did not know whether she would be comfortable or scared in finding for death is a natural reaction for any prospective juror in a capital case. So was her answer that it was a "possibility" it would be difficult to impose the death penalty; as a matter of common sense, such a momentous decision is never easy, but always difficult. She agreed that she would weigh all applicable factors and that it would not be impossible for her to "impose...death." (6RT 881-884.) No. 7731 expressed the normal feelings of any person being called upon to pass judgment on the life of a defendant. As the dissent stated in *United States v. Fell* (2nd Cir.2009) 571 F.3d 264, 291, "it is common in capital cases for jurors to be conflicted about whether they could, if asked, sentence another person to death. Until called for jury duty and questioned in court about whether they could vote in favor of death, few people have given the question serious, focused thought." No. 7731 did not express extreme difficulty with the job she was being called upon to undertake. The prosecutor's reason for dismissal of no. 7731 was pretextual.

Nor did prospective juror no. 9049 "express extreme difficulty in imposing the death penalty" (9RT 1727), as the prosecutor claimed. He said that he would follow "all

the rules and law" and could impose the death penalty if he felt it was appropriate; although death was not his "preference," he was "open to it." If he felt the death penalty was appropriate, he could set aside his religious beliefs against it and reach that result. (6RT 1182-1187.) Without fully explaining the concept of felony-murder to no. 9049, the prosecutor asked him whether he could impose the death penalty if there was no intent to kill. Quite naturally, no. 9049 said no. (6RT 1187-1188.)[24] But, no. 9049 had already

---

[24] Of course a prospective juror, unschooled in the confusing, counterintuitive concept of felony-murder would be loath to impose death where the defendant had no intent to kill. "The felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct. The felony-murder rule thus 'erodes the relation between criminal liability and moral culpability'...***...'[T]he felony-murder doctrine gives rise to what can only be described as an emotional reaction, not one based on logical and abstract principles.'" (*People v. Aaron* (Mich.1980) 409 Mich.672, 708, 710, 299 N.W. 2d 304, 317.) And, as Justice Moreno stated in his concurring and dissenting opinion in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1214, 91 Cal.Rptr.3d 106, 139:

> ..."[t]he felony-murder rule...erodes the relation between criminal liability and moral culpability....We have described the felony-murder rule as "a '"highly artificial concept"'" that this court long has held "in disfavor" "because it relieves the prosecution of the burden of proving one element of murder, malice aforethought". "The felony-murder doctrine has been censured not only because it artificially imposes malice as to one crime because of defendant's commission of another but because it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin." (Citations omitted.)

Given the "highly artificial" nature of the felony-murder rule, it is not surprising that a prospective juror would, not having been instructed on the doctrine, have a great deal of difficulty understanding how a defendant could receive the death penalty without an

stated that he would follow the law. And, as the trial court said, the juror had not been "given the full instruction under the law as to what felony murder is" and that the questioning as to this confusing concept had been "limited." (6RT 1189.) No. 9049's reasonable, fair-minded answers to the voir dire questions provided no proper, justifiable reason to peremptorily challenge him.

In her comments at the hearing on the *Wheeler* motion, as to no. 9049, the prosecutor stated, "...I believe he wrote some extremely strong answers in his questionnaire in opposition to the death penalty." (9RT 1727.) But, not knowing what those answers were, the prosecutor was merely speculating and could not properly rely on those unknown answers as a reason for peremptorily challenging the prospective juror.

The prosecutor also said that she challenged no. 7731 because the prospective juror's "body language" was "unreceptive" to imposition of the death penalty. (9RT 1727-1728.) But, juror no. 7731 was never questioned regarding her "body language" or demeanor. And, the prospective juror said she would be fair and follow the law and could impose the death penalty if warranted by the facts.

Further, the prosecutor was wrong in belatedly stating that prospective juror no. 7713 "said she would be very uncomfortable and scared to impose the death penalty." (9RT 1738-1739.) What no. 7713 really said, and what is certainly the feeling of *every* prospective and seated juror in a capital case, is that she *did not know* whether she would

---

intent to kill.

be uncomfortable or scared in imposing the death penalty. (4RT 883.) And, no. 7731 only said it was "a possibility" that finding for the death penalty would be difficult. She never said "very difficult." The prosecutor's mistaken claim as to no. 7731's answers provided no support for the challenge and is evidence of pretext.

The prosecutor stated that "...the defendant is a non-Hispanic caucasian and that same description describes all of the victims" and, with the exception of a minor witness, "[e]veryone else appears to be a non-Hispanic caucasian who is associated with this case as a witness." (9RT 1727-1728.) The trial court, in denying the *Wheeler/ Batson* motion, relied on the fact that "[t]here are no racial issues in this case" (9RT 1728-1729) and that "this is a race neutral case." (9RT 1740.) But, justifying a peremptory challenge on such a basis is not race-neutral. (*Bui v. Haley* (11th Cir.2003) 321 F.3d 1304, 1316 [Prosecution has "...*Batson* burden of coming forward with a race-neutral explanation."]) Indeed, such a challenge is eminently race-based. This is improper.

Later in the hearing, after looking at the questionnaires of the two prospective jurors, the prosecutor came up with additional reasons for challenging them. (9RT 1738-1740.) But the courts have condemned "'...sham excuses belatedly contrived to avoid admitting acts of group discrimination'" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216, 255 Cal. Rptr.569, 576.) The prosecutor's explanation for the challenge must be based on "'the circumstances of the case then known.'" (*Id.*) The prosecutor was not free to mine the jurors' questionnaires for additional, previously unknown reasons, and thereby

supplement her previous explanation. From her explanation at the point when the motion was made, it is apparent that the prosecutor did not have a proper reason for excusing the jurors; her reliance on the questionnaires was simply a last-ditch attempt to salvage the situation. . Explanations which "reek[ ] of afterthought" should not be credited. (*Miller-El v. Dretke, supra,* 545 U.S. at 246, 125 S.Ct. at 2328.) The prosecutor's reasons must stand or fall based on her knowledge and thoughts at the time the prospective juror is dismissed and when the explanation for the challenge is given.

The answers of prospective jurors nos. 7731 and 9049 on their questionnaires (26CT 7094-7088; 29CT 7629-7623) did not indicate that they could not be fair and impartial jurors. They both would follow the law and set aside their personal beliefs. Although the challenged African-American prospective jurors -- just as all the seated jurors -- had some "baggage," the totality of their questionnaire responses did not provide a justifiable reason for the prosecutor to peremptorily dismiss them.

A comparative analysis (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 331-332, 123 S.Ct. 1029, 1036-1037; *McLain v. Prunty* (9th Cir.2000) 217 F.3d 1209, 1220-1221) does not show that the two African-American prospective jurors' questionnaire responses were so different from those of other non-African-American prospective jurors such that a non-race-based reason for dismissing them can somehow be inferred. (See, e.g., 28CT 7519-7526, 7609-7616; 31CT 8329-8336, 8374-8381.) Many seated jurors' views stated in the questionnaires were similar to those of the two dismissed African-American prospective

jurors.

Juror nos. 6889 and 1267 thought life in prison was worse than death. (7CT 1626, 1628, 1718); so did no. 9049. (26CT 7022, 7074.) Juror no. 1999 stated she was "able to discount my emotions in the pursuit of justice." (7CT 1675.) Nos. 7731 and 9049 gave very similar answers. (26CT 7076 ["I am a very rasional [sic] per[s]on who can reason and listen to a reason."]; 29CT 7661 ["Any decision must be based on facts and evidence."]) Juror no. 3466's religion had a view of the death penalty: "Someone needs to be accountable for their crime." (7CT 1763.) So did juror no. 1599's: "Catholic Church do not believe in the death penalty." (8CT 1943.) No. 9049's religion also had a view: "God is the only one to give life and take life." (26CT 7074.) Indeed, the questionnaire answers of nos. 7731 and 9049 were not so different from any of the answers of the seated jurors (7CT 8CT, 9CT) that a race neutral reason for the dismissal can be divined.

A fair and impartial jury, drawn from a representative cross-section of the community "...is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202-1203, 259 Cal.Rptr. 870, 879.) A defendant in a criminal case has "...a substantial and legitimate expectation that he [will] be tried by a jury selected in accordance with ...state law and federal constitutional law." (*Aki-Khuam v. Davis* (7th Cir.2003) 339 F.3d 521, 529.) Here, appellant "...was deprived of his liberty by a jury whose very creation

involved a denial of his...constitutional rights. Consequently, [he] was denied due process...in violation of the Fourteenth Amendment." (*Id.*) Not only was appellant's due process right to an impartial jury violated by the trial court's erroneous ruling, but so were his rights to a fair trial, a reliable determination of guilt and penalty, a representative jury, equal protection, and fundamental fairness.

5. Conclusion

As the Ninth Circuit stated in *Williams v. Runnels* (9th Cir.2006) 432 F.3d 1102, 1108:

> "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."

"[T]he Constitution forbids striking even a single prospective juror for a discriminating purpose." (*United States v. Vasquez-Lopez* (9th Cir.1994) 22 F.3d 900, 902; accord, *Williams v. Runnels, supra*, 432 F.3d at 1107.)

The prosecutor's challenges to the two African-American prospective jurors were unconstitutional because they were based on improper racial grounds. The prosecutor's reasons for dismissing them were pretextual. The trial court committed constitutional error by denying appellant's *Wheeler/Batson* motion. This Court must therefore reverse appellant's conviction.

B. THE TRIAL COURT'S DISPARATE TREATMENT OF CHALLENGES TO JURORS REGARDING THEIR VIEWS ON THE DEATH PENALTY VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AN IMPARTIAL JURY, EQUAL PROTECTION, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THEIR CALIFORNIA COUNTERPARTS.

1. Introduction

A fair trial commensurate with basic constitutional principles requires that the trial court, in jury selection, deal with challenges for cause in an evenhanded, neutral manner. The same standard and voir dire procedures should be applied in assessing the qualifications of all prospective jurors to serve on a capital jury, whether they are for the death penalty or opposed to it. However, that did not occur in this case. To appellant's great prejudice, the trial court questioned prospective jurors differently and exercised its discretion in ruling on cause challenges differently depending on the prospective jurors' view of the death penalty, improperly favoring those who supported capital punishment. This biased process violated appellant's rights to due process, a fair trial, a reliable determination of guilt and penalty, an impartial jury, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Reversal is required.

///

//

/

2. The facts

a. Prosecution for-cause challenges granted

i. Prospective juror no. 8814

In his questionnaire, prospective juror no. 8814 indicated he was "neutral" regarding his opinion on the death penalty. He could impose life or death and thought some "cases...deserve the death penalty." (18CT 4659-4666.) When questioned by defense counsel, no. 8814 said he would listen to all the evidence before making a decision on penalty and would want to be informed about appellant's background. When questioned by the prosecutor, no. 8814 stated it would be hard to impose the death penalty and that he was having second thoughts regarding whether he could impose that penalty. Nevertheless, he said he "...would need to see what happened, how it happened..." (4RT 885-888.) The trial court then asked, "Based upon your present feeling...would you find yourself in the position of always voting for life instead of the death penalty?" The juror responded yes and indicated that "at this point," he could not imagine changing his mind. (4 RT 888.) However, when questioned again by defense counsel, no. 8814 said he could "...possibly vote for death. If I listen to all the evidence...I may change my mind and vote for the death penalty." He was open to voting for death. (4RT 889.) When asked a final question by the prosecutor, no. 8814 said, "My definite response this time is going to be no, I won't vote for the death penalty." (4RT 890.) The trial court did not ask any other questions and granted the prosecution's

challenge for cause. The trial court noted that the prospective juror "equivocated" and that his "stronger position" was life and found the juror to be "anti-death penalty." (4RT 890-892.) Defense counsel stated, "...what is happening is we are selecting jurors that are only predisposed for death..." (4RT 892.)

ii. Prospective juror no. 8891

In his questionnaire, prospective juror no. 8891 stated he had "strong objections to the death penalty." He was "strongly against" and thought it was imposed "too often." He was "opposed to the death penalty." (18CT 4884-4891.) During voir dire, the trial court asked no. 8891, "...it seems to me in reading the rest of your questionnaire that you are strongly against the death penalty?" No. 8891 answered, "Yes..." However, he stated he "...could be persuaded," "would be open," and "...if I were convinced of the right things, then I could impose the death penalty." He admitted that, if the charges were based mainly on circumstantial evidence, imposition of the death penalty would be more difficult and that "...if I were right on the borderline, I would choose not guilty." When asked by the trial court, "...could you foresee yourself voting for death...," no. 8891 replied, "It's possible. I would have to hear the facts." (5RT 1003-1008.) During questioning by counsel, no. 8891 stated he would weigh the aggravating and mitigating factors and could impose the death penalty. Although he would "prefer not to" be a juror in a death case, he agreed he "must follow the judge's instructions, otherwise we don't have a legal system." (5RT 1008-1012.)

The prosecution moved to excuse the juror for cause. (5RT 1012-1013, 1018.) The trial court granted the challenge because no. 8891 "...equivocated somewhat on the record..." and "...indicated he had strong objections to the death penalty." The trial court mentioned no. 8891's equivocal questionnaire answers. The trial court stated "...he waffled a bit but I don't think he truly waffled...he is anti death penalty." (5RT 1013-1015.)

Defense counsel responded that no. 8891's answers "...seemed to support a conclusion that he would in fact consider death if in fact the appropriate evidence was introduced..." Counsel saw "...no difference between that juror and some of the other jurors...who said, "...I could consider it [life] even though I'm so strongly in favor of the death penalty..." (5RT 1015-1017.)

iii. Prospective juror no. 1115

In her questionnaire, no. 1115 stated she had "mixed feelings" about the death penalty. She was "moderately in favor" of it. She felt the number of charges against appellant made it more likely he was guilty -- he has a pattern and repeats. She was not sure she could be fair. (34CT 9094-9101.)

When the trial court first questioned prospective juror no. 1115, it did not ask any death-related questions. (7RT 1411-1415.) When questioned by defense counsel, no. 1115, she said she would be open to death or life without the possibility of parole. She stated that, whatever her decision, it would be "very hard." (7RT 1415-14417.) When

questioned by the prosecutor whether, "at a gut level" she could impose the death penalty, no. 1115 said, "...I really don't know...I lost a son, it is very difficult for me to make that decision." She said she would "probably" be unable to make a life or death decision. (7RT 1417-1419.) When asked by the trial court, "Do you think if the evidence warranted it and the penalty phase warranted it, could you vote for death?" she replied, "Probably after listening to everything, maybe I could." When asked by the trial court, "Are you certain?" and when reminded that she "seem[ed] to be emotional," she answered, "Probably not." (7RT 1419-1420.) When subsequently asked by defense counsel whether she could impose the death penalty, she said "yes." When asked by the prosecutor, she said, "I guess not." (7RT 1420-1421.)

The trial court granted the prosecutor's challenge for cause because counsel and the trial court "...flip-flopped her both ways..." Her answers to the questionnaire were problematic. She "...was not comfortable as a death penalty juror." (7RT 1422-1423.)

b. Defense for-cause challenges denied

i. Prospective juror no. 8046

In her questionnaire, no. 8046 stated that, "If the defendant is found guilty I have no problem with death [sic] penalty." She was "neutral" regarding her opinion of the death penalty. (14CT 3559-3560.)

Prospective juror no. 8046 stated that the prior rape of her daughter would not affect her in this case. (4RT 751-752.)

On voir dire, no. 8046 stated that, if the defendant is found guilty of first degree, special circumstance murder, he should be put to death. When asked by the prosecutor if it was "...possible that you could decide that life without the possibility of parole would be the appropriate penalty...," no. 8046 replied, "If it's completely proven that he's guilty, I have no problem with the death penalty." She would find for life "...if that's what the majority wants," but she would not vote for life. After the trial court explained the concept of aggravating and mitigating factors, no. 8046 claimed she was "...open to life without parole." (4RT 753-755.)

Out of the prospective juror's presence, the prosecutor stated, "...I thought she had made herself ineligible as a juror and then I felt that she had changed in response to the court's questioning." Defense counsel made a challenge for cause. (4RT 756-759.) The trial court looked at no. 8046's questionnaire and said, "There was no definite pro death bias." Upon further questioning by the trial court, no. 8046 said she was "open" to considering aggravating and mitigating factors and would make up her own mind. She was certain that she was "open" to both death and life. (4RT 759-762.) The challenge was denied. (4RT 762.)

ii. Prospective juror no. 4061

In his questionnaire, no. 4061 stated that he "...believe[d] the death penalty is to serve justice. " I don't have any problem with the death penalty." He felt the death penalty is imposed "about right" and should be imposed "...if there was many counts

against one person." He also stated, "[b]eing a Catholic it is wrong for someone to kill someone." (25CT 6663-6670.)

Although his questionnaire stated he would always vote guilty regardless of the evidence in order to get to the penalty phase (25CT 6668; 4RT 7464-765), no. 4061 backtracked during voir dire. The trial court asked, "Is that your true opinion?" and "...would you automatically vote for murder with special circumstances just so you can get to the penalty phase or would you consider the evidence..."?" (4RT 765.) No. 4061 said he would consider the evidence and would not automatically vote guilty. He was trying to become a police officer and believed that police officers were more credible than other witnesses, but that he would judge them the same as other witnesses. A prior incident involving a female friend who was raped would not impact his ability to be fair. (25CT 6650; 4RT 764-768.)

In his questionnaire, no. 4061 agreed that the state should put to death everyone who kills another person. (25CT 6663-6670; 4RT 768.) When questioned, he again backtracked and said "...it depends on the evidence....I have to see the evidence first..." He did "not necessarily" believe that anyone convicted of murder should be executed; he would have to see the evidence. Although his church was against the death penalty, he could find death was appropriate. (4RT 768-772.)

Appellant's challenge for cause was denied. The trial court found that the prospective juror "...was open to both penalties..." (4RT 772.)

iii. Prospective juror no. 2746

In her questionnaire, no. 2746 stated that the death penalty was imposed "too infrequently" because "sometime[s] people can get away w[ith] murder..." (28CT 7429-7436.)

During voir dire, prospective juror no. 2746 stated that the death penalty was used too infrequently. She stated that, if appellant were to be found guilty of special circumstance murder, he should be executed. When asked whether life without parole could be appropriate in some situations, she replied, "I guess so. It depends..." In response to the trial court's questions, she said she was open to life and death and was not predisposed as to either penalty. (4RT 817-821.) Appellant's challenge for cause was denied. The trial court found no. 2746 "credible...and convincing...[A]ll of her answers seem to be appropriate in terms of being fair and neutral on the issue of guilt and penalty." (4RT 822-823.)

iv. Prospective juror no. 6957

In his questionnaire, no. 6957 stated his "general feelings about the death penalty": "There is always a price to pay...'What goes around comes around.'" He was "moderately in favor" of the death penalty. (28CT 7609-7616.)

When asked defense counsel "...if someone murders someone, do you think they should always get the death penalty?," no. 6957 answered, "I would say so, yes." (4RT 875-876.) However, he agreed with the prosecutor that he was not required to find for

death if appellant were to be found guilty of murder. He would listen to all the evidence and would be willing to find for life, or death. (4RT 876-878.)

Appellant's challenge for cause was denied. The trial court found that no. 6957 was "sincere" and would not always impose life or death. (4RT 879-880.)

v. Prospective juror no. 9021

In her questionnaire, no. 9021 stated that she was [i]n favor" of the death penalty. She was "strongly in favor" of it and felt it was "imposed too infrequently." She felt "too many murders get life" and that if someone were to be convicted of murder they should be "put to death." (29CT 7779-7886.)

During voir dire, in response to the trial court's questions, prospective juror no. 9021 stated that her experience as a victim of domestic violence would not cause her to be unfair to appellant. No. 9021 stated that, because there were numerous charges against appellant, she felt it was more likely that he was guilty. She said "Yes" when the trial court said she needed to keep an open mind. (5RT 985-987.)

In response to questioning by defense counsel, she stated, "I am not opposed to the death penalty" and "I would have no trouble imposing the death penalty if warranted." She felt the death penalty had been imposed too infrequently and that too many murderers get life without parole. However, she said, "I'm not a die-hard death penalty person." She told the prosecutor she could impose death in a felony-murder situation and could impose death on appellant "if warranted." (5RT 987-990.)

Appellant's challenge for cause was denied. (5RT 991-992.) The trial court did not grant the challenge despite finding that no. 9021 was "strongly pro death penalty." The trial court claimed no. 9021 could be fair and impartial. (5RT 991-992.)

vi. Prospective juror no. 0517

Prospective juror no. 0517 indicated in his questionnaire that the death penalty is not imposed often enough. He believed in an "eye for an eye." He was "for" the death penalty and felt it was imposed "too infrequently." (25CT 6798-6885; 5RT 1043.)

When the trial court asked, "What do you mean by that," No. 0517 explained, "...when the death penalty has been placed on a person, we don't follow up on it. They stay on death row forever." The trial court then responded, "You didn't mean that -- you didn't disagree with other jurors' findings that life in prison without parole was an appropriate penalty?" No. 0517 answered, "Correct." Although he claimed that he did not disagree with life without parole, he felt, "If there's a person who killed another person and got the death penalty, I would be in favor of it." He agreed with the trial court that he would consider mitigating and aggravating factors: "I would consider any other circumstances involved" and that he could return a life verdict "if it's so warranted." But, he also said that the mere fact appellant was charged with numerous offenses would play a role in his life v. death evaluation. (5RT 1043-1047.)

Appellant challenged no. 0517 for cause. (5RT 1047.) The trial court believed that no. 0517 had "strong feelings pro death penalty..." (5RT 1044) and found "[s]he

obviously is a strong death penalty proponent." (5RT 1077.) Nevertheless, the challenge was denied because no. 0517 supposedly would "consider the penalty phase evidence ...and she would not always vote for death." (5RT 1077.)

vii. Prospective juror no. 3390

In her questionnaire, no. 3390 wrote, "I really think people that commit murder should get the death penalty." She felt that the state should put to death anyone who killed another person or who committed murder. (26CT 7024-7031.) When the trial court asked, "So are you open to the possibility that...not all killings are murder?", she said "Right." (6RT 1175.)

When questioned by defense counsel, she agreed that not all killings were murders. She said she was open to the possibility that life or death would be an appropriate penalty. Whether a defendant should get death "...depends on the circumstances." She preferred the death penalty as a"gut" feeling. For the most part, she would vote for death. "Most likely...," life would not be punishment enough. Based on the charges, she felt death was the appropriate penalty. (6RT 1174-1177.)

If something in appellant's background made her "a little more sympathetic," she thought she "...would probably feel a little different" and could consider life. She would consider life or death in a felony-murder situation. She was open to either penalty. (6RT 1177-1180.)

Appellant's challenge for cause was denied. (6RT 1180-1181.) The trial court

thought that no. 3390 initially "...was making judgment purely based on the allegations in the case," but had been rehabilitated and "would be open to either penalty..." (6RT 1181.)

viii. Prospective juror no. 1827

In his questionnaire, no. 1827 stated, "I am for the use of the death penalty in a case where murder has occurred." He was "strongly in favor" of the death penalty. The death penalty "has a place in our society." (27CT 7114-7121.) When questioned by the trial court, no. 1827 said it would be difficult for him to be fair based upon the nature of the charges. (6RT 1190.)

When questioned by the trial court, no. 1827 stated that he felt the death penalty should be extended to cover rape. He stated that imposition of the death penalty "...would depend on the evidence that's presented." He told the trial court he would weigh the penalty phase evidence and was open to both life and death. (6RT 1190-1192.)

No. 1827 felt that, even if the charges in this case did not include murder, it was "possible" that death was the appropriate penalty. In this case, no. 1827 would have to "hear[ ] the case." But, he believed that psychological evidence was a "...superficial way to get to know a person." He would consider such evidence if so instructed by the trial court. He could impose life or death depending on the evidence. (6RT 1192-1197.)

Appellant challenged no. 1827 for cause. (6RT 1197-1198.) The trial court found that no. 1827 was "certainly strongly in favor of the death penalty." Nevertheless, the

challenge was denied because "...his answers were appropriate with regards to questions whether he could impose life or death." (6RT 1198.)

ix. Prospective juror no. 8642

In his questionnaire, no. 8642 stated he was "strongly in favor" of the death penalty. He felt the numbers of charges made it more likely appellant was guilty. He was "not sure" whether he would weigh appellant's background. (34CT 9049-9056.)

When questioned by the trial court, prospective juror no. 8642 stated that the rape of his daughter could have an effect on him regarding appellant's case. The trial court asked, "In other word, you would have difficulty separating your feelings about her case and the charges against the defendant?" No. 8642 stated that this experience and his work as a firefighter seeing victims of similar situations would cause him difficulty in separating these feelings from the charges against appellant. He found it would be difficult to be fair and that "...I'm sure there would be some bias." However, he "could try" to do so and thought he could. (7RT 1395-1397, 1398-1404.)

In response to questioning by the trial court, no. 8642 said he could see himself considering life or death in the present case, but that he would have to wait to hear the evidence. (7RT 1397.) He would "attempt to follow the law." (7RT 1402-1404.)

Appellant's for-cause challenge was denied because, although the trial court found no. 8642 "waffled," the court felt he could be fair. (7RT 1404-1405.)

x. Prospective juror no. 8964

No. 8964's sister had been beaten up by her boyfriend. The trial court asked her whether "...that would interfere or affect you in any way in determining the guilt of this defendant?" She said that, although this event was "very close" to her, she thought she could separate it from the current case. She said she would keep an open mind regarding the charges against appellant. (8RT 1480-1482, 1484.)

In her questionnaire, no. 8964 said she was strongly in favor of the death penalty and that it was imposed too infrequently. She reiterated this point when questioned by the trial court. She felt "favorably about the death penalty." She believed in the death penalty, thought life was the harsher penalty, but could not say "right now" whether she would tend to impose life. She would not refuse to impose the death penalty. (8RT 1482-1483; 35CT 9275-9282.) She was open to both penalties. She believed she could be fair and impartial. She is "more open to this situation" than when she filled out her questionnaire. (8RT 1482-1488.)

No. 8964 said she could impose death in a felony-murder situation even where the killing was not intentional. (8RT 1488-1490.)

Although the trial court found no. 8964 "...thought defendant might be guilty..." and was "...strongly in favor of the death penalty and imposed too infrequently..." the trial court denied appellant's challenge for cause because "I think she's been sufficiently rehabilitated." (8RT 1490-1491.)

xi. Prospective juror no. 4920

In response to a question from the trial court, no. 4920 said she might have a problem viewing graphic photographs, but she could still be objective. She was bothered by vulgar language and did not know how she would react, but would try to be objective. She could be fair despite the fact that her sister was a victim of domestic violence. (8RT 1532-1536, 1540-1541.)

In questions by the trial court, no. 4920 stated she has been in favor of the death penalty "ever since [she] can remember." She was "okay with the death penalty if there was no question of guilt." When asked by the trial court, "...as long as the defendant was found guilty, you then could go into the penalty phase with an open mind as to either penalty...", she replied that she would keep an open mind at the penalty phase. (18RT 1536-1537.) When the trial court asked, "...you would not refuse to vote for murder or special circumstances...to avoid the death penalty?", she answered, "No," and "I'm not against the death penalty." (8RT 1537.)

In response to questioning by counsels, no. 4920 said she does not believe that people who are sentenced to life without parole should have privileges and that they should have "perhaps" received the death penalty instead. If guilt and special circumstances were proven, no. 4920 was "really pro death" and that is how she would "probably" vote. (8RT 1538-1549; 32 CT 8689-8696.)

No. 4920 claimed, in response to counsels' questions, that she was open to the

possibility of a life verdict depending on the evidence. But, she said that, "...if I was given a case where the person was guilty, I would have no problem voting for the death penalty." But, she would also "consider life in prison." She "would hope" and "would like to think" she could wait to hear and weigh additional evidence at the penalty phase. She would not automatically vote for death on what she then knew. (8RT 1541-1544.)

Appellant challenged no. 4920 for cause. (8RT 1545-1546.) The trial court "...thought her responses in court contradicted that of her opinion. I think it was a little confusing for her." However, the trial court thought that "...upon the court's questions and the People's questioning that she cleared it up." Although the trial court found no. 4920 was "definitely in favor of the death penalty," it denied the challenge. (8RT 1546-1547.)

xii. Prospective juror no. 5293

In his questionnaire, no. 5293 stated that the death penalty was "...a necessary alternative in a capital case." He "...believe[d] the death penalty is necessary" and was "moderately in favor" of it. He felt that "[h]einous crimes perpetrators, if convicted, deserve heinous punishment." Protests against the death penalty "...have hardened [his] opinions for the death penalty..." He noted that the Catholic church is against the death penalty but that he "...strongly disagree[d] in special circumstances." He was "...not sure the legal system will always enforce 'without the possibility of parole.'" (32CT 8509-8516.)

When questioned during voir dire by the trial court, no. 5293 said he thought that life without parole was a worse penalty than death. He was informed by the Court that the parties thought death was worse. (8RT 1622-1623.)

In response to questioning by counsels for the parties, no. 5293 said he was in favor of the death penalty. He would rather have death imposed "...than allow someone to get back out on the street that's been convicted of this..." He was under the impression that people with life without possibility of parole might get out -- "Nothing would surprise me, I'm afraid." Even if he knew a person could never get out, he would "...absolutely consider the death penalty..." He claimed he would "...be open to listen to whatever...: regarding life or death. (8RT 1623-1626.) He was "...totally open to either penalty..." (8RT 1628.)

No. 5293's past problems with the law, substance abuse, and domestic violence would not affect his ability to be fair. (8RT 1626-1628.)

When no. 5293 mentioned he had been a victim of violence and had been a witness for the prosecution, the trial court asked whether this would affect his ability to be fair and whether he could separate the two incidents. No. 5293 said there would be no problem. (8RT 1627-1628.) When the trial court asked, "You are totally open to either penalty at this point?", no. 5293 answered, "...yes." (8RT 1628.)

Appellant's challenge for cause was denied. (8RT 1628-1630.) The trial court found that no. 5293 had "been rehabilitated" because most of his answers were neutral.

(8RT 1630.)

xiii. Prospective juror no. 1599

In his questionnaire, prospective juror no. 1599 indicated that he was "moderately in favor" of the death penalty. He felt it was imposed "too infrequently" and that it takes too long to execute someone. He felt that anyone convicted of murder should be put to death. The number of charges were a factor against appellant. He indicated that a tattoo on appellant's left hand might bias him against appellant. (8CT 1938-1945.)

When questioned by the trial court, no. 1599 stated that, despite the feelings expressed in his questionnaire, he could still be open-minded. He said that not all murderers should be put to death; "It depends on the severity." (7RT 1357-1359.) The trial court told no. 1599 that it was "human nature to suspect" that a defendant was "more guilty just because of the number of different charges..." (7RT 1358.) No. 1599 confirmed in response to the trial court inquiry that appellant's tattoo was "...a negative connotation...for me," and a "strike against him," but that he could put this aside. (7RT 1357-1361.)

In response to counsels' questions, no. 1599 said that, because of the number and nature of charges against appellant, no. 1599 was "already leaning against" appellant. He confirmed he has a preference for the death penalty. No. 1599 agreed that defense counsel was "correct" when he said, "...this is probably not a case where you could be fair with Mr. Baker." (7RT 1360-1362.) But, he said he could set aside his biases (7RT

1362-1363) and find for life or death. He claimed he was open to the possibility of both penalties and would keep an open mind. (7RT 1362-1365.)

After questioning by counsel, the trial court said to no. 1599, "I'm just trying to make sure that you aren't already predisposed in your mind that you would choose death no matter what the evidence showed." No. 1599 said he had an open mind. (7RT 1364-1365.)

Appellant moved to dismiss no. 1599 for cause. After argument (8RT 1365-1366), the trial court denied the challenge, finding that, despite the prospective juror's "strong feelings against Mr. Baker" and pro-death answers, "...he is not so pro death penalty, that he...would not always impose it." The trial court found no. 1599 "moderately in favor of the death penalty" and that he had been "sufficiently rehabilitated." The trial court found that no. 1599 was "completely candid" and could be "fair." (7RT 1366-1367.)

3. The trial court's discrimination against life-leaning jurors renders jury selection invalid and requires reversal *per se* of the guilt and death penalty verdicts.

As the United States Supreme Court stated:

> [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

(*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-523.)

> The high court subsequently added:
>
> > It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital case; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing temporarily to set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Both the United States Supreme Court and this Court agree that a prospective juror should be excused for cause as result of views on the death penalty if the juror's views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, fn. omitted; accord, *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146; *People v. Guzman* (1988) 45 Cal.3d 915, 955.) This standard applies whether the juror is predisposed to vote for or against the death penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) And this Court has stated that:

> [T]rial courts should be evenhanded in their questions to prospective jurors during the death-qualification portion of the voir dire and should inquire into the jurors attitude both for and against the death penalty to determine whether these views will impair their ability to serve as jurors.

(*People v. Champion* (1995) 9 Cal.4th 879, 908-909.)

In the present case, the record demonstrates that the trial court was not evenhanded

and did not apply to jurors challenged as anti-death penalty the same standard it applied to jurors challenged as pro-death penalty. As to prospective juror 8814, dismissed at the prosecutor's request, the trial court asked only one question (4RT 888) and made no effort to "rehabilitate" the prospective juror as it did with prospective jurors appellant sought to excuse for cause. (See, e.g., 8RT 1490-1491, 1630.)

The trial court granted the prosecution's challenge to no. 8814 because the prospective juror's "stronger position" was for life and he was "anti-death penalty." (4RT 890-892.) As to prospective juror no. 8891, the trial court granted the prosecution's challenge because the no. 8891 was "anti-death penalty" and had "strong objections to the death penalty." (5RT 1013-1015.) The prosecutor's challenge for cause as to prospective juror no. 1115 was granted because the trial court found she "...was not comfortable as a death penalty jury (juror?)." (7RT 1422-1423.)

In stark contrast to the granting of the prosecution's challenges to prospective jurors nos. 8814, 8891, and 1115, the trial court denied appellant's challenges even where the trial court found the prospective juror to be strongly in favor of the death penalty. As to no. 9021, the trial court denied appellant's challenge for cause despite finding that no. 9021 was "strongly pro death penalty." (5RT 991-992.) Appellant's challenge to no. 0517 was denied despite the trial court finding the prospective juror had "strong feelings pro death penalty..." and was "...obviously...a strong death penalty proponent." (5RT 1047.) Prospective juror no. 1827 was "certainly strongly in favor of the death penalty"

(6RT 1198), no. 8964 was "strongly in favor of the death penalty" (8RT 1490-1491), no. 1599 was "pro death penalty" and had "strong feelings against [appellant]" (8RT 1366-1367), and no. 4926 was "definitely in favor" (8RT 1546-1547), yet appellant's challenges to these prospective jurors were denied. When pro-death jurors "waffled" or equivocated (nos. 8814, 8891, 1115), they were retained, whereas a waffling life-leaning juror (no. 8692) was removed. It is clear that, rather than treating prospective jurors with reservations about the death penalty as sought-after resources to be preserved as part of the pool of qualified jurors, they were viewed as though they were dangers threatening the integrity of the pool. The trial court did not treat prospective jurors in a fair and balanced manner.

The United States Supreme Court and this Court have held that both the manner of "death qualification" voir dire and the determinations made by the trial judge are within the discretion of the trial judge and are not often disturbed on appeal. (See *Morgan v. Illinois, supra,* 504 U.S. at 730; *Rosales Lopez v. United States* (1981) 451 U.S. 182, 188 [plurality opinion]; *People v. Jones, supra,* 29 Cal.4th at 1246; *People v. Rodrigues, supra,* 8 Cal.4th at 1146; *People v. Kaurish* (1990) 52 Cal.3d 648, 675.) "But we have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." (*Morgan v. Illinois, supra,* 504 U.S. at 730 [court must inquire of the ability life-leaning jurors, just as it does of pro-death jurors, to put their personal feelings aside and follow the court's instructions]; *Turner v. Murray*

(1986) 476 U.S. 28, 36-37 [judge has no discretion to refuse to ask questions requested by the defense about racial bias in a case involving a black defendant and white victim]; *Ham v. South Carolina* (1973) 409 U.S. 524, 526-527 [court has no discretion to refuse to inquire about racial bias]; *Witherspoon v. Illinois, supra,* 391 U.S. at 512-513 [court has no discretion to permit state to make unlimited challenges for cause to exclude those jurors who "might hesitate" to return a verdict imposing death."])

In the present case, the trial judge unlawfully applied different qualification standards and voir dire to life-leaning and pro-death jurors, asking, in some instances, rehabilitating questions of pro-death jurors, but not doing so for life-leaning jurors and excusing those with reservations about the death penalty views while retaining those with strong pro-death views.

The voir dire process in this case was infected by both procedural and substantive unfairness to life-leaning jurors. Procedurally, the trial court did not intervene to rehabilitate the life-leaning jurors as it did with pro-death jurors. Substantively, the court indicated a skepticism about the ability of life-leaning jurors to exercise the discretion they had to decide if the death penalty was appropriate (even if they could decide that the evidence in aggravation outweighed the evidence in mitigation), but showed no similar concerns about the ability of the pro-death prospective jurors, regardless of the strength of their feelings favoring the death penalty, to choose life in prison over death if they concluded that aggravation outweighed mitigation. The effect of the process used by the

trial court was to "entrust the determination of whether [Paul Baker] should live or die to a tribunal organized to return a verdict of death" (*Witherspoon, supra,* 391 U.S. at 521), thereby violating appellant's right to the fair and impartial jury to which he was entitled under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

The trial court's more accommodating treatment of pro-death prospective jurors than life-leaning jurors also violated appellant's Fourteenth Amendment rights to due process and equal protection of the law by improperly tilting the jury selection process and ultimately the guilt and penalty deliberations in favor of the prosecution. The United States Supreme Court and this Court have recognized the need for equipose between the defense and the prosecution. (*Wardius v. Oregon* (1973) 412 U.S. 470 [reciprocal discovery]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377 [same]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [impartiality in matter of jury instructions]; *People v. Moore* (1954) 43 Cal.2d 517, 526-527 [same].) In *Wardius*, noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," the high court 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,* 412 U.S. at 474.) The Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; see also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates

equal protection]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the codefendant]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; *Washington v. Texas* (1967) 388 U.S. 14, 22-23 [accomplice permitted to testify for the prosecution but not for the defense].) Further, the trial court's application of different, less accommodating procedural and substantive standards to life-leaning jurors who would not have been excluded had they been given the benefit of the more accommodating standards applied to pro-death jurors, also clearly violated the right of the excluded life-leaning jurors to Equal Protection of the law under the Fourteenth Amendment, and appellant has standing to assert that violation of their rights. (*Powers v. Ohio* (1991) 499 U.S. 400.)

Had the trial court applied to life-leaning jurors the same relatively accommodating substantive standard that it applied to pro-death jurors and followed the same procedure of questioning life-leaning jurors about their willingness to follow the law and fairly consider both penalties (and directing them to do so as he had pro-death jurors), it appears thatthe jurors who were uncomfortable with the death penalty would not have been disqualified from the death-qualified pool. If even one of these jurors was improperly excluded from the death-qualified pool, appellant is entitled to a new penalty trial with a fairly selected, impartial jury. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 962 ["The exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires

automatic reversal -- but only as to penalty and not as to guilt."] [citing *Gray v. Mississippi* (1987) 481 U.S. 648, 666-667 (opn. of court); *id.* at 667-668 (plur. opn.); *id.* at 672 (conc. opn. of Powell, J.); *Witherspoon v. Illinois, supra,* 391 U.S. at 521-523.)

This is not a case in which the reviewing court can accord the customary deference to the trial court's rulings on prospective jurors who gave conflicting evidence. (See *People v. Jones, supra*; *People v. Carpenter* (1997) 15 Cal.4th 312, 257.) The gravamen of appellant's complaint here is that the trial court let bias infect its decision-making process by treating jurors with reservations about the death penalty differently and more hostilely than jurors who indicated that they strongly favored the death penalty. For an appellate court to defer to the trial court's results in this case without examining the discriminatory process by which it arrived at these results would be to deny appellant a meaningful hearing on this claim. This Court cannot, consistent with its constitutional duty to assure defendants in death penalty cases an impartial jury selected by an even-handed process, fail to examine the claim that the trial court exercised its discretion in a manner that disfavored the seating of life-leaning jurors. The record is clear that such disparate, unconstitutional treatment occurred.

Though he did not expressly state it, the difference in the trial court's treatment of life-leaning and pro-death penalty jurors may well have been influenced by the fact that under California law, it takes a unanimous vote of the jury to impose the death penalty; one vote for life precludes the death sentence. Thus, the trial court may have felt

constrained to be extra-cautious about qualifying life-leaning jurors. Exactly such an argument was advanced by the State of Illinois in attempting to justify a system which allowed for close questioning of life-leaning jurors for their ability to impose the death sentence, but refused a defense request to question pro-death jurors as to their ability to vote for life. The United States Supreme Court emphatically rejected this argument:

> Almost in passing the State also suggests that the "reverse-Witherspoon inquiry is inapposite because of a putative "quantitative difference." Illinois requires a unanimous verdict in favor of imposing death, ... thus any one juror can nullify the imposition of the death penalty. "Persons automatically for the death penalty would not carry the same weight," Illinois argues, "because persons automatically for the death penalty would still need to persuade the remaining eleven jurors to vote *for* the death penalty." ... The dissent chooses to champion this argument, ... although it is clearly foreclosed by *Ross v. Oklahoma* 487 U.S. 81, 85 (1988) where we held that even one such juror on the panel would be one too many. ... In any event, the measure of a jury is taken by reference to the impartiality of each, individual juror. Illinois has chosen to provide a capital defendant 12 jurors to decide his fate, and each of these jurors must stand equally impartial in his or her ability to follow the law.

(*Morgan v. Illinois, supra,* 540 U.S. at 735, fn. 8.)

Though the system used in the instant case to disfavor life-leaning jurors as compared with pro-death penalty jurors was not as blatant as the blanket exclusion of life-leaning jurors practiced in *Witherspoon,* its words seem applicable to the subtler system practiced in the instant case:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to

> him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it (sees) fit,' a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death....in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.

(*Witherspoon, supra,* 391 U.S. at 519-520.)

While the numbers in the on-going societal debate on the wisdom of the death penalty have shifted over the years, the principle that the conscience of the community cannot be fairly represented by a panel from whom those who have doubts about the death penalty have been excluded remains firmly established.

The trial court's actions disfavoring jurors with conscientious reservations about the death penalty, but favoring those who strongly believed in it, deprived appellant of an impartial jury representative of the conscience of the community. For all of the foregoing reasons, the guilty verdicts and sentence of death should be vacated and the case remanded to the trial court for the selection of an impartial jury who can fairly represent the conscience of the community in deciding whether appellant is guilty and should be put to death or sentenced to life without the possibility of parole.

4. Reversal of the guilt verdicts is required as a remedy for the discrimination against jurors with reservations about the death penalty.

This Court should reverse the guilt determinations as well as the penalty verdict.

As stated by Justice Marshall, in *Lockhart v. McCree, supra,* 476 U.S. at 184-206, there is unanimous social science research which finds that a jury death-qualified under *Witherspoon* is more prone to convict at the guilt phase. The majority in *Lockhart,* though expressing some skepticism about the research, assumed *arguendo* that it was correct and nonetheless denied the claim that a properly conducted *Witherspoon* voir dire denied a defendant a representative cross-section or an impartial jury. The instant case raises a different issue: the voir dire in this case was not conducted in an evenhanded manner; rather, jurors with scruples against the death penalty, but who were potentially able to qualify under *Witherspoon-Witt* standards, were systematically treated less favorably procedurally (by not being afforded the opportunity to answer rehabilitating questions from the court to the extent pro-death jurors were) and substantively by being judged by different, less accommodating standards than pro-death jurors. This violated not only appellant's rights under *Witherspoon,* but also the jurors' Fourteenth Amendment rights to equal protection, a right which appellant has standing to assert. (*Powers v. Ohio, supra,* 499 U.S. 400.) Thus, the guilt phase jury resulting from the *voir dire* in the instant was the result not of neutral and proper application of *Witherspoon-Witt* (the basis of the *Lockhart* decision), but rather from a discriminatory jury selection process. As Justice Marshall's dissent makes clear, there is overwhelming social science support for the conclusion that even properly selected death qualified juries are pro-prosecution in the guilt phase. Although such pro-prosecution bias may be a permissible by-product of a

fair selection process, it is simply not permissible for the prosecution to gain such a benefit as a result of unlawful discrimination in the selection of a jury. For these reasons, this Court should reverse the guilt phase determination as an appropriate remedy for the constitutional violation in this case.

C. TWO PROSPECTIVE JURORS WITH PHILOSOPHICAL AND/OR MORAL RESERVATIONS ABOUT THE DEATH PENALTY WERE ERRONEOUSLY EXCLUDED UNDER THE *WITHERSPOON-WITT* STANDARD REQUIRING REVERSAL OF THE PENALTY VERDICTS.

Appellant has demonstrated that his guilt verdict and death sentence must be set aside because the trial court, in conducting the death-qualification voir dire, applied a different, more hostile standard to life-leaning-penalty prospective jurors than the court applied to pro-death-penalty prospective jurors. Despite the trial court's failure to ask life-leaning-penalty prospective jurors the same sort of rehabilitation questions asked of pro-death penalty prospective jurors, and to apply the same standard to all prospective jurors, the record reveals two erroneous excusals for cause of prospective jurors in violation of the standards established in *Wainwright v. Witt, supra*, 469 U.S. 412 and *Witherspoon v. Illinois, supra*, 391 U.S. 510 and applied by this Court in *People v. Heard* (2003) 31 Cal.4th 946, 958-966. Independent of the trial court's lack of evenhandedness in conducting the death-qualification voir dire, the erroneous excusals of prospective jurors nos. 8814 and 8891 require the setting aside of appellant's sentence of death.

As stated above, both the United States Supreme Court and this Court agree that a

prospective juror should be excused for cause where the juror's views on capital punishment "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra,* 469 U.S. at 424, fn. omitted; *People v. Heard, supra,* 31 Cal.4th at 958; *People v. Jones, supra,* 29 Cal.4th at 1246; *People v. Rodrigues, supra,* 8 Cal.4th at 1146; *People v. Guzman, supra,* 45 Cal.3d at 955.) This standard applies whether the juror is predisposed to vote for or against the death penalty. (*Morgan v. Illinois, supra,* 504 U.S. 719; *People v. Cunningham, supra,* 25 Cal.4th at 975.) The United States Supreme Court has made clear that this standard is not to be applied to disqualify all jurors with conscientious objections to the death penalty:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing temporarily to set aside their own beliefs in deference to the rule of law. (*Lockhart v. McCree, supra,* 476 U.S. at 176.)

A trial court may excuse a prospective juror for cause only where "...their state of mind will prevent them from acting impartially and without prejudice to any party." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 627, 168 Cal.Rptr.3d 380, 418. Here, prospective jurors 8814 and 8891 did not have this problematic state of mind.

The record establishes that prospective jurors nos. 8814 and 8891 met the standards of qualification prescribed by both the United States Supreme Court and this

Court. Prospective juror no. 8814 stated he could impose life or death, although, quite naturally, he felt it would be difficult to impose death. Although he said he would always vote for life based on his "present feeling," he agreed that he would "possibly vote for death" after listening to the evidence. He was open to voting for death. (18CT 4659-4666; 4RT 885-892.)

Prospective juror no. 8891, although strongly opposed to the death penalty, agreed he "could be persuaded" to impose death and would be open to such a verdict. He agreed that it was "possible" he could impose death after hearing the facts. He agreed that he would follow the trial court's instructions. (18CT 4884-4891; 5RT 1003-1012.)

It is clear that the views of prospective jurors 8814 and 8891 would not have prevented or substantially impaired their ability to properly perform their duties as a juror. Both said that, despite their discomfort with sentencing someone to death, they could find for death if such an outcome were supported by the evidence.

The trial court erroneously excluded these two prospective jurors. Under settled precedents of the United States Supreme Court and this Court, even one erroneous exclusion requires reversal of the penalty phase verdict. (See *People v. Heard, supra,* 31 Cal.4th at 966; *People v. Ashmus, supra,* 54 Cal.3d at 962 ["The exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal -- but only as to penalty and not as to guilt.", [citing *Gray v. Mississippi, supra,* 481 U.S. at 666-667 (opn. of court); *id.* at 667-668 (plur. opn.); *id.* at 672 (conc. opn. of Powell, J.);

Witherspoon v. Illinois, supra, 391 U.S. at 521-523.)

The record establishes that, viewed on their individual merits and in isolation from the manner in which pro-death jurors were evaluated, prospective jurors 8814 and 8891 were open to both penalties and were willing to put aside any personal beliefs about opposition to the death penalty and return a verdict of death if they felt it was appropriate. The improper exclusion of each requires reversal *per se* of the penalty verdict.

D. THERE IS INSUFFICIENT EVIDENCE THAT PALMER WAS RAPED OR THAT APPELLANT ATTEMPTED TO DO SO; THEREFORE, THE RAPE CONVICTION AND SPECIAL CIRCUMSTANCE ARE UNCONSTITUTIONAL AND MUST BE REVERSED.

1. Introduction

While there is some evidence that something sexual may have occurred, there is insufficient evidence showing that appellant raped or attempted to rape Palmer. As a result, there is insufficient evidence to support the rape conviction (count 2), rape during a burglary factor (sec.667.61, subd.(a)(14)), and the rape special circumstance. The unsupported convictions and findings violate appellant's rights to due process, a jury trial, a reliable determination of guilt and penalty, a fair trial, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. This Court must reverse appellant's conviction.

2. Standard of review

In determining whether there is sufficient evidence to support a conviction and

finding, this Court applies the substantial evidence test. As stated in *People v. Morris* (1988) 46 Cal. 3d 1, 19, 249 Cal.Rptr.119, 129-130;

> "In resolving a contention based upon insufficiency of the evidence, the reviewing court's task is to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. The judgment must be supported by 'substantial evidence,' which has been defined as evidence that 'reasonably inspires confidence and is of "solid value."'"

(Accord, *People v. Mayfield* (1997) 14 Cal.4th 668, 790-791, 60 Cal.Rptr.2d 1, 74; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320, 99 S.Ct. 2781, 2788-2790; *United States v. Vuitch* (1971) 402 U.S. 62, 72, n.7, 91 S.Ct. 1294, 1299, n.7 ["...a court should always set aside a jury verdict...when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt."]) Further, "it is not enough for the respondent simply to point to 'some' evidence supporting the finding." (*People v. Bassett* (1968) 69 Cal.2d 122, 139, 70 Cal.Rptr.193, 203.) "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty." (*People v. Hall* (1964) 62 Cal.2d 104, 112, 41 Cal.Rptr.284, 289) by "reasonable, credible evidence of solid value." (*People v. Clark* (2011) 52 Cal.4th 856, 944-945, 131 Cal.Rptr.3d 225, 312.)

A conviction or finding which is not supported by substantial evidence violates a defendant's rights to due process, a fair trial, and fundamental fairness under the Fifth, Sixth, and Fourteenth Amendments and article 1, section 15 of the California Constitution. As stated in *People v. Rowland* (1992) 4 Cal.4th 238, 269, 14 Cal.Rptr.2d

377, 397:

> "A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason. [Citation.] In our view, a California conviction without adequate support separately and independently offends, and falls under the due process clause of article 1, section 15."

(Accord, *Jackson v. Virginia, supra*, 443 U.S. 307, 315-316, 99 S.Ct. 2781, 2786-2787; *In re Winship, supra,* 397 U.S. 358, 90 S.Ct. 1068.)

Applying the above-stated standard, there is insufficient evidence to support appellant's rape conviction as to Palmer, as well as the rape during a burglary factor and the rape special circumstance finding. Reversal is required.

3. <u>There is insufficient evidence of rape or intent to rape</u>.

In count 2, appellant was charged with the forcible rape of Palmer (Penal Code sec.261, subd.(a)(2)) and a rape during a burglary allegation (sec.667.61, subd.(a)(14)). As to her death, it was alleged that the murder had been committed while in the commission of rape. (Penal Code sec.190.2, subd.(17)(C.) Forcible rape is "...an act of sexual intercourse...[w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury..." (Sec.261, subd.(a)(2); accord, *People v. Stitely* (2005) 35 Cal.4th 514, 554, 26 Cal.Rptr.3d 1, 33 ["'sexual intercourse' has a common meaning in the context of rape, ...the term can only refer to vaginal penetration or intercourse."])

Here, there is insufficient evidence showing that appellant raped Palmer. Of

course, there were no witnesses to the alleged rape. Given the decomposed condition of her body, no forensic findings were made as to whether a rape occurred. There was no physical evidence of a rape. The fact that appellant's sperm and/or seminal fluid was found on various objects (couch, rug, blanket, towel, bootie) is evidence only of some sort of sexual activity, not rape, and not even physical contact of a sexual nature between the two parties. There is no evidence as to when, during Palmer's and appellant's relationship, this sperm was deposited on these objects. The fact that appellant's sperm was found on Palmer's underwear does not show that a rape occurred. The sperm could have been deposited after consensual sexual intercourse. After all, appellant and Palmer had an intimate sexual relationship. The evidence establishes she wa a caring individual. For all the evidence shows, Palmer readily could have had consensual sex with appellant, despite the evidence showing she no longer wanted a relationship with him. Such conduct would be consistent with her empathetic character.

Also, there was no sperm found in the crotch area of Palmer's underwear. (19RT 3358-3359, 3420; 22RT 3779-3786.) Had there been a rape, i.e., vaginal penetration, it is likely that sperm would have been deposited in the crotch area. The fact that sperm was found on other areas is indicative of sexual conduct other than rape.

Although appellant had said to Calhoun that he "beat up the pussy," no reasonable juror could have reasonably inferred that this meant appellant had raped her or attempted to do so. Calhoun claimed that "beat up the pussy" may have been a reference to

"aggressive sex" of some nature. The cryptic nature of Calhoun's opinion does not constitute evidence of a rape or an attempted rape, nor could a reasonable juror so infer. And, not having been at Palmer's apartment, Calhoun did not know what actually occurred.

Even if, *arguendo,* the evidence can somehow be interpreted as showing that vaginal intercourse actually occurred, there is no evidence that Palmer was alive when it happened. Intercourse with a dead person is not rape. (*People v. Booker* (2011) 51 Cal.4th 141, 179, 181, 119 Cal.Rptr.3d 722, 760, 760 ["The crime of rape requires a live victim; the intent to have sexual intercourse with a dead body is neither rape nor attempted rape. [T]he required intent [to rape] must be formed before the murder."]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 660, 21 Cal.Rptr.3d 612, 649-650 ["Certainly, rape requires a live victim, and the intent to have sexual intercourse with a dead body qualifies as neither rape nor attempted rape."]) Clearly, there is insufficient evidence of rape. The conviction for rape and the burglary sentencing factor must be reversed.

Regarding the special circumstance of murder during the commission of a rape, a jury is required to "...find that the rape was an '"independent purpose"' in the killing of [the victim] [...], such that defendant intended to commit rape and the rape and killing were part of one continuous transaction." (*People v. San Nicolas, supra,* 34 Cal.4th at 661, 21 Cal.Rptr.3d at 650.) "After intent to rape is established, the special circumstance

is applicable regardless of whether actual penetration occurred before or after death." (*Id.*) And, as stated in *People v. Lewis* (2009) 46 Cal.4th 1255, 1299-1300, 96 Cal.Rptr.3d 512, 555-556:

> The felony - murder special circumstance finding must be "based upon proof that the defendant intended to commit the underlying felony separate from forming an intent to kill the victim; ..."..."Therefore, although intentionally killing the victim during an attempted rape ultimately might thwart, in the legal sense, the perpetrator's goal of committing a rape, this circumstance does not mean the murder was not "committed while the defendant was engaged in...the attempted commission of...rape, 'which is what [section 190.2, subdivision (a)(17)c] requires."

In this case, there is no evidence that, prior to or during the killing, appellant intended to rape Palmer. Appellant did not make any statement indicative of any such pre-murder intent. And, as explained above, there is no evidence that a rape actually occurred. There is no evidence, when, during the course of events, she was killed nor is there any evidence establishing what was taking place prior to or during the killing.

The case of *People v. Quicke* (1964) 61 Cal.2d 155, 37 Cal.Rptr.617 illustrates the quantum or type of evidence necessary to properly infer that an attempt to rape occurred. There, the defendant was looking for girls and stated that he intended "to get a piece before he left the canyon." He took a female acquaintance to a drive-in movie and thereafter parked on the side of the road. He strangled the victim after she resisted his sexual advances. He then drove to a remote location and had sex with her body. The Court held that the evidence was sufficient to support a conviction for murder committed

in the perpetration of a rape. The evidence supported "the inference that upon preconceived reflection he deliberately formed a plan to coerce the victim into engaging in intercourse with him while she was alive, or if that failed, to kill her to satisfy his desires with her corpse." (61 Cal.2d at 159, 37 Cal.Rptr. at 619.)

Here, by stark contrast to *Quicke*, there is no evidence of any plan to rape nor of resistance to an attempted rape, nor any actual rape. Based on the evidence in the instant case, it cannot reasonably be inferred that the murder was committed during a rape or attempted rape. Such an inference would be pure speculation. "[A]n inference may not be based on mere surmise or conjecture..., nor upon mere possibility. It must be based on probability." (*People v. Mayo* (1961) 194 Cal.App.2d 527, 535-536, 15 Cal.Rptr.366, 371.) The required probability of a rape or attempted rape is absent in the instant case. The rape special circumstance must be reversed.

Finally, because there is insufficient evidence showing that Palmer was raped, or that appellant attempted to do so, there is no substantial evidence that her death was "the direct causal result" of a rape. (*People v. Stamp* (1969) 2 Cal.App.3d 203, 210, 82 Cal.Rptr.598, 603; accord, *People v. Huynh* (2012) 212 Cal.App.4th 285, 308, 151 Cal.Rptr.3d 170, 189.) Thus, the murder conviction cannot be upheld on a theory of felony-murder based on rape. (*Id.*)

4. Conclusion

There is insufficient evidence supporting appellant's rape conviction and the rape

special circumstance. The jury's determinations in this regard are based on nothing more than surmise and conjecture. As a result, appellant's rights to due process, a jury trial, a fair trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by these unsupported determinations. Reversal is therefore required.

E. GIVEN THE FACTS OF THIS CASE AND THE PROSECUTION'S THEORY OF GUILT, THE TRIAL COURT PREJUDICIALLY ERRED BY INSTRUCTING THE JURY AT THE GUILT PHASE ON FELONY MURDER AND THE FELONY MURDER SPECIAL CIRCUMSTANCE BASED UPON THE UNDERLYING FELONY OF BURGLARY.

1. Introduction

This Court, in *People v. Seaton* (2001) 26 Cal.4th 598, 646, 110 Cal.Rptr2d 441, 472-473 stated: "Although the intent to commit any felony or theft, including intent to unlawfully kill or to commit felonious assault, would support a burglary conviction, the felony-murder rule and the burglary-murder special circumstance do not apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim." Here, contrary to the holding of *Seaton*, the trial court instructed the jury that appellant could be convicted of burglary-based felony-murder where he "...intended to commit burglary, rape, forcible sodomy or sexual penetration by a foreign object." (6CT 1348; 48RT 7479.) The jury was instructed that the burglary special circumstance could be found true where, when appellant entered Palmer's apartment, he "intended to commit burglary, rape, or sexual penetration with a foreign object." (6CT 1356; 48RT 7480-

7489.) Burglary was defined as an entry with the intent "to commit theft or rape or sexual penetration by a foreign object or forcible sodomy." (6CT 1383; 48RT 7519.)

Here, there is no evidence that, when appellant entered the apartment, he intended to commit theft, nor was the jury instructed that theft could form the basis of the burglary in this case. The only possible intents shown by the evidence are that appellant entered with the intent to kill or with the intent to sexually assault Palmer. But, under these scenarios, the jury could not legally find a burglary-based felony murder or a burglary special circumstance. The jury, however, did so. This was the result of the confusing, misleading jury instructions. Appellant was prejudiced and his rights to due process, a fair trial, a reliable determination of guilt and penalty and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were violated. Reversal is required.

2. The trial court committed prejudicial instructional error.[25]

Neither a burglary-based felony murder nor a burglary special circumstance can properly be based on an entry with the intent to commit sexual assault. In *People v. Wilson* (1969) 1 Cal.3d 431, 82 Cal.Rptr.494, this Court held that first degree felony-murder cannot be based on a burglary committed with the intent to assault the homicide

---

[25] Instructional error may be raised for the first time on appeal even where no objection was interposed in the trial court. (Penal Code sec.1259 ["The appellate court may review any instruction given...even though ho objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."])

victim. There, the jury instructions allowed the jury to find the defendant guilty of first degree murder if "he entered [the victim's] bathroom with an intent to commit an assault with a deadly weapon and thereby committed a burglary, in the course of which he killed his wife." (*Id.* at p. 439, 82 Cal.Rptr. 494.) The Court stated that "the only basis for finding a felonious entry is the intent to commit an assault with a deadly weapon." The Court reasoned that, "[w]hen, as here, the entry would be nonfelonious but for the intent to commit the assault, and the assault is an integral part of the homicide and is included in fact in the offense charged, utilization of the felony-murder rule extends that doctrine 'beyond any rational function that it is designed to serve.'" (*Id.* at p. 440, 82 Cal.Rptr. 494.) The Court held that "an instruction on first degree felony murder is improper when the underlying felony is burglary based upon an intention *to assault the victim of the homicide* with a deadly weapon." (*Id.* at 442, 82 Cal.Rptr.494; italics added.)

Wilson's reasoning was applied in *People v. Sanders* (1990) 51 Cal.3d 471, 509, 517, 273 Cal.Rptr.537, 557-558, 563:

> In addition to being instructed that it should return a verdict of first degree murder if it found defendant premeditated and deliberated the killing, or killed during a robbery, the jury was also instructed that it could return a verdict of first degree murder if it found the murder was committed during a burglary in which defendant entered Boender's home with the intent to (1) steal, (2) commit an assault, (3) falsely imprison the victims, or (4) dissuade the victims from testifying.
>
> Defendant correctly contends, and the People now concede, that it was error to instruct the jury that it might convict of first degree murder if it found the killing occurred

> during a burglary in which defendant's intent was to commit an assault. "In [*People v.*] *Ireland* [(1969) 70 Cal.2d 522, 75 Cal.Rptr. 188], we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." We thus concluded that "a burglary based on intent to assault ... cannot support a felony-murder instruction."
>
> ***
>
> ...the burglary-murder special circumstance must be set aside for the same merger problems discussed ante, at page 509 i.e., the jury instructions improperly permitted the jury to find a burglary based on defendant's intent to commit an assault.

(Accord, *People v. Garrison* (1989) 47 Cal.3d 746, 778, 788-789, 254 Cal.Rptr.257, 273, 280 ["...an entry with the specific intent to commit murder cannot support a felony-murder conviction under the doctrine of merger explained in *People v. Ireland*...*** ...[W]e are...compelled to strike those two [burglary] special circumstances for failure to instruct on the *Ireland*...exception to the burglary felony-murder rule -- that the felony-murder rule can only apply if the jury finds that defendant entered for the purpose of theft."]; *People v. Seaton, supra,* 26 Cal.4th at 646, 110 Cal.Rptr.2d at 472-473; *People v. Ramirez* (2006) 39 Cal.4th 398, 463, 46 Cal.Rptr.3d 677, 729 ["'[T]he felony-murder rule and the burglary-murder special circumstance do not apply to a burglary committed for

the sole purpose of assaulting or killing the homicide victim.'"])[26]

The trial court instructed the jury that count 1, a charge of felony-murder, could be based on a murder committed during a completed or attempted "burglary, rape, forcible sodomy, or sexual penetration by foreign object." (6CT 1348, 1349; 48RT 7479-7480.) The jury was also instructed that the special circumstances could be based on "...murder in the commission or attempted commission of rape, burglary, or sexual penetration by foreign object." (6CT 1349, 1355, 1356; 48RT 7479-7481.) Regarding burglary, the jury was instructed that, "[w]hen he entered the house or apartment, he intended to commit theft or rape or sexual penetration by a foreign object or forcible sodomy." (6RT 1383; 48RT 7519.) However, based on the above-cited authorities, as well as the evidence, these instructions were erroneous.[27]

The prosecution's theory of the case was that appellant entered the apartment with

---

[26] In *People v. Farley* (2009) 46 Cal.4th 1053, 1113-1121, 96 Cal.Rptr.3d 191, 243-250, the Court overruled this line of authority and held that the felony murder doctrine can be based on an entry with the intent to commit an assault. The Court confirmed, however, that where there has been an entry with an intent to kill, "the felony-murder rule would be unnecessary." (46 Cal.4th at 1120, 191 Cal.Rptr.3d at 249.) However, the *Farley* Court held its decision applied prospectively only; it did not apply retroactively. (46 Cal.4th at 1121-1122, 96 Cal.Rptr.3d at 250-251; accord, *People v. Gonzales* (2011) 51 Cal.4th 894, 942, 126 Cal.Rptr.3d 1, 46.) Palmer was killed in 2004. Thus, *Farley* does not apply to the instant case. As a result, the above-cited law governs this case. Also, *Farley* did not address whether *Wilson*'s merger doctrine was still applicable vis-a-vis a special circumstance.

[27] Although "'*concurrent* intent to kill and commit the target felony or felonies does not undermine the basis for a felony-murder conviction.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1262, 57 Cal.Rptr.3d 543, 613), the jury in this case was never instructed regarding concurrent intents.

the intent and purpose of committing "rape, forcible sodomy, or sex by penetration with a foreign object." (45RT 7192-7193.) The prosecutor[28] told the jury:

> And in regard to the sexual assault of Judy Palmer -- and I'm just going to touch on this for a moment because I know Ms. Ford will address it as well -- but if you find the defendant guilty of forcible rape and sexual penetration by a foreign object as to Judy Palmer, you will also have to decide whether or not the defendant committed those crimes, those particular sex crimes during a burglary. And, in addition, the other allegation is whether or not he committed those sex crimes during a residential burglary where his intent before entering the apartment was to commit any sex crimes such as rape or sexual penetration by a foreign object. Those are some of the allegations that will be presented to you if you find the defendant guilty of any of these sex crimes beyond a reasonable doubt. (45RT 7122.)

The prosecutor argued, "...if at the time that he entered he intended to commit the felonies that you'll hear about in the instructions, it's still a burglary" (47RT 7430) and, "...it's a burglary if you intended to commit a felony inside." (47RT 7440.) Regarding felony murder, she told the jury, "...you don't really have to think about intent with regard to the homicide." (47RT 7438.) The prosecutor mentioned that theft was "...not a charged crime here but that is a felony. It's one of the things that you can consider." (45RT 7200.) But, she also told the jury that a theft-related offense, "robbery," was not involved -- "...to step away from this case, very often a robbery..." (45RT 7192.)

Following this argument, and the instructions, the jury found that count 1 was first

---

[28] The prosecutors, Ms. Flood and Ms. Ford each argued part of the prosecution's case. They are referred to here by the collective "she."

degree murder. (The jury did not specify the legal theory of guilt.) It also found the burglary special circumstance to be true. (6CT 1397; 49RT 7648-7660.) The erroneous instructions permitted this verdict, which given the evidence and the prosecution's theory of guilt, finds no support in the law.

In this case, the prosecution did not present any evidence that, when appellant entered Palmer's apartment, he intended to commit theft. Nor was the jury instructed with theft as a basis for felony-murder. (6CT 1346-1348.) The prosecutor's argument that the jury could "consider" theft was wrong and misleading. For a theft-based burglary to form the basis for felony-murder or a burglary special circumstance, the intent to steal must be present upon entry. (*People v. Horning* (2004) 34 Cal.4th 871, 903, 22 Cal.Rptr. 3d 305, 331 ["...burglary-felony murder requires that the intent to steal be formed before the fatal blow is struck..."]; *People v. Reynolds* (1986) 186 Cal.App.3d 988, 998, 233 Cal.Rptr.596, 602 ["...a murder which precedes the formation of the intent to...steal is not within the perpetration of a...burglary."]) Although items were taken in this case, the prosecution only presented evidence that the intent to take them was formed after Palmer was killed, and for the express purpose of hiding and/or disposing of the body and evidence. There is no evidence that, when he entered the apartment, appellant intended to steal these items and therefore nothing to support the burglary special circumstance on the basis of an entry with the intent to commit theft. The prosecution's theory of the case was that appellant entered Palmer's apartment with the intent to commit various assaultive sex

offenses. In conformance with this theory, the prosecution presented evidence that appellant entered with the intent to commit an assaultive sex offense. Under this scenario, the merger doctrine, as a matter of law, precludes a finding of felony-murder as well as a special circumstance finding that the murder occurred during a rape-based burglary. The erroneous instruction given in this case allowed such verdicts.

The analysis does not change despite the fact that the jury was instructed that, for the special circumstance to be true, "...the people must prove that the defendant intended to commit burglary, rape or sexual penetration by a foreign object independent of the killing." (6CT 1357;[29] 48RT 7490.) Here, there is no evidence that any intent was independent of the killing. The prosecution's theory and the evidence arguably showed that the entry into Palmer's apartment was made with the intent to commit an assaultive sex offense. This intent did not arise post-entry. Applying the merger doctrine to the evidence in this case, there is no evidence that the murder was "committed to carry out or advance commission of [an] underlying felony." (*People v. Garrison, supra*, 47 Cal.3d at 791, 254 Cal.Rptr. at 281-282.) Rather, this case involved a burglary and rape "committed in the course of a murder." (*People v. Marshall* (1997) 15 Cal.4th 1, 4, 61

---

[29] The jury was instructed: "In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit burglary, rape or sexual penetration by a foreign object independent of the killing. If you find that the defendant only intended to commit murder and the commission of burglary, rape or sexual penetration by a foreign object was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved." (6CT 1357; 48RT 7490.)

Cal.Rptr.2d 84, 106.) To paraphrase *Marshall*, "The burglary-murder [and rape-murder] special circumstance[s] apply to a murder in the commission of a burglary or rape, not to a burglary or rape committed in the course of a murder." (*Id.*; accord, *People v. Alexander* (2010) 49 Cal.4th 846, 919, 113 Cal.Rptr.3d 190, 262.) Here, under the evidence, the jury could not have properly found that a burglary or rape was anything but incidental to commission of the murder.

3. Conclusion

The prosecution presented evidence in support of its theory that appellant committed burglary by entering the victim's apartment with the intent to commit a sexual assault. Under the merger doctrine, neither a felony-murder determination nor a burglary with an intent to commit rape special circumstance could properly be found by the jury. The court's erroneous instructions were prejudicial to appellant where the entry was made with the intent to commit an assaultive sex offense.

The erroneous instructions "contribute[d] to the verdict" and were not "unimportant in relation to everything else the jury considered on the issue in question..." (*Yates v. Evatt* (1991) 500 U.S. 391, 403-404, 111 S.Ct. 1884, 1893.) The prosecution cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (*Chapman v. California* (1967) 386 U.S. 18, 24.) The state cannot show that the jury's verdict was not based on an erroneous application of the felony-murder rule. This Court cannot conclude beyond a reasonable doubt that the jury

verdict would have been the same absent the error. As a result, appellant's right to due process, a fair trial, a reliable determination of guilt and penalty, a jury trial, and fundamental fairness under the Fifth, Sixth, and Fourteenth Amendments were violated. Reversal is required.

F. BECAUSE THIS COURT CANNOT CONCLUDE THAT THE JURY UNANIMOUSLY FOUND APPELLANT GUILTY OF FIRST DEGREE MURDER ON A LEGALLY PERMISSIBLY THEORY, THIS COURT MUST REVERSE APPELLANT'S MURDER CONVICTION.

1. Introduction

As demonstrated in the previous section of this brief, because the evidence showed that appellant entered Palmer's apartment with the intent to commit an assaultive sex offense, the felony-murder theory of guilt as to the murder charge is inapplicable as a matter of law. (*People v. Wilson, supra,* 1 Cal.3d at 440, 82 Cal.Rptr. at 499-500.) Although the jury was instructed with premeditation and deliberation as alternate theories for first degree murder (6CT 1346-1347), it is impossible to determine upon which theory the jury based its guilty verdict as to the murder charge, i.e., felony murder, or premeditated murder. The verdict form does not indicate which theory formed the basis for the guilty verdict. (6CT 1397.) In such a case, because legal error has occurred regarding the felony-murder theory, reversal is required even though, *arguendo*, the alternate theory may be supported by sufficient evidence. The conviction on count 1, the murder charge, violates appellant's rights to due process, a fair trial, a reliable

determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Therefore, this Court should reverse the murder conviction on count 1. The same analysis applies to the rape special circumstance finding.

2. Reversal is required

Where one of two legal theories of guilt is legally incorrect, and the reviewing court cannot determine upon which theory the jury based its verdict of guilt, reversal is required. In *People v. Sellers* (1988) 203 Cal.App.3d 1042, 1055, 250 Cal.Rptr.345, 353-354, "[t]he jury was instructed on alternate theories of first degree murder; premeditated murder and various theories of felony murder," including murder in the course of a rape and in the course of a burglary. Erroneous jury instructions on the rape theory "rendered any jury finding of rape legally incorrect, including a finding of rape as the underlying crime supporting felony murder." (*Id.*) Because the reviewing court could not determine upon which theory the first degree murder finding was based, reversal was necessary:

> Because the jury was instructed on alternate first degree murder theories and the prosecutor did not request special findings, we cannot say which of those theories formed the basis of the first degree murder conviction. As was said by our Supreme Court in *People v. Green* (1980) 27 Cal.3d 1, 69, 164 Cal.Rptr. 1, 609 P.2d 468, "the governing rule on appeal is both settled and clear: when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." The error with respect to the instructions on rape in

> this case rendered the theory of felony murder based on rape legally incorrect, and a conviction on that theory would have been erroneous. Under these circumstances, the first degree murder conviction must be reversed and the cause remanded for new trial. (*Ibid*; *People v. Garewal* (1985) 173 Cal.App. 3d 285, 303, 218 Cal.Rptr. 690.) (203 Cal.App.3d at 1055, 250 Cal.Rptr. at 353-354.)

(Accord, *People v. Sanders, supra,* 51 Cal.3d at 509, 273 Cal.Rptr. at 558 [Where jury is presented with permissible and impermissible theories of guilt, "...the applicable rule on appeal is clear: reversal is required only if the reviewing court cannot determine from the record on which theory the jury relied."]; *People v. Morales* (2001) 25 Cal.4th 34, 41-43, 104 Cal.Rptr.2d 582, 587-588; *People v. Perez* (2005) 35 Cal.4th 1219, 1233-1234, 29 Cal.Rptr.3d 423, 433-434.)

Federal law is in accord. (See, *Leary v. United States* (1969) 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-1546 ["...when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside."]; *Bachellar v. Maryland* (1970) 397 U.S. 564, 571, 90 S.Ct. 1312, 1316 ["It is impossible to say...that either of these grounds was the basis for the verdict....Thus, since petitioner's convictions may have rested on an unconstitutional ground, they must be set aside."] *United States v. Garcia* (2nd Cir.1993) 992 F.2d 409, 416 ["...if the challenge is legal and any of the theories [of guilt] was legally insufficient, then the verdict must be reversed."]; *United States v. Moye* (4th Cir.2006) 454 F.3d 390, 400, fn.10 ["Under *Yates* [*v. United States* (1957) 354 U.S. 298, 77 S.Ct. at 1064], reversal is required when a case is

submitted to a jury on two or more alternate theories, one of which is legally (as opposed to factually) inadequate, the jury returns a general verdict, and it is impossible to discern the basis on which the jury actually rested its verdict."])

The first degree murder charge (count 1) was submitted to the jury on two legal theories of guilt -- felony-murder and premeditation and deliberation. (6CT 1343-1357.) The felony-murder theory was inapplicable as a matter of law. (See section E, *supra*.) And, there was no special finding on the verdict (6CT 1397) as to the theory upon which the jury found appellant guilty of murder. Further, from the record, there is no way to determine upon which theory the guilty verdict was based. Thus, reversal is required even if, *arguendo,* the premeditation and deliberation theory is supported by sufficient evidence.

Further, under *Seaton, Wilson*, and *Sanders, supra*, the rape special circumstance finding (if, *arguendo,* there is sufficient evidence to support such a finding) could not properly be based on a rape following a burglarious entry with the intent to rape.Although the rape special circumstance possibly could have been based on a rape independent of the burglary, the state cannot prove beyond a reasonable doubt that this was the theory upon which the jury's verdict rested.

3. Conclusion

There is no way to discern upon which theory the jury found appellant guilty of first degree murder -- the legally inapplicable felony-murder theory or the premeditation

and deliberation theory. Nor is it possible to discern whether the rape special circumstance was based on a proper legal theory. Therefore, as a matter of constitutional law, reversal of the conviction and the rape special circumstance on count 1 is required.

G. THE TRIAL COURT PREJUDICIALLY ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY PERMITTING THE PROSECUTOR TO INTRODUCE AN UNWARRANTED AMOUNT OF EVIDENCE OF UNCHARGED CONDUCT.

1. Introduction

Over appellant's Evidence Code section 352 and "federal and state grounds" objections (10RT 1819, 1820, 1823, 1824, 1825[30], 1840, 1844, 1870; 23RT 3932-3935, 4092-4106; 24RT 4110-4113), after a lengthy hearing (10RT 1816-1874), the trial court granted the prosecution's motion to introduce evidence of uncharged acts pursuant to Evidence Code sections 1101, subdivision (b), 1108, and 1109. (5CT 1019-1044, 1198-1200.) Thereafter, the prosecutor introduced a mountain of evidence of uncharged conduct. However, this wholly unwarranted amount of highly prejudicial evidence ran afoul of Evidence Code section 352 and violated the "common-law tradition" of excluding propensity evidence. (*Old Chief v. United States* (1997) 519 U.S. 172, 181-182, 117 S.Ct.644, 651.) The introduction of the evidence resulted in the denial of a defendant's rights to due process, a fair trial, a reliable determination of guilt and penalty,

---

[30] The trial court stated: "The Court will consider it a continuing objection, unless I'm told otherwise, as to every act that the Court intends to admit." (10RT 1825.)

and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. By permitting introduction of the inordinate amount of uncharged conduct evidence, the trial court prejudicially and unconstitutionally abused its discretion. Therefore, reversal is necessary.

2. Standard of review

Evidence Code section 1101, subdivision (b) provides that evidence of prior bad acts is admissible "...to prove some fact..." such as intent. The admission of such evidence is reviewed for an abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602, 94 Cal.Rptr.3d 322, 382.) The admission of evidence under Evidence Code sections 1108 and 1109 is also reviewed for an abuse of discretion. (*People v. Loy* (2011) 52 Cal. 4th 46, 61, 127 Cal.Rptr.3d 679, 694; *People v. Johnson* (2010) 185 Cal.App.4th 520, 531, 110 Cal.Rptr.3d 515, 524.) Applying this standard, the trial court's ruling constitutes prejudicial error.

3. Uncharged conduct

a. Uncharged conduct - Michelle W.

Michelle W. met appellant in 1982 when she was 17 years old and he was 20. They began dating. Appellant was "...very outgoing. Just socially very interesting." The relationship was going "fairly well." They moved into an apartment together when she was 18. (25RT 4273-4275, 4336-4372.) Appellant mentioned that he had been in the Navy. (25RT 4335.)

After they moved into the apartment, things did not go smoothly. Regarding appellant, "...there were many anger issues. There were issues with drinking." He thought she was "fooling around on him" and threw a vase at her, hitting her in the arm and cutting her. He ripped up things in the house and choked her. He spit in her face. Michelle, then 19, moved in with her grandmother. It was 1984. (25RT 4275-4277, 4280-4283, 4346-4347, 4419-4420.)

Thereafter, appellant called Michelle, wanting to reconcile. She testified he stalked and watched her. She felt uncomfortable. As she was moving into her grandmother's, appellant approached. A verbal argument ensued. Appellant hit her in her lip and nose with his fist. She fell, hitting her shoulder. Appellant then left. Michelle did not call the police because she was scared and felt humiliated. (25RT 4277-4280, 4348-4350.)

After moving out, Michelle ran into appellant at a hamburger stand. He cornered her and said, "Where do you think you're going? You can't leave me." There was no further conversation for 20 minutes. When Michelle finally made a move to leave, appellant attacked her and kicked her. Again, Michelle did not contact the police. (25RT 4284-4286.)

After the attack at the hamburger stand, Michelle moved to Wisconsin, where her parents had moved the year before. Michelle was still in love with appellant. They talked on the phone. In 1985, she moved back to California. (25RT 4286-4288, 4392, 4350-

4358.)

Although appellant still had issues with drinking, the two got married in 1986 and moved to an apartment in Long Beach. There were good times. There were also bad times. The drinking problems continued. Appellant used illegal drugs. Appellant accused Michelle of seeing someone else. He got violent during arguments. He would choke her with both hands and punch her in the face. He beat her. (25RT 4288-4292, 4358-4365.)

In 1988 or 1989, after their son was born, appellant and Michelle moved to Wisconsin. Appellant had just gotten out of rehab regarding crack cocaine use. It was "peaceful" for a short time. On one occasion, after running errands, appellant and Michelle stopped into a tavern. Michelle had two or three Screwdrivers. Appellant drank beer. While they were playing pool, the bartender bumped into Michelle and her bra strap somehow came undone. Appellant got extremely angry and accused her of having an affair. They left. Michelle was drunk and threw up on the way home. (25RT 4292, 4297, 4365-4376.)

At home, Michelle went upstairs to the bedroom. Appellant had some baby oil. Michelle testified, "...the next thing I noticed was he was on top of me and we were having sex." They had not agreed on this. Even though she had told appellant she did not want to have sex, he removed her clothes, "didn't listen" and "proceeded." Michelle struggled and said "no." Appellant put the baby oil on her. He was "very aggressive and

very demanding." He had forcible sexual intercourse with her against her will as she lay face down in the bed. When Michelle fell off the bed, appellant banged her head on the floor five or six, maybe 10, times. He picked her up, threw her back onto the bed, and sodomized her more than once. He bit her leg, back, and arm. (25RT 4297-4307.)

Michelle managed to break away. Grabbing a shirt, she ran outside to a neighbor's house. The police were called. Michelle described the incident and told the police appellant had said he would kill her if she left the house. Appellant was arrested. She received treatment at a hospital for her injuries. Her injuries were photographed. Michelle obtained a restraining order. (25RT 4307-4311, 4322-4330, 4384.)

After the incident, appellant made contact with Michelle. She let him back into the house. The case against appellant was dismissed. (25RT 4309, 4311, 4330-4331, 4384-4387.)

In 1990, the family moved to Florida. The "marriage was falling apart." Appellant's mother arranged for them to move into a one-room fishing shack. Times were difficult. Appellant entered rehabilitation in 1991. In Florida, Michelle won prizes given away by a small local radio station. Appellant left rehabilitation and, over the phone, accused Michelle of having a relationship with the station's D.J. Michelle was scared and moved back to California with their two boys. Appellant stayed in Florida. They were divorced in 1993 or 1994. (25 RT 4311-4316, 4392-4396, 4400-4406.)

In 1994, because appellant wanted to be a part of the children's lives, Michelle

allowed him to temporarily move into her apartment. Michelle made it clear she did not want a romantic relationship with appellant. She was dating someone else, a man named Jeff. (25RT 4316-4317, 4406-4416.)

In June 1994, appellant thought Michelle was leading him on. On her phone, she saw that her last call had been to her boyfriend. Appellant became "jealous and enraged," cornered her in the kitchen, and put a lit cigarette up to her eye. Appellant left. Michelle called her boyfriend and asked him to come over. He did. (25RT 4317-4319.)

When appellant returned, he had a 12-pack of beer. Appellant saw Michelle's boyfriend and started a fight with him. Appellant took out a knife and cut the boyfriend's ear. A police report was made. A stay-away order was obtained. Appellant moved out. (25RT 4319-4321, 4416-4418.)

After the fight incident, Michelle gave appellant gas money. He threatened her with financial ruin, but did not specify how he was going to accomplish this. He thereafter "pretty much" left her alone. (25RT 4321-4322, 4418, 4423-4424.)

b. <u>Uncharged conduct - Sandra B.</u>

Sandra B. met appellant on July 19, 1994 at an A.A. meeting. She had been sober for five months. Appellant was "friendly, outgoing, pretty charming." They dated over the next several months. (25RT 4426-4428, 4464-4470.)

Sometime later appellant's behavior changed and they began arguing. Appellant said he had "other options if [she] didn't like some of the ways that he interacted with

[her]." One day, when Sandra came home from work, she found that appellant had unexpectedly moved himself into her apartment. They argued, but Sandra agreed he could stay until he found another place to live. (25RT 4428-4430; 26RT 4473-4474.)

Appellant eventually found a place to live about three weeks later. (26RT 4473-4474.) On the day he moved out, he and Sandra got into an argument in the bedroom. Appellant was ranting and raving. He would bump into Sandra. He pulled the phone cord out of the wall, swore at Sandra, and said she "was going to pay for this." To Sandra, it was "really quite a terrorizing situation." After appellant left, she found that the cards and letters she had given him had been stuffed into a toilet. Some of the items had been ripped up. (25RT 4430-4433.)

On July 31, 1995, after appellant had moved out, he called Sandra and asked for a ride to an A.A. meeting. She said she had somewhere to go, but would do so thereafter. She took an ex-boyfriend to the mall and dropped him while his car was being repaired. She then went to get appellant. When she picked him up, he was "really irritated because it was an ex-boyfriend of mine." Appellant opened the door and jumped out into traffic. Sandra picked up her friend at the mall and went to the car repair shop. (25RT 4433-4436; 26RT 4474-4476.)

At the repair shop, Sandra and her friend got out of her car. Appellant, who was 50-100 feet away, started yelling at them. He was angry and threatened them. He came up and pounded on the hood of Sandra's car, damaging it. Appellant eventually calmed

down. Sandra drove home. (25RT 4436-4438; 26RT 4475.)

After the July 31, 1995 incident, frightening incidents with appellant continued. Sandra got law enforcement involved and documented the incidents (26RT 4450-4453), which included appellant showing up at her apartment and other places and staring at her, telephoning her incessantly, sometimes fifteen time an hour, and leaving threatening messages. When she refused to get back together, appellant responded with degrading, demeaning comments and told her that she needed to watch her back, that she did not "know what he was capable of." (26RT 4453-4456, 4479-4482, 4501.)

One time, at an A.A. meeting, when Sandra declined to speak to appellant, he threw a cup of coffee at her and kicked her leg. Sandra got a restraining order against him. A criminal case was also filed against appellant. Appellant continued to make degrading and demeaning comments to Sandra. He was convicted and the harassment ended. (26RT 4456-4464, 4482-4486, 4996-4407, 4501.)

c. Uncharged conduct - Theresa Tannatt

Theresa Tannatt is an alcoholic. She was convicted of vehicular manslaughter as a result of her drinking. She also has drug-related convictions. She has had periods of sobriety. As of the date of trial, she had been sober for four years. She does, however, occasionally smoke marijuana. (15RT 2562-2566, 2605-2614, 2647-2650.)

Tannatt met appellant around November 6, 2003 at the Palm Tree Inn Hotel, which was a "crack hotel." They agreed to "score" some crack and smoke it. Appellant called

his connection and the two of them drove in appellant's Bronco to pick up the drugs. Tannatt hung out with appellant for about a week, obtaining and using drugs. Sometimes they would sleep in the Bronco. They attempted to have sex, but "[i]t wasn't possible at first, there was too may drugs involved." They were successful one time. (15RT 2566-2572, 2588, 2614-2616, 2620-2621, 2652.)

During the first week they were together, appellant mentioned that his last romantic relationship had been with Judy Palmer, with whom Tannatt was acquainted. Appellant said he could not stay at Palmer's because he was using drugs. Around November 7 or 8, 2003, appellant and Tannatt went over to Palmer's apartment. Appellant used the code to get through the gate. Palmer was not there. Appellant used his credit card to get into the apartment. Appellant picked up a duffel bag and a toothbrush from the bathroom. The two of them left; appellant was "...nervous. He wanted to get out of there." (15RT 2572-2579, 2586, 2616-2107.)

About a week after meeting appellant, Tannatt checked herself into a rehabilitation program After a few days, she called appellant and he came and took her out of the program. (15RT 2594-2595, 2624-2627.)

Tannatt testified that, at times, she and appellant slept in a model apartment in Palmer's building. Appellant used his credit card to get in. Tannatt and appellant "would party" and do drugs in a stairwell in the building. Appellant never parked in front of the building. (15RT 2579-2586, 2618-2620.)

One morning around November 20, 2003, in the model apartment, Tannatt and appellant were lying together side by side. Tannatt's back was toward appellant. Appellant said, I want some." Tannatt felt appellant prodding her with his erection. Tannatt replied, "Not now." Appellant "forced [her] over," pinned her shoulders, and said, "I want it." Tannatt testified that, because "I'd rather get fucked than killed," she unzipped her pants and pulled them down. Appellant thereafter had vaginal intercourse with her. Afterward, Tannatt was "very mad. Very disgusted." (15RT 2587-2592, 2604-2605, 2627-2628, 2631, 2638.)

After this incident, appellant and Tannatt drove around and "scored a little." Tannatt "had nowhere to go." Her belongings were in the Bronco. (15RT 2592-2593, 2629, 2639-2641.) Driving down a side street, appellant hit another car and a mirror flew off the Bronco. Tannatt got out, got her belongings, and called a friend. A taxi came and picked her up. (15RT 2593-2596, 2642-2646.)

Appellant called Tannatt in December 2003. She did not encourage him to call and told him to "lose" the phone number. (15RT 2604.)

At a Valley Club A.A. meeting, Tannatt subsequently learned that Judy Palmer was missing. Her "first instinct was, '...oh my God, Paul...'" She called the number on a missing person poster and thereafter contacted the police. She told them of her experiences with appellant. However, she did not tell them appellant had raped her. (15RT 2595-2601, 2602, 2646-2647.)

Around November 20, 2007, Tannatt was contacted by Detective Park. She told him that appellant had raped her. (15RT 2601-2602, 2633-2637.) Tannatt identified a photograph of appellant and his dog. (15RT 2603-2604.)

d. Kathleen S.

Kathleen S. testified to uncharged conduct allegedly committed by appellant. She claimed he once threw her down in the middle of the street, which led to a conviction for battery. (32RT 5403-5407, 5442-5446.) In August 1997, appellant broke her vehicle's antenna and hit the windshield, cracking it. This resulted in a vandalism conviction for appellant. (32RT 5423-5426.)

e. Laura M.

Laura M. testified that, in 2000, appellant threatened her and stranded her in Las Vegas. (30RT 5083-5084; 31RT 5176-5178.) She testified to three acts of sodomy (30RT 5064-5080), whereas only two such acts were charged (counts 9, 13). She claimed appellant threatened to burn down her house. (30RT 5081-5083; 31RT 5190-5191.)

f. Lorna T.

Lorna T. testified that, in mid-1996, appellant stole her credit card and that he was arrested. (31RT 5226-5243; 34RT 5595-5600.)

4. Admission of the prior sexual offenses to show a propensity to commit sex-related offenses violated appellant's right to due process; to the extent they permit such proof, Evidence Code sections 1108 and 1109 are unconstitutional.

Petitioner respectfully submits that Evidence Code sections 1108 and 1109 are

unconstitutional because they permit evidence of prior crimes to be presented in order to show a propensity to commit such crimes. The principle that evidence may not be presented for that purpose is "so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43.)

Petitioner recognizes that this Court has previously upheld section 1108 against just such a due process challenge (see *People v. Falsetta* (1999) 21 Cal.4th 903, 911), but respectfully submits that this Court should revisit the issue for the reasons set forth herein. In addition, because the United States Supreme Court has never squarely addressed the issue (see *Estelle v. McGuire* (1991) 502 U.S. 62, 75 n.5), and because the point cannot be raised through habeas corpus (*Teague v. Lane* (1989) 489 U.S. 288; 28 U.S.C. sec.2254(d)(1)), appellant must raise the issue on direct appeal in order to preserve it for federal review. A more detailed discussion follows.

a. Admission of prior crimes evidence to show propensity offends principles of justice firmly rooted in Anglo-American legal tradition and violates due process principles.

The Fifth and Fourteenth Amendments of the United States Constitution guarantee that criminal defendants will have due process of law, that is, the "observ[ation of] that fundamental fairness essential to the very concept of justice." (*Lisenba v. California* (1941) 314 U.S. 219 at p.236.) Thus, state law violates due process where "it offends some principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff, supra*, 518 U.S. at p.43; *Cooper v.*

Oklahoma (1996) 517 U.S. 348 at p.356; *Medina v. California* (1992) 505 U.S. 437 at pp.445-446.)

One of the functions of due process is to "draw[ ] a boundary beyond which state rules of evidence cannot stray; ..." (*Perry v. Rushen* (9th Cir.1983) 713 F.2d 1447 at p.1453.) For example, due process requires proof of a criminal charge beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358) and prohibits conviction unsupported by evidence or based on unreliable evidence (*California v. Green* (1970) 399 U.S. 149, 186, fn.20) or based on evidence that is unnecessarily suggestive or conducive to irreparable mistake. (*Stoval v. Denno* (1967) 390 U.S. 293, 301-302.)

In *People v. Falsetta, supra,* this Court upheld California Evidence Code section 1108 against a due process challenge. Evidence Code section 1108 contains an exception to the Code's broad proscription on the admission of evidence of an accused's other crimes to prove his general criminal disposition to commit a charged crime and allows the prosecution in any sexual offense case to introduce "evidence of the defendant's commission of another sexual offense or offenses." This evidence is admissible to prove the defendant's general criminal disposition, or propensity, to commit the charged crime. (Cal. Evid. Code section 1108(a); *People v. Falsetta, supra,* 21 Cal.4th 903 at p.911.)

While acknowledging that "[t]he rule excluding evidence of criminal propensity is nearly three centuries old in the common law," this Court concluded that it was "unclear whether the rule against 'propensity' evidence in sex offenses should be deemed a

fundamental historical principle of justice: because courts "permit admission of...sexual misconduct [for the purpose of showing] motive, identity, and common plan..." (*Ibid.*) This Court declined to settle that question and held that the limitations imposed on the admission of section 1108 evidence, largely those imposed by the trial court's discretion to exclude propensity evidence under section 352, were sufficient to avoid offending whatever historical practice existed. (*Id.*, at pp.915-918.)

For the reasons discussed below, appellant respectfully requests that this Court reconsider its decision in *Falsetta*.

b. Application of the United States Supreme Court due process analysis demonstrates that admission of evidence of appellant's propensity to rape violated due process.

Appellant acknowledges that the United States Supreme Court has stopped short of announcing a bright-line rule prohibiting propensity evidence because the Court has never needed to answer this precise question in order to resolve a case before it. (See *Estelle v. McGuire, supra,* 502 U.S. 62, at p.75, fn.5.) However, the Supreme Court has clearly explained the analysis that applies to due process claims. For over 150 years, the Court has applied a historical test for ascertaining what rules are protected by due process. In *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 U.S. 272, the Court held that when the process at issue is not in conflict with any express constitutional provisions, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and

which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. (*Id.*, at 277.)

This historical test was further elaborated in *Hurtado v. California* (1884) 110 U.S. 51, at p.528 [rule deemed to be embodied in due process if supported by the sanction of settled usage both in England and in this country]. Over a century later, the Supreme Court affirmed this definition in *Dowling v. United States* (1990) 493 U.S. 342, defining due process as "those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (*Id.* at p.352 (internal quotation omitted).)

The historical pedigree of the prohibition on propensity evidence is unimpeachable. The rule is rooted in English law and was adopted by the colonial courts, enforced as a common-law rule throughout the history of our nation's judiciary, and codified in state and federal rules of evidence.[31] Commentators agree that the propensity ban has received judicial sanction for three centuries.[32] This historical legacy amply demonstrates that propensity evidence "offends [a] principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Patterson v. New York* (1977) 432 U.S. 197 at pp. 201-202.)

---

[31] See, Louis M. Natali, Jr. & R. Stephen Stigall, "Are You Going To Arraign His Whole Life?"; How Sexual Propensity Evidence Violates the Due Process Clause, 28 LOYOLA U. CHI. LJ. 1, 13-15 & fn. 85-101 (1996) (summarizing historical record and collecting cases).

[32] See, e.g., 1AWigmore on Evidence, sec.58.2, p.1213 (rev. 1983)

The Supreme Court has acknowledged the constitutional dimensions of the trial rights protected by the propensity ban. (See *Boyd v. United States,* 142 U.S. 450 (1892) [prior crimes evidence impermissibly impressed upon the jury the notion that defendants were "wretches" undeserving of prescribed trial protections]; see also *Estelle, supra,* 502 U.S. at 78 (O'Connor J., concurring) [suggesting that prohibition on propensity evidence protects proof beyond reasonable doubt standard].) Thus, federal law compels the conclusion that the propensity ban is a requirement of due process. Moreover, at least two federal courts of appeal have explicitly held that admission of character evidence to prove the disposition of the defendant to commit the current offense violates federal due process. (*Panzavecchia v. Wainwright* (5th Cir.1981) 658 F.2d 337; *McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378.)

Even in the absence of a bright-line rule that pure propensity evidence violates due process, the use of propensity evidence rendered appellant's trial fundamentally unfair. In this case, during jury instructions prior to deliberations, the jury was instructed with CALCRIM No. 1191. This instruction told the jury that it could conclude "that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit rape, forcible sodomy, rape and sexual penetration by a foreign object, as charged here." (6CT 1360.) Admission of this evidence accompanied by an instruction expressly authorizing a propensity-based inference of guilt violated "the underlying premise of our criminal

justice system, that the defendant must be tried for what he did, not who he is." (*United States v. Hodges* (9th Cir.1985) 770 F.2d 475 at p.1479.) As the *Hodges* court continued:

> Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing.

(*Id.*, at p.1479.)

The evidence involving the uncharged prior conduct and CALCRIM No. 1191 invited the jury to convict appellant on the general basis that appellant was a sex offender, rather than on the exclusive basis of evidence regarding the death and possible rape of Palmer. Thus, admission of evidence of the claimed sexual offenses against several other women rendered the trial fundamentally unfair. Further, in light of the long recognized dangers of permitting jurors to rely upon propensity evidence as a basis for conviction,[33]

---

[33] See, e.g., *Michelson v. United States* (1948) 335 U.S. 469, at pp.475-476:

> 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

the evidence and instruction also undermined the 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, 637-638 [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].)

c. Section 352 does not provide the safeguard anticipated by *Falsetta*.

In *Falsetta, supra*, this Court relied heavily on *People v. Fitch* (1997) 55 Cal.App. 4th 172, in holding that section 1108 did not violate due process because:

> [W]e think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch*. '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under...section 352. (...sec.1108, subd.(a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352 the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (...sec.352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. *With this check upon the admission of uncharged sex crimes in prosecutions for sex crimes, we find that...section 1108*

---

opportunity to defend against a particular charge.

> *does not violate the due process clause."* [Emphasis in original.] [Citation.]

(*Falsetta, supra,* 21 Cal.4th at p.917-918.)

As anticipated by *Falsetta:*

> [R]ather than admit[ting] or exclud[ing] every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]

(*Falsetta, supra*, at p.917.)

However, section 352 does not provide the "safeguard" this Court anticipated. Sections 1108 and 1109 alter the traditional balancing process of section 352 by establishing a presumption in favor of admissibility of prior sex or domestic violence offenses to prove disposition, and because sections 1108 and 1109 make prior sex or domestic violence offenses presumptively admissible, such priors may now be excluded under section 352 only if they are unduly prejudicial for some reason other than their tendency to prove disposition.

As this Court has noted, propensity evidence has historically been "deemed objectionable, not because it has no appreciable probative value, but because it has too

much." (*Falsetta, supra,* 21 Cal.4th at p.915.) Thus, based on its "appreciable probative value," in addition to its presumption of admissibility, it is clear that prior sex or domestic violence offenses will only be excluded under section 352 in extremely rare circumstances. This cannot be considered an adequate safeguard against the admission of evidence that has traditionally been considered inherently prejudicial. (See *United States v. Burkhart* (10th Cir.1972) 458 F.2d 201 at p.204 ["[O]nce prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."].)

Indeed, experience has shown that section 352 provides no safeguard at all. The *Falsetta* opinion relied on the earlier Court of Appeal decision in *People v. Harris* (1998) 60 Cal.App.4th 727, to demonstrate that the section 352 exclusion remedy is both vital and legally viable:

> [I]n *Harris* [citation], the appellate court reversed a conviction under that section, concluding the trial court abused its discretion under section 352 in admitting an altered version of the defendant's past violent se offense. In its discussion, the *Harris* court carefully examined, and applied to the facts before it, the factors included in the trial court's discretionary decision to admit propensity evidence under sections 352 and 1108.

(*Falsetta, supra,* 21 Cal.4th at pp.918.)

Harris was decided in January 1998 -- more than 15 years ago, and it is the only pre-*Falsetta* case holding that a trial court erred in admitting evidence under section 1108. Although this Court found that there was "no reason to assume, as defendant suggests,

that 'the prejudicial effect of a sex prior will rarely if ever outweigh its probative value to show disposition'" (*Falsetta, supra,* 21 Cal.4th at p.919), no reported appellate decision since *Falsetta* has found reversible error in the admission of other crimes evidence proffered by the prosecution under sections 1108 or 1109. A practice which admits other crimes evidence when offered to prove a defendant's disposition to commit the charged offense -- even when subject to the empty safeguard of section 352 -- violates Due Process. Indeed, as a matter of logic, section 352 analysis conducted in light of Evidence Code sections 1108 and 1109 and an instruction like CALCRIM No. 1191 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.

In short, if proving propensity is deemed legitimate, it is difficult to imagine a case in which Evidence Code section 352 analysis would ever exclude prior sex or domestic violence crimes evidence.[34] A 352 analysis thus does not save sections 1108 and 1109

---

[34] A brief examination of the facts in *Harris* shows why exclusion of prior sex offenses under section 352 will be extraordinarily rare. In that case, the defendant, a male mental health nurse, was charged with fondling the breasts and clitoris of one female patient and having an inappropriate but consensual sexual relationship with another female patient, both of whom were or had been under his care and had a strong defense with respect to each count. (*People v. Harris, supra,* 60 Cal.App.4th at pp.691-692.) The prior offense which the prosecution sought to present under section 1108 involved not merely inappropriate sexual conduct but an incident in which the defendant broke into the home of a strange woman in the nighttime, beat her unconscious, used a sharp instrument to rip through the muscles from her vagina to her rectum, then stabbed her in the chest with an ice pick, leaving a portion of the pick inside her. The police found both the

from unconstitutionality as a federal due process violation, appellant's conviction must be reversed under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.

5. The introduction of the evidence regarding the uncharged conduct was prejudicial and violated appellant's constitutional rights.

Evidence Code section 1101, subdivision (b) permits the introduction of evidence of uncharged conduct when relevant to prove "some fact" such as "motive, opportunity, intent, ..." Evidence Code section 1108 allows the introduction of evidence of "the defendant's commission of another sexual offense or offenses" where the defendant is accused of committing a sexual offense. Under Evidence Code section 1109, where the "defendant is accused of an offense involving domestic violence," the prosecution may introduce" evidence of the defendant's commission of other domestic violence." However, the admission of evidence under all three code sections is governed by Evidence Code section 352, which requires exclusion where the prejudicial nature of the evidence of the uncharged conduct outweighs the probative value of the evidence. (Evidence Code secs.1108, subd.(a), 1109, subd.(a) [evidence must be excluded if "inadmissible pursuant to section 352."]; *People v. Soper* (2009) 45 Cal.4th 759, 772-773, 89 Cal.Rptr.3d 188, 200 [Evidence admitted under section 1101, subdivision (b) """must

---

victim and the defendant covered in blood. (*Id.*, at p.692.) In that case, the appellate court properly found the prior conviction inadmissible because it was shocking, inflammatory, and profoundly out of proportion to the charged offense. The fact that, apparently, there has not been a single section 352 exclusion of a prior sex offense in an 1108 case in the last 15 years shows just how rare such circumstances are likely to be.

not contravene...section 352."""])

The uncharged conduct evidence detailed above may have been admissible under sections 1101, subdivision (b), 1108, and 1109 because the evidence arguably involved a sexual offense (sec.1108), domestic violence (sec.1109), or was relevant to, e.g., motive, intent, consent, etc. (Sec.1101, subd.(b).) But, as explained, *infra*, despite being facially admissible, the prejudicial nature of the evidence required its exclusion.

It is well-settled that evidence of prior offenses is extremely prejudicial. As stated in *People v. Ewoldt* (1994) 7 Cal. 4th 380, 404, 27 Cal. Rptr. 2d 646, 660:

> "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. ...' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.'"

(Accord, *People v. Carpenter* (1997) 15 Cal. 4th 312, 380, 63 Cal. Rptr. 2d 1, 39 ["Evidence of uncharged crimes is inherently prejudicial..."]; *People v. Davis, supra,* 46 Cal.4th at 602, 94 Cal.Rptr.3d at 382 ["...evidence of other crimes may be highly inflammatory..."]; *United States v. Myles* (D.C.Cir.1996) 96 F.3d 491, 494 ["...other crimes evidence is always prejudicial to a defendant because '[i]t diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character.'"]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314, 97 Cal.Rptr.2d 727, 737 ["a careful weighing of prejudice against probative value... is essential to protect a defendant's due process right to a fundamentally fair trial."])

Here, the trial court prejudicially and unconstitutionally abused its discretion when it allowed the prosecutor to introduce the evidence of appellant's prior uncharged conduct

The extensive evidence of violent uncharged sexual and domestic violence offenses provided by Michelle W., Sandra B., Theresa Tannant, Kathleen S., Laura M., and Lorna T. was exceedingly prejudicial, as it showed that appellant committed violent non-sexual offenses. Michelle W.'s testimony was especially prejudicial because most of the violence occurred while appellant was married to her. The jury would readily view with particular disdain and contempt anyone who so horribly abused his wife, someone he presumably loved. The evidence of the uncharged conduct provided by the other witnesses only compounded the prejudice.

Moreover, the evidence that an actual rape occurred in connection with Palmer's death was exceedingly thin, if nonexistent. The jury likely convicted appellant of the sexual offenses against Palmer in large part because it believed he had a propensity to commit such offenses, after having heard all of the uncharged conduct. Further, the fact that appellant had never been punished for all of the uncharged acts increases the prejudice from admission of the evidence. (Compare, *People v. Ortiz* (2003) 109 Cal. App.4th 104, 118, 134 Cal.Rptr.2d 467, 478 ["...defendant had been punished – via convictions – for the prior bad acts..., a circumstance [which] ...lessens its prejudicial impact."]) Here, the prejudicial impact was not lessened.

The inflammatory evidence of the uncharged conduct introduced in this case

"...uniquely tends to evoke an emotional bias against defendant as an individual..." (*People v. Yu* (1983) 143 Cal. App.3d 358, 377, 191 Cal.Rptr.859, 870), which effectively canceled out whatever probative value the evidence may have had. The evidence *unfairly* biased the jury against appellant.

Supposedly "limiting" instructions were given regarding the uncharged offenses. These instructions told the jury that it could consider the evidence of the uncharged offenses if proved by a preponderance of the evidence. Once mere preponderance was shown, the jury could "...conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit rape, forcible sodomy rape and sexual penetration by a foreign object..." (6RT 1360.) The same instruction was given regarding evidence of uncharged offenses involving domestic violence. (6RT 1361-1362.) Using the evidence of the uncharged conduct as proof of current conduct, the jury could find appellant guilty even though the evidence on actual rape of Palmer was exceedingly thin.

Although limiting instructions were given regarding the jury's consideration of the uncharged conduct (6CT 1360-1364, 1372), respondent cannot "...insulate reversal by pointing to a limiting [or cautionary] instruction..." (*Werner v. Upjohn Co., Inc.* (4th Cir.1980) 628 F.2d 848, 854; accord, *Francis v. Franklin* (1985) 471 U.S. 307, 324, n.9, 105 S.Ct. 1965, 1976, n.9 ["Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not

adequately protect a criminal defendant's constitutional rights."]) And, as stated in *People v. Gibson* (1976) 56 Cal.App.3d 119, 130, 128 Cal.Rptr.302, 308:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals....We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

Also, as noted in *Jackson v. Denno* (1964) 378 U.S. 368, 388, n.15, 84 S.Ct. 1774, 1787, n.15, "'The naive assumption that prejudicial effects can be overcome by instructions to the jury, ...all practicing lawyers know to be unmitigated fiction.'"

6. <u>Conclusion</u>

As a matter of law, the trial court abused its discretion by allowing the prosecutor to present the extremely inflammatory, prejudicial evidence of uncharged offenses. Under section 352, the evidence should have been excluded. Its admission violated "...the 'long-standing tradition that protects a defendant from "guilty be reputation" and from "unnecessary prejudice."'" (*United States v. Daniels* (D.C. Cir.1985) 770 F.2d 1111, 1116.) This tradition is based on the Due Process Clause of the Fifth Amendment and "...is 'fundamental to American jurisprudence.'" (*Id.*)

The admission of the evidence of the uncharged conduct was "substantially more prejudicial than probative" because it "...pose[d] an intolerable 'risk to the fairness of the proceedings...'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724, 94 Cal.Rptr.2d 396, 418.)

It was "'so prejudicial as to constitute a denial of due process.'" (*Reese v. Wainwright* (5th Cir.1979) 600 F.2d 1085, 1090.) Admission of the evidence "...violate[d] the defendant's right to due process by denying him a fundamentally fair trial." (*Milone v. Camp* (7th Cir.1994) 22F.3d 693, 702.) In the absence of this evidence, this Court cannot say beyond a reasonable doubt that a result more favorable to appellant would not have occurred. (*Chapman v. California* (1967) 386 U.S. 18, 87 S. Ct. 824.) If error of federal constitutional magnitude has not occurred, it is reasonably probable a result more favorable to appellant would have occurred. (*People v. Watson* (1956) 46 Cal. 2d 818, 299 P.2d 243.) Therefore, reversal is necessary.

H. THE TRIAL COURT PREJUDICIALLY ERRED WHEN, OVER APPELLANT'S OBJECTIONS, IT ALLOWED DR. STAUB TO TESTIFY REGARDING THE DNA REPORTS OF OTHERS AND ADMITTED THOSE HEARSAY REPORTS INTO EVIDENCE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

1. Introduction

In *Crawford v. Washington* (2004) 541 U.S. 36, 59, 124 S.Ct. 1354, the Court held that the Sixth Amendment's confrontation clause required the exclusion of out-of-court "[t]estimonial statements of witnesses absent from trial...where the declarant is unavailable, and...where the defendant has [not] had a prior opportunity to cross-examine." (Accord, *People v. Lopez* (2012) 55 Cal.4th 569, 573, 147 Cal.Rptr.3d 559, 561 ["The Sixth Amendment...grants a criminal defendant the right to confront adverse witnesses."]) Here, this fundamental protective right was prejudicially violated when,

over appellant's "prevent proper cross-examination" (20RT 2445) objection, the trial court allowed Dr. Staub to testify -- and not merely as an expert giving his or her opinion -- as to the truth and accuracy of the results of DNA testing conducted by Cellmark analysts who did not testify at trial.and appellant never had the opportunity to cross-examine the analysts who performed the testing. The trial court committed further error when, over appellant's hearsay objection, it permitted the prosecutor to introduce into evidence the reports of the non-testifying Cellmark analysts.[35]

The trial court's errors regarding Dr. Staub and the analysts' reports were prejudicial to appellant and violated. his rights to due process, a fair trial, confrontation, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts Reversal of the murder and rape convictions and the rape special circumstance is required.

2. The facts

The prosecution called Dr. Staub to testify regarding the results of DNA testing conducted at the Cellmark laboratories in Germantown, Maryland and Dallas, Texas. However, Staub did not work at the Germantown lab, did not have any administrative,

---

[35] In November 2004, the Orchid Cellmark lab in Maryland fired a DNA analyst over allegedly falsified DNA analyses. (See, Los Angeles Daily News, 11/18/04 (http://truthinjustice.org/false-DNA.htm); Baltimore Sun 11/18/04 (http://articles.baltimoresun.com/2004-11-18-04/news/0411180133_1_dna-angeles-police-department-cases.) The Baltimore Sun article stated, "Many of the cases were performed for the Los Angeles Police Department." *(Id.)*

management, or quality control responsibilities at that lab, and did not conduct or supervise any of the DNA testing there. He had no personal knowledge as to the analyses about which he testified at the trial. (20RT 3425-3427, 3433-3457, 3541-3545; 36RT 5906, 5932-5933, 5985.) Nor did Staub personally conduct any of the DNA testing at the Dallas laboratory, although he supervised the two analysts who did. (20RT 3497-3498, 3517-3518; 36RT 5905-5907.)

Shortly after Dr. Staub began testifying, appellant interposed several objections:

> Q. Are there procedures in place which all of the analysts are instructed to follow to make sure there is no cross-contamination from one thing to the other?
>
> MR. GARCIA: Objection, vague as to location. Cellmark at Dallas, the facility that he is the -- overseeing?
>
> THE COURT: Sustained.
>
> Q. BY MS. FORD: Did the lab in Germantown follow the same procedures with regard to the integrity of the evidence that are followed in the Dallas lab?
>
> MR. GARCIA: Your Honor, there will be a foundational problem as to that.
>
> THE COURT: Can you lay a little better foundation? I know you laid some.
>
> MS. FORD: Sure.
>
> THE COURT: Objection's sustained.
>
> Q. BY MS. FORD: Doctor, how much do you know about what went on in the Germantown, Maryland lab?

A. I know a pretty good amount.

Q. Okay. Have you reviewed the case files of analysts who worked there?

A. Yes, I have.

Q. And were those analysts following the same sets of policies and procedures as the analysts were following in the lab in which you were working?

MR. GARCIA: Your Honor, same objection as to foundation as to any opinion as to any information from Germantown, Maryland.

THE COURT: He testified he reviewed the case files. Overruled.

You may answer.

MR. GARCIA: For the record, there will be an objection as to that. Does that mean he's in a position to provide an opinion? He's not overseeing any quality control or anything as to Germantown.

THE COURT: All right, so noted.

Q. BY MS. FORD: Okay, sir, did the Germantown lab follow the same policies and procedures that the analysts follow in the Dallas lab?

A. They typically follow the same documentation protocols that we do in Dallas. There might be minor differences as to how they're entered into the computer or whether it's done manually.

MR. GARCIA: Your Honor, objection, nonresponsive to that question. "Typically" is not the answer.

THE COURT: Overruled. The answer stands.

***

Q. And have you reviewed a series of case files from the

Germantown lab as well as from the Dallas lab in connection with this particular case that brings you to Los Angeles?

A. Yes, I have.

Q. And did each of those --

MR. GARCIA: For the record, there would be an objection.

Can we approach at side bar, your Honor, to preserve the objection?

THE COURT: Okay. Both counsel at side bar on remote.

(The following proceedings were held at side bar:)

THE COURT: Okay. Go ahead, Mr. Garcia.

MR. GARCIA: Your Honor, for the record I wanted to preserve the objection with regard to this expert testifying with regard to the Germantown, Maryland laboratory and any of their analysis.

It's my position that there's a lack of foundation. There's nothing to indicate that the policies are the same, that he has any quality control overseeing with regard to that lab other than generalizations.

I know I already objected, your Honor, but it wasn't clear whether there was a continuing objection. I want to make sure that objection is noted and that I'm covering any of the testimony with regard to the Maryland laboratory on those grounds.

THE COURT: Ms. Ford, do you plan to have him analyze the stuff -- testify as to the analysis of the things from the Germantown --

MS. FORD: I do.

And he has done this many times with regard to other

labs because they all follow the same policies. Essentially, they're business records.

THE COURT: But he's not a custodian for Germantown.

MS. FORD: He doesn't need to be a custodian of records if he's familiar with -- do you have the Evidence Code handy by any chance? I can demonstrate to you that that's not necessary to prove.

If he's familiar with the records and familiar with the policies and the way in which those records are kept and he finds they're consistent with the protocol, that's adequate for business records. Custodian of records plays a different role.

I want to get the Evidence Code, if I might.

Looking at Evidence Code section 1271, evidence of a writing made as a record of an act, condition or event is not made admissible by the hearsay rule when offered to prove the act, condition or event.

If -- item three -- the custodian or other qualified witness testifies to its identity and the mode of its preparation and the sources of the information and methods and time of preparation were such as to indicate its trustworthiness.

And the first two qualifications will have been met. The writings were made in the regular course of business. The writings made at or near the time of the act, condition or event. But for it to be a custodian is not necessary.

THE COURT: Well, I guess he can testify the writing was made in the regular course of events comparing their policies and procedures with his and having reviewed their policies and procedures and casework. I guess he can testify also as to near the time of the act, condition or event based upon documentation from the records. That's the only way.

MS. FORD: And I intend for him to testify about the ultimate

conclusions also.

And if it helps court and counsel to understand why I feel no dis-ease with doing this it's because very typically you don't get the analyst that you want either from L.A.P.D. or from Cellmark and there are people testifying all over the county on any given day that are not the Cellmark representative who did the testing but another person with a same or higher level job.

And it's true that coroners testify for other coroners all the time. If I had to, I could probably testify for another D.A. with regard to certain well-documented activities.

THE COURT: But you are talking about in the same business. We are talking about that he's from the same department, so he's much more familiar with the protocol from L.A. County as opposed to Riverside County.

MS. FORD: If you wish to have a hearing in front of the jury or even in front of the jury, that's fine. This gentleman is adequately familiar with how things are done in Germantown and has testified, if I'm not mistaken, about Germantown results in the past. It's the same company. It's akin to another building of the same company.

THE COURT: Germantown is now defunct?

MS. FORD: I think they've closed it. I don't know the story behind that.

THE COURT: Well, I think if she can go through each of the requirements of 1271 item by item and he can testify to same, then I think counsel's right, the testimony would come in under 1271 of the Evidence Code.

MR. GARCIA: Your Honor, I would still be objecting. I think it's a different situation.

This is attorney Garcia. I am still objecting, your Honor. I think there's a difference between the labs. I don't

think it's the same thing as, for example, as a coroner in Los Angeles County. That's a different situation.

There's different aspects to each different lab and there are different problems with regard to quality control. As to Cellmark in Dallas, this individual can testify even though he didn't do personal analysis based on him reviewing the records there; however, as to him testifying as to laboratory conditions, any kind of problems, any type of quality control at Cellmark Maryland, it is a different situation.

In my experience with Cellmark Maryland, there has been problems with quality control. Even *Brady* letters to the defense raises questions with regard to tampering. Not with tampering, with regard to quality control problems and problems with controls. He would not be privy to any of that information. In order to prevent the defense from properly examining with regards to problems in Maryland that he would not have firsthand information. *He would just be looking at conclusions from notes and would then prevent proper cross-examination with regard to that.*

THE COURT: Well, perhaps another witness you can call to establish that if this expert cannot.

Again, you could create a better foundation. I'll let you go through this.

MS. FORD: Sure. Thank you. (20RT 3437-3466; italics added.)

Dr. Staub then testified regarding the results, the accuracy, and reliability of the analyses performed by others.

Dr. Staub testified that Catherine Leisy, a DNA analyst at the Cellmark laboratory

in Germantown, Maryland, analyzed DNA evidence from Palmer and appellant.[36] The analyses took place in early 2005, months after appellant had been arrested for Palmer's murder. Leisy's written report (People's Exhibit 313) documented how she received the DNA samples, conducted her analyses, and listed the results. From her report, Dr. Staub testified -- and not simply as an expert rendering an opinion -- regarding how the analyses were conducted by Leisy and her results. He testified as to the actual truth and accuracy of the analyses and results. (20RT 3455-3464.)

Regarding the January 2005 tests, Staub testified that from a portion of a rug from Palmer's apartment, Leisy isolated a non-sperm DNA fraction and a sperm fraction from appellant. She also found a then-unknown female DNA fraction. (20RT 3466-3478, 3489, 3536-3537, 3555; 36RT 5970.)

Leisy's March 2005 report (People's Exhibits 316, 317) stated that appellant's DNA and DNA from another person were found on the pink dildo. (20RT 3478-3484.)

In late March 2005, Leisy received a DNA profile for Palmer. Dr. Staub testified that Leisy re-examined the evidence. Her report stated that Palmer's blood was found on the wall of her apartment and on the carpet and carpet padding from her apartment. (20RT 3490-3493; 36RT 5971-5973.) Palmer's and appellant's DNA were found on the pink dildo. (20RT 3493-3497, 3534-3535, 3553-3557.)

---

[36] Leisy did not testify at trial and there is no evidence that she was unavailable to do so.

Dr. Staub testified that, in 2007, YSTR testing was done at Cellmark's Dallas lab by Cassie Johnson and Melissa Benavides, neither of whom testified at trial.[37] Johnson was supervised by Dr. Staub. He "reviewed her work" and consulted with her. Regarding the YSTR testing for DNA, Staub testified, "Actually, I think the work actually in this case was done by Melissa Benavides." Johnson was Benavides' supervisor. The two analysts kept records and wrote reports. Dr. Staub did not supervise any of the actual work and did not personally oversee the tests. He "...wasn't present in the lab when they were done." (20RT 3503-3508, 3517-3518; 36RT 5905-5907; People's Exhibits 323, 324, 325, 326.)

Dr. Staub reviewed the reports from the Dallas lab and testified that the DNA samples had been properly received. (20RT 3504-3505.) Reviewing the reports, Staub testified that, through YSTR testing, appellant's DNA was found on latex gloves and on Palmer's underwear. (20RT 3528-3537, 3597, 3591-3592; 36RT 5935-5937, 5946-5961, 5973-5976.)

The prosecutor requested that the reports and bench notes from the Cellmark analysts be admitted into evidence. The trial court agreed, on the basis that the reports were business records. Appellant objected, arguing that the reports were hearsay and that the exception did not apply. (48RT 7547-7558.) The reports and related documents were admitted. (48RT 7564; People's Exhibits 313, 316, 317A, 318, 319A, 320A, 322, 323,

---

[37] There is no evidence that analysts Johnson and Benavides were unavailable.

324, 325, 326, 327.)

3. Standard of review

In *United States v. Woodard* (10th Cir.2012) 699 F.3d 1188, 1194, 1198, the Court discussed the standard of review to be applied where, as here, the Sixth Amendment right to confrontation has been violated:

> The Sixth Amendment guarantees the right of a defendant to "be confronted with the witnesses against him." U.S. Const. Amend. VI. One of the primary interests secured by the Sixth Amendment's confrontation clause is the right of cross-examination. This is the "principal means by which the believability of a witness and the truth of his testimony are tested." A violation of this constitutional right occurs when "the defendant is prohibited from engaging in otherwise appropriate cross-examination that, as a result, precludes him from eliciting information from which jurors could draw vital inferences in his favor." Stated differently, "'a defendant's right to confrontation may be violated if the trial court precludes an entire relevant area of cross-examination.'"
>
> ***
>
> Because we conclude Defendant's Sixth Amendment confrontation rights were violated, we must reverse Defendant's conviction unless the government can prove "that the constitutional error was harmless beyond a reasonable doubt." We have described the government's burden as an "extraordinary" one. In deciding whether the government has met this burden, we assume the damaging potential of the cross-examination was fully realized. We then consider various factors, including "the importance of the witness' [s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case" to determine whether the error was harmless beyond a reasonable doubt. If there is a "reasonable

> probability" the jury would have reached a different verdict, "it necessarily follows that the district court's prohibition on cross-examination...cannot clear the high hurdle of harmlessness beyond a reasonable doubt." (Citations omitted.)

(Accord, *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1373, 113 Cal.Rptr.2d 804, 821 ["If...the error violated appellant's Confrontation Clause rights, we must determine whether the error was harmless beyond a reasonable doubt."]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 ["Confrontation Clause error" reviewed to determine whether it "was harmless beyond a reasonable doubt."]; *Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.)

4. The trial court prejudicially erred by allowing Dr. Staub to testify.

In recent years, the United States Supreme Court and the California Supreme Court have addressed the issue of whether a defendant's Sixth Amendment confrontation rights are violated where the results of a test or a similar inculpating procedure are testified to by an individual who did not perform the tests. This court, in *People v. Huynh, supra,* 212 Cal.App.4th at 316-320, 151 Cal.Rptr.3d at 196-199, summarized the United States Supreme Court cases as follows:

> In *Crawford v. Washington* (2004) 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (*Crawford*), the United States Supreme Court held that the Sixth Amendment's confrontation clause prohibits admission of out-of-court "[t]estimonial statements of witnesses absent from trial [unless] the declarant is unavailable," and "only where the defendant has had a prior opportunity to cross-examine." The

Crawford court did not set forth "a comprehensive definition" of what constitutes "testimonial evidence," but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p.68, 124 S.Ct. 1354.) Elaborating to some degree, the *Crawford* court also stated the "core class" of testimonial statements included "'ex parte in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' ...' extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'...'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.* at pp. 51-52, 124 S.Ct. 1354, italics omitted.)

Subsequently, the high court addressed what constituted testimonial statements in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (*Melendez-Diaz); Bullcoming v. New Mexico* (2011) 564 U.S. ____, 131 S.Ct. 2705, 180 L.Ed.2d 610 (*Bullcoming*); and *Williams v. Illinois* (2012) 567 U.S. ____, 132 S.Ct. 2221, 183 L.Ed.2d 89 (*Williams*).

In *Melendez-Diaz, supra,* 557 U.S. at pages 308 through 309, 129 S.Ct. 2527, a drug case, the prosecution introduced "'certificates of analysis'" prepared by laboratory analysts who did not testify; the certificates reported that a substance found in the defendant's car was cocaine. The Supreme Court held the certificates were "within the 'core class of testimonial statements,'" and, therefore, their use violated the defendant's Sixth Amendment rights under *Crawford.* (*Melendez-Diaz, supra,* at p. 310, 129 S.Ct. 2527, 174 L.Ed.2d 314.) Each certificate was a "'"solemn declaration or affirmation made for the purpose of establishing or proving some fact,"' ...functionally identical to

live, in-court testimony... ... '"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"' ...[and created] to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." (*Id.* at pp. 310-311, 129 S.Ct. 2527.)

In *Bullcoming, supra,* ____ U.S. ____, 131 S.Ct., 2705, 180 L.Ed.2d 610, a drunk driving case, the high court again held that a laboratory analyst's certificate was a testimonial statement that could not be introduced unless the analyst was unavailable for trial and the defendant had a prior opportunity to confront that witness. (*Id.* at pp. 2710, 2713.) The defendant's blood sample was sent to a state laboratory for testing after he was arrested for drunk driving. (*Id.* at p. 2710.) The analyst who tested the defendant's blood sample recorded the results on a state form that included a "'certificate of analyst.'" (*Ibid.*) At trial, the analyst who tested his blood sample did not testify, but a colleague familiar with laboratory's testing testified. (*Id.* at pp. 2711-2712.)

The *Bullcoming* court explained that another analyst who did not participate in or observe the test on the defendant's sample was an inadequate substitute or surrogate for the analyst who performed the test. (*Bullcoming, supra,* 131 S.Ct. at p. 2715.) Testimony by someone who qualified as an expert regarding the machine used and the laboratory's procedures "could not convey what [the actual analyst] knew or observed about the events his certification concerned, *i.e.,* the particular test and testing process he employed" and would not expose "any lapses or lies on the certifying analyst's part." (*Ibid.*) The high court stated that, if the Sixth Amendment is violated, "no substitute procedure can cure the violation." (*Id.* at p. 2716.) The high court reiterated the principle stated in *Melendez-Diaz* that a document created solely for an evidentiary purpose in aid of a police investigation is testimonial. (*Bullcoming, supra,* at p. 2717.) Even though the analyst's certificate was not signed under oath, as occurred in *Melendez-Diaz*, the two documents were

similar in all material respects. (*Bullcoming, supra,* at p. 2717.)

Earlier this year, in *Williams, supra*, 132 S.Ct. 2221, a rape case, the high court considered a forensic DNA expert's testimony that the DNA profile, which was derived from semen on vaginal swabs taken from the victim and produced by an outside laboratory, matched a DNA profile derived from the suspect's blood and produced by the state police laboratory. Justice Alito, writing with the concurrence of three justices and with Justice Thomas concurring in the judgment, concluded that the expert's testimony did not violate the defendant's confrontation rights. The plurality held that the outside laboratory report, which was not admitted into evidence (*id.* at pp. 2230, 2335), was "basis evidence" to explain the expert's opinion, was not offered for its truth, and therefore did not violate the confrontation clause. (*Id.* at pp. 2239-2240.) The plurality also supplied an alternative theory: even if the report been offered for its truth, its admission would not have violated the confrontation clause because the report was not a formalized statement made primarily to accuse a targeted individual. (*Id.* at pp. 2242-2244.) Applying an objective test in which the court looks "for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances" (*id.* at p. 2243), the *Williams* plurality found that the primary purpose of the outside laboratory report "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." (*Ibid.*) Further, the plurality found that no one at the outside laboratory could have possibly known that the profile it generated would result in inculpating the defendant, and, therefore, there was no prospect for fabrication and no incentive for developing something other than a scientifically sound profile. (*Id.* at pp. 2243-2244.) Justice Thomas concurred on the basis the report lacked the requisite formality and solemnity to be testimonial. (*Id.* at pp.2255 (conc. Opn. of Thomas, J.).)

Under *Crawford, Melendez-Diaz, Bullcoming* and *Williams*, "...the prosecution's use at trial of testimonial out-of-court statements ordinarily violates the defendant's right to confront the maker of the statement unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." (*People v. Lopez, supra,* 55 Cal.4th at 581, 147 Cal.Rptr.3d at 568.) The *Lopez* court held that there are "two critical components" regarding whether a statement is testimonial, both of which must be satisfied:

> First, to be testimonial, the out-of-court statement must have been made with some degree of formality or solemnity...
>
> Second, ...an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution..."for the primary purpose of accusing a targeted individual" ... "for the purpose of providing evidence." (*Lopez, supra,* 55 Cal.4th at 582, 147 Cal.Rptr.3d at 569.)

Here, there is no evidence that Leisy, Johnson, and Benavides, the Cellmark analysts who conducted the YSTR DNA tests in this case, were unavailable to testify and that appellant had a previous opportunity to cross-examine them. Thus, under *Crawford, supra,* their reports should have been excluded pursuant to Sixth Amendment Confrontation Clause principles.

The reports of Leisy, Johnson, and Benavides, even if not signed under oath or by declaration under penalty of perjury, were certainly testimonial: formal, solemn documents """made for the purpose of establishing or proving some fact,""" i.e., that

appellant's DNA was on items associated with Palmer, which was "the precise testimony the analysts would be expected to provide if called at trial." Their reports were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310-311, 129 S.Ct. 2527, 2535.) Further, the analyses and reports were certainly "'"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."'" (*Id.*) Indeed, it cannot be argued that there was any other purpose for the analyses and the resulting reports. As a matter of constitutional law, under *Crawford* and *Melendez-Diaz*, appellant had the right to be confronted by the authors of the reports, i.e., the witnesses who actually and personally conducted the DNA analyses. (557 U.S. at 311, 129 S.Ct. at 2532.)

In *Williams v. Illinois* (2012) ____ U.S. ____, 132 S.Ct. 2221, a DNA expert compared the defendant's DNA profile with that of a DNA profile from a semen sample left on the victim and opined that they matched. The Court stated that the Confrontation Clause was not violated by introduction of that expert's hearsay opinion at trial (____ U.S. at ____, 132 U.S. at 2227-2228) and gave several reasons for its decision: (1) the report "was not admitted into evidence and was not seen by the trier of fact" (____ U.S. at ____, 132 U.S. at 2230, 2235); (2) the report had not been admitted for the truth of the matter, but was merely "basis evidence" used to support the expert's opinion (____ U.S. at ____, 132 U.S. at 2239-2240); (3) the purpose of the report "was not to accuse

petitioner or to create evidence for use at trial...[I]t's primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence against petitioner, who was neither in custody nor under suspicion at that time" (____ U.S. at ____, 132 S.Ct. at 2243); and (4) no one at the lab could have known the report would inculpate the defendant. (____ U. S. at _____, 132 S.Ct. at 2242-2244.)

None of the reasons supporting admissibility even under the plurality opinion in *Williams* are applicable here. First, the analysts' reports were admitted into evidence and seen by the jury (48RT 7547-7558, 7589). Second, the reports were admitted for the truth of their contents, and Staub testified as if the information in the reports were true. Unlike the expert in *Williams*, Staub did not render any independent expert opinion but merely recited the report's results as if they were true and accurate. Third, the purpose of the Cellmark reports was to tie appellant, who had been in custody for at least seven months for Palmer's murder, directly to the murder -- the analyses and reports were generated solely to "accuse" appellant and to "create evidence for use at trial" against him; there was no other purpose for the analyses and reports. Fourth, any reasonable analyst or lab personnel would have known the DNA test results would inculpate appellant. Finally, the fact that Staub may have qualified as an expert does not cure the confrontation clause violation. In *Bullcoming v. New Mexico* (2012) 564 U.S. ____, ____, 131 S.Ct. 2705, 2715-2716, the Court held "surrogate testimony" by an expert cannot "cure the

violation."[38]

People v. Dungo (2012) 55 Cal.4th 608, 147 Cal.Rptr.3d 527 is also distinguishable from the present case. Unlike Dr. Staub, the testifying pathologist in *Dungo*, "... gave his independent opinion..." regarding cause of death, and the autopsy report was not introduced into evidence. (55 Cal.4th at 612, 147 Cal.Rptr.3d at 529.) Further, unlike the Cellmark DNA reports in the instant case, the "primary purpose" of the autopsy report in *Dungo* did not "pertain[ ] in some fashion to a criminal investigation." (55 Cal.4th at 619, 621, 147 Cal.Rptr.3d at 535, 536.) Here, the sole purpose of Cellmark's DNA analyses and reports was the criminal investigation of appellant, who had been arrested for the murder of Palmer. The only purpose of the analyses and reports was to provide testimonial-type trial evidence showing that appellant killed Palmer. In such a case, even if, *arguendo,* the reports are not as formal or solemn as a declaration under penalty of perjury, they were sufficiently serious and weighty to qualify as testimonial under *Lopez, Melendez-Diaz,* and *Williams,* especially here, where Dr. Staub did not testify merely as an expert but as to the truth of the facts stated in the reports

Dr. Staub's testimony was also barred by Evidence Code section 1271, the business records exception to the hearsay rule. (Evidence Code sec.1200.) In response to

---

[38] Although Staub may have qualified as a DNA expert, he did not testify as such vis-a-vis the reports of the missing analysts. He testified as to the truth and accuracy of the facts contained therein. He did not render an opinion based on the reports.

appellant's lack of foundation objection, the prosecutor argued that Dr. Staub could properly testify as to the contents of the Cellmark reports because, the prosecutor claimed, they were business records. However, the reports and related documents were not business records. (See, *infra*, subsection 5.) Thus, the foundation for admission of the reports had not been laid, and Dr. Staub should have been precluded from testifying as to their content. (See, *People v. Dorsey* (1974) 43 Cal.App.3d 953, 959-960, 118 Cal. Rptr.362, 366-367 [witness may not testify as to the "contents of records" unless the records qualify as business records under Evidence Code section 1271.] The trial court erred when it overruled appellant's objections to having Staub testify regarding the reports.

5. The Cellmark laboratory reports should not have been admitted into evidence.

The prosecutor argued that the DNA reports and related Cellmark documents were admissible as business records pursuant to Evidence Code section 1271. Likening the reports to a coroner's report, the trial court agreed. Appellant argued that the analysts' DNA reports did not qualify under the business records exception to the hearsay rule. After discussion, the trial court ruled that the DNA reports and related documents were admissible as business records. (48RT 7547-7558.) The reports were admitted into evidence. (48RT 7558-7588.) The jury was given the reports to review and consider during deliberations. (48RT 7589.) However, the trial court erred -- the DNA reports were not admissible as business records. Rather, they were inadmissible pursuant to the

hearsay rule because they were prepared solely for use at trial as evidence in an attempt to prove appellant's guilt. The trial court prejudicially erred by allowing the prosecutor to introduce the reports.[39]

Pursuant to Evidence Code section 1200, hearsay evidence is "...evidence of a statement...that is offered to prove the truth of the matter stated." (Subd.(a).) "Except as provided by law, hearsay evidence is inadmissible." (Sec.1200, subd.(b); accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 185, 58 Cal.Rptr.2d 385, 402 ["Hearsay...is evidence of an out-of-court statement offered by its proponent to prove what it states....Unless it comes within an exception, it is inadmissible."]; *United States v. Montes-Salas* (5th Cir. 2012) 669 F.3d 240, 251.)

Evidence Code section 1271 provides an exception to the hearsay rule for business records:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to

[39] And, as explained in the preceding sub-section of this brief, the reports were inadmissible because their use in this case violated appellant's Sixth Amendment confrontation rights.

its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Because a business record is an exception to the hearsay rule, evidence admitted pursuant to section 1271 is admitted for the truth of the matter asserted therein. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321, 99 Cal.Rptr.3d 198, 215 -216 ["Section 1271 permits admission of business records to establish the truth of the matters contained therein..."])

"[T]o qualify as a business record the document's *author* must have created the document in the ordinary course of his or her business." (*Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 191, 75 Cal.Rptr.3d 439, 452.) However, "...the Confrontation Clause, like the hearsay rule, bars the admission of documents kept in the regular course of business as part of a regularly conducted business activity 'if the regularly conducted business activity is the production of evidence for use at trial.'" (*United States v. Thompson* (8th Cir.2012) 686 F.3d 575, 581; accord, *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at 321-322, 129 S.Ct. at 2538 [Same, and adding, accident report not admissible as business record where "...it was 'calculated for use essentially in the court, not in the business."]) In this case, Cellmark's business activity was preparing evidence -- the reports -- for use against appellant at trial. The reports were not used as part of Cellmark's business.

The Cellmark DNA reports were not admissible under the business records exception because they were not "'created for the administration of an entity's affairs'"

but rather "'for the purpose of establishing or proving some fact at trial.'" (*Bullcoming v. New Mexico, supra,* 564 U.S. ____, ____, fn.6, 131 S.Ct. at 2714, fn.6; accord, *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at 324, 129 S.Ct. at 2539-2540.) The reports were not admissible as business records because they were prepared specifically "to 'establish or prov[e] past events potentially relevant to later criminal prosecution.'" (*United States v. Cameron* (1st Cir.2012) 699 F.3d 621, 642.) The "primary purpose" (*id.*), if not the only purpose of the reports, was to directly tie appellant to the murder of Palmer. As a matter of law, the Cellmark reports were not admissible as under the business records exception to the hearsay rule. The evidence should have been excluded.

6. Appellant was prejudiced by Dr. Staub's testimony and the hearsay reports.

The erroneous admission of the Cellmark DNA reports and the improper introduction of Dr. Staub's testimony about the truth of those reports was prejudicial to appellant.

Leisy's January 2005 report claimed that the DNA samples had been properly received and maintained. (20RT 3449-3457, 3541-3545; People's Exhibit 313.) That report stated that appellant's DNA had been found in a sperm and non-sperm fraction on the rug in Palmer's apartment. (20RT 3466-3473, 3536-3537, 3555.) In March 2005, Leisy found appellant's DNA on the pink dildo and determined that the blood in the apartment was Palmer's. (20RT 3478-3484, 3490-3493; People's Exhibit 316, 317.) But, Dr. Staub had no idea whether Leisy had made any mistakes during her testing.

The YSTR DNA tests done at Cellmark in 2007 by Benavides (or Johnson) showed that appellant's sperm-related DNA was found on latex gloves and on Palmer's underwear. (20RT 3538-3522, 3577, 3591-3592; 36RT 5948-5949.) Staub testified as to the purported truth and accuracy of the tests performed by Leisy and Benavides. But, he did not conduct the tests.

The prosecution argued that the DNA-related evidence placed appellant in Palmer's apartment close to the date of her disappearance. His DNA in the latex gloves provided more evidence of his guilt -- he did not want to leave fingerprints and/or did not want to soil his clothes. And, the DNA found on Palmer's underwear provided virtually irrefutable evidence that he had performed some sort of sex offense against her and bolstered the idea that he had entered Palmer's apartment with the intent to commit a felony. Without the evidence provided by Staub's testimony and the admission of the Cellmark reports and related documents, there was virtually no evidence of a possible rape or sodomy. In the absence of the DNA evidence pertaining to the rug, dildo, underwear and latex gloves, the prosecution's case on the murder count would have been considerably weaker.

Further, because the evidence contained in the Cellmark DNA reports had been presented as the truth by Dr. Staub, an esteemed DNA expert, laboratory director, and senior manager (20RT 3425-3433), it took on added significance. As stated in *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1185, 22 Cal.Rptr.2d 545, 554, "...expert witnesses

often have a significant impact on juries. '[J]uries tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials.'"

Indeed, during deliberations, the jury asked for a re-read of "the parts" of Dr. Staub's testimony regarding "...the underwear and the dildo, especially the conclusion." (49RT 7611-7616.) After appellant objected to such a piecemeal re-read, the entirety of Dr. Staub's testimony was read to the jury. (49RT 7617-7620, 7623-7624, 7632-7636.) This request and the re-read of the DNA-related testimony was "...important to the jury's decision-making" and "...strongly suggest[s] that the inadmissible evidence was a factor in [the jury's] decision to convict..." (*People v. Quiltiquit* (2007) 155 Cal.App.4th 1, 13, 65 Cal.Rptr.3d 674, 683.) The re-read request during deliberations "suggest[s] that the jury was at least partially persuaded" (*Murtishaw v. Woodford* (9th Cir.2001) 255 F.3d 926, 973) by Dr. Staub's testimony. But, had his testimony and the reports been excluded -- as *Melendez-Diaz*, et al. required -- the jury would not have considered this "persuasive" albeit prejudicial and inadmissible evidence. Appellant was prejudiced.

The prosecutor's closing argument exacerbated the prejudice. The prosecutor relied on and emphasized Dr. Staub's testimony and the hearsay reports. She argued that, through the YSTR testing, appellant's DNA was found in Palmer's underwear: "...according to Dr. Rick Staub who heads up the Cellmark Lab in Dallas, this is a quotation, 'There was definitely a major profile that matched Paul Baker in the seat of Judy's panties.' In other words, this is the defendant's semen, we know that much, and

it's in the seat of her panties. That's a bit of a problem for the defendant." (45RT 7165-7166.) The prosecutor emphasized, "Again, evidence of the rape include[s] the defendant's semen and his Y-STR partial profile. But a very strong presence of his profile, essentially is what Dr. Staub said, in the seat of her panties." (45RT 7201.) It is well-settled that, "A prosecutor's closing argument is an especially critical period of trial....Since it comes from an official representative of the People, it carries great weight..." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694, 273 Cal.Rptr.757, 809.) Had Dr. Staub's testimony and the Cellmark DNA reports been excluded -- as they should have been -- the prosecutor would not have been able to make such a damaging argument.

Justice Kagan's dissent in *Williams v. Illinois, supra,* provides a pointed example of why cross-examination of the analyst who actually conducted the test is necessary for a fair trial and to prevent prejudice:

> Some years ago, the State of California prosecuted a man named John Kocak for rape. At a preliminary hearing, the State presented testimony from an analyst at the Cellmark Diagnostics Laboratory–the same facility used to generate DNA evidence in this case. The analyst had extracted DNA from a bloody sweatshirt found at the crime scene and then compared it to two control samples–one from Kocak and one from the victim. The analysts's report identified a single match: As she explained on direct examination, the DNA found on the sweatshirt belonged to Kocak. But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim's control sample as coming from Kocak, and Kocak's as coming from the victim. So the DNA on the sweatshirt matched not Kocak, but the victim herself....In trying Kocak, the State would have

to look elsewhere for its evidence.

> Our Constitution contains a mechanism for catching such errors–the Sixth Amendment's Confrontation Clause. That Clause, and the Court's recent cases interpreting it, require that testimony against a criminal defendant be subject to cross-examination. And that command applies with full force to forensic evidence of the kind involved in both the Kocak case and this one. In two decisions issued in the last three years, this Court held that if a prosecutor wants to introduce the results of forensic testing into evidence he must afford the defendant an opportunity to cross-examine an analyst responsible for the test. Forensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining whether that has happened. The Kocak incident illustrates how the Clause is designed to work: Once confronted, the analyst discovered and disclosed the error she had made. That error would probably not have come to light if the prosecutor had merely admitted the report into evidence or asked a third party to resent its findings. Hence the genius of an 18th-century device as applied to 21st-century evidence: Cross-examination of the analysts is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded. (____ U.S. at ____, 132 S.Ct. at 2264-2265.)

Appellant recognizes that other DNA evidence properly testified-to by Department of Justice criminalist Theresa Pollard linked appellant to the crime. She claimed that appellant's sperm-derived DNA was found on a blanket, a dish towel, and a "towel bootie." (21RT 3638-3642, 3651-3656.) Non-sperm DNA from appellant was found on cigarette butts. (21RT 3642-3649.) But, such evidence is readily explained by appellant's previous relationship with Palmer.

7. The issue has not been forfeited

In objecting to admission of Dr. Staub's testimony and the Cellmark DNA reports, appellant's counsel objected on the basis that having Dr. Staub testify regarding the reports "would then prevent proper cross-examination." (20RT 3465-3466.) Such an objection "...made the federal constitutional basis of his [objection] sufficiently clear to preserve the issue for review." (*People v. Cowan* (2010) 50 Cal.4th 401, 485, 113 Cal.Rptr.3d 850, 925.)

Even though counsel did not expressly rely on *Crawford v. Washington, supra,* 541 U.S. 36, 124 S.Ct. 1354 or the Confrontation Clause of the Sixth Amendment. (20RT 3437-3466; 48RT 7547-7588), the issue can still be reviewed by this Court for constitutional error. This court, in *People v. Pearson* (2013) 56 Cal.4th 393, 462, 154 Cal.Rptr.3d 541, made clear that the failure to specifically object on Confrontation Clause grounds to this testimony does not forfeit the claim for review:

> The People contend that defendant forfeited his claim because defense counsel objected only on hearsay grounds to Dr. Peterson's testimony and failed to object on any basis to admission of the autopsy reports. We disagree.
>
> This case was tried before *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, which for 24 years governed the admissibility of statements from witnesses unavailable at trial. Roberts held that admission of an unavailable witness's statement does not violate the Sixth Amendment's confrontation requirement "so long as [the statement] has adequate indicia of reliability—i.e., falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'"....[T]his court

> [has] held that admission of the contents of an autopsy report prepared by a nontestifying pathologist did not violate the defendant's confrontation rights where the contents of the report "were admitted under a 'firmly rooted' exception to the hearsay rule that carries sufficient indicia of reliability to satisfy the requirements of the confrontation clause." ..."*Crawford* dramatically departed from prior confrontation clause case law." Thus, we find it represents an unforeseen change in the law "that competent and knowledgeable counsel reasonably could [not] have been expected to have anticipated" at defendant's 1996 trial, and excuse his failure to object. (Citations omitted.)

(Accord, *People v. Harris* (2013) 57 Cal.4th 804, 840, 161 Cal.Rptr.3d 364, 400-401.)

The issue has not been forfeited and is before this Court for decision on the merits.

8. Conclusion

Because the trial court violated appellant's rights under the Confrontation Clause by allowing Dr. Staub to testify and admitting the Cellmark DNA reports into evidence, the state must demonstrate beyond a reasonable doubt that this error was harmless. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.) The state cannot do so given the importance that this evidence played in the prosecution's case in chief. The improper introduction of Dr. Staub's testimony and the Cellmark DNA reports and related documents prejudicially violated appellant's fundamental rights to due process, confrontation, a reliable determination of guilt and penalty, and a fair trial. Reversal of the murder and rape convictions and the rape special circumstance is required.

I. THE $10,000 PAROLE REVOCATION FINE MUST BE STRICKEN BECAUSE APPELLANT'S SENTENCE IS NOT SUBJECT TO A PAROLE PERIOD.

The sentencing minutes and the abstract of judgment show imposition of a

$10,000.00 parole revocation fine pursuant to Penal Code section 1202.45. (36CT 9477, 9485.) However, because appellant was sentenced to death, his sentence does not include a period of parole. Therefore, the minutes and abstract should be corrected by deletion of this fine.[40]

Penal Code section 1202.45, subdivision (a) provides for a parole revocation restitution fine where the defendant's "sentence includes a period of parole." But, where, as here, the defendant's sentence does not include a period of parole, the fine may not properly be imposed. In *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 83 Cal.Rptr. 2d 157, the defendant was convicted of murder with special circumstances and was sentenced to life without the possibility of parole. Respondent argued that the trial court erred by failing to impose a section 1202.45 parole revocation restitution fine. The Court rejected this argument, holding that because the defendant would never be paroled, the fine could not be imposed:

> The issue of whether section 1202.45 applies when only a sentence of life imprisonment without possibility of parole is imposed is the easiest to resolve. When there is no parole eligibility, the fine is clearly not applicable. The statutory language itself is clear, the additional restitution fine is only imposed in a "case" where a sentence has been imposed which includes a "period of parole." (Sec.12-2.45.) Simply stated, the clear legislative intent which can be

---

[40] In sentencing appellant, the trial court did not orally impose a parole revocation fine. (62RT 8725.)

> derived from the language of the statute is clear; if there is no parole eligibility, no section 1202.45 fine may be imposed. Moreover, section 1202.45 provides that the fine is suspended during the period of parole. If a "case" is one in which a sentence has been imposed but there is no "period of parole," then the suspension language becomes meaningless. (70 Cal 4th at 1183, 83 Cal.Rptr.2d at 159-160.)

(Accord, *People v. Hannah* (1999) 73 Cal.App.4th 270, 274, 86 Cal.Rptr.2d 395, 397-398 [citing *Oganesyan*]: *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1184, 91 Cal. Rptr.3d 874, 902-903.)

The *Oganesyan* Court also explained why the parole revocation restitution fine could not be imposed where, as here, a defendant is also convicted of offenses which typically provided for a period of parole:

> However, the present case involves a situation where there are two sentences, both where section 12022.5, subdivision (a) firearm use findings have been imposed. One sentence, for the special circumstances first degree murder conviction with an additional finding of firearm use, is one where there is no parole eligibility. The other sentence of 15 years to life for second degree murder plus the additional section 12022.5, subdivision (a) firearm use term is one where defendant could conceivably be eligible for parole. The Attorney General argues with some justification then that this is a "case" where a sentence has been imposed which includes a "period of parole." However, two reasons, based upon well-established principles statutory interpretation, lead us to reject this analysis.
>
> First, the entire statutory scheme concerning restitution fines has as its legislative purpose the recoupment from prisoners and potentially from parolees who violate the conditions of their parole some of the costs of providing restitution to crime victims. ...

> The chances of recoupment of costs resulting from a section 1202.45 fine would be extremely rare from a prisoner serving sentences one of which prohibits parole and another from which the defendant could ultimately be paroled which are the circumstances in this case. ...The chances of actual recoupment of costs in a case such as this where there are parole and non-parole offenses are almost beyond rational belief. ...
>
> Second, the language of section 1202.45 indicates that the overall sentence is the indicator of whether the additional restitution fine is to be imposed. Section 1202.45 indicates that it is applicable to a "person ... whose sentence includes a period of parole." At present, defendant's "sentence" does not allow for parole. When we apply a common sense interpretation to the language of section 1202.45 [citations], we conclude that because the sentence does not presently allow for parole and there is no evidence it ever will, no additional restitution fine must be imposed. Based on the collective reasons discussed above, no jurisdictional error occurred when the trial court declined to impose a section 1202.45 additional restitution fine. (70 Cal.App.4th at 1183-1186, 83 Cal.Rptr.2d at

In *People v. McWhorter* (2009) 47 Cal.4th 318, 97 Cal.Rptr.3d 412, the defendant was convicted of a residential robbery and two murders with special circumstances. The trial court imposed a $200.00 parole revocation restitution fine. Following *Oganesyan*, this Court reversed and struck the fine:

> "Defendant...claims that because his sentence did not include a period of parole, the trial court erred in imposing and staying a $200 parole revocation restitution fine pursuant to section 1202.45. He is correct. (See *People v. Oganesyan...*) ...We shall...order the fine stricken and the judgment modified to so reflect." (47 Cal.4th at 377, 97 Cal.Rptr.3d at 461.)

Appellant was sentenced to death, a sentence which does not include a period of parole. Therefore, the section 1202.45 parole revocation restitution fine was improperly imposed and must be stricken.

VI. ARGUMENT: PENALTY PHASE

A. THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE THAT, IN HIS CHILDHOOD, APPELLANT MISTREATED CATS.

1. Introduction

During the penalty phase, the prosecutor sought to introduce evidence that, when appellant was young, he mistreated cats. (55RT 8067-8073, 8177-8178.) Over appellant's objection (55RT 8070), the trial court allowed the prosecution to introduce the evidence. Clyde Penglase, Jr. subsequently testified about the cat mistreatment. (55RT 8179-8181.)

The trial court's ruling was erroneous. The cat mistreatment evidence was extremely prejudicial to appellant and was not probative evidence to support any statutory aggravating factor. The introduction of the evidence violated appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Reversal of the penalty decision is required.

2. The facts

The prosecutor stated that she intended to present evidence that appellant, in his

youth, had "tortured" cats. The trial court limited this evidence to evidence that appellant tied cats' tails together and threw them over a clothesline. (55RT 8067-8073, 8177-8178.) Defense counsel stated, "...if the court rules that that's fair game, then we'll have to live with it. But we'd be objecting to it." (55RT 8070.)

In an effort to somehow blunt the highly prejudicial nature of the evidence, defense counsel during direct examination asked defense penalty phase witness Clyde Penglase, Jr. about the animal cruelty:

> MR. GARCIA: Just a couple questions.
>
> Q. Now, did you have occasion to see Paul -- that you personally saw Paul get a couple cats and tie their tails and put them up on a clothesline or something?
>
> A. Yeah. It was getting ready to happen and I ran because I didn't want to see it.
>
> Q. Okay. Did you actually see any -- did you actually ever see anything that happened?
>
> A No. I ran.
>
> Q Okay.
>
> A But they were getting ready to do it.
>
> Q Okay. Thank you.
>
> MR. GARCIA: I have nothing further, your Honor.
> (55 RT 8179.)

The prosecutor proceeded to cross-examine Penglase, Jr. about the cat mistreatment:

BY MS. FORD:

Q Sir, about the cats, who was getting ready to do it?

A Paul and a few other kids there in the backyard of our house.

Q I'm sorry?

A It was him and a few other boys there in the -- in our backyard at the clothesline.

Q At the clothesline?

A Yeah.

Q And what was the plan?

A To tie the cats.

MR. GARCIA: Objection as to "plan." Lack of personal knowledge also based on hearsay.

THE COURT: Sustained, unless he personally observed it, without hearsay.

BY MS. FORD:

Q Well, what was Paul discussing doing with these other kids?

A Tying the tails together and throwing them over the clothesline.

Q Did you see them begin to do that?

A They were trying.

Q Trying to catch the cats?

A (Nodding.)

Q Is that "yes"?

A Yes. I'm sorry.

Q We see you nodding.

A I'm sorry. Yes.

Q The court reporter takes it in words.
There was some rope on hand to do this?

A Yeah, they had something. I don't know if it was rope or twine or what it was.

Q And there were cats on hand; correct?

A Correct.

Q Now, sir, besides that instance, did you yourself see Paul harm animals on other occasions?

A No.

Q You seem to hesitate there, is there --

A Well, I mean, I heard stores, but I never actually saw anything.

Q I think I --

MR. GARCIA: Objection. Move to strike. Lack of personal knowledge, your Honor.

THE COURT: Sustained. The last answer will be stricken and disregarded.

BY MS. FORD:

Q Okay. Back to this episode with the cats. Was the plan that Paul was discussing that when their tails were tied

together they'd be thrown over a clothing line?

A That was my understanding.

Q And you didn't want to see it?

A No.

Q You don't care for violence against pets?

A No. (55RT 8179-8181.)

3. <u>The cat mistreatment evidence should have been excluded</u>.

Presumably, the prosecutor wanted to introduce the cat torture evidence pursuant to Penal Code section 190.3, subdivision (b): "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Subdivision (b) is the only subdivision of section 190.3 that arguably allows for the introduction of the evidence. However, "...the necessary 'force or violence' must be directed toward persons." (*People v. Clair* (1992) 2 Cal.4th 629, 672, 7 Cal.Rptr.2d 564, 590.) Assuming, *arguendo,* that appellant's conduct testified to by Penglase, Jr. involved force or violence, it was not directed at persons. Conduct directed at cats does not qualify for admission under subdivision (b). Thus, the evidence was not admissible as an aggravating factor.[41]

Because the cat-related evidence was not admissible as an aggravating factor under

---

[41] Indeed, the trial court stated that the introduction of this evidence was "clear error" and that the evidence should not have "come in." (56RT 82-5-8211.)

subdivision (b), it was irrelevant. "[E]vidence of a defendant's background, character or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." (*People v. Carter* (2003) 30 Cal.4th 1166, 1203, 135 Cal.Rptr.2d 553, 579; accord, *People v. Nelson* (2011) 51 Cal.4th 198, 222, 120 Cal.Rptr.3d 406, 427; *Dawson v. Delaware* (1992) 503 U.S. 159, 164-168, 112 S.Ct. 1093, 1097-1099 [Introduction of irrelevant character evidence at capital sentencing proceedings constitutes "constitutional error."])

Appellant recognizes that, where a defendant at the penalty phase introduces evidence of his good character, the prosecution is entitled to introduce evidence that undermines that claim. (*People v. Verdugo* (2010) 50 Cal.4th 263, 300-301, 113 Cal. Rptr.3d 803, 839.) Here, however, appellant did not introduce evidence of his good character; rather, he presented evidence of his horrendous childhood upbringing. "Evidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct." (*In re Lucas* (2004) 33 Cal. 4th 682, 733, 16 Cal.Rptr.3d 331, 370-371; *People v. Loker* (2008) 44 Cal.4th 691, 709, 80 Cal.Rptr.3d 630, 651.) Indeed, as the trial court stated, "...the defense was extremely careful not to bring out any good character evidence of any form through any witness...[A]nimal torture...the cases seem very clear to me that that evidence does not come in because the defense did not open the door." (56RT 8206.) Thus, the cat-related evidence was not admissible in rebuttal.

It is axiomatic that evidence of cat mistreatment by a defendant is extremely prejudicial. (See, e.g., *People v. Chung* (2010) 195 Cal.App.4th 721, 728, fn.4, 110 Cal.Rptr.3d 253, 258 fn.3 ["Changed circumstances make society even less tolerant of cruelty to animals..."]) Such evidence "...uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu, supra,* 143 Cal.App.3d at 377, 191 Cal.Rptr. at 870.) Here, appellant introduced considerable evidence of his abusive, humiliating, difficult upbringing and his significant mental problems. This mitigating evidence could readily have justified a determination that life without possibility of parole was the appropriate punishment. But, with the deviant cat mistreatment evidence factored into the calculus, no reasonable jury would ever reach such a result. Clearly, appellant was prejudiced.

4. <u>The issue has not been forfeited</u>.

When appellant's counsel objected to the introduction of the cat mistreatment evidence, he did not state a basis for the objection. He merely said, "...we'd be objecting to that." (55RT 8070.) However, the trial court recognized that such evidence was exceedingly prejudicial. (55RT 8073 ["Let's try to minimize this testimony."; "...I'm going to put a halt to it if it becomes too inflammatory."]) The trial court also acknowledged that appellant had objected to admission "...of the incident involving the cat." (56RT 8205-8206.) Thus, given the trial court's statements and the nature of the evidence, any trial judge would have understood that Evidence Code section 352 formed

the basis for the objection. "'The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court.'" (*Darey v. Taraday* (2011) 196 Cal.App.4th 962, 908, 126 Cal.Rptr.3d 804, 815.) An objection is sufficient to preserve the issue "...if it points out clearly the error complained of." (*Allin v. International, Etc.* (1952) 113 Cal.App.2d 135, 136-137, 247 P.2d 857, 858.) Thus, no further elucidation was necessary.

Additionally, given the trial court's view of the issue (55RT 8067-8073), any objection on specific grounds would have been unavailing; thus, the issue has not been forfeited. (*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406, 138 Cal.Rptr.3d 464, 468 ["...a party need not object if it would be futile."])

Finally, a reviewing court may always consider an issue even in the absence of a specific objection. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn.16, 69 Cal.Rptr.2d 917, 925, fn.6.)

Counsel's failure to interpose a specific objection to the cat mistreatment evidence does not constitute a forfeiture of the issue. It is preserved for review on its merits.

5. Conclusion

The erroneous admission of evidence may be "'so prejudicial as to constitute a denial of due process.'" (*Reese v. Wainwright, supra,* 600 F.2d at 1090.) Exceedingly prejudicial evidence can "...violate[ ] the defendant's right to due process by denying him

a fundamentally fair trial." (*Milone v. Camp, supra,* 22 F.3d at 702.) Here, the introduction of the cat mistreatment evidence prejudicially violated appellant's fundamental rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness. Reversal of the penalty decision is required.

B. AS A MATTER OF CONSTITUTIONAL LAW, THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR MODIFICATION OF THE DEATH VERDICT THEREBY VIOLATING HIS RIGHTS TO DUE PROCESS, A RELIABLE DETERMINATION OF PENALTY, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Pursuant to Penal Code section 190.4, appellant filed a motion for modification of the verdict of death. (6CT 1508-1518.) The prosecution filed opposition (6CT 1519-1525) and appellant filed a response. (6CT 1567-1584.) After a hearing, the trial court denied the motion. (62RT 8708-8714; 36CT 9463-9485.) However, this ruling was error and violated appellant's constitutional rights to due process, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and its California analogues. This Court, therefore, should reverse the trial court's denial and order that appellant be sentenced to life without the possibility of parole.[42]

---

[42] Appellant recognizes that his counsel did not object to the trial court's denial of the automatic motion to modify the penalty. Such a failure generally constitutes forfeiture of the issue on appeal. (*People v. Riel* (2000) 22 Cal.4th 1153, 1220, 96 Cal.Rptr.2d 1, 52.) However, given the trial court's adamant view of the case (62RT 8708-8714), any objection would have been futile; thus, no objection was required to preserve the issue.

In ruling on a Penal Code section 190.4 application for modification of a death penalty verdict, the trial court:

> "...must independently reweigh the evidence of aggravating and mitigating circumstances and then determine whether, in the court's independent judgment, the weight of the evidence supports the jury verdict. It must set forth its reasons with sufficient particularity to allow effective appellate review." (*People v. Edwards* (1991) 54 Cal.3d 787, 847, 1 Cal.Rptr.2d 696, 734.)

(Accord, *People v. Osband* (1996) 13 Cal.4th 622, 726, 55 Cal.Rptr.2d 26, 93. ["On appeal, we subject [the] ruling...to independent review. [...] Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty." (Internal quotations and citation omitted.]) Applying this standard of review, it is clear that the trial court erred in denying appellant's modification motion.

In denying the automatic motion, the trial court stated, "I find that the first degree murder of Judy Palmer was an intentional killing....And I further find that the murder was premeditated, willful, and committed with malice aforethought." (62RT 8709.) The finding of an intentional, premeditated killing presumably was based on the prosecutor's

---

(See, *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn.5, 161 Cal.Rptr.762, 771, fn.5 [Issue not forfeited because "...any objection at trial on the grounds urged before this court would clearly have been futile..."]; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn.1, 105 Cal.Rptr.2d 504, 509, fn.1 [Argument on appeal not waived because "argument to the contrary [in the trial court] would have been futile."])

argument that appellant obtained the rope prior to the killing with the intent to kill Palmer and bind her body. In such a case, if, as is likely, appellant entered the apartment with this intent, the burglary cannot be relied on as a special circumstance. (*People v. Seaton, supra,* 26 Cal.4th at 646, 110 Cal.Rptr.2d at 473 ["...the burglary-murder special circumstance do[es] not apply to a burglary committed for the sole purpose of assaulting or killing the victim."]) Under this view of the case, the fact that the burglary special circumstance is inapplicable provides a firm basis for granting the automatic motion to modify the penalty.

The trial court denied the motion on the basis that the murder took place in the course of a rape. (62RT 8709.) But, as argued, *supra,* there is no substantial evidence that appellant actually committed a rape. Thus, the problematic nature of the viability of this special circumstance also counsels in favor of granting the motion.

The trial court also denied the motion based on the claim that the nature of the killing was "particularly heinous" because the body was tied up and dumped in the desert. (62RT 8709-8710.) However, this conduct had nothing whatsoever to do with the actual killing. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 61, 51, 164 Cal.Rptr.1, 38 [defendant not subject to death penalty where, "to prevent identification...he buried the victim fully clothed or even if he doused the clothed body with gasoline and burned it at the scene..."]; and see, *id.*, fn.51 ["Concealment of the victim's identity, even by partial or total destruction of the corpse, is not a special circumstance..."]) And, a contention that a

murder was "particularly heinous" is vague and cannot support imposition of the death penalty. Moreover, to the extent that the trial court was considering this as a factor in aggravation, it did so in violation of *People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797 (1982) which held that the heinous, atrocious and cruel special circumstance in Penal Code Section 190.2 is unconstitutional. (See, *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364, 108 S.Ct. 1853, 1859.) Here, unlike the trial court in *People v. Lucero* (2000) 23 Cal.4th 692, 737, 97 Cal.Rptr.2d 871, 902, the trial court did not use the term "particularly heinous" simply "in passing." It meant that the murder of Palmer was exceptionally bad; but all murders are bad. This vague view of the case cannot support denial of the motion.

Appellant acknowledges the serious nature of all his offenses (62RT 8710-8711) and recognizes that they show a "pattern of criminal conduct." (62RT 8711.) However, this pattern is explained by the wretched and inhumane living conditions he experienced growing up. He has significant "lifelong psychological problems," as the trial court stated. (62RT 8712.) Even if, as the trial court said, appellant knew that "his behavior was aberrant and wrong" (62RT 8713), his serious mental problems, as detailed by Dr. Adams, provides significant mitigating evidence reducing his culpability.

The trial court denied the modification motion because Palmer was beloved by her family and was a kind, generous, and loving individual. (62RT 8710.) Appellant does not dispute these findings. But, when considered with all the facts and arguments in favor

of the motion, they are not sufficient to justify the decision not to modify the verdict.

It is well-settled that "[t]he Constitution prohibits the arbitrary or irrational imposition of the death penalty." (*Parker v. Dugger* (1991) 498 U.S. 308, 321, 111 S.Ct. 731, 739.) To ensure that the constitution's mandate is carried out, the Court must apply "'...an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" (*Id.*); accord, *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 2743-2744.) Here, the trial court erred when it denied appellant's modification motion and thereby denied appellant his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as the California Constitution, art.1, secs.15, 16.

Although the circumstances of the instant crimes can be considered an aggravating factor (section 190.3(a)), as a matter of law they do not justify denial of appellant's modification motion, especially when weighed in the balance with all applicable mitigating circumstances. Applying the appropriate de novo or independent standard of review, this Court should reverse. (*People v. Osband, supra,* 13 Cal.4th at 726, 55 Cal.Rptr.2d at 93.)

VII. ARGUMENT: OTHER ISSUES

A. APPELLANT'S CONSTITUTIONAL RIGHTS WERE PREJUDICIALLY VIOLATED BECAUSE THE VICTIM IMPACT EVIDENCE WAS NOT LIMITED TO THE FACTS OR CIRCUMSTANCES KNOWN TO APPELLANT WHEN HE ALLEGEDLY COMMITTED THE CRIME.[43]

[43] In *People v. Roldan* (2005) 35 Cal.4th 646, 732, 27 Cal.Rptr.3d 360, 429, this Court, without explanation, stated "[w]e disagree with this argument."

In the words of one commentator:

> "Traditionally, the American criminal justice system has been guided by the principle that personal harm is properly avenged by the State, acting in the name of the individual harmed. Only by interposing the State between the victim and the accused, the thinking has been, can punishment be fairly measured and imposed, and the unseemly and socially destabilizing specter of privatized justice and revenge thereby avoided."

(Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev.143, 143 (1999) [footnotes omitted].) The admission of so-called "victim impact" evidence in some capital proceedings changes this tradition.

The United States Supreme Court first addressed the use of evidence, in capital cases, of the impact of a murder on the victim's family in *Booth v. Maryland* (1987) 482 U.S. 496. In *Booth,* the Court addressed a Maryland statute that permitted the introduction of information relating to the (1) personal characteristics of the murder victim and the emotional impact of the killing on the victim's family and (2) family members' opinions and characterizations of the crime and the defendant. The Court characterized both types of evidence as irrelevant and rejected the assertion that such information was needed to allow jurors to assess the "gravity" of the offense. (482 U.S. at 504.) Booth The Court stated that victim impact evidence improperly served to refocus the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was perhaps wholly unaware of the personal qualities and worth of the victim. (482 U.S.

at 504.) The Court explained:

> "One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant... The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases."

(482 U.S. at 508-509.)

Four years later, after a change in personnel, the Court reversed *Booth* in *Payne v. Tennessee, supra,* 501 U.S. 808 to the extent that *Booth* created a per se ban on victim impact testimony. In *Payne,* a mother and her 2-year-old daughter were killed with a butcher knife in the presence of the mother's 3-year-old son, who survived critical injuries suffered in the same attack. The prosecution presented the testimony of the boy's grandmother regarding how he missed his mother. (501 U.S. at 816.) The Court concluded "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (501 U.S. at 827.)

In finding no Eighth Amendment bar to victim impact evidence, however, the *Payne* opinion did not mandate the introduction of such evidence, nor did it suggest that such evidence should be admitted in all capital cases. Justice O'Connor stated in her concurrence: "we do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (502 U.S. at 831.) To the extent that such evidence is not constitutionally prohibited, it is left to the statutory scheme of the individual states to determine whether and how to permit the introduction of evidence of this type. The general constitutional guidelines regarding capital sentencing remain unaffected: the need for "extraordinary measures" to ensure the reliability of decisions regarding the punishment imposed in a death penalty trial. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 conc. opn. of O'Connor, J.; see *Gardner v. Florida* (1977) 430 U.S. 280, 305.)

In other words, while *Payne v. Tennessee* holds that the Eighth Amendment does not bar evidence of the victim's characteristics from the penalty phase, the matter is still controlled by statutory guidelines and the need to ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 423.)

Under the California statutory scheme, there is no "victim impact" sentencing factor. The aggravating evidence at penalty phase is limited to evidence relevant to the specific aggravating factors under Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 763, 771-776.) However, in *People v. Edwards* (1991) 54 Cal.3d 787, 835-836,

this Court held that *some* evidence of certain characteristics of the victim can be used as a proper consideration at penalty phase under section 190.3 factor (a) because they might relate to "circumstances of the crime." *Edwards* has come to stand for the proposition that "evidence of the harm caused by the defendant's actions is admissible at the penalty phase under section 190.3, factor (a), as one of the 'circumstances of the crime.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 992.)

This Court has not defined specifically the boundaries for the admission of victim impact evidence,[44] but there appears to be a need for some connection to the defendant's knowledge or perception. (See, e.g., *Edwards, supra* [Photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them]; *People v. Wash* (1993) 6 Cal.4th 215, 267 [Evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime.].) Justice Kennard has offered a sensible and logical guideline. In the concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 264, Justice Kennard discussed the proper scope of section 190, subdivision (a) in relation to victim traits:

---

[44] The *Edwards* opinion noted: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* ..." (54 Cal.3d at 835-836.) Since *Edwards*, little further explication of the boundaries of the holding have been offered. In his dissent in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 492 fn. 2, Justice Mosk noted that the Court's *Edwards* language lacked specificity.

> "As used in section 190.3, 'circumstances of the crime:' should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. This definition appears most consistent with the rule of construction that listed items should be given related meaning and with the United States Supreme Court's understanding of the term as reflected in its opinions."

(1 Cal.4th at 264.) Under this interpretation, characteristics of the victim unknown to the defendant should not be admitted as a penalty phase consideration.[45]

Here, the victim impact evidence admitted was unrelated to appellant's knowledge, and unrelated to his moral culpability. There is no evidence that he was aware of any aspect of the victims' lives. He did not know, for example, that Ricky Byrd's brother had been murdered. (13RT 3041-3042.)

The question before the jury at a sentencing phase involves an assessment of the moral culpability of a defendant. A series of United States Supreme Court opinions have instructed that the question whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the

---

[45] In considering the scope and logic of the California capital sentencing scheme, it should be noted that the California statutes allow a time and place for a victim's next of kin to express their feelings of loss during a criminal homicide proceeding. That time is not at the penalty-phase trial of a capital case. Rather, that time is when the sentence is formally imposed. Penal Code section 1191.1 mandates notice and an opportunity for the victim's next of kin to "express his, her or their views concerning the crime, the person responsible, and the need for restitution" when final judgment is pronounced. The victim's families were given this opportunity at the imposition of sentence. (See RT39, 7339-7345.)

crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879; see also *Eddings v. Oklahoma, supra,* 455 U.S. 104, 112; *Enmund v. Florida* (1982) 458 U.S. 782, 801.) Unless the evidence introduced in aggravation has some bearing on the defendant's personal responsibility and moral guilt, its admission creates the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process.

Justice Kennard's approach to victim impact evidence, discussed in her opinion in *Fierro,* seeks to avoid these problems. This type of evidence should only be allowed if it relates to "circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (1 Cal.4th at 264.)

Recognizing that this type of victim impact evidence would have an unwarranted prejudicial effect, appellant asked that the jury be instructed:

> "In assessing to what extent, if any, you should consider any victim impact evidence in your deliberations you may not consider any victim impact evidence unless it was foreseeably related to the personal characteristics of the victim that were known to the defendant at the time of the crime." (3CT 647; 14RT 3147.)

The trial court refused to give the instruction. (14RT 3147-3148.) Based on the instant argument, this ruling was wrong and severely prejudicial.

Here, the relationships of the victims with their families were not known to the defendant. Nor did the defendant know anything about the victims. The victim impact

evidence admitted at trial was beyond the knowledge of the defendant and unrelated to his moral culpability. To the extent a defendant can be *assumed* to know that a victim has family members who will be grieving survivors, the evidence should not be admissible because it can also be assumed that *the jury* is also so aware. Consequently, the evidence was outside the proper scope of the aggravating evidence. Appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and their California counterparts were violated. Reversal is required.

B. PENAL CODE SECTIONS 190.3 AND 190.2 VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE CALIFORNIA CONSTITUTION.[46]

1. United States Supreme Court cases preclude vagueness in capital sentencing statutes and hold that aggravating factors must meet Eighth and Fourteenth Amendment vagueness requirements.

As the Supreme Court has held, the constitutional infirmity arising from use of a vague aggravating factor in a penalty phase weighing scheme, or with employing a vague capital sentencing system, is that such vagueness:

> "...creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance ...[and] creates the possibility not

---

46 Appellant recognizes that this Court has rejected this argument on other occasions. See, e.g., *People v. Osband* (1996) 13 Cal. 4th 622, 702, 55 Cal.Rptr.2d 26, 78. However, he requests this Court to reconsider these issues.

> only of randomness but also of bias in favor of the death penalty..." (*Stringer v. Black* (1992) 503 U.S. 222, 235-236, 112 S.Ct. 1130, 1139.)

(Accord, *Tuilaepa v. California* (1994) 512 U.S. 967, 974, 114 S.Ct. 2630, 2636 ["a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentences process..."])

In order to minimize this risk of arbitrary and capricious application of the death penalty, the Supreme Court has long held that a state's aggravating factors must "channel the sentencer's discretion..." by "...clear and objective standards ..." that provide "specific and detailed guidance...," so as to "make rationally reviewable the process for imposing a sentence of death." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 773, 110 S.Ct. 3092, quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 428, 100 S.Ct. 1759, 1765.) This channeling requirement applies regardless of whether the jury or the trial court determines the penalty because both are governed by the same statutes.

Thus, a capital sentencing scheme may not allot the sentencer complete discretion in deciding whether a defendant should be sentenced to death based merely on the facts of a particular case. (*Furman v. Georgia* (1972) 408 U.S. 238, 239-240, 255-257, 309-310, 314, 92 S.Ct. 2726, 2727, 2735, 2762, 2764.) The trier of fact must be "given guidance about the crime...that the State, representing organized society, deems particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 196, emphasis supplied [plur. opn., Stewart, Powell and Stevens, JJ.].) *Furman* and *Gregg*

require that "the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case..." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S. Ct. 1756; emphasis supplied.)

As noted in *Lewis v. Jeffers, supra*, 497 U.S. at 774, 110 S.Ct. at 3099 quoting *Gregg v. Georgia, supra,* 428 U.S. at 189 (internal quotation marks omitted):

> "...[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

It follows that a sentencing statute which, as here, merely directs the sentencer to look at vague categories, without attempting any further limitation or guidance, is unconstitutionally vague. (See, e.g., *Maynard v. Cartwright, supra,* 486 U.S. at 363, 108 S.Ct. at 1859; *Godfrey v. Georgia, supra*, 446 U.S. at 429-433, 100 S.Ct. at 1765-1767.)

Under the Eighth Amendment, "...a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." (*Richmond v. Lewis* (1992) 506 U.S. 40, 46, 113 S.Ct. 528, 534.).

> "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. (*Stringer v. Black, supra*, 503 U.S. at 235, 112 S.Ct. at 1139.)

Even though the United States Supreme Court has upheld factors (a), (b), and (i)

of section 190.3 (*Tuilaepa v. California, supra*, 512 U.S. 967, 114 S.Ct. 2630), the crucial issue is the interaction between *all* factors during the jury's deliberations. While each discrete factor, standing alone, may appear constitutional, the combined effect of all factors renders the scheme unconstitutional. As stated by Justice Blackmun in his dissent in *Tuilaepa*:

> "[T]he Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes constitutional muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it." (512 U.S. at 995, 114 S.Ct. at 2647.)[47]

Further, *Tuilaepa*'s holding that factors (a), (b), and (I) were proper because they are not "propositional" (512 U.S. at 974-975, 114 S.Ct. 2636), even if arguably correct, is *not* applicable to the remaining factors, all of which (except possibly factor (k)) call for a "propositional" answer, e.g., a "yes" or "no" answer to the statutory question "Whether or not..." the factor is present. Depending on the answer, the factor is either aggravating or mitigating. Thus, under *Tuilaepa*, all factors except (a), (b) and (i) are "propositional," and thus violative of the Eighth Amendment.

Appellant submits that the Eighth Amendment's vagueness limitations and the

---

[47] *Tuilaepa* did not decide whether section 190.3 as a whole violates the Eighth Amendment. Nor did it consider factors (c), (d), (e), (f), (g), (h), (j) or (k). Thus, it is inapposite regarding these issues. (*San Diego Gas & Elect. Co. v. Superior Court*, (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 754 ["Cases are not authority, of course, for issues not raised and resolved."])

other constitutional guarantees described above apply to the entirety of section 190.3. Section 190.3 leaves the jury unguided in its penalty deliberations, in violation of appellant's rights to due process, a fair trial, a reliable determination of penalty and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, the denial of appellant's state-created rights constitutes a denial of due process under the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 2229.) Thus, reversal is required.

2. Factor (a) of Penal Code section 190.3, which directed the jury to separately weigh the "circumstances of the crime" as a factor in aggravation, violated the Eighth and Fourteenth Amendments.[48]

Penal Code section 190.3, subdivision (a) states that the sentencer may consider as a factor:

> "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1."

Factor (a), the aggravating factor that allowed the jury to impose death based on the "circumstances of the crime," made the penalty-determination process here look dangerously similar to the standardless scheme invalidated in *Furman v. Georgia, supra,* 408 U.S. 238, 96 S.Ct. 2726. Factor (a) failed to identify any aspect of the underlying

---

[48] Appellant acknowledges that this court has previously rejected similar contentions (see, e.g., *People v. Wader* (1993) 5 Cal.4th 610, 663-64, 20 Cal.Rptr.2d 788, 818-819) but respectfully requests that the issue be reconsidered.

offense which might aggravate punishment. This factor did nothing to limit the discretion of the jury; instead, it inherently invited the jury to *personally* determine why *it* was most offended by the crime, and to use that perception as a basis for imposing the death penalty, without reference to any objective standard.

Here, the general proscription against use of vague categories in rendering a death judgment, without limitation or guidance, as articulated in *Maynard v.Cartwright, supra,* as well as the specific proscription against use of vague penalty phase aggravating factors , as stated in *Stringer v. Black, supra,* were both contravened by factor (a), which is standardless, subjective as to the sentencer, arbitrary, and weighted heavily toward death.[49] A sentencer may not impose a death sentence merely by looking at the circumstances of the crime with no guiding principles whatsoever. Yet factor (a) implicitly allows such standardless, unguided discretion.

This portion of section 190.3 also violated the Eighth Amendment's reliability requirements,[50] state and federal constitutional guarantees of due process, the requirement

---

[49] The same arguments also apply to factor (a)'s "existence of any special circumstances found to be true" language, which failed to distinguish this case from any other capital prosecution. First, the use of such a factor is inherently death-biased because one or more special circumstances is present in every penalty phase proceeding. Second, the sentencer was given no guidance or standards by which to evaluate the special circumstances as aggravating factors in this case, i.e., the jury was asked to evaluate the special circumstances in a standardless vacuum.

[50] Factor (a) is also unconstitutionally vague under the less rigorous due process clause standards, which require that state statutes give clear notice of the conduct prohibited so that the parties can prepare to meet the charge. (See, e.g., *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 543, 59 S. Ct. 618.) When a state statute contains terms not "susceptible of

that a sentencer be given clear and objective standards so that it may have proper guidance in its capital sentencing determination, the requirement that the sentencer not engage in arbitrary or capricious decision-making, the requirement that said process be designed so as to be rationally reviewable, and the prohibitions against cruel and/or unusual punishments under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In *Tuilaepa v. California, supra*, 512 U.S. at 975, 114 S. Ct. at 2637, the Court found that factor (a) was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence." Relying on *Tuilaepa*, this Court has ruled that factors (a), (b) and (I) are constitutional. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 187-190, 51 Cal.Rptr.2d 770, 831-833.) Appellant submits these cases are wrongly decided, result in fundamental, unconstitutional unfairness and, thus, should not be followed by this Court. (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, n.7, 150 Cal.Rptr.435, 441, n.7 ["'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused.'"]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679, 312 P.2d 680, 685 ["...decisions should not be followed to the extent that error may

---

objective measurement," with no reference to a "specific or definite act," it is unconstitutionally vague under the due process clause. (See, e.g., *Cramp v. Board of Public Instruction* (1961) 368 U.S. 278, 286, 82 S. Ct. 275.) Here, the phrase "circumstances of the crime" gives no notice as to what "specific or definite acts" to rebut in order to forestall a death sentence. Indeed, the phrase is so broad and incapable of definition that it is impossible to rebut this aggravating factor.

be perpetuated and that wrong may result."])

Further, as Justice Blackmun stated in his dissent in *Tuilaepa*, the use of "...the 'circumstances of the crime' [factor (a)] as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide...[is] something this Court condemned in *Godfrey v. Georgia*..." (512 U.S. at 988, 114 S.Ct. at 2643.) Further, because factor (a) "...lacks clarity and objectivity, it poses an unacceptable risk that a sentencer will succumb either to overt or subtle racial impulses or appeals ...The California sentencing scheme does little to minimize this risk." (512 U.S. at 992, 114 S. Ct. at 2645.) Clearly, factor (a) encompasses *every* fact which could possibly exist in *any* homicide; thus, it is vague and overly broad.

A vague factor such as factor (a) fails to "...provide[] a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not..." and fails to "...differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed." *(State v. Middlebrooks* (Tenn. 1992) 840 S.W. 2d 317, 343.) Thus, it is <u>not</u> "a proper narrowing device." (*Id.*) (Accord, *Richmond v. Lewis, supra,* 506 U.S. at 46, 113 S.Ct. at 534 ["...a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty.]; (*Wade v. Calderon* (9th Cir.1994) 29 F.3d 1312.)

Factor (a) does nothing to limit or guide the sentencer's discretion, creates a

category so constitutionally vague as to be meaningless, is death-biased and encourages arbitrary, capricious, unreliable and unreviewable decision making, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-237; *Zant v. Stephens* (1983) 462 U.S. 862, 865, 103 S.Ct. 2733, 2736.)

3. A unitary list of aggravating and mitigating factors which does not specify which factors were aggravating and which were mitigating, which does not limit aggravation to the factors specified, and which fails to properly define aggravation and mitigation, violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

a. Section 190.3's unitary list violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

Penal Code section 190.3 fails to tell the sentencer which factors are aggravating or mitigating, and fails to give any definition or explanation of aggravation which might have served as a narrowing principle in the application of the factors. These errors resulted in unconstitutionally arbitrary and inconsistent sentencing, in several distinct respects.

Permitting the sentencer to use mitigating evidence in aggravation impermissibly allows the imposition of the death sentence in an arbitrary[51] and unprincipled manner,

---

[51] With no guidance afforded to the sentencer as to how the state deems mental disturbance, victim participation, rage, etc. to be "particularly relevant to the sentencing decision" (*Gregg v. Georgia, supra*, 428 U.S. at 196), identically situated defendants will be sentenced differently depending purely upon the subjective predilections of the sentencer involved.

violating the Eighth and Fourteenth Amendments. (See *Gregg v. Georgia, supra*, 428 U.S. at 192; *Zant v. Stephens supra*, 462 U.S. at 865.) In addition to this constitutional deficiency, the use of a unitary list also improperly allowed the sentencer to consider the *absence* of statutory mitigating factors as aggravating factors.

The unitary list codified in Penal Code section 190.3 is unconstitutionally vague and therefore gives the sentencer no guidance whatsoever in determining sentence. It permitted and encouraged the prosecutor to manipulate and exploit the putatively mitigating factors to suit his own ends as exemplified by his arguments characterizing mitigating evidence -- appellant's young age -- as aggravating evidence. (RT 6237-6238, 6239-6240, 6246.) It thus reduced the penalty decision process to a standardless, confused, subjective, arbitrary and unreviewable determination in violation of appellant's rights to fair trial, impartial sentencer, reliable determination of penalty, due process and fundamental fairness under the United States Constitution's Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

b. Section 190.3 allowed the jury to engage in an undefined, open-ended consideration of nonstatutory aggravating factors.

Section 190.3 is unconstitutionally vague because it fails to limit the sentencer to consideration of specified factors in aggravation. Additionally, it fails to guide the

sentencer and permits the prosecutor to argue non-statutory matters as evidence in aggravation.[52] (See, e.g., RT 6299, where the prosecutor argued that appellant should die because "[h]e is still part of society"; this is not a factor listed in section 190.3.) Section 190.3 therefore allows the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

The failure of California's capital sentencing statute to properly guide the sentencer with respect to how it is to consider the various factors is vividly illustrated by factor (I) relating to the matter of defendant's age. Appellant was almost 43 years old at the time of the incident. The United States Supreme Court has held, per the Eighth and Fourteenth Amendments, that "one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age..." (*Stanford v. Kentucky* (1989) 492 U.S. 361, 375, n.5, 109 S.Ct. 2969, 2978, n.5.) Thus, even the highest court in the land regards "age" as a *factor in mitigation*. Yet in cases where the defendant is not exceptionally youthful, the factor will be used -- as here -- in aggravation under an "he's old enough to

---

[52] Reviewing courts often find it useful to refer to history and to the current practices of other states in determining whether a state has framed its statutes consistent with the requirements of due process. (*Schad v. Arizona, supra,* 501 U.S. at 631-633, 111 S.Ct. at 2497.)

know better" theory.

This Court, by contrast, has held that age is a metonym for any age-related matter and may be used either in aggravation or mitigation, because age alone is not a factor over which a defendant may exercise control (*People v. Lucky* (1985) 45 Cal.3d 259, 302).[53] It recently reiterated the proposition that:

> "...the standard instructions [are] adequate despite their failure to identify the aggravating or mitigating character of the various sentencing factors, because such matters "should be self-evident to any reasonable person within the context of each particular case." (*People v. Medina* (1990) 51 Cal.3d 870, 909, quoting *People v. Jackson* (1980) 28 Cal.3d 264, 316.)

Surely the reasoning in *Medina* raises both substantive and procedural due process concerns. Not only does it condone the standardless procedure characterized by ambiguous, undefined terms that, in the Court's view, "should be self-evident... within the context of each case," but it allows a state's most severe sanction to be meted out in an arbitrary, capricious fashion by a sentencer lacking adequate guidance regarding the

---

[53] This court has held that age can mitigate or aggravate in the same case, depending on the sentencer's personal perspective. (*People v. Edwards, supra*, 54 Cal.3d at 839.) In some cases, the sentencer might find the defendant's youth indicative of his lack of judgment, and therefore consider it in mitigation. Other sentencers might consider it aggravating, standing alone, or in view of the expense for imprisoning a young person for a life without parole term. Appellant respectfully requests this court reconsider *Edwards* and *Lucky*, because this level of ambiguity demonstrates factor (I) is unconstitutionally vague and arbitrary, under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p.192; *Zant v. Stephens, supra*, 462 U.S. at p.865; *Stringer v. Black, supra*, 503 U.S. at 234-236.)

proper considerations that should be made in determining sentence.

The failure to limit consideration of age to mitigation only invites the sentencer to impose death based on a constitutionally vague factor in a constitutionally arbitrary, unreviewable manner and skews the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Stringer v. Black supra*, 503 U.S. 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

c. Section 190.3, subdivision (d) does not define mental illness as a mitigating factor and its "extreme" modifier is unconstitutional. The vagueness of section 190.3 violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Section 190.3 provides that only an "extreme mental or emotional disturbance," per factor (d), or capacity questions involving impairment due to mental disease, defect or intoxication, per factor (h), can be taken into account by the sentencer. As presented, these factors could be considered either aggravating or mitigating. Factor (k) provides that "any other" extenuating circumstance can also be considered. The combination of these factors has three constitutional deficiencies.

First, this Court has previously defined factor (d) as a purely mitigating factor. (*People v. Davenport* (1985) 41 Cal.3d 247, 277-278, 221 Cal.Rptr.794, 813.)[54] The

---

[54] This characterization no doubt arose due to the "belief, long held by this society, that defendants who commit criminal acts that are attributable to...emotional and mental problems, may be less culpable than defendants who have no such excuse." (*California v.*

threshold problem is that absent an explicit limitation of factor (d) to mitigation, a sentencer is likely to consider it in aggravation. Mental or emotional instability -- which it appears appellant was certainly suffering from -- is not a factor which the sentencer will automatically or intuitively understand as mitigating in nature; a sentencer is more likely to conclude that it is indicative of defendant's future dangerousness and is therefore aggravating.[55] This aspect, standing alone, violates the Eighth Amendment.

The language of factors (d) and (h) injected unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. (*Stringer v. Black, supra*, 503 U.S. 234-236.) Such terminology creates an unacceptable risk that there will be no principled distinction between those cases in which the death penalty is imposed and those in which it is not. (*Maynard v. Cartwright, supra*, 486 U.S. at pp.361-362.) A sentence based on such vague considerations is unreviewable, and thus unconstitutional, in violation of the Eighth and Fourteenth Amendments. (*Godfrey v. Georgia, supra*, 446 U.S. at p.428.)

The second problem, assuming the jury understood factor (d) to be mitigating, is its specification that only "extreme" mental illness may be considered. This language has

---

Brown (1987) 479 U.S. 538, 545 [O'Connor, J., conc.].)

[55] For an example of such attitudes by a judge, see *Miller v. State* (Fla.1979) 373 So.2d 882, 883-885 (Trial judge sentenced defendant to death based on defendant's incurable mental illness rendering defendant a future danger, even after recognizing such disturbances are mitigating); as to public attitudes, see Note, (1979) 12 John Marshall J. Prac. & Proc. 351, 365.

all the constitutional infirmities discussed above,[56] plus others all its own.

A sentencing entity may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367, 374, 108 S.Ct. 1860; *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954 [plur. opn., Burger, C.J.].) The "extreme" adjective preceding "mental or emotional disturbance" creates a barrier to the sentencer's full consideration and assignment of mitigating weight to Appellant's evidence, in violation of these authorities.

This court recognized this limitation in *People v. Ghent* (1987) 43 Cal.3d 739, p.776, 239 Cal.Rptr.82, 106, but held that this constitutional defect was cured by factor (k). (See *People v. Kelly* (1990) 51 Cal. 3d 931, 968-969.) However, a reasonable sentencer could have understood these factors to unconstitutionally limit one another, i.e., that the factor (k) language referred only to any evidence "other" than those areas explicitly discussed earlier in the same instruction, i.e., mental or emotional disturbances.

---

[56] Aggravating factors that include constitutionally vague terms like "extreme" must also meet constitutional vagueness standards. "Extreme" does not provide sufficient guidance to avoid arbitrary and capricious sentencing, provides no principled basis for distinguishing between a death sentence and life without parole, and is death-biased; sentences based on such terms are also unreviewable, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Stringer v. Black, supra*, 503 U.S. 234-236; *Maynard v. Cartwright, supra,* 486 U.S. at 361-362; *Godfrey v. Georgia, supra,* 446 U.S. at 428; see, e.g., *State v. David* (La. 1985) 468 So. 2d 1126, 1129-1130 [holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct]; *Arnold v. State* (1976) 224 S.E. 2d 386, 391-392 [holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions].)

(See *Francis v. Franklin* (1985) 471 U.S. 307, 315-316, 105 S.Ct. 1965.)[57] This undue limitation of the sentencer's ability to consider all relevant mitigating evidence resulted in the imposition of death in violation of the Eighth and Fourteenth Amendments. (*Lockett v. Ohio, supra*, 438 U.S. at 604.)[58]

The third problem with factor (d) is that the use of the word "extreme" as a modifier invites the sentencer to engage in the sort of subjective, vague, arbitrary, unreviewable determination that has consistently been found constitutionally unacceptable, viz., subjective determinations of what level of mental illness is adequate for consideration. (E.g., *Maynard v. Cartwright, supra*, 486 U.S. at 363-364 ["especially"];[59] *Shell v. Mississippi* (1990) 498 U.S. 1, 4, 111 S.Ct. 313 ["especially"]; *Moore v. Clarke* (8th Cir.1990) 904 F.2d 1226, 1232-1233 ["exceptional"], *cert. den.*,

---

[57] Such an interpretation is required by standard rules of statutory construction, e.g., the provisions that: specific rules take precedence over general rules, both as a matter of legal interpretation and common understanding (*Rose v. California* (1942) 19 Cal.2d 713, 723-724; *People v. Breyer* (1934) 139 Cal.App.547, 550) and *expressio unius est exclusio alterius,* the "[e]xpression of one thing is the exclusion of another." (*Black's Law Dictionary* (West Rev. 4th Ed. 1968) p.692; *In Re Lance W.* (1985) 37 Cal.3d 873, 888.)

[58] Alternatively, at a minimum, there is a legitimate basis for finding ambiguity concerning the factors actually considered by the sentencer. (*California v. Brown, supra*, 479 U.S. at 546 [O'Connor, J., conc.].)

[59] Notably, the unconstitutionally vague "especially" is a synonym for "extremely" (Random House Thesaurus, College Edition (1984) p. 257), the adverbial form of "extreme." (Webster's New World Dictionary, Second College Edition (Simon & Schuster 1980), p. 498.)

(1992) 504 U.S. 930, 112 S.Ct. 1995.)[60] This effectively ensures that the sentencer, regardless of the mitigating nature of the evidence, will devalue or reject altogether any mitigating mental illness that does not meet their subjective definition of "extreme." Also, what may be "extreme" to one sentencer may be only mild to another, thus further illustrating the vague and arbitrary nature of factor (d).

Factors (d) and (h), individually and considered together, are prejudicially violative of appellant's rights to fair trial, to a reliable determination of sentence, to due process, and to fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

d. The factors listed in section 190.3 are unconstitutionally vague, arbitrary and result in unreliable sentences, in violation of the Eighth and Fourteenth Amendments.

In addition to the factors discussed above, all the remaining factors in section 190.3 fail to pass constitutional scrutiny, both facially and as applied, when measured against the Eighth and Fourteenth Amendments' prohibitions against vagueness and arbitrariness. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446

---

[60] This constitutional flaw is also found in factor (g)'s "... *extreme* duress or...*substantial* domination..." (Emphasis supplied.) The use of such modifiers in various instructions is unconstitutional, because it conveys to a reasonable sentencer that only the most extreme examples of various potential mitigating factors are to be considered in mitigation.

U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236). This is particularly true in view of the heightened level of due process and reliability required in capital cases pursuant to the Eighth and Fourteenth Amendments. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama, supra,* 447 U.S. at 637-638 and n.13.)

Both on its face and in the context of appellant's case, section 190.3's factors provided the jury the same unguided, limitless, unreviewable discretion which is constitutionally inadequate. (*Furman v. Georgia, supra*, 408 U.S. at 295 ["...wholly unguided by standards governing that (death) decision..."] (Brennan, J., conc.); ["...capriciously selected random handful upon whom the sentence of death has in fact been imposed."] (Stewart, J., conc.) *Id.*, at 309-310.)

This conclusion is reinforced by *Stringer v. Black, supra*, 503 at U.S. 234-236, where the United States Supreme Court held that, in a weighing state (such as California), which requires the sentencer to weigh aggravation against mitigation, vague aggravating factors create a risk of randomness in sentencing decision-making and create a bias in favor of death. (Accord, *Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2635 ["The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision."]) The factors listed in section 190.3 fail to guide or limit the sentencer's discretion, create a pro-death bias, create the impermissible risk that vaguely-defined factors would result in the arbitrary selection of appellant for execution, and afford no meaningful basis on which this Court may review the sentence,

all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Section 190.3's failure to provide proper guidance also violates appellant's rights under state law, thereby implicating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S. Ct. at 2229.)

e. Section 190.3's failure to require that individual aggravating factors be proven beyond a reasonable doubt, that any determination that aggravation outweighed mitigation be proven beyond a reasonable doubt, and that death be proven the appropriate penalty beyond a reasonable doubt, violated the Eighth and Fourteenth Amendments.

The failure to require proof of aggravating circumstances beyond a reasonable doubt violates a defendant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428; *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531.) A defendant's state-created rights are also violated, thus violating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S.Ct. at 222.) This failure leaves the sentencer with no abstract yardstick by which to measure aggravation or mitigation, and no scale on which to weigh and balance the two. The standards provided by section 190.3 are so vague as to be nearly meaningless, as evidenced by the fact that both the prosecution largely and the

defense almost entirely bypassed any discussion of those standards in closing argument.[61]

The closing argument of the prosecutor was focused not so much on whether individual factors in aggravation had been shown, or what weight was to be attributed to those factors, individually or cumulatively, but on a standardless determination that appellant deserved death because horrible crimes had been committed. This lack of guided discretion is analogous to one of the constitutional errors condemned in *Beck v. Alabama, supra,* (1980) 447 U.S. 625, 643 n.19, 100 S. Ct. 2382, 2392, n.19.[62] The jury

---

[61] In *State v. Wood* (Utah 1982) 648 P.2d 71, the Utah Supreme Court reviewed a capital conviction where the trial court had found that a single aggravating factor outweighed three mitigating factors. The Utah Supreme Court held that proof beyond a reasonable doubt was required, and set forth the following standard for future capital case juries: "After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and *you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.*" (*Id.*, at p. 83; emphasis supplied.)

The Utah Supreme Court explained that this standard means that the sentencer must "...have no reasonable doubt as to...the conclusion that the death penalty is justified and appropriate after considering all the circumstances." (*Id.*, at p. 84.)

[62] In *Beck*, the Alabama capital statutes provided for the jury to hear guilt phase evidence and render a verdict "...either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him..." (*Beck v. Alabama, supra*, 447 U.S. at 629.) Therefore, although that Alabama procedure is different than California's, the unconstitutional dilemma posed to the *Beck* jury and the constitutional problem for the trial court here were similar: "...the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to *whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision...*" (*Id.*, 447 U.S. at 640, emphasis supplied.)

here had no adequate guidelines or standards by which to measure or weigh the evidence presented by either side. Thus, each side was faced with an amorphous, subjective, individual decision-making process that failed to comport with constitutional demands.[63]

Section 190.3's factors and the related CALJIC instructions were unconstitutionally vague, failed to direct or limit the jury's discretion, encouraged the jury to act in a constitutionally arbitrary, capricious, unreviewable manner and skewed the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865; see, *State v. Wood, supra,* (Utah 1982) 648 P. 2d 71, 83.)[64]

Criminal cases merit the highest standard of proof known to the law, i.e., proof beyond a reasonable doubt:

> "...the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof

---

[63] Even assuming, *arguendo*, that the beyond a reasonable doubt standard was not required to establish the existence of any aggravating circumstance relied upon to impose a death sentence, or that death was the appropriate sentence, or that the aggravating circumstances outweighed mitigating circumstances, section 190.3 nevertheless violates the Fifth, Sixth, Eighth and Fourteenth Amendments by failing to specify any burden of proof or burden of persuasion at all.

[64] Appellant is aware that this court has rejected similar contentions (*People v. Rodriguez,* (1986) 42 Cal. 3d 730, 777-779; *People v. Allen* (1986) 42 Cal. 3d 1222, 1285), but respectfully requests that the issue be reconsidered.

> designed to exclude as nearly as possible the likelihood of an erroneous judgment. The stringency of the beyond a reasonable doubt standard bespeaks the weight and gravity of the...interest affected,..., society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impose almost the entire risk of error upon itself. ...In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755-756, 102 S.Ct. 1388], quoting *Addington v. Texas* (1979) 441 U.S. 418, 423, 415, 99 S.Ct. 1804; internal quotation marks and brackets omitted.)

The imposition of a death sentence represents the ultimate imposition on individual liberty. Therefore, the Fourteenth Amendment's general concepts of due process and equal protection, and the Eighth and Fourteenth Amendment's heightened level of due process and reliability in capital cases (*Ford v. Wainwright, supra,* 477 U.S. at 414, 106 S. Ct. at 2595; *Beck v. Alabama, supra*, 447 U.S. at 637-638 and n.13), as well as the California Constitution, mandate the use of the beyond a reasonable doubt standard in all decisions by capital case sentencers. A similar conclusion obtains under the California Constitution as well.

////

///

//

/

f. The failure to require that the jury base any death sentence on written findings regarding individual aggravating factors violated the Fifth, Sixth, Eighth and Fourteenth Amendments.[65]

The California death penalty statute does not require the sentencer to base its decision on any written findings. As a result, appellant's constitutional rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the failure to require that the jury present written findings on its decision regarding the applicable aggravating factors relied on in determining the appropriate sentence. This failure also violates appellant's rights under state law, thereby violating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S. Ct. at 2229.)

Section 190.3 fails to direct or limit the sentencer's discretion, encourages it to act in a constitutionally arbitrary, capricious, unreviewable manner and skews the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra,* 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.) This is particularly so as to Appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, reliability in the determination that death is

---

[65] Appellant is aware that this court has previously rejected similar contentions (e.g., *People v. Allen, supra*, 42 Cal.3d at 1285), but respectfully requests that the issue be reconsidered.

appropriate, and meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at 543; *Gregg v. Georgia, supra*, 418 U.S. at 195.)

The jury was not required to expressly find which factors in aggravation had been proven or why the aggravating factors allegedly outweighed the mitigating factors. In the absence of guided discretion, it could have made its decision to impose death using any of the improper considerations described above or any number of other factors unrelated to section 190.3. Absent a requirement of written findings, the propriety of the judgment here cannot be reviewed in a constitutional manner. Lack of such a requirement creates a constitutionally impermissible risk that the sentencer will rely on factors constituting improper aggravation, or discount proper mitigation, thereby resulting in an unreliable sentence. Written findings would obviate this prejudicial problem.

g. The provisions of California's death penalty statute fail to provide for comparative appellate review to prevent arbitrary, discriminatory or disproportionate imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Some states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. Georgia, for example, requires that the state Supreme Court determine whether "...the sentence of death is excessive or disproportionate to the penalty imposed in similar cases." (Ga. Stat. Ann. section 27-2537(c.) This provision was approved by the United States Supreme Court, which reasoned that it guards "...further against a situation comparable to that presented in *Furman v. Georgia, supra*]..." (*Gregg*

v. Georgia, supra, 428 U.S. at 198.) Toward the same end, Florida has judicially "...adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259, 96 S.Ct. 2960.)

Section 190.3 does not require that either the jury, trial court, or this Court undertake inter-case proportionality review -- a comparison between this and other capital cases regarding the relative proportionality of sentence imposed. (See *People v. Fierro* (1991) 1 Cal. 4th 173, 253.) The California sentencing scheme therefore fails to guard "...against [the] situation comparable to that...in *Furman*..." (*Gregg v. Georgia, supra*, 428 U.S. at 198) i.e., unbridled discretion, arbitrariness, and caprice.

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192, citing *Furman v. Georgia, supra*, 408 U.S. at 313 (White, J., conc.).)

The California capital punishment scheme also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia supra*, 446 U.S. at 428-429; *Stringer v. Black, supra,* 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.

Additionally, the Eighth and Fourteenth Amendments require a heightened level of due process and reliability in capital cases. (*Ford v. Wainwright, supra*, 477 U.S. at 414; *Beck v. Alabama, supra*, 447 U.S. at 637-638 and n.13.) Finally, the California scheme violates appellant's right to equal protection, under the Fourteenth Amendment, because such review is afforded non-condemned inmates, per section 1170, subdivision (f).[66]

Even assuming, *arguendo*, that appellant has no constitutional right to inter-case review, appellant is entitled to equal treatment vis-a-vis other similarly situated inmates convicted of crimes occurring at the same time as those of which he has been convicted, i.e., the benefit of a determination of whether his "...sentence is disparate in comparison with the sentences in similar cases." (*Ibid.*)

h. California's failure to provide penalty phase safeguards violates the Eighth and Fourteenth Amendments.[67]

The United States Supreme Court has repeatedly recognized that the death penalty is qualitatively different in nature from any other punishment. Therefore, capital case sentencing systems may not create a substantial risk that a death judgment and execution will be inflicted in an arbitrary and capricious manner. (*Gregg v. Georgia, supra*, 428

---

[66] Appellant is aware that this court has previously rejected similar contentions (*People v. Marshall* (1990) 50 Cal.3d 907, 945, 269 Cal.Rptr.269, 289; *People v. Allen, supra*, 42 Cal.3d at 1285, 232 Cal.Rptr. at 889), but respectfully requests that the issue be reconsidered.

[67] Appellant recognizes that this court has rejected similar arguments previously (e.g., *People v. Sully* (1991) 53 Cal.3d 1995, 1251-1252), but respectfully asks that it reconsider the points at issue, both facially and as applied in this case.

U.S. at 189; *Godfrey v. Georgia, supra*, 446 U.S. at 431.) *Furman* and *Gregg* require that "...the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case..." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 1774.) Accordingly, penalty phase aggravating factors in "weighing states," such as California, may not be unconstitutionally vague. (*Stringer v. Black, supra,* 503 U.S. at 234-236.)

The safeguards such as written findings as to the aggravating factors found by the sentencer, proof beyond a reasonable doubt of the aggravating factors, unanimity on the aggravating factors (when there is a jury), a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt, a finding that death is the appropriate punishment beyond a reasonable doubt, a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision, and definition of which specified relevant factors are aggravating and which are mitigating, greatly lessen the chance of an arbitrary or capricious death judgment. These safeguards reflect attempts to eliminate the use of unconstitutionally vague penalty phase factors, eliminate death-biased proceedings, eliminate arbitrary and capricious death judgments and executions, and to make death judgments meaningfully reviewable on appeal. California's system singularly fails to employ any of these safeguards, or to employ alternative but comparable measures. Therefore, California's capital case system is unconstitutional on its face and, as applied, in violation of appellant's rights to a fair trial, a reliable determination of sentence, due

process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments.

i. The California statutory scheme fails to perform the constitutionally required function of narrowing the population of death-eligible defendants, in violation of the Eighth and Fourteenth Amendments.

i. Introduction

To avoid constitutionally arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions:

> "...must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra*, 462 U.S. at 877.)

(Accord, *Tuilaepa v. California, supra*, 512 U.S. at 972, 114 S.Ct. at 2635 ["...the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder."]) California's capital statute fails to comport with these requirements.

ii. Section 190.2's numerous special circumstances are so broad as to include nearly every first degree murder and therefore fail to perform the constitutionality required narrowing function, in violation of the Eighth and Fourteenth Amendments.

The special circumstances included in section 190.2 are not only numerous but also so broad in definition as to encompass nearly every first degree murder. Section

190.2's all-embracing special circumstances were therefore created with an intent directly contrary to the "...constitutionally necessary function at the stage of legislative definition: [that] they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at 878.) In *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465, 24 Cal.Rptr.2d 808, 812, this Court addressed the "narrowing" aspect of capital sentencing in general:

> "'Narrowing' pertains to a state's 'legislative definition' of the circumstances that place a defendant within the class of persons eligible for the death penalty. To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite 'narrowing' function must 'circumscribe the class of persons eligible for the death penalty.' Additionally, it must afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not. A legislative definition lacking 'some narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment." (Citations omitted.)

(Accord, *Godfrey v. Georgia, supra,* (1980) 446 U.S. 420, 428, 433, 100 S. Ct. 1759, 1764, 1767.)

In *Godfrey v. Georgia, supra*, the United States Supreme Court reviewed a Georgia capital murder statute which sanctioned the death penalty for a murder found to have been "...outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (*Godfrey v. Georgia, supra*, 446 U.S. at 422.) Despite Georgia's argument that it had applied a "narrowing

construction" to that statute (*Id.*, at 429-430), the plurality opinion held:

> "In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" (*Id.*, at 428-429.)

Section 190.2 seemingly circumvents the *Godfrey* problem because it does not contain one special circumstance embracing "almost every murder," like the Georgia statute; nevertheless, section 190.2 has many individual special circumstances, which together embrace almost every murder. Such a scheme is contrary to the pertinent principle of *Godfrey* and the Eighth Amendment:

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Furman v. Georgia, supra*, 408 U.S. at 313 [conc. opn., White, J.]; accord, *Godfrey v. Georgia, supra*, 446 U.S. at 427 [plur. opn.]; (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

Viewed in its proper light, section 190.2 conflicts with this Eighth Amendment principle by purposefully encompassing almost every murderer. Moreover, multiple murder, the special circumstance found in this case, is, unfortunately, a common or "routine" form of murder occurring in California, yet has been defined as a potential capital crime, along with other much less common forms of murder.

In *People v. Morales* (1989) 48 Cal. 3d 527, 557-558, this Court noted that even the rare lying-in-wait special circumstance might be susceptible to an Eighth Amendment failure to narrow challenge if lying-in-wait were defined simply as a concealment of the perpetrator's purpose. In affirming Morales' conviction, this Court fashioned a three part definition for the lying-in-wait special circumstance which it held "...presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." (*Ibid.*) Justice Mosk dissented, finding the court's definition to be "so broad as to embrace virtually all intentional killings...," and opining that it "...does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not." (*Id.*, at 575.)

Justice Mosk's latter criticism is also applicable to the multiple murder circumstance here, and the comprehensive listing contained in section 190.2 generally. Under *Godfrey*, it is constitutionally impermissible for a statute making a defendant death-eligible to have so broad and indiscriminate a sweep, selecting as it does on the basis of the common aspects attending many murders. Serious as these factors are, they are not those which society views as inherently being among the most "...grievous... affronts to humanity...," as required by the Eighth Amendment. (*Zant v. Stephens, supra*, 642 U.S. at 877, n.15, citing *Gregg v. Georgia, supra*, 418 U.S. at 184.) Moreover, a statute which specifically contemplates encompassing every murderer fails to account for different degrees of culpability involved in different types of murder, increasing the

likelihood that juries will arbitrarily sentence defendants to death without proper regard for the defendant or the act, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

iii. Section 190.2, subdivisions (a), (3), the special circumstance of multiple murder, fails to perform the constitutionally required narrowing function, by making a common form of felony murder death-eligible, in violation of the Eighth and Fourteenth Amendments.[68]

California's statutory scheme violates the Eighth and Fourteenth Amendments, in that it attaches overly-broad eligibility for the death penalty to multiple murder offenses, and fails to..."genuinely narrow the class of persons eligible for the death penalty and...reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra*, 462 U.S. at 878.)[69]

---

[68] Appellant recognizes that this court rejected a similar argument in *People v. Marshall, supra*, 50 Cal.3d at 945-946. Appellant respectfully asks that this court reconsider the argument.

[69] Additionally, because the substantive felony murder offenses (section 189) the rape and burglary special circumstances (section 190.2) and the circumstances of the offense (section 190.3, subd. (a)) used in the actual decision to impose death, are all duplicative, a death judgment which, as here, is based on such factors also violates the Fifth Amendment's prohibition against double jeopardy, applicable to the states through the Fourteenth Amendment (see *Benton v. Maryland* (1969) 395 U.S. 784, 793-794, 89 S.Ct. 2056), as well as article I, section 15 of the California Constitution. (*Contra, People v. Gates* (1987) 43 Cal. 3d 1168, 1188-1190.) Indeed, this "triple use" of facts in a capital case felony murder also violates the Eighth Amendment's prohibition against cruel and unusual punishments, the Fourteenth Amendment's due process clause, and the enhanced capital case due process protections of both. (*Contra, People v. Marshall, supra,* 50 Cal. 3d at 945-946, citing *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241-246, 108 S. Ct. 546,

Additionally, California's statutory scheme is particularly death-biased in felony murder cases because after a first degree murder conviction and special circumstance finding based on multiple murder, the sentencer is required to double-count or weigh the same felony murder "crime circumstances" (Pen. C. sec. 190.3, subd. (a)) and the same multiple murder special circumstance as factors in aggravation (see, Pen. C. sec. 190.3, subd. (a)) contrary to the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra,* 503 U. S. at 234-236.)

Narrowing criteria must apply to multiple murder offenses as well as to other death-eligible statutory provisions, and death eligibility must be limited to the most reprehensible murderers. The criteria applied to multiple murder in California fail to provide this narrowing function; instead, they sweep in a broad, arbitrary fashion. This is demonstrated by the anomalous fact that, while any multiple-murderer may be executed, the same is not true of all "traditional" -- and often far more reprehensible -- first degree murderers, a result which is "highly incongruous." (*State v. Cherry* (N.C.1979) 257 S.E. 2d 551, 567.) California's multiple murder special circumstance therefore fails to provide the constitutionally required meaningful or rational basis for distinguishing capital from non-capital murder. (*Zant v. Stephens, supra*, 462 U.S. at 878 and n.15; *Furman v. Georgia, supra,* 408 U.S. at 248, n.11 [Douglas, J., conc.], 294 [Brennan, J., conc.], 309-310 [Stewart, J., Conc.], 313 [White, J. conc.].)

552-555.)

iv. Section 190.3, subdivision (a)'s specification of special circumstances as factors in aggravation grants the penalty phase sentencer unbridled discretion, weighted in favor of death, in violation of the Eighth and Fourteenth Amendments.

In addition to the above-described constitutional deficiencies, the statutory provision that a multiple murder special circumstance finding may be used at the penalty phase as a factor in aggravation is another Eighth and Fourteenth Amendment[70] violation.

In California, the sentencer weighs in aggravation of sentence any special circumstance which was found true at the guilt phase. (Section 190.3, subd. (a).) A defendant convicted of two murders in one proceeding is therefore automatically subject to a multiple murder special circumstance (section 190.2, subd. (a)(3)) and a penalty phase murder aggravating factor (section 190.3, subd. (a)) by the simple nature of the charges.

By contrast, a defendant accused of a single premeditated killing is not automatically subjected to a statutorily mandated special circumstance. Even though a single pre-meditated murder involving deliberation, malice, and an intent to kill may be far more serious than a multiple murder,[71] premeditated murder alone does not automatically give rise to both a special circumstance and an aggravating factor. This

---

[70] As described, post, the Fourteenth Amendment violation offends both the due process clause and the equal protection clause.

[61] A defendant's intent and therefore moral guilt, *Enmund v. Florida* (1982) 458, 485 U.S. 782, 800, 102 S.Ct. 3368, 3378), are critical to a determination of death penalty suitability. (*Id.*, at pp.800-801.)

disparity between a heinous premeditated murder of a single individual and multiple murder is both "highly incongruous" (*State v. Cherry, supra,* 257 S.Ed.2d at p.567; see *State v. Middlebrooks*, 840 S.W. 2d at 345), and a violation of the due process clauses of the Fifth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

California attempts to comply with the Eighth Amendment's narrowing requirement by means of guilt phase findings of special circumstances accompanying guilt phase findings of first-degree murder. (Sec. 190.2, subd.(a).) Where the homicide is multiple murder, however, the narrowing fails to pass constitutional muster because no narrowing takes place: the special circumstances found under section 190.2, subd.(a)(3) duplicates the elements of the crimes themselves. (*Furman v. Georgia, supra*, 408 U.S. at 313 [White, J., conc.,]; accord, *Godfrey v. Georgia, supra,* 446 U.S. at 427 [plur. opn.].) The error is then exacerbated by having the sentencer consider the special circumstance finding as a penalty phase aggravating factor (sec. 190.3, subd.(a)), creating a death-biased process that violates the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra*, 503 U.S. at 234-236; *Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2635.)

v. Sections 190-190.5 afford the prosecutor complete discretion to determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments.

Sections 190-190.5 afford the individual prosecutor complete discretion to

determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments. In *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, Justice Broussard dissented on this ground, noting that it creates a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.

Under the California statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar, if not identical, charges in different counties will not. These arbitrary outcomes occur either at the charging stage, prior to trial by plea to a non-capital charge, after the guilt phase, and during or after the penalty phase. This disparate range of options, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including, *inter alia*, race, sexual orientation, personal dislike of the defendant, and/or economic status. Additionally, the prosecutor is free to seek death in virtually every first degree murder case on either a lying-in-wait theory (*People v. Morales, supra*, 48 Cal.3d 527) or a felony murder theory.

The statutory scheme therefore allows arbitrary and wanton prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury and opposing the automatic motion to modify the sentence. This compounds the effects of the vagueness and arbitrariness in the statutory scheme,

described *ante*. Much like the arbitrary and wanton jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 96 S.Ct. 2978 this unlimited discretion is contrary to the principled decision-making required by *Furman v. Georgia, supra*, 408 U.S. 238.

In appellant's case, the prosecutor decided to charge rape and burglary special circumstance, giving rise to the special circumstances and aggravators that ultimately resulted in a death sentence. In his penalty phase argument regarding the circumstances of the crime as a factor warranting the death penalty, the prosecutor exploited the unconstitutionally vague statutory factors by arguing the special circumstances themselves justified death. The jury therefore arrived at its death judgment by a tainted process involving unguided consideration of improper factors improperly argued by the prosecutor. Therefore, under the Eighth and Fourteenth Amendments, and the principles articulated in *Furman*, *Tuilaepa*, and *Stringer*, reversal of the death judgment here is mandated.

j. <u>These errors prejudiced appellant and mandate reversal</u>.

Section 190.3 violated the Fifth, Sixth, Eighth and Fourteenth Amendments, as described above. It also violated appellant's analogous state-created rights, thereby violating his right to due process. (*Hicks v. Oklahoma, supra*, 497 U.S. at 346, 100 S.Ct. at 2229.) These errors are each prejudicial and mandate reversal individually and cumulatively.

As to all the unconstitutionally vague provisions of section 190.3, reversal is automatic, because the use of a vague aggravating factor in the weighing process created randomness and a bias in favor of execution. (*Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2675; *Stringer v. Black, supra*, 503 U.S. at 234-236.)

As to all other errors, *ante*, reversal is mandated, as respondent cannot demonstrate that they individually or collectively had no effect on the penalty verdict in this exceedingly close case. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, 107 S.Ct. 1821.)

C. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

1. Introduction

Appellant was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). While appellant's rights under state and federal constitutions have been violated, these violations are also violations of international law.

2. Background

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank

with federal statutes.[72] Customary international law is equated with federal common law.[73] International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700, 44 L.Ed. 320, 20 S.Ct. 290.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118, 2 L.Ed.208.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33, 71 L.Ed.2d 715, 102 S.Ct. 1510.) The United States Constitution also authorizes Congress to "define and punish...offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252, 80 L.Ed.2d 273, 104 S.Ct.

---

[72] Article VI, sec. 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[73] Restatement Third of the Foreign Relations Law of the United States (1987), p.145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

1776.[74]

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[75] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[76]

---

[74] See also *Oyama v. California* (1948) 332 U.S. 633, 92 L.Ec.249, 68 S.Ct. 269, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Laws] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* At 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, 570 invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat.1031, 1046.)" (*Id.* at 604.)

[75] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[76] Buergenthal, International Human Rights (1988) p.3.

This expression was further in 1920 by the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[77] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[78]

It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[79]

3. Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human

---

[77] *Id.*, pp. 7-9.

[78] Restatement Third of the Foreign Relations law of the United States (1987) Not to Part VII, vol. 2 at 1058.

[79] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

rights provisions are seen in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[80] By adhering to its multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the United Nations drafted and adopted both the Universal Declaration of Human Rights[81] and the Convention on the Prevention and Punishment of the Crime of Genocide.[82] The Universal Declaration is part of the International Bill of Human

---

[80] Article 1 (3) of the UN Charter, June 26, 1945, 59 Stat.1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world."
>
> Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).

[81] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res.217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[82] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, *supra,* p.48.

Rights,[83] which also includes the International Covenant on Civil and Political Rights,[84] the Optional Protocol to the ICCPR,[85] the International Covenant on Economic, Social and Cultural Rights,[86] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the

---

[83] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills." (1991) 40 Emory L.J. 731.

[84] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976 (hereinafter ICCPR).

[85] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[86] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

individual without distinction as to race, nationality, creed or sex."[87] In 1948, the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[88]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[89] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to

---

[87] OAS Charter, 119 U.N.T.S.3, entered into force December 13, 1951, amended 721 U.N.T.S. 324, entered into force February 27, 1970.

[88] Buergenthal, International Human Rights, *supra,* pp.127-131.

[89] Buergenthal, International Human Rights, *supra.*

Appellant notes that this appeal is a stet in exhausting his administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

reinforce the normative effect of the American Declaration.[90]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the United Nations Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[91] Though the 1950s was a period of isolationist, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[92]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; Ex-President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[93] and the

---

[90] Buergenthal, International Human Rights, *supra.*

[91] Sohn and Buergenthal, International Protection of Human Rights (1973) pp.506-9.

[92] Buergenthal, International Human Rights, *supra,* p.230.

[93] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. _____ U.N.T.S.

International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment[94] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[95]

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[96] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[97] Though the United States courts have not strictly applied

---

____ (1994).

More than 100 countries are parties to the Race Convention.

[94] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res.39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. ____ U.N.T.S. ____ (1994).

[95] Buergenthal, International Human Rights, *supra,* p.4.

[96] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p.579.

[97] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), entered into force January 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet

Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[98]

4. Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[99] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the

---

been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc.L., 92d Cong., 1sat Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[98] See for example *Inupiat Community of the Arctic Slope v. United States* (9th Cir.1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); *Crow v. Gullet* (8th Cir.1983) 706 F.2d 774 (citing the International Covenant on Civil and Political Rights); *Filartiga v. Pena-Irala* (2nd Cir.1980) 630 F.2d 876 (citing the International Covenant on Civil and Political Rights).

See also Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 Geo.Wash.J.Int'l.L & Econ.71. Ms. Charme argues that Article 18 codified the existing interim (pre-treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. Thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[99] Restatement Third of the Foreign Relations Law of the United States, sec.102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[100]

Customary international law is "part of our law." (*The Paquete Habana, supra,* at 700.) According to 22 U.S.C. sec.2304 (a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.[101] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[102] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala* (2d Cir.1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary

---

[100] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J. 731 at 737.

[101] 22 U.S.C. sec.2304 (a)(1).

[102] Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts & Docs. 46. This statute is generally considered to be an authoritative list of the sources of international law.

international law as evidenced and defined by the Universal Declaration of Human Rights...." (*Id.*) at 882. The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[103] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[104]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on human rights. Thought Ex-President Bush vetoed this legislation,[105] in May 1993 Ex-President Clinton tied renewal of China's most favored

---

[103] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser.L/VII.50, doc.6 (1980).

[104] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser.L/V/II.52, doc.17, para.48 (1987).

[105] See Michael Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times, September 29, 1992, at A1.

nation status to progress on specific human rights issues in compliance with the Universal Declaration.[106]

The International Convention on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound."[107]

5. Due process violations

The factual and legal issues presented in the brief demonstrate that appellant was

---

[106] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's "MFN" status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14 Nw. J. Int'l L.&Bus.66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use "MFN" status to influence China's compliance with recognized international human rights. See Kent, China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994 (1995) 17 H.R. Quarterly, 1.

[107] Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures (1993) 42 DePaul L. Rev.1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

denied his rights to due process and a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[108] ("ICCPR") as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[109] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[110] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[111]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-

---

[108] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[109] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d Sess.

[110] Vienna Convention, *supra,* 1155 U.N.T.S. 331, entered into force January 27, 1980.

[111] Restatement Third of the Foreign Relations Law of the United States, (1987) sec.313.cmt.b. With respect to reservations, the Restatement lists "the requirement...that a reservation must be compatible with the object and purpose of the agreement."

executing or have been implemented by legislation.[112] The United States declared that the articles of the ICCPR are not self-executing.[113] In 1992, the Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.[114]

But under the Constitution, a treaty stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Asakura v. Seattle* (1924) 265 U.S. 332, 341, 68 L.Ed. 1041, 44 S.CT. 515.)[115] Moreover, treaties designed to protect individual rights should be

---

[112] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p.257. See also *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[113] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d Sess.

[114] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d sess. at 19.

[115] Some legal scholars argue that the distinction between self-executing and non-self-executing treaties is patently inconsistent with express language in Article 6, sec.2 of the United States Constitution and that all treaties shall be the supreme law of the land.

construed as self-executing. (*United States v. Noriega* (1992) 808 F.Supp.791.) In *Noriega,* the court noted, "It is inconsistent with both the language of the [Geneve III] treaty and with our professed support of its purpose to find that the rights established herein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs -- not to create some morphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.... Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life... [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[116] Likewise, these protections are found in the American Declaration:

See generally Jordan L. Paust, Self-Executing Treaties (1988) 82 Am. J. Int'l L.760.

[116] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[117]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[118] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.[119]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[120] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any

---

[117] American Declaration of the Rights and Duties of Man, *supra.*

[118] Report of the Human Rights Committee, p.72, 49 UN GAOR Supp. (No.40) p.72, UN Doc. A/49/40 (1994).

[119] *Id.*

[120] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

of the nonderogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[121] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[122]

6. Conclusion

The due process violations that appellant suffered throughout his trial and sentencing phases are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international

---

[121] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer. Ct.H.R., ser. A: Judgments and Opinions, No.3 (1983) reprinted in 23 I.L.M.320, 341 (1984).

[122] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex.Int'l L.J.69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jusisdiction." Advisory Opinion No.OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982) reprinted in 22 I.L.M.37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

commitment to further protections of human rights. The United States must honor its role in the international community be recognizing the human rights standards in our own country to which we hold other countries accountable. As a result of the violations of international law which occurred in this case, reversal is required.

D. THE CUMULATIVE PREJUDICIAL EFFECT OF ALL THE ERRORS IN THE INSTANT CASE VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, THE EFFECTIVE ASSISTANCE OF COUNSEL, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS WELL AS THE CALIFORNIA CONSTITUTION.

As shown in the preceding sections of this brief, numerous extremely prejudicial errors were committed in the instant case. Even if, *arguendo*, none alone may justify reversal, when considered cumulatively, these errors denied appellant his constitutional rights to a fair trial, due process, effective assistance of counsel, to present a defense, and a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the analogous provisions of the California Constitution. Reversal of the verdict of guilty as well as the penalty of death are therefore required.

In *People v. Hill* (1998) 17 Cal.4th 800, 844-847, 72 Cal.Rptr.2d 656, 681-682, this Court discussed why the cumulative effect of all the trial errors prejudiced the defendant, violated his constitutional rights, and required reversal:

"[A] series of trial errors, though independently harmless,

> may in some circumstances rise by accretion to the level of reversible and prejudicial error. ...
>
> Defendant's trial, as seen, was far from perfect. In the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. ...
>
> ***
>
> Although we might conclude any single instance of misconduct was harmless standing alone, we cannot ignore the overall prejudice to defendant's fair trial rights...[I]t became increasingly difficult for the jury to remain impartial. 'It has been truly said: "You can't unring a bell."' (*People v. Wein* (1958) 50 Cal.2d 383, 423 (dis.opn. of Carter, J.) Here, the jury heard not just a bell, but a constant clang of erroneous law and fact.
>
> ***
>
> The sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors. Considering the cumulative impact of [the prosecutor's] misconduct, at both the guilt and penalty phases of the trial, together with...the other errors throughout the trial, we...conclude defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial. Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects."

(Accord, *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469 ["The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."]; *United States v. Necolchea* (9th Cir.1993) 986 F.2d 1273, 1282-1283, citing *Rivera, supra.*)

Here, the trial court erroneously denied appellant's *Wheeler/Batson* motion. It prejudicially erred when it allowed the prosecutor to introduce an incredible amount of evidence regarding inflammatory uncharged conduct. Additional prejudicial error occurred regarding Dr. Staub's improper DNA-related testimony and the introduction of Cellmark Labs' DNA hearsay reports and documents. Instructional error improperly permitted felony-murder and special circumstance findings. At the penalty phase, prejudicial error occurred regarding admission of the cat torture evidence. The trial court erroneously denied appellant's motion to modify the death penalty. Clearly, numerous prejudicial errors occurred in this case.

As explained in *Hill, supra,* here the "aggregate prejudicial effect of [these] errors was greater than the sum of the prejudice of each error standing along." (17 Cal.4th at 845, 72 Cal.Rptr.2d at 681.) Thus, appellant was denied his constitutional rights to a fair trial, due process, effective assistance of counsel, to present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, art.1, secs.15, 16, 17. This Court cannot say that beyond a reasonable doubt, that a result more favorable to appellant would not have occurred in the absence of the errors. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824; *United States v. Rivera, supra,* 900 F.2d at 1470, n.6 ["If any of the errors being aggregated are constitutional in nature...*Chapman* should be used..."])

VIII. CONCLUSION

For the reasons stated above, reversal is required.

Dated: April 30, 2014

Respectfully submitted,
LAW OFFICES OF JOHN F. SCHUCK
John F. Schuck, #96111
885 N. San Antonio Road, Suite A
Los Altos, CA 94022
(650) 383-5325

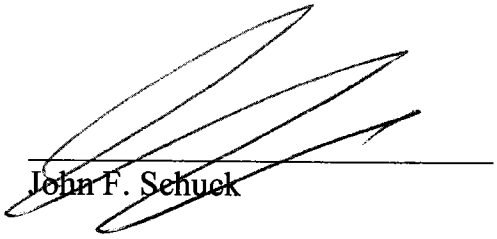
By _____
JOHN F. SCHUCK
Attorney for Appellant
PAUL WESLEY BAKER
(Appointed by the Court)

CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Opening Brief contains 79,035 words.

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

Dated: April 30, 2014



John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

I am a citizen of the United States and a resident of the County of Santa Clara; I am over the age of eighteen years and am not a party to the within action; my business address is 885 N. San Antonio Road, Suite A, Los Altos, CA 94022.

On May 2, 2014, I served the within:

on the following interested persons in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Altos, California addressed as follows:

APPELLANT'S OPENING BRIEF

Carlos Dominguez, Deputy Attorney General
North Tower, Suite 5001
300 S. Spring Street
Los Angeles, CA 90013

District Attorney
210 W. Temple Street
Los Angeles, CA 90012-3210

Los Angeles County Superior Court
210 W. Temple Street, Room M3
Los Angeles, CA 90012-3210

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Paul Wesley Baker
G-47360
San Quentin State Prison
San Quentin, CA 94974

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

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

Executed at Los Altos, California on May 2, 2014.

John F. Schuck