THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. SO99274
Plaintiff and Respondent,	)	Superior Court No. PA032918
v.	)	
DONALD L. BROOKS,	)	
Defendant and Appellant.	)	

Appeal from the Superior Court of Los Angeles County

Honorable Warren G. Greene, Judge

APPELLANT'S OPENING BRIEF
(Volume I of II: Pages 1-251)

John L. Staley
Attorney at Law
State Bar No. 129624
11770 Bernardo Plaza Court
Suite 305
San Diego, CA 92128

(858) 613-1047

Counsel for Appellant by
Appointment of the
California Supreme Court

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

CALIFORNIA STATE STATUTES

FOREIGN JURISDICTION STATUTES

SECONDARY AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. SO99274
	)	
Plaintiff and Respondent,	)	Superior Court No.
	)	PA032918
v.	)	
	)	
DONALD L. BROOKS,	)	
	)	
Defendant and Appellant.	)	
	)	
	)	

Appeal from the Superior Court of Los Angeles County

Honorable Warren G. Greene, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment following trial and a judgment of death which disposes of all issues between the parties and is authorized by Penal Code section 1239, subdivision (b), and the California Rules of Court, rule 8.600, subdivision (a).

STATEMENT OF THE CASE

A warrant for appellant's arrest was issued on March 24, 1999. (1 CT p. 1.)[1] On April 7, 1999, a felony complaint for extradition was filed which alleged appellant committed

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

7, 1999, a felony complaint for extradition was filed which alleged appellant committed murder in violation of Penal Code section 187, subdivision (a). (1 CT pp. 3-4.)[2] On September 24, 1999, appellant pled not guilty to the sole count of the felony complaint filed on March 24, 1999. (1 CT p. 35.)

The preliminary hearing commenced on April 17, 2000. (1 CT p. 56-1.) That same day, the trial court ordered appellant to stand trial in the Superior Court. Count one alleged murder in violation of Penal Code section 187, subdivision (a). Count two alleged stalking in violation of Penal Code section 646.9, subdivision (a). Count three alleged arson in violation of Penal Code section 451, subdivision (a). Count one alleged that appellant committed the murder: (1) while lying in wait within the meaning of Penal Code section 190.2, subdivision (a)(15); (2) while kidnaping the victim within the meaning of Penal Code section 190.2, subdivision (a)(17); and (3) while inflicting torture within the meaning of Penal Code section 190.2, subdivision (a)(18). (1 CT p. 56-183; 1A CT p. 63.)

An information filed on May 1, 2000, alleged appellant committed the above three violations of the Penal Code. It also alleged the three special circumstance allegations. (2 CT pp. 315-317.) Jury selection commenced on April 24, 2001. (2 RT p. 61.) On April 26, 2001, and May 1, 2001, the trial court held a hearing on appellant's motion to exclude his statements to law enforcement officers from evidence. (4 RT p. 265; 6 RT p. 489.) The trial court granted the motion in part and denied it in part. (4 RT pp. 366-367; 6 RT p. 523.) On

---

[2] The felony complaint did not allege any special circumstances.

May 16, 2001, the jury was empaneled and sworn. (13 RT pp. 1374, 1431.)

Trial testimony for the guilt phase commenced on May 17, 2001. (14 RT p. 1480.) The jury commenced guilt phase deliberations on June 6, 2001. (24 RT pp. 2690-2692.) On June 11, 2001, the jury found appellant guilty of all three counts. The jury found true the allegations under count one that appellant kidnaped and tortured the victim in the commission of the offense. The jury found not true the allegation that appellant committed the murder while lying in wait. (24 RT pp. 2704-2705.)

The penalty phase commenced on June 14, 2001. (25 RT p. 2711.) The penalty phase jury deliberations commenced on June 18, 2001. (27 RT pp. 3041-3043.) On June 21, 2001, the jury returned a verdict of death. (28 RT p. 3115.)

On July 16, 2001, the trial court denied appellant's automatic motion to modify the judgment of death to life in prison without the possibility of parole and sentenced appellant to death. (29 RT pp. 3126, 3160.)

STATEMENT OF FACTS–GUILT PHASE

1. THE AFFAIR BETWEEN LISA KERR AND APPELLANT

Appellant and Lisa Kerr met and started an intense love affair. Ms. Kerr constantly manipulated appellant's affection for her by pursuing the relationship with him when it was convenient and casting him aside when she had other interests. Ms. Kerr often was condescending to appellant despite his intense devotion to her. Appellant even paid for an apartment for Ms. Kerr so she could get away from her husband. Appellant paid for the apartment during a time period in which Ms. Kerr told third parties that appellant was stalking her. Appellant eventually could not handle the emotional abuse and manipulation. Mr. Kerr became the focus of appellant's life even as she cast him aside. Appellant's anger and despair grew. The situation finally reached a crescendo when appellant heard Ms. Kerr make disparaging remarks about him to a third person with whom he believed she was having a sexual relationship and refer to him as, "squirrel boy." Appellant confronted Ms. Kerr shortly after that conversation and strangled her. Appellant believed she was dead. He then left Ms. Kerr's body in the back of her vehicle and set the car on fire. Appellant acted out of desperation and because he had been pushed to his emotional edge.

A. THE PROSECUTION WITNESSES

Lisa Kerr and appellant met in October 1997 at the Valley Club, where they attended Alcoholics Anonymous meetings. (17 RT pp. 1948-1950, 1869; 19 RT p. 2108.) Sometime in 1998, appellant and Ms. Kerr, who was married, began a sexual relationship. (17 RT pp.

1949-1950; 18 RT pp. 2056-2057.)

David Heiserman worked for appellant as a plumber's helper. (18 RT pp. 2067-2069.) Mr. Heiserman had been with appellant and Ms. Kerr on many occasions starting in October 1998. They often went to Charlie O's bar. Ms. Kerr's brother played in a band that performed at the bar. Mr. Heiserman and appellant also went to the Beehive beauty supply store where Ms. Kerr worked. They also met for lunch. (19 RT pp. 2102-2103.) Ms. Kerr occasionally visited appellant at a job site. (19 RT pp. 2103-2104.)

Mr. Heiserman heard Ms. Kerr tell appellant she loved him, but the comment appeared sarcastic. Ms. Kerr usually made fun of appellant. (19 RT pp. 2107-2108.) From October 1998 through March 1999, Ms. Kerr would put appellant down with comments such as "You're acting lame." She was rude to appellant. (19 RT p. 2113.) Appellant paid for Ms. Kerr's clothing, paid for her meals, and paid for her apartment. (19 RT p. 2113.)

Several witnesses described Ms. Kerr being fearful of appellant as early as September of 1998. (17 RT pp. 1935-1938, 1923-1924; 17 RT pp. 1958-1959.) Ms. Kerr, however, moved into an apartment in January 1999 which was paid for by appellant. (17 RT p. 1945; 20 RT p. 2304.) The lease was in the name of Lisa Brooks and appellant. Ms. Kerr was not employed when she moved from her home to the apartment. Appellant agreed to help Ms. Kerr financially because she was leaving her husband and needed assistance. (18 RT pp. 2057-2058; 20 RT p. 2304.)

Mark Harvey and appellant had been friends since 1991. (17 RT p. 1868) They both attended AA meeting at the Valley Club, which was located at the corner of Tampa and Vanowen. Several months prior to March 1999, appellant asked to speak to Mr. Harvey after an AA meeting. (17 RT pp. 1864-1865.) Appellant said he was having an affair with a married woman who had a little boy. Appellant said everything was great when they were together. Appellant said he was frustrated. He paced the parking lot and kicked the tires of his van. (17 RT p. 1865-1866.) Appellant said life was falling into place. He owned a business, had hired employees, and cleaned up his credit. Appellant was upset the woman with whom he was having the affair had decided to return to her husband. (17 RT p. 1866.) After several hours of conversation, appellant said he was having the affair with Lisa Kerr. (17 RT p. 1867.) Mr. Harvey was upset because Ms. Kerr was a close friend with Mr. Harvey's girlfriend, Lynda Farnand. (15 RT pp. 1688-1690; 17 RT pp. 1868-1869.)

Lynda Farnand knew Ms. Kerr and appellant. (17 RT pp. 1913-1915.) In September 1998, Ms. Farnand was working at the Samadona Family Foster Agency when Ms. Kerr called. She was upset about voice mail messages appellant had left on her answering machine. Ms. Farnand and Ms. Kerr went to the latter's residence on Hart Street. (17 RT p. 1935.) Ms. Farnand listened to the voice mail messages. (17 RT pp. 1935-1936.) She heard appellant call Ms. Kerr a "slut" and a "whore," and said if he could not have her nobody

could. (17 RT pp. 1937-1938.)[3] Appellant's sounded angry and agitated. Ms. Kerr was upset and did not know what to do. (17 RT p. 1938.)

In late September 1998, Ms. Farnand had five to six conversations with Ms. Kerr about appellant. Ms. Kerr said she was afraid of appellant. During the last conversation, Ms. Kerr sounded scared and upset. (17 RT pp. 1923-1924.) Later that day, Ms. Farnand met Ms. Kerr at the West Valley Police Station to help her inquire about obtaining a restraining order. (17 RT pp. 1915-1916, 1924-1925.)

Dwayne Scott Kari knew Ms. Kerr and appellant. (20 RT pp. 2278-2279.) Following AA meetings, appellant had talked with Mr. Kari on several occasions about his relationship with Ms. Kerr. (20 RT pp. 2280-2282.) On at least one occasion, Mr. Kari told appellant he was committing adultery and should stop. (20 RT p. 2282.)

Several months prior to Ms. Kerr's death, Mr. Kari was getting a cup of coffee between 8:00 and 8:30 a.m. at the corner of Tampa Avenue and Vanowen Street in Van Nuys. He saw appellant driving a van down Vanowen Street. Mr. Kari got in his car and followed appellant. Appellant went towards Ms. Kerr's home on Hart Street. (20 RT p. 2285.) Appellant went up a side street which ended at Hart Street. (20 RT pp. 2286-2287.)

Mr. Kari caught up with appellant and asked him to get out of his vehicle. Appellant did so. Mr. Kari asked appellant why he was stalking Ms. Kerr. Appellant denied the

---

[3] The trial court gave the jury a limiting instruction which stated this evidence was being admitted to show the victim's fear for purpose of the stalking count. (17 RT p. 1938.)

accusation. Appellant said Ms. Kerr was "screwing around on him." Appellant retrieved a tape recorded message from his van and played it on a handheld recorder. Mr. Kari heard Ms. Kerr say, "All I can say about last night was yummy." (20 RT pp. 2286-2287.)

Appellant showed Mr. Kari a piece of paper with Ms. Kerr's handwriting. It said, "Lisa Brooks." Appellant said he would show it to Casey Kerr if Ms. Kerr did not leave him. Mr. Kari told appellant he should not blackmail anyone. Mr. Kari asked appellant if he was going to kill or stab Casey. Appellant said yes. (20 RT p. 2288.) Mr. Kari spoke with appellant on other occasions when appellant said Ms. Kerr was messing around on him and he was going to kill Casey. (20 RT p. 2289.)

Cheryl Zornes and Ms. Kerr were friends. (17 RT pp. 1951-1952.) During December 1998, Ms. Kerr told Ms. Zornes she was afraid of appellant. Ms. Zornes knew appellant by the name of "Louie." (17 RT p. 1958.) Ms. Kerr said appellant was following her. (17 RT pp. 1958-1959.) Ms. Kerr said appellant had forced her to tell Casey about her relationship with him by threatening to do so himself. (17 RT pp. 1960-1961.) He also had a plane fly a birthday banner fly over her house. Ms. Kerr commented to Ms. Zornes, "Look what he's willing to do for me." (17 RT p. 1962.) She appeared scared and confused when she made that comment. (17 RT p. 1964.)

Kim Hyer and Ms. Kerr were close friends. During January through March 1999, Ms. Hyer lived in Phoenix, but she flew to Los Angeles every other weekend to see Ms. Kerr. (18 RT pp. 2007, 2051-2052.) On a Sunday morning in February 1999, Ms. Hyer was staying

with Ms. Kerr at her apartment on Woodman Avenue. Tyler was staying with her. Ms. Kerr had separated from her husband. (18 RT p. 2020.) Ms. Hyer, Ms. Kerr and Tyler went to a restaurant called Norm's for breakfast. (18 RT pp. 2021-2022.) Appellant and his daughter were there eating breakfast. Ms. Kerr and appellant exchanged words. (18 RT p. 2022.)

Appellant left with his daughter. Ms. Kerr appeared upset and agitated. (18 RT pp. 2023-2024.) Ms. Hyer, Mr. Kerr, and Tyler left the restaurant after approximately 45 minutes. They walked to the parking lot behind the restaurant to enter Ms. Kerr's vehicle. Ms. Kerr's vehicle was covered with gifts, including a mylar balloon, roses, a box of chocolate, and a house plant. (18 RT pp. 2025- 2026.) Ms. Hyer took the car keys and told Ms. Kerr to go inside the restaurant while she drove the car to the front of the restaurant. (18 RT p. 2025.) Ms. Hyer gave the gifts to two teenagers who walked by the car. Ms. Hyer drove to the front of the restaurant where she picked up Ms. Kerr and Tyler. (18 RT pp. 2026, 2028.) They returned to Ms. Kerr's apartment. (18 RT p. 2028.) When Ms. Hyer drove the vehicle into Ms. Kerr's parking spot, a plastic bag was hanging from the fence. It contained three dozen Hot Wheel cars. (18 RT p. 2029.)

On another occasion in February 1999, Ms. Hyer was at an AA meeting. She called Ms. Kerr and asked her to bring money from the pocket of pants Ms. Hyer had at Ms. Kerr's apartment. Appellant showed up at the meeting with the money. Ms. Hyer and appellant had not spoken about the subject. (18 RT pp. 2030-2031.)

Ms. Hyer last saw Ms. Kerr 10 days before her death on March 24, 1999. Ms. Kerr

dropped Ms. Hyer off at the airport so she could fly home to Phoenix. Ms. Kerr was scared. (18 RT pp. 2008-2009.) Ms. Kerr made Ms. Hyer promise to care for Tyler if anything happened to her. Ms. Hyer told her not to worry because nothing was going to happen. (18 RT pp. 2013-2014.)[4] During the March 1999 time period, Ms. Hyer paid several bills for Ms. Kerr with her personal checks. (18 RT pp. 2033-2039.) She did so to help Ms. Kerr get away from appellant. (18 RT pp. 2057-2058.) Ms. Hyer told the prosecutor that Ms. Kerr kept appellant in her life for money. (18 RT p. 2047.)

Mr. Heiserman testified that appellant was obsessed with Ms. Kerr during early 1999, and continuing into the Spring. Several months prior to Ms. Kerr's death, appellant drove Mr. Heiserman to her residence on Hart Street. They circled around the house and parked a block away. Appellant said he wanted to see what was going on. He walked up the street to the house. He was gone for about 25 minutes. Appellant was upset when he returned. Ms. Heiserman was with appellant on several occasions when he followed Ms. Kerr or met her for lunch. (18 RT pp. 2072, 2077; 19 RT p. 2139.) On another occasion, Mr. Heiserman and appellant followed Ms. Kerr home from work. (19 RT pp. 2139-2140.)

About a month prior to March 24, 1999, Mr. Heiserman was with appellant when he followed Ms. Kerr to a bar named Charlie O's. Appellant said he had ordered a device through the mail which would allow him to hear what was being said in Ms. Kerr's home and

---

[4] The trial court gave a limiting instruction to the jury which stated this evidence was being admitted to show Ms. Kerr's fear of appellant because fear was an element of the crime of stalking. (18 RT p. 2014.)

had planted it. (18 RT pp. 2077-2078.) Appellant said he bugged the house because Ms. Kerr was "fucking around on him." Appellant mentioned the name Mark. (18 RT pp. 2079.)

During the month or two preceding Ms. Kerr's death, Mr. Heiserman heard appellant say two or three times he wanted to kill Ms. Kerr. Appellant also talked about killing Casey Kerr. He talked about being a sniper and taking "Casey out." Appellant said he wanted to burn Ms. Kerr's vehicle. About a month prior to Ms. Kerr's death, appellant said burning her vehicle would eliminate fingerprints. (18 RT pp. 2081-2082, 2084-2085.) Appellant did not say anything about Ms. Kerr being in the vehicle. (18 RT p. 2088.)

Appellant said the only way he could obtain peace and quiet was to get rid of Ms. Kerr. (18 RT p. 2083.) Mr. Heiserman told appellant to "leave it alone." Appellant said he could not. (18 RT p. 2087.) The name "Mark" was mentioned when appellant talked about Ms. Kerr having a relationship with someone else. Appellant said Ms. Kerr was sleeping with Mark. (18 RT p. 2079' 19 RT p. 2145.) The thought of Ms. Kerr not doing what appellant wanted took over appellant's life. He wanted Ms. Kerr to leave her family and start a family with him. (19 RT p. 2146.)

Mr. Heiserman did not take appellant's comments seriously because he did not seem like a person who would commit such acts. (18 RT p. 2082.) Mr. Heiserman stopped working for appellant because he was obsessed with Ms. Kerr. (18 RT p. 2071.)

B. THE DEFENSE WITNESSES

Several witnesses testified to the romantic relationship between appellant and Ms.

Kerr, her stated plans to leave her husband to be with appellant, and how appellant emotionally deteriorated when Ms. Kerr betrayed him. Appellant was not able to handle the emotional manipulation and the realization that Ms. Kerr had only used him for her own benefit.

Sheila Peet was the officer manager and part owner of William A. Peet and Son Plumbing. Appellant had come to the business to purchase plumbing supplies. Appellant had performed plumbing work for the company. (21 RT p. 2379.) During October and November 1998, appellant brought Ms. Kerr to the business on two or three occasions. (21 RT pp. 2379-2380, 2385.) Ms. Kerr was happy with appellant and did not fear him. She talked about appellant getting her an apartment and an attorney. Ms. Kerr was planning to divorce her husband. (21 RT pp. 2383-2384.) Mr. Peet believed Ms. Kerr dressed risque and was showing too much of her body. Her dress disrupted the office. (21 RT pp. 2384-2386.)

Jody Wheeler worked the day shift at a business named "Charlie O's saloon." It was located on Victory and Van Nuys Boulevard. (21 RT pp. 2339, 2345.) Ms. Wheeler knew Ms. Kerr and appellant. Appellant often came to the saloon for lunch. (21RT p. 2341.) Appellant introduced Ms. Wheeler and Ms. Kerr. (21 RT pp. 2341-2342.) Ms. Kerr worked at the saloon as a bartender trainee for one day. Ms. Wheeler recommended to her employer not to hire Ms. Kerr. Ms. Wheeler believed Ms. Kerr would be distracted by appellant's presence at the bar. (21 RT pp. 2341-2342, 2345-2346.) Up to the time of Ms. Kerr's death, she often called the saloon as many as 10 times a day looking for appellant. Ms. Kerr was

not working at the saloon when she called looking for appellant. (21 RT p. 2346.) Ms. Kerr also came to the bar looking for appellant. (21 RT p. 2359.) Ms. Wheeler told appellant to get away from Ms. Kerr because she was using him. (21 RT pp. 2350-2351.)

Yreneo Joseph Lujano was a plumber and appellant's friend. Mr. Lujano knew appellant had a girlfriend named Lisa. (21 RT pp. 2319-2321.) Appellant played several tapes from a phone answering machine which contained Ms. Kerr's voice, although Mr. Lujano could not remember the year he listed to the tapes. (21 RT pp. 2321, 2325.) The tapes contained statements such as, "I love you, I miss you," "Thanks for helping me with my lawyer," and similar comments. (21 RT p. 2326.) Mr. Lujano believed Ms. Kerr was trying to divorce her husband. (21 RT p. 2326.) Sometime in February, Mr. Lujano saw a card from Ms. Kerr to appellant which said something like, "I love you." (21 RT pp. 2327-2328.)

Appellant's behavior changed dramatically about two weeks prior to Ms. Kerr's death. Appellant said he was in love with Ms. Kerr and she was in love with him. Appellant was obsessed with her. Appellant said they had problems with Ms. Kerr's husband, but he did not show any concern or anger about Ms. Kerr going back to her husband. (21 RT pp. 2331-2333.) Appellant did not make any statements such as no one could have Ms. Kerr if he could not. (21 RT pp. 2331-2333.) Appellant was leaving jobs and neglecting his customers. Mr. Lujano told appellant to get his act together. Mr. Lujano did appellant's work during the two weeks preceding Ms. Kerr's death. (21 RT p. 2333.)

John Wolff, a licensed private investigator, worked on appellant's case. He was a

police officer for the City of Los Angeles for 27 years. (21 RT pp. 2361-2362.) Mr. Wolff interviewed David Heiserman on February 15, 2000. Mr. Heiserman told Mr. Wolff that appellant never intended to kill Ms. Kerr. (21 RT pp. 2363-2365.)

2. THE DEATH OF LISA KERR

Lynda Farnand lived with Mark Harvey at 19017 Arminta Street in Reseda. They had two young children ages 30 months and eight months. (15 RT pp. 1688-1689, 1692; 18 RT pp. 1913-1914.) On March 16, 1999, Ms. Farnand went to jail because of a grand theft charge. (17 RT p. 1914.)

On March 23, 1999, Ms. Kerr was employed at Beehive Beauty Supply located at 14510 Ventura Boulevard. She left work that day at 6:05 p.m. (20 RT p. 2303.) Ms. Kerr went to Mr. Harvey's residence around 7:00 p.m. to babysit Mr. Harvey's children so he could go to an AA meeting. They also intended to discuss whether Ms. Kerr should rent a room in Mr. Harvey's residence. (15 RT pp. 1690-1691.) Ms. Kerr arrived at his house in a white Ford Probe. (15 RT p. 1692.) Mr. Harvey took his oldest daughter with him to the meeting. He returned home between 10:00 and 10:15 p.m. (15 RT pp. 1691-1692.)

A street light was located across from Mr. Harvey's home. (15 RT p. 1693.) When Mr. Harvey returned home, he saw the glow of a cigarette and the silhouette of a person near the bushes at the edge of the fence and driveway. (15 RT p. 1695.) Mr. Harvey was not concerned. He pulled into the driveway and removed his daughter from the truck. (15 RT p. 1696.)

Mr. Harvey heard the dogs barking in the back of the neighbor's property located behind his house. He walked up the driveway while carrying his daughter and attempted to turn on the floodlight in the backyard. Mr. Harvey's daughter said she was cold, so Mr. Harvey went inside his house and checked on his youngest daughter who was asleep in her crib. (15 RT p. 1696.)

Ms. Kerr was sleeping on the couch. Mr. Harvey put his oldest daughter to bed. He rested with her until approximately 11:15 p.m. when she fell asleep. Ms. Kerr was awake when Mr. Harvey walked back into the living room. (15 RT p. 1698.) Ms. Kerr stepped outside to have a cigarette. (15 RT pp. 1701-1702.) She appeared nervous when she returned. (16 RT p. 1823.) Mr. Harvey and Ms. Kerr spoke for approximately two hours in the living room. (17 RT pp. 1840-1841.)

Ms. Kerr said she was afraid of appellant. She said appellant had threatened to kill her and was following her. (17 RT pp. 1847-1848.) Ms. Kerr told Mr. Harvey that it would not be a good idea for her to rent a room from him because she was being threatened by appellant. (15 RT pp. 1705-1706; 16 RT pp. 1823-1824.) Ms. Kerr told Mr. Harvey she adored him. (17 RT p. 1872.) They discussed having a physical relationship, but concluded they should not. Ms. Kerr said she was frustrated with the relationship she had with appellant and with her husband. She said she wanted to find a happy medium with someone like Mr. Harvey. (17 RT pp. 1891-1892.) Ms. Kerr said that Mr. Harvey was not obsessed with making her a doll like her husband or overwhelming her emotionally like appellant. (17 RT

p. 1893.) Mr. Harvey denied having sexual relations with Ms. Kerr that evening but admitted rubbing her shoulders. (17 RT p. 1895.)

Mr. Harvey approached Ms. Kerr to give her a hug when she leaving. Ms. Kerr turned around 180 degrees and said, "Be careful, Squirrel Boy might be watching us." "Squirrel Boy" referred to appellant. Mr. Harvey told Ms. Kerr not to worry. He walked her to her vehicle and told her to call him when she got home. Ms. Kerr drove away. Mr. Harvey did not receive a call. (17 RT pp. 1860-1861.)

The morning of March 24, 1999, fire fighters from the Los Angeles City Fire Department, and law enforcement, responded to the report of a fire off the I-70 freeway. It was also known as the Hollywood Freeway. The Fire Department received the report at 4:11 a.m. (14 RT pp. 1480-1484.) Tim Traurig, a firefighter, went to the scene. (14 RT pp. 1480-1482.) The fire was off the southbound Roscoe exit ramp. The fire fighters found flames shooting from the interior of a vehicle. (14 RT p. 1484.) Mr. Traurig did not see other vehicles in the area nor did he see signs of a collision. (14 RT p. 1486.) The off-ramp had a steep embankment approximately 30 to 40 feet in distance. A small amount of grass and a soft dirt area were located immediately off the paved section of the highway. (14 RT pp. 1487-1488.) A chain link fence was located at the end of the embankment. The vehicle did not appear to have hit the fence. A large and intense fire engulfed the vehicle. (14 RT p. 1488.) The majority of the flames were coming from the interior. The engine compartment did not appear to be on fire. (14 RT pp. 1488-1489.) The fire fighters put the fire out in two

to three minutes. (14 RT p. 1490.) They then saw a body on the floorboard of the back seat area. The body was resting on the floorboard. (14 RT p. 1492.) The arson department was contacted. (14 RT p. 1500.)

Michael Camello, an arson investigator with the Los Angeles City Fire Department, responded to the Roscoe off-ramp. (14 RT pp. 1527-1531.) The vehicle was at the bottom of the embankment. (14 RT p. 1533; Exhibits 3C and 3B.) Mr. Camello inspected the vehicle, which had been raised by a forklift so the bottom portion could be inspected. (14 RT p. 1534.) The engine compartment had not sustained substantial damage, suggesting the fire had not originated there. (14 RT p. 1534.) The damage to the engine appeared to be from heat radiated from the passenger compartment. (14 RT p. 1536.)

The windows and doors were completely burned away. It appeared the windows had been in the up position. (14 RT p. 1537.) The fact that the windows burned away indicated intense heat. (14 RT p. 1538.) Mr. Camello believed the fire was probably caused by the use of a flammable liquid as an accelerant. (14 RT p. 1538.) The majority of the carpet on the floorboard where passengers placed their feet was burned away. The carpet under the dashboard where a driver places his or her feet was intact. (14 RT p. 1540, 1542.)

Fire burns upward and outward. (14 RT p. 1540.) A fire becomes very hot and spreads out in a low area if an accelerant is used. (14 RT p. 1543.) Low burning indicates an accelerant based fire. (14 RT p. 1545.) The burning away of the carpet in the area where a backseat passenger would place his or her feet was consistent with a low burning fire

caused by an accelerant. (14 RT p. 1544-1545.) The fire was not caused by electrical problems. (14 RT p. 1548.) A small portion of the carpet on the back seat floorboard was still intact because the body had prevented it from burning. (14 RT p. 1550.) The damage to the interior suggested a rapid burning fire consuming a large portion of the interior. (14 RT p. 1551.) The damage in this case was consistent with a flammable liquid burning over a short period of time. (14 RT p. 1552.)

The victim's body was in the right lateral position, which meant she was laying on her right side. The body was directly behind the rear seat with the head facing towards the rear. The body was wedged over the differential tunnel, which is the hump in the middle of the back. The lower extremities down to the knees were wedged behind the passenger seat on the floor. (14 RT p. 1557.) A portion of Ms. Kerr's face was not burned because it was compressed against her purse and the floorboard. (14 RT p. 1558.) Mr. Camello believed Ms. Kerr was in the above described position when the fire originated. (14 RT p. 1558.) Her body sustained extensive damage. The legs and hands were burned away. (15 RT p. 1559.) In Mr. Camello's opinion, a flammable liquid was poured on the legs causing severe damage and burning the carpet below. He believed the fire was intentionally started. (14 RT pp. 1560-1561.)

Raul Campos, a Highway Patrol officer, responded to the crime scene. (15 RT pp. 1582-1586.) He did not find broken glass, debris, tire friction marks, or other evidence of a collision. (15 RT pp. 1588-1589.) The pop-up headlights to the vehicle were not open. The

headlights should have been lit if the vehicle had been driven at night. (15 RT pp. 1591-1592.) The angle which the vehicle rested was not consistent with a traffic collision. (15 RT p. 1592.) It did not have any damage from a collision. (15 RT p. 1594.) The distance from the curb to the chain link fence was approximately 50 feet. (15 RT p. 1597.) The vehicle would not have been easily observed by an individual driving on the off-ramp. (15 RT p. 1599.) Officer Campos believed someone pushed the vehicle off the freeway and down the gully. (15 RT pp. 1595, 1601.)

Detective Lindy Gligorijevic of the Los Angeles Police Department responded to the crime scene at 7:58 a.m. (15 RT pp. 1610-1614.) The victim's purse was under her head. (15 RT p. 1617.) The purse contained two California's driver's licenses in the name of Lis Lorraine Johnson. (15 RT pp. 1617-1618; Exhibits 10 and 11.) Johnson was Ms. Kerr's maiden name. (15 RT p. 1618.) The keys to the car were on the floor and not in the ignition. It appeared the key had broken or melted. (15 RT p. 1619.) The distance from the curb to the fence was 38 feet. The vehicle was four feet east of the fence. (15 RT p. 1620.) The vehicle was registered to Lisa Kerr with an address of 2012 Hart Street in Canoga Park. (15 RT pp. 1622, 1627, 1632.) Ms. Kerr's husband lived at 2012 Hart Street. (15 RT p. 1633.)

Detective Gligorijevic went to Ms. Kerr's apartment at 5923 Woodman Avenue. (15 RT p. 1628.) The name on the lease for the apartment was Lisa and Al Brooks. (15 RT p. 1635.) The drive from Mr. Harvey's residence to Ms. Kerr's residence in the early morning hours was approximately 20 minutes. The drive from Ms. Kerr's apartment to the Roscoe off-

ramp where her body was found was between five to 10 minutes. (19 RT pp. 2204-2206.)

The morning of Ms. Kerr's death, David Heiserman tried unsuccessfully to call appellant on his cellular telephone. He also called appellant at home and paged him. He did not reach appellant. Appellant called Mr. Heiserman about 11:30 a.m. (18 RT pp. 2093-2094.) Appellant asked, "[I]s she okay." Mr. Heiserman responded, "[I]s who okay?" Appellant said, "Come on Smiley. Is she okay?" Mr. Heiserman said she was dead. Appellant cried and said he had to go. (18 RT p. 2096.)

Mr. Heiserman spoke with appellant again later that day around 6:00 to 7:00 p.m. Mr. Heiserman told appellant it was going to be okay. Appellant said, "[N]o, no, no, it's not. It's not going to be okay." Appellant told Mr. Heiserman he could have the truck and tools. Mr. Heiserman told appellant he had to deal with the situation. Appellant said he could not. (18 RT p. 2097.)

Mr. Heiserman next spoke with appellant at the Foothill substation after he had been extradited from Colorado. Appellant said he followed Ms. Kerr to Mark's house. Appellant was under the house when he heard Ms. Kerr making derogatory comments about him. He said he confronted Ms. Kerr when she got to her car, strangled her, and left her in the back seat. (18 RT p. 2098.)

Frank Oglesby was an arson investigator for the Los Angeles City Fire Department and a canine handler for a dog named Flower. (16 RT pp. 1745, 1750.) Mr. Oglesby inspected Ms. Kerr's vehicle with Flower. It was at Black and White Towing on San

Fernando Boulevard. Flower detected ignitable liquids. She had been certified annually by the Bureau of Alcohol, Tobacco, and Firearms. (16 RT pp. 1759-1760, 1764, 1780.) Flower sits down and points her nose when she detects a flammable liquid. (15 RT p. 1752.) Mr. Oglesby command to Flower was "show me," and she would put her nose on the item. (16 RT p. 1753.) Flower was certified to detect accelerants commonly used by arsonist such as gasoline, paint thinner, charcoal lighter fluid, kerosene, diesel fuel, and jet fuel. (16 RT p. 1762.)

Mr. Oglesby divided the vehicle into four different quadrants going down the middle and side to side for the purpose of removing debris. He removed debris from each of the quadrants. (16 RT pp. 1765-1767.) Flower alerted on material removed from the left front interior, which consisted of fire debris, carpet, and padding. (16 RT p. 1769.) Flower also alerted on material from the other three quadrants. (16 RT pp. 1771, 1774-1777.) In Mr. Oglesby's opinion, an ignitable liquid was distributed throughout the vehicle to accelerate the fire. (16 RT pp. 1778, 1814-1815.)

3. APPELLANT'S ARREST

Christian Olson was an investigator for the Corporate Security Group of Verizon Wireless. (19 RT pp. 2149-2150.) Incoming and outgoing calls to cellular telephones will be routed through the cellular site closest to the cell phone making or receiving the call. (19 RT p. 2174.) A call was made from appellant's cellular telephone on March 24th 1999, at 3:19 a.m. The call went though the Oak cellular site. (19 RT p. 2173.) The next call was

made at 4:23 a.m., and went through North Hollywood cell site. (19 RT p. 2174.) The North Hollywood cell site was the cell site closest to where Ms. Kerr's body was found. (19 RT p. 2177.) The next calls were at 5:00 and 5:01 a.m., and went through the Fulton cell site. (19 RT p. 2174.) On March 24, 1999, a call was placed from Phoenix, Arizona. (19 RT p. 2174.) On March 25, 1999, several more calls were made from various places in Arizona. From March 29 through March 31, 1999, calls were placed from various places in Arizona, Colorado, and New Mexico. (19 RT pp. 2177-2178, 2185-2186.)

During June 1999, David Paul Jayne, who was suffering from schizophrenia, was living at 1204 Cheyenne Meadows Road in Colorado Springs. He was renting a room at the residence. (20 RT pp. 2233, 2239.) Appellant was living in the home and using the name Don Blanton. (20 RT pp. 2233-2234.) Mr. Jayne worked as a plumber and met appellant at the Plumbing Supply House where they both worked. Mr. Jayne and appellant worked together for two to three months. (20 RT p. 2234.) Approximately three to four weeks after appellant moved into the residence at Cheyenne Meadows Road, he said he had to return to California to get his van. Appellant returned with a van containing tools. (20 RT p. 2255.) In the beginning of June 1999, appellant said he needed to obtain new identification because he had gotten in "trouble" in California. (20 RT p. 2235.) Mr. Jayne testified that about three weeks before appellant was arrested, he told Mr. Jayne the details of Ms. Kerr's death. The conversation occurred at the residence on Cheyenne Meadows Road. (20 RT pp. 2238, 2254.)

Appellant said he had been following Ms. Kerr for several days. (20 RT p. 2254.) He

said he followed Ms. Kerr to the residence of another individual and entered the crawl space to listen to her conversation. Ms. Kerr made comments about appellant's father that angered appellant. Appellant said Ms. Kerr was cheating on him or some similar comment. Appellant said he followed Ms. Kerr to her apartment and strangled her. (20 RT pp. 2236-2237, 2252-2253.) Appellant held his hands together and said, "Well, I'm going to jail for assault anyway, so I might as well kill her." (20 RT p. 2237.) Appellant said the decision to kill her was made on the spur of the moment and resulted from anger. (20 RT p. 2244.) Mr. Jayne's schizophrenia required daily medicine which he took the day he talked with appellant about killing Ms. Kerr. Mr. Jayne had also taken medication the day he testified. (20 RT pp. 2239-2240.)

On July 21, 1999, Detective Derek Graham of the Colorado Springs Police Department went to 1204 Cheyenne Meadows Road to arrest appellant. (20 RT pp. 2209-2211.)[5] Detective Graham saw appellant exit out the door from the residence into the garage. The garage door was open. Officer Graham approached appellant. Appellant turned and started to run back into the residence. Detective Graham yelled, "Police, police." (20 RT pp. 2212-2213.) Detective Graham ordered appellant to the ground. Appellant complied and was arrested. (20 RT p. 2213.)

---

[5] Detective Graham testified that he went to appellant's residence in Colorado Springs to arrest him on July 29, 1999. (20 RT p. 2210.) This date was in error because appellant was flown back to the Los Angeles area on July 26, 1999. (4 RT p. 291.) During the suppression hearing, Detective Graham testified that he first interrogated appellant on July 21, 1999. (6 RT pp. 490-492.)

Detective Graham interviewed appellant at the police station located at 705 South Nevada Avenue in Colorado Springs. (20 RT pp. 2213-2214.) Appellant said he and Ms. Kerr argued about 1:30 a.m. on March 24. He did not explain why they argued. Ms. Kerr was angry and left in her white Ford Probe. Appellant said he then went to his father's residence and argued with his father. (20 RT pp. 2215, 2222.) Appellant was driving down the freeway when he saw Ms. Kerr's vehicle on fire. The fire department was present. (20 RT pp. 2215-2216.) Appellant said he kept driving and left. (20 RT p. 2217.) He said the last time he saw Ms. Kerr was at 1:30 a.m. (20 RT p. 2229.)

Appellant provided additional details about his relationship with Ms. Kerr. Appellant said Ms. Kerr and he had separated, but got back together on her initiative. (20 RT p. 2224.) After they resumed seeing each other, Ms. Kerr told appellant she needed a place to live. Appellant rented an apartment for her. (20 RT p. 2224.) Appellant noticed Ms. Kerr spending time with someone named Mark. He believed Ms. Kerr was sleeping with Mark Harvey. (20 RT pp. 2223-2225, 2228.) Appellant said he frequently slept at Ms. Kerr's apartment when her son was with his father. (20 RT pp. 2226-2227.) Appellant felt betrayed because he was paying for Ms. Kerr's apartment and she was seeing Mr. Harvey. He said he frequently had sexual relations with Ms. Kerr. (20 RT p. 2228.) Appellant became agitated, angry, and emotional. He felt betrayed by Ms. Kerr. (20 RT p. 2229.)

Detective Graham searched appellant's bedroom at the Cheyenne Meadows Road address. He found a Colorado driver's license in the name of Steven Daniel Blanton, an

application to United Video in the name of Steven Daniel Blanton, and a copy of an application to the Social Security Administration. (20 RT pp. 2219-2221.)[6]

4. THE AUTOPSY

Graffi Djabourian, a deputy medical examiner for the Los Angeles County Coroner's Office, performed the autopsy on Ms. Kerr's body. (18 RT pp. 1969-1973.) He believed the cause of death was smoke inhalation, thermal injuries, and other factors which could not be evaluated. (18 RT p. 1988.) Ms. Kerr was probably unconscious when the fire occurred and when she died. (18 RT pp. 1995-1997.) Dr. Djabourian did not see any evidence Ms. Kerr had been restrained or strangled. (18 RT pp. 1997, 2002.) The toxicology report did not show any alcohol or drugs in Ms. Kerr's body. Her blood had less than 10-percent carbon monoxide. The carbon monoxide level meant the fire was sufficiently rapid there was not enough time for carbon monoxide to get into the blood. (18 RT p. 1990.) The presence of soot in the airways, the nature of the injuries to Ms. Kerr's body, and the carbon monoxide level, are findings associated with very rapid burning fires in which the victim was alive. (18 RT p. 1991.)

Dr. Djabourian explained that soot results from the combustion of fire. He found soot in the mouth and airway, which consisted of the larynx, trachea, and the bronchi. (18 RT pp. 1977-1978) Soot can enter the above areas of the body only through breathing. Dr.

---

[6] The parties stipulated the above items were found by the Colorado Springs police detectives when they searched appellant's room. (20 RT p. 2302.)

Djabourian believed the distribution of soot in Ms. Kerr's airway meant she was alive when the fire commenced. (18 RT pp. 1983-1984, 1987.) External injuries to the body could not have caused soot to enter the respiratory system. (18 RT p. 1985.) There is no postmortem reflex which could cause soot to get in the airways in the quantity it was present in Ms. Kerr's body. (18 RT pp. 1983-1984.)

THE PENALTY PHASE EVIDENCE

A. THE PROSECUTION EVIDENCE

Helen Sorena was Ms. Kerr's grandmother. Ms. Sorena testified that she was very close to Ms. Kerr. They never lived more than four to five miles apart. (25 RT pp. 2745-2747.) Ms. Sorena had a good relationship with Ms. Kerr's son, Tyler, who was nine years old at the time of trial. Ms. Sorena often watched Tyler when Ms. Kerr attended beauty school. (25 RT pp. 2748, 2751.) Tyler had difficulty coming to Mr. Sorena's residence since Ms. Kerr's death because he had gone there with his mother. He was, however, getting better. (25 RT p. 2748.) Tyler believed his mother had been in a car accident. He did not know she had been murdered. Casey Kerr did not want Tyler to know his mother had been murdered. (25 RT p. 2750.) Ms. Kerr's mother, Peggy, had been under the care of a physician since Ms. Kerr's death and could not attend the trial. (25 RT p. 2749.) Ms. Sorena suffered a mild heart attack and required the insertion of a stent in her heart after Ms. Kerr's death. He physician told her that stress caused the heart problems. (25 RT p. 2749.)

Travis Johnson was Ms. Kerr's brother. Mr. Johnson and Ms. Kerr had been best friends. She often came to see his band play. (25 RT pp. 2756-2758.) Ms. Kerr's mother was not doing well and weighed less than 100 pounds. (25 RT p. 2762.)

Kim Hyer had known Ms. Kerr for 10 years. For approximately 18 months preceding Ms. Kerr's death, she had been flying into the Los Angeles area every other weekend to see Ms. Kerr. (25 RT pp. 2764-2765.) After Ms. Kerr's death, Tyler had become angry and

scared that people were going to leave him. Ms. Hyer's life had been difficult since Ms. Kerr's death. (25 RT pp. 2767-2768.)

Mary Christian was appellant's former wife. She met appellant at Walter Reed Medical Center in Washington, D.C., in 1987, when they were in the Army. Ms. Christian and appellant married in November 1986. They were married three years and had two children--Spencer now 14 years old, and Lindsey, now 12 years old. (25 RT pp. 2780-2782.) Ms. Christian's relationship with appellant had been punctuated by acts of punching, pulling, and mutual combat. (25 RT pp. 2788-2798.)

Ms. Christian testified that appellant had hit her before they were married. On one occasion after they were married, Ms. Christian was running water into a bathtub. Appellant entered the bathroom, grabbed her by the back of the hair, and pushed her into the hot water in the bathtub. Ms. Christian got up and walked out of the bathroom. She was pregnant with Spencer at the time. (25 RT p. 2783.)

On another occasion, Ms. Christian came home and found several people in her house whom she assumed were using drugs. Ms. Christian's four month old daughter was sitting in the lap of one of the individuals. Ms. Christian said, "Who the hell are all of you and where's Donny?" Someone said appellant had left for a couple of hours. It was not acceptable to Ms. Christian that appellant had left their child with strangers. (25 RT pp. 2783-2784.) The following day, Ms. Christian and appellant were arguing. Ms. Christian was sitting in a wicker chair. Appellant was behind her. Appellant walked up to Ms.

Christian and grabbed and jerked the chair as if he was going to push her in the fire. Ms. Christian kicked appellant, got up, and left. (25 RT pp. 2784-2795.)

Appellant was a hunter and kept guns in the house. When Ms. Christian was eight months pregnant, appellant pointed a loaded 12-gauge shotgun at her stomach and said, "do you want to die?" She said, "Pull the fucking trigger. I'm tired of talking about it." (25 RT p. 2788.) Ms. Christian separated from appellant towards the end of 1989, or the beginning of 1990, because of the violence. (25 RT p. 2789.) Appellant also heavily used cocaine at one time during their relationship. (25 RT pp. 2798-2799.)

Ms. Christian commenced divorce proceedings. Appellant left for South Carolina and said he would return a new man. Ms. Christian filed for a restraining order. (25 RT p. 2785.) When appellant returned, he told Ms. Christian to frame the restraining order so she could remember what she had put him through. Ms. Christian told appellant to "stick it up his ass," because it was not her fault she was forced to get a restraining order. They argued. Appellant grabbed one of the children and the car keys and said he was leaving with the children. Ms. Christian said he was not. (25 RT p. 2786.) She tried to call 911. Appellant ripped the telephone out of the wall. She believed she hit appellant and then ran out of the house. Appellant put down the children and chased her. Ms. Christian ran to a neighbor's house and called 911. Appellant came over a fence, put Ms. Christian into a headlock, and pulled her back to their house. The police arrived and appellant ran into the house. (25 RT p. 2787.)

Ms. Christian believed appellant had a good heart, but correlated being kind with

having control over people. If appellant fed somebody who was hungry, he believed the person owed him something. (25 RT p. 2801.) Ms. Christian never saw appellant seriously hurt anyone while they were together. (25 RT p. 2803.)

B. THE DEFENSE EVIDENCE

Sheri Bayden was appellant's older half-sister. June Brewton was their mother. Sheri, an alcoholic, was 44 years old at the time of trial. (26 RT pp. 2842-2843, 2849, 2877.) Her father was William Weatheford. June divorced Mr. Weatheford when Sheri was three years old. She then married someone name Ike. June divorced Ike and married appellant's father, Donald Brooks, Sr. Appellant was born when Sheri was eight years old. (26 RT p. 2845.)

Sheri was in the custody of her grandparents from the age of six to 12. June regained legal custody of Sheri when she was 12 year old. The family moved from Rock Hill, South Carolina to Columbia, South Carolina. The family consisted of appellant's father, Donald Senior, June, Sheri, and appellant. Appellant excelled in sports. (26 RT pp. 2843-2846.)

June and Donald Senior divorced when appellant was seven years old. (26 RT p. 2878.) Donald Senior was an alcoholic. (26 RT p. 2879.) Sheri and appellant witnessed the arguments and fights leading up to the divorce. Appellant was very young but knew something was not right. He became very upset. (26 RT pp. 2847-2848.)

June married Edwin Rawl following her divorce from Donald Senior. The family moved to Lexington, Kentucky. Edwin usually woke up between 9:00 and 10:00 a.m. and drank. There was physical violence between June and Edwin. Sheri and appellant again

witnessed the incidents. (27 RT p. 2850-2851, 2879.) On one occasion, Edwin chased Ms. Brewton around the house with a gun. He shot the gun over the refrigerator. (26 RT p. 2852.)

Edwin became violent after he and June had been married for about two years. (26 RT pp. 2881-2882.) Appellant witnessed the violence. Edwin often became intoxicated and beat June. Appellant often intervened. This occurred until appellant graduated from high school and left for the Army. (26 RT pp. 2882-2883.) One time Edwin tried to set June's bed on fire when she was in it. Appellant dragged June away from the bed.

Another incident occurred upon the birth of June and Edwin's child, Philip. Philip was only three pounds and two ounces when he was born. A huge medical bill resulted. Edwin was very upset about the bill. He poured gasoline about the house the day before June came home from the hospital with Philip, but Edwin's father talked him out of burning down the house. (26 RT p. 2882.)

During another incident in 1978, Edwin came home and said his aunt had died. The family had been invited over to some friends house for a cookout. June had not known about the death of Edwin's aunt when she accepted the invitation to the cookout. Edwin became irate that June considered going to a cookout. (26 RT pp. 2853, 2884-2885.) June took a bath and changed clothing in order to go to the funeral. (26 RT p. 2883.) Edwin came back in the house with an M1 Carbine firearm. As June got up and started to walk out the door, Edwin shot her in the back. (26 RT p. 2856, 2884.) Appellant, who was 13 years old at the time,

was home when this incident occurred. June was in the hospital for a week. Appellant visited her and was very upset. (26 RT p. 2885.)

June did not let Edwin move back into the house for six months. During that time, Edwin called June and said he was going to dynamite the house. He said it was a shame the children would die with her. (26 RT p. 2885.) The family canceled many social dates and functions because of Edwin's intoxication. (26 RT p. 2853.) Appellant left for the Army as soon as he graduated from Lexington High School. June left Edwin the next Thanksgiving and did not return to him. (26 RT p. 2886.)

June testified that appellant had three children, Spencer, Lindsey, and Nicole. Appellant did not see Spencer and Lindsey often because their mother lived far away. Appellant's former girlfriend, Becky, was Nicole's mother. (26 RT p. 2889.) Appellant often let people live with him until they could get on their feet. (26 RT p. 2891.) He had not used drugs for 10 years. (26 RT p. 2889.)

June believed appellant did not intend to kill Ms. Kerr. He simply panicked. She believed appellant loved Ms. Kerr. Appellant called June the night of the incident. She could tell from the message on the machine that appellant was very upset. (26 RT p. 2893.)

Lindsay Peet testified that appellant worked as a subcontractor for his plumbing business. Appellant often came into Mr. Peet's business and they talked. Mr. Peet believed appellant was a good man, but confused. Appellant often employed someone just out of prison or jail in order to give him a chance. He also let people live with him. (26 RT p. 2828.)

Appellant had visitation rights every other weekend with his daughter, and appellant was adamant about not taking work when he was supposed to be with his daughter. (26 RT p. 2829.) Mr. Peet received positive remarks from his customers for the work performed by appellant. (26 RT p. 2830.)

Sheila Peet was Lindsey Peet's wife. (26 RT pp. 2826-2827.) She described appellant as a kind and loving person. He was naive about people. Ms. Kerr knew how to manipulate people. (26 RT p. 2869.) Ms. Peet believed Ms. Kerr was manipulative based on the way she dressed and talked to appellant. (26 RT p. 2874.) Appellant had been on an emotional roller coaster with Ms. Kerr. He was euphoric one moment and crying the next. Appellant would looked like he had not slept in days, and then, another time, would appear all clean and happy. A few days later, he would be depressed again. (26 RT pp. 2869-2870.) During a period of about two to three months when appellant was separated from Ms. Kerr, he told Ms. Peet he was dating again. (26 RT p. 2870.)

Susan Baker was a travel agent. She had known appellant for eight to nine years. Ms. Baker's ex-husband was a member of Alcoholics Anonymous and a general contractor. She knew appellant through her ex-husband. Her ex-husband used appellant regularly for plumbing work. Ms. Baker maintained close contact with appellant over the years. (26 RT pp. 2836-2837.) Appellant was a caring person and would give the shirt off his back to help someone. (26 RT p. 2838.) Appellant once showed up at Ms. Baker's home to help with a plumbing problem, despite the fact that he was wearing a tuxedo. (26 RT pp. 2840-2841.)

Appellant was active in AA and often sponsored other people. (26 RT p. 2839.)

Appellant cared about his children. He occasionally brought his daughter Nicole to a job site. Ms. Baker helped take care of Nicole. On one occasion, appellant had promised his daughter he would take her to Disneyland. Appellant took the day off from work to keep that promise. (26 RT pp. 2839.) Ms. Baker visited appellant every other week in county jail and he called her at least once a week. Ms. Baker also purchased clothes for appellant to wear in court. (26 RT p. 2840.)

GUILT PHASE ISSUES

I

THE JUDGMENT OF GUILT AND THE PENALTY SHOULD BE REVERSED AND THE CASE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS ON APPELLANT'S MOTION TO EXCLUDE HIS STATEMENTS FOR VIOLATION OF HIS MIRANDA RIGHTS BECAUSE THE TRIAL COURT, IN VIOLATION OF APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS, ERRONEOUSLY STRUCK APPELLANT'S TESTIMONY OFFERED DURING THE 402 HEARING TO EXCLUDE HIS STATEMENTS FROM EVIDENCE.

A. SUMMARY OF ARGUMENT

Appellant was arrested by the Colorado Springs Police Department. He was questioned shortly thereafter at police headquarters by Detective Derek Graham of the Colorado Springs Police Department. Appellant said he argued with Ms. Kerr the evening of her death and then later saw her vehicle on fire on the side of the road while appellant was traveling down the freeway. (6 RT pp. 490-493; 20 RT pp. 2215-2216.) Detective Lindy Gligorijevic of the Los Angeles Police Department had flown to Colorado Springs to interrogate appellant and return him to Los Angeles. Appellant was later interrogated by her in Colorado Springs and again made incriminating statements. (2 CT pp. 333-480.) Appellant continued to make incriminating statements when he was being transported from Colorado Springs to Los Angeles. (4 RT pp. 292-295; 4 RT pp. 304-308.)

Appellant filed a motion to exclude his statements from evidence because he had

requested an attorney before the above interrogations occurred. Detective Graham testified appellant was read his *Miranda* rights prior to the first interrogation. (6 RT p. 492.) Appellant testified that he requested an attorney prior to the interrogations. (4 RT pp. 438-439.) The trial court struck appellant's testimony when he refused to answer the prosecutor's question on cross-examination about whether he had told Detectives Gonzalez and Gligorijevic that he had killed Ms. Kerr. (4 RT pp. 352-354, 357.) The trial court found appellant had been read his *Miranda* rights and did not request an attorney based on the uncontradicted testimony of the detectives. The trial court erred by striking appellant's testimony because appellant had not refused to answer any questions relevant to the *Miranda* issue being litigated. The striking of appellant's testimony violated his state and federal right to present a defense, to due process of law, to a fair trial, and a reliable determination of the facts as required by the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments. (*Davis v. Alaska* (1974) 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Martin v. Ohio* (1987) 480 U.S. 228, 233, 107 S.Ct. 1098, 94 L.Ed.2d 267; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed; Lockett v. Ohio (1978) 438 U.S. 586, 604, 98 S.Ct. 2594, 57 L.Ed.2d 973.) It prevented the trial court from being able to properly determine if appellant's admissions had to be excluded because of a violation of his *Miranda* rights. The conviction and penalty should therefore be reversed. Alternatively, the judgment should be vacated and the case remanded to the trial court to determine if appellant's admissions should be suppressed following appellant's testimony.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

On May 30, 2000, appellant filed a motion to exclude his statements to police detectives from evidence based on a violation of his *Miranda* rights. (2 CT pp. 321-329.) The trial court received evidence on the motion to suppress during two hearings held on April 26, 2001, and May 1, 2001 (4 RT pp. 265-368; 6 RT pp. 490-523.)

Detective Graham interrogated appellant on July 21, 1999, at 8:45 p.m., in the Colorado Springs Police Department. (6 RT pp. 490-492.) He read appellant his *Miranda* rights from a form. (6 RT pp. 492-493.) Appellant did not request an attorney or refuse to talk with him. (6 RT p. 496.) Appellant's interview at the Police Department was not recorded at his request. (6 RT p. 498.) Appellant did most of the talking during the interview and was allowed to take breaks and offered food and cigarettes. (6 RT pp. 500-502.) During the interview, appellant said he had argued with Ms. Kerr the night of her murder and later drove by her vehicle on the side of the freeway while it was burning. (6 RT pp. 490-493; 20 RT pp. 2215-2216.)[7]

Detective Gligorijevic interviewed appellant during the evening of July 22, 1999. (4 RT p.287.) This interview also occurred at the Colorado Springs Police Department.[8] The

---

[7] During the 402 hearing on appellant's motion to exclude his statements from evidence, the attorneys agreed that it was not necessary to elicit testimony about the contents of appellant's statements to Detective Graham during the interview. (6 RT p. 500.) The contents of appellant's statements to Detective Graham is set forth in his direct testimony before the jury. (20 RT pp. 2215-2216, 2222.)

[8] The interview was videotaped. (4 RT p. 287.) A transcript of the interview appears at volume two, pages 333 through 480 of the clerk's transcript. At the beginning of the transcript, appellant acknowledged that he had previously been read his *Miranda* rights. (2 CT p. 333.) The trial court received the transcript into evidence for purpose of

interview was videotaped. (4 RT p. 287.) At the beginning of the transcript of the tape, appellant acknowledged that he had been read his *Miranda* rights. (2 CT p. 333.) Detective Gligorijevic stopped interviewing appellant when he requested an attorney. (4 RT p. 290.)

Detective Gligorijevic picked appellant up from the Colorado Springs County jail on July 26, 1999, to transport him back to Los Angeles. (4 RT p. 291.) She was accompanied by Detective Gonzalez. (*Ibid.*) Appellant initiated conversation during the drive to the airport. (4 RT p. 302.) Appellant said at some point during the drive to the airport that he wanted an attorney. (3 RT p. 301.)) During the ride, Detective Gligorijevic told appellant that his statements could not be used against him and she had no intention of doing so. (4 RT pp. 301, 312.) Appellant said he had not been completely truthful when he made his prior statement because he was afraid of the death penalty. (4 RT pp. 292-293.) Appellant wanted to know the circumstances under which an individual could be sentenced to death. (4 RT p. 293.) Appellant said he was concerned about the lying in wait special circumstance because he was underneath Mark Harvey's residence when he heard the conversation between Ms. Kerr and Mr. Harvey. (4 RT p. 295.) During the plane ride, appellant made statements about what happened the night Ms. Kerr was killed. Appellant said he was under Mr. Harvey's house and heard comments that were painful to him. (4 RT p. 304.) Appellant continued to make incriminating statements about what happened that night. (4 RT pp. 305-308.)

---

ruling on the motion. (4 RT p. 266.)

Appellant testified during the hearing on the motion to suppress evidence. When appellant was arrested, a police officer asked him about signing a waiver for a search of the residence where he had been living. Appellant said, "What about a defense for me? How do I speak to a lawyer and when do I get my phone call?" (4 RT p. 346.) Appellant asked for an attorney between eight to 20 minutes after the police arrived at his residence. (4 RT p. 348.) Appellant was transported to police headquarters and interrogated. Appellant asked, "what about a lawyer and a phone call?" (4 RT p. 348.) Appellant twice specifically asked for an attorney before he was questioned about the crime. (4 RT p. 349.) Appellant signed the *Miranda* waiver form because the detectives said they would help him. Appellant asked for an attorney twice before signing the waiver form. Detective Graham did not stop interrogating appellant after he asked for an attorney. (4 RT p. 350.)

During cross-examination, the prosecutor asked appellant if he told the detectives that he had killed Ms. Kerr. The defense counsel objected based on lack of relevance and because the question went beyond the scope of direct examination. (4 RT p. 352.) The trial court overruled the objection because it believed the motion to exclude appellant's statements put all of his statements in controversy . (4 RT pp. 352-353.) The trial court took a recess so the defense counsel could confer with appellant. There had been no mention at this point in time regarding the striking of appellant's testimony. (4 RT p. 353.) Appellant conferred with his defense counsel. (4 RT p. 354.) The defense counsel stated appellant was going to decline to answer the question with the understanding that the trial court might strike his testimony. (4 RT p. 354.) The defense counsel argued that his questioning of appellant did not address

events occurring after July 22, 1999, and there was no need to elicit appellant's testimony about events occurring after that date. (4 RT p. 355.) The trial court granted the prosecutor's motion to strike his testimony. (4 RT pp. 354, 357.)

Following the admission of the evidence on the motion to exclude appellant's statements, the trial court heard arguments from the attorneys. (6 RT pp. 519-523.) The defense counsel argued the trial court erred by striking appellant's testimony, but stated that he would submit the matter based on the arguments that had previously been presented to the trial court on the issue. (6 RT p. 519.) The defense counsel argued appellant's statements had to be suppressed if appellant's testimony that he requested an attorney was considered by the trial court. (6 RT p. 520.) The prosecutor argued the detectives had complied with their obligations under *Miranda* and appellant's motion to exclude his statements should be denied. (6 RT pp. 521-522.)

The trial court excluded appellant's statements made prior to appellant being advised in writing of his *Miranda* rights by Detective Graham of the Colorado Springs Police Department on July 21, 1999. It denied appellant's motion to exclude his statements made after he was advised of his *Miranda* rights. (6 RT p. 523.)[9] Appellant's statements to Detective Graham which were not suppressed were admitted into evidence during the

---

[9] The trial court ruled on the admissibility of appellant's statements as the evidence was received for each of the statements. The trial court ruled on the admissibility of appellant's statements to Detective Gligorijevic during the hearing held on April 26, 2001. (4 RT pp. 265, 363-366.) It ruled on the admissibility of appellant's statements to Detective Graham during the hearing held on May 1, 2001. (6 RT p. 523.)

prosecution case-in-chief of the guilt phase of the trial.[10] The evidence that was not suppressed and which was admitted into evidence was as follows; Detective Graham participated in appellant's arrest at 1204 Cheyenne Road. (20 RT p. 2210.) Appellant said he had argued with Ms. Kerr the evening of March 23 at approximately 1:30 a.m. (20 RT p. 2215.) Appellant said he then went to his dad's residence and argued with him. (20 RT p. 2215.) Appellant said he later was driving down the freeway when he saw Ms. Kerr's vehicle on the side of the road. It was on fire. (20 RT p. 2216.) Appellant identified Ms. Kerr's vehicle by the license plates. (*Ibid.*) He kept driving. (6 RT p. 2217.) During cross-examination, the defense counsel elicited additional details about appellant's relationship with Ms. Kerr, including the fact appellant rented an apartment for her and appellant felt betrayed because Ms. Kerr was seeing Mr. Harvey. (20 RT pp. 2224, 2229.) Appellant said he frequently had sexual relations with Ms. Kerr. (20 RT p. 2228.) He became agitated, angry, and emotional during the interview. (20 RT p. 2229.)

The trial court suppressed appellant's statements made during the July 22, 1999 interrogation by Detective Gligorijevic, which occurred after page 123, line 14, of the transcript because appellant requested an attorney at that time. (4 RT p. 363.) The trial court also suppressed appellant's statements made during the drive to the airport and on the

---

[10] There is a discrepancy between Detective Graham's testimony during the 402 hearing and at trial. During the section 402 hearing, Detective Graham testified that he interviewed appellant on July 21, 1999. (6 RT pp. 490-492.) Detective Graham testified before the jury that he interviewed appellant on July 29, 1999, at the Colorado Spring Police Department. (20 RT pp. 2209-2210.) Appellant, in fact, was transported back to Los Angeles from Colorado Springs on July 26, 1999. (4 RT p. 291.)

airplane because Detective Gligorijevic had assured appellant that his statements would not be used against him. (4 RT pp. 365-366.) The trial court stated appellant's statements to Detective Gligorijevic could be used for impeachment if appellant testified despite her assurances to appellant that his statements would not be used against him. (4 RT p. 367.) Detective Gligorijevic's testimony before the jury did not include any of appellant's statements to her. She authenticated a photograph of Ms. Kerr's vehicle and phone calls she placed to appellant's mother and Eddie Lujano. (21 RT pp. 2312-2318.)

C. THE TRIAL COURT ERRED BY STRIKING APPELLANT'S TESTIMONY

A party has the right to cross-examine a witness about matters within the scope of direct testimony and to test the credibility of the witness. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507.) Where a party cannot cross-examine a witness because the witness refuses to answer, the trial court may strike the direct examination. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 735; *People v. Daggett* (1990) 225 Cal.App.3d 751, 760.) "Striking a witness's entire testimony is, of course, a `drastic solution,' only to be employed `after less severe means are considered'." (*Fost v. Superior Court, supra*, 80 Cal.App.4th at p. 736, quoting *People v. Reynolds* (1984) 152 Cal.App.3d 42, 47-48.) The refusal of a witness to answer only one or two questions need not lead to the striking of the testimony." (*People v. Daggett, supra*, 225 Cal.App.3d at p. 760.) The striking of testimony violates a defendant's due process right to present relevant evidence in violation of the Fifth and Fourteenth Amendments, right to confront witnesses and for a jury determination of the facts as guaranteed by the Sixth and Fourteenth Amendments, and undermines the reliability of

the guilt and penalty phase in violation of the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments. (*Davis v. Alaska* (1974) 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Martin v. Ohio* (1987) 480 U.S. 228, 233, 107 S.Ct. 1098, 94 L.Ed.2d 267; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed; *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2594, 57 L.Ed.2d 973.)

The Ninth Circuit does not allow the striking of the testimony of a witness who refused to answer questions about collateral matters. "When a witness refuses to answer questions based on fifth amendment privilege, striking the witness's testimony is an extreme sanction." (*United States v. Lord* (9th Cir. 1983) 711 F.2d 887, 892.) "A trial judge may apply this sanction only when the question asked pertains to matters directly affecting the witness's testimony; the judge may not use the sanction when the privileged answer pertains to a collateral matter." (*Ibid*, citing *United States v. Seifert* (9th Cir. 1980) 648 F.2d 557, 561-562.)

In *United States v. Negrete-Gonzales* (9th Cir. 1992) 966 F.2d 1277, the defendant was charged with being one of three participants in a drug distribution ring. One of the participants had pled guilty. She was called as a witness by the defendant and testified she alone distributed the drugs and the defendant was not guilty. During cross-examination, the prosecutor asked her to identify the source of the cocaine. She refused because her children would be in danger if she identified her source. The trial court granted the prosecutor's motion to strike her testimony.

The Court of Appeals noted that striking the testimony of a witness was a drastic

sanction and could not be used when the question the defendant refused to answer pertained to a collateral matter. (*United States v. Negrete-Gonzales, supra*, 966 F.2d at p. 1280.) Hence, "the key question is whether the defendant's right to present witnesses can be protected without frustrating the government's interest in effective cross-examination. A witness's reason for refusing to answer is crucial in determining whether to hold the witness in contempt, but it plays no role in considering whether the cross-examination was frustrated." (*Ibid.*) The Court concluded the trial court erred by striking the witness's testimony because the identity of the unknown suppliers was only peripherally related to her direct testimony. (*Ibid.*) In *People v. Lord*, the Ninth Circuit found the striking of the testimony of a witness who refused to identify the source of his drugs to be erroneous, but harmless. *(United States v. Lord, supra*, 711 F.2d at p. 892.)

In the instant case, the issue was whether appellant requested an attorney prior to custodial interrogation. A defendant must be advised of his right to silence and his right to an attorney before his is subject to custodial interrogation by a law enforcement officer. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694.) A statement made during custodial interrogation may be admitted in evidence only if the officer advises the suspect of both his or her right to remain silent and the right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer. A statement obtained in violation of *Miranda* is not admissible in the prosecution's case in chief. (*Miranda v. Arizona, supra*, 436 U.S. at p. 444.)

A waiver of *Miranda* rights may be express or implied. (*People v. Whitson* (1998) 17

Cal.4th 229, 244, fn. 4.) The waiver is invalid, however, unless the prosecution proves by a preponderance of the evidence that it was made voluntarily, knowingly, and intelligently. (*Id.* at pp. 247-248.) Courts apply the totality of the circumstances test to determine whether a *Miranda* waiver is valid. "The due process [voluntariness] test takes into consideration the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation. This test examines whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.)

The police must cease questioning a defendant once he has requested an attorney. (*Minnick v. Mississippi* (1990) 498 U.S. 146, 152-153, 112 L.Ed.2d 489, 111 S.Ct. 486.) "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." (*Id.*, at p. 153.)

In the instant case, the trial court struck appellant's testimony during the section 402 hearing to determine whether his statements to Detectives Graham and Gligorijevic should be excluded from evidence because appellant requested an attorney. During the hearing, appellant testified that he repeatedly requested an attorney prior to being interrogated or very early in the interrogation process. His requests for an attorney were ignored. (4 RT pp. 346, 348-350.) During appellant's direct examination, he did not give any testimony about the substance of his statements to the detectives. The prosecutor's question to appellant, about whether, during the flight to Los Angeles, he told the detective he killed Ms. Kerr, was not

relevant to whether appellant demanded an attorney at the inception of the interrogation.

Appellant requested an attorney before entering the interrogation room and his request was not honored. (4 RT pp. 338-339.) The trial court misunderstood the law when it struck appellant's testimony. Appellant's direct testimony was limited to events up to July 22, 1999. Appellant's testimony commenced on page 333 of the reporter's transcript. (4 RT p. 333.) Appellant testified at pages 333 through 344 about what occurred at the beginning of the interrogation by Detective Gligorijevic on July 21, 1999, at the Colorado Springs Police Department. (4 RT pp. 333-344. He repeated his request for an attorney in the interrogation room. (4 RT p. 340.) Appellant was asked on pages 340 through 344 about his state of mind when he requested an attorney. (4 RT pp. 340-344.) Appellant was asked on pages 344 through 350 about his arrest by Detective Graham, the search of the residence where he was living, and his requests for an attorney which were ignored. (4 RT pp. 344-350.) The prosecutor first raised during cross-examination the topic of appellant's statements to Detectives Gligorijevic and Gonzales on the flight to Los Angeles and whether appellant told them he killed Ms. Kerr. (4 RT p. 352.) The defense counsel properly objected based on lack of relevance and the prosecutor's cross-examination going beyond the scope of appellant's direct testimony. (4 RT pp. 352, 355.)

Appellant's direct testimony did not raise the issue of what statements he made to Detectives Gligorijevic and Gonzales during the flight to Los Angeles. Appellant's statements several days after his interrogations by Detectives Graham and Gligorijevic were not relevant to whether he requested an attorney during those interrogations. After the

defense counsel objected to the prosecutor's question about whether appellant said he killed Ms. Kerr, the trial court commented, "Doesn't your motion to suppress put all of the subject matter of these statements in controversy? Your client has chosen to take the stand to testify in that regard. It seems to me it's fair game." (4 RT pp. 352-253.) The trial court later commented, "Now, you've inquired of your client only regarding two of those statements, but there's been significant testimony regarding the other two statements, and the district attorney ----your client having taken the stand, your client having filed this motion to suppress all of them—I believe is entitled to inquire about all four of them." (4 RT p. 356.)

The trial court erroneously believed appellant's direct testimony made relevant any and all statements he made to the detectives. This was wrong because appellant's statements to the detectives on the airplane was collateral to whether he requested an attorney at the inception of the earlier interrogations. Appellant's effort to suppress the statements he made during the trip to the airport, and while traveling on the airplane, relied on the testimony of Detective Gligorijevic. Appellant did not attempt to suppress those statements based on his testimony during the section 402 hearing. There was simply no need to ask appellant about his statements during the flight on the airplane in order to determine if he had previously requested an attorney. The government's interest in effective cross-examination of appellant about whether he requested an attorney when first questioned by Detectives Graham and Gligorijevic was not frustrated by preventing cross-examination about his statements during the trip to the airport or on the airplane. The theory of suppression was that appellant had requested an attorney, that request had not been honored, and all of appellant's statements

made after that request should be suppressed. This theory did not require the prosecutor to question appellant about his statements during the flight in order to effectively cross-examine appellant about his earlier request for an attorney.

People v. Robinson (1961) 196 Cal.App.2d 383, demonstrates that the refusal of a witness to answer every question, or questions about collateral matters, during cross-examination does not warrant the striking of his testimony. During the preliminary hearing, a prosecution witness refused to answer a question about the disposition of stolen property. The defense counsel's motion to strike the entire testimony of the witness was denied. A motion to dismiss was filed on the basis the magistrate should have stricken the entirety of the witness's testimony. The motion was granted. The prosecution appealed.

The Court of Appeal concluded that the magistrate was not compelled to strike all of the testimony of the witness because of his refusal to answer the question about the disposition of the stolen goods. After reviewing the relevant authorities, the Court stated, "It is to be noted in each of the above cases the subject matter of the cross-examination of which the defendant was deprived went to the heart of the controversy. In *Boardman*[11] it involved a vital element of the offense of rape. In *McGowan*[12] it involved the very presence of the defendant at the scene of the crime. In *Manchett*,[13] of course, thee was substantially not

---

[11] *People v. Boardman* (1922) 56 Cal.App. 587.

[12] *People v. McGowan* (1926) 80 Cal.App. 293.

[13] *People v. Manchetti* (1946) 29 Cal.2d 452.

cross-examination of the witness afforded." (*People v. Robinson, supra*, 196 Cal.App.2d at p. 389.) The magistrate properly refused to strike the entirety of the witness's testimony because, "[T]he witness refused to answer but one question which, through relevant to the credibility of the witness, had no bearing on the actual elements of the crime of burglary with which the defendant was charged." (*Ibid.*)

Similar reasoning applies to the instant case. Appellant's refusal to answer questions about whether he had admitted to killing Ms. Kerr to the detective did not go to the heart of the issue raised in appellant's motion to exclude his statements from evidence. The issue raised by appellant was whether he requested an attorney prior to being interviewed by Detectives Graham and Gligorijevic. Statements made by appellant days and hours after he requested an attorney was of marginal, if any, relevance to whether he requested an attorney at the inception of his interrogation.

Appellant's testimony about his request for an attorney during a section 402 hearing to determine if his statements should be suppressed did not operate as a waiver of his Fifth Amendment right to silence for matters unrelated to the suppression motion. In *Calloway v. Wainwright* (5th Cir. 1968) 409 F.2d 59, the defendant testified during a pretrial hearing to determine if his confession was voluntary. The Court noted that the defendant taking the witness stand "for the sole purpose of testifying upon the credibility of the voluntariness of his confession should not be taken as a complete waiver of his constitutional privilege against self-incrimination." (*Calloway v. Wainwright, supra*, 409 F.2d at p. 66.) Similar reasoning applies to the instant case. Appellant waived his Fifth Amendment privilege against self-

incrimination for the limited purpose of testifying about whether he requested an attorney when initially interrogated by the detectives. This limited waiver did not give the prosecutor free rein to ask appellant questions unrelated to that topic, including whether appellant told the detectives that he had killed Ms. Kerr.

The trial court also failed to consider less drastic alternatives to striking appellant's testimony. The trial court believed it had no choice but to strike appellant's direct testimony. The trial court informed the defense attorney that he was going to stand by his earlier ruling which overruled the defense objection to the prosecutor asking appellant about whether he told Detective Gligorijevic that he had killed Ms. Kerr. (4 RT p. 356.) Appellant told the trial court he was going to continue not answering the question based on advice of counsel. (4 RT p. 357.) The prosecutor moved to strike appellant's testimony. (*Ibid.*) The trial court stated, "Well, my view of this is that Mr. Brooks can't pick and choose what questions he's going to answer. If I deemed it a valid question and he chooses not to answer the question on cross-examination, then the balance of his testimony should not be permitted to stand. The motion to strike the direct examination of Mr. Brooks is granted." (4 RT p. 357.) The trial court did not discuss any options other than striking appellant's testimony. The trial court could have allowed the prosecutor to continue his cross-examination, with the exception of the question to which the defense counsel objected, and then assessed at the conclusion of appellant's testimony whether his testimony should have been stricken. It could also have considered appellant's refusal to answer the question in determining his credibility, but without the drastic sanction of striking his testimony. (*People v. Seminoff*

(2008) 159 Cal.App.4th 518, 526; *People v. Reynolds* (1984) 152 Cal.App.3d 42, 48.) The trial court could have struck a portion of appellant's testimony but not all of his testimony. (*People v. Reynolds, supra*, 152 Cal.App.2d at p. 47.)

The trial court's striking of appellant's testimony cannot be upheld based on *People v. Boyette* (2002) 29 Cal.4th 381. The defendant made three separate recorded statements to the police concerning the murders. The defendant testified during a motion to suppress his statements based on a Miranda violation. During the prosecutor's cross-examination of the defendant, he admitted that he lied in the three statements had made to the police. The defense counsel objected to this line of questioning based on relevance, the Fifth Amendment privilege against self-incrimination, and going beyond the scope of cross-examination. The trial court overruled the objections. The Court of Appeal concluded the trial court had properly overruled the objections because the "defendant's credibility was at issue in the suppression hearing and he properly could be impeached with information that he had lied in all three of his recorded statements." (*People v. Boyette, supra*, 29 Cal.4th at p. 414.) The defendant's credibility was directly implicated because he testified that the police sergeant had ignored his request for an attorney, and the police sergeant and another peace officer had testified that the defendant had voluntarily waived his *Miranda* rights. The Court noted that the credibility of a witness may be challenged by statements by a witness that are inconsistent with his or her trial testimony. (*Ibid.*)

In *People v. Boyette*, the proper scope of cross-examination included questions about whether the defendant had lied during his statements to the police officers because the

defendant was testifying about those precise statements. The issue of whether the defendant had lied during those statements was inextricably tied to whether he was also lying about what occurred during those interrogations. In the instant case, the prosecutor was seeking to ask cross-examine appellant about statements he made days after the interrogation in which appellant testified he had requested an attorney. (4 RT pp. 333-344, 352.) The prosecutor was not seeking to impeach appellant with a statement that was inconsistent with his testimony during the suppression hearing because appellant had not given any testimony about what happened during the flight to Los Angeles. As the above authorities establish, appellant's statements to Detective Gligorijevic during the flight to Los Angeles was collateral to whether appellant requested an attorney during the July 21, 1999, interview. Furthermore, the issue during the suppression motion was whether appellant had requested an attorney prior to custodial interrogation. That issue is distinct from the truthfulness of those statements. This Court recognized that distinction when it concluded, "whether or not [the defendant] told the truth to the officers was not germane at the suppression hearing, where the only issues were whether his statements were voluntary and his Miranda waivers were valid." (*People v. Rundle* (2008) 43 Cal.4th 76, 126.) Whether appellant told Detective Gligorijevic during the flight to Los Angeles that he had killed Ms. Kerr, and the truthfulness of that statement, were not relevant to whether he requested an attorney at a prior interrogation.

For the reasons above, the trial court erred by striking appellant's direct testimony given during the 402 hearing to exclude his statements from evidence based on a violation

of his *Miranda* rights.

D. THE TRIAL COURT'S STRIKING OF APPELLANT'S TESTIMONY VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS

In *Dickerson v. United States* (2000) 530 U.S. 428, 438-439, 120 S.Ct. 2326, 147 L.Ed.2d 405, the Supreme Court concluded the requirement for Miranda warnings was based on the due process clause of the United States Constitution. The trial court's striking of appellant's testimony prevented appellant from presenting evidence concerning his federal constitutional claim. The striking of appellant's testimony therefore violated his federal constitutional rights, his right to a fair trial, and his right to present a defense under the federal and state constitutions. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 [finding a due process violation because the trial court excluded evidence offered by the defendant to show his confession was unreliable]; see also *Olden v. Kentucky* (1988) 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513.)

In *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, the trial court excluded evidence that another person had confessed to the murder. The Supreme Court concluded the exclusion of this evidence violated the defendant's due process right to present a defense. (*Chambers v. Mississippi, supra*, 410 U.S. at p. 302.) Similar reasoning applies to the instant case. The striking of appellant's testimony prevented him presenting key evidence necessary for the trial court to resolve whether his statements should have been suppressed. The trial court's ruling violated appellant's due process right to defend himself.

E. PREJUDICE

The judgment of guilt must be reversed unless the trial court's striking of appellant's testimony was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

The striking of appellant's direct testimony during the section 402 hearing was not harmless beyond a reasonable doubt. The prosecution presented three items of evidence connecting appellant to Ms. Kerr's death: (1) appellant's admissions to David Jayne when appellant admitted strangling Ms. Kerr in her apartment, (20 RT pp. 2238-2244, 2254); (2) appellant's admissions to Detective Graham that appellant met with Ms. Kerr around 1:30 a.m., the morning of her death, saw her vehicle on fire when he drove past it, and felt betrayed because he believed Ms. Kerr was sleeping with Mr. Harvey. (20 RT pp. 2215-2217, 2222); and (3) appellant's conversation with Mr. Heiserman following Ms. Kerr's death. (18 RT pp. 2093-2094, 2096.)

Appellant testified during his direct examination that Detective Graham ignored his request for an attorney prior to the commencement of the interrogation. (4 RT pp. 344-350.) Because the trial court struck appellant's direct examination, it never made a credibility determination whether appellant was being truthful when he claimed he asked for an attorney prior to being interrogated. All of appellant's statements to Detective Graham would have been excluded from evidence had the trial court concluded appellant's testimony that he requested an attorney was true.

Assuming appellant's admissions to Detective Graham were excluded from evidence, the primary evidence connecting appellant to Ms. Kerr's death were his statements to Mr.

Jayne. Mr. Jayne suffered from schizophrenia and was not a reliable witness. (20 RT p. 2239.) Mr. Jayne never picked up the telephone and reported appellant's statements to police despite the serious crime appellant allegedly admitted.

Prejudice, furthermore, cannot be measured solely by examining the evidence in the record connecting appellant to Ms. Kerr's death. The defense counsel conceded during his opening statement that appellant killed Ms. Kerr. The defense was that appellant was guilty of voluntary manslaughter. (14 RT pp. 1470-1471.) The defense counsel obviously knew prior to making his opening statement that the trial court had denied the motion to exclude appellant's admissions to Detective Graham from evidence. This ruling obviously impacted the defense theory of the case and presentation of evidence. Had the trial court excluded appellant's statements to Detective Graham from evidence, it was unlikely the defense counsel would have conceded that appellant killed Ms. Kerr. Mr. Jayne suffered from a serious mental illness and his credibility was therefore suspect.

The remaining evidence failed to establish any direct connection between appellant and Ms. Kerr's death. Appellant was in a volatile relationship with Ms. Kerr and fled from the Los Angeles area after her death. He was living in another state using an alias. Appellant's relationship with Ms. Kerr provided a motive for the murder and his flight reflected consciousness of guilt. However, appellant's relationship with Ms. Kerr and his flight were only circumstantial evidence of guilt and insufficient to connect him to her death. The defense counsel's decision to admit appellant killed Ms. Kerr, and argue he was guilty of voluntary manslaughter, provided the connection between appellant and Ms. Kerr's death.

Without that decision by the defense counsel and without appellant's admissions to the detectives, the prosecution might not have been able to establish to the jury's satisfaction beyond a reasonable doubt that appellant killed Ms. Kerr.

The trial court never determined whether appellant's was truthful when he testified he made multiple requests for an attorney prior to being interrogated by Detective Graham. The judgment must be reversed because the admission of appellant's statements to Detective Graham were prejudicial for the reasons explained above. Alternatively, the judgment should be conditionally reversed and the case remanded to the trial court for further proceedings on appellant's motion to exclude his statements to Detective Graham from evidence. If the trial court concludes appellant's admissions to Detective Graham should have been excluded from evidence, the judgment of guilt and penalty must be reversed. If the trial court determines after a hearing that appellant's statements were properly admitted, this Court will have to review that determination.

The penalty must be reversed, furthermore, even if this Court or the trial court concludes that the striking of appellant's testimony was harmless error with regard to the guilt phase of the trial. During the penalty phase, the jury was instructed that it could consider all the evidence admitted during the entire trial. (27 RT p. 3034.) Assuming appellant's motion to exclude his statements from evidence had been granted, the jury would not have heard Detective Graham's testimony that appellant told him he met with Ms. Kerr around 1:30 a.m., the morning of her death, saw her vehicle on fire when he drove past it, and felt betrayed because he believed Ms. Kerr was sleeping with Mr. Harvey. This Court

cannot conclude beyond a reasonable doubt the jury would have sentenced appellant to death if it had not heard Detective Graham's testimony about appellant's statements concerning the night of Ms. Kerr's death. Hence, the penalty must be reversed even if the convictions are affirmed.

II

THE JUDGMENT OF DEATH, AND THE SPECIAL CIRCUMSTANCE FINDING THAT APPELLANT COMMITTED MURDER IN THE COMMISSION OF KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that appellant murdered Ms. Kerr in the commission of a kidnaping. (24 RT pp. 2704-2705.) The trial court gave a jury instruction for the kidnaping allegation which allowed the jury to consider a variety of factors in determining if Ms. Kerr had been kidnaped. (23 RT pp. 2538-2540.) In *People v. Martinez* (1999) 20 Cal.4th 225, this Court overruled its prior decisions and held the trier of fact was not limited to considering only distance in determining if the asportation element of kidnaping had been proven. *People v. Martinez* was issued after appellant committed the crime and its holding did not apply retroactively. The trial court's jury instruction for kidnaping incorporated the additional factors the trier of fact was allowed to consider by *People v. Martinez* in determining if asportation had occurred. (23 RT pp. 2538-2540.) The

instruction was therefore erroneous. The correct instruction would only have allowed the jury to consider the distance Ms. Kerr was moved in determining if she had been kidnaped. Because the erroneous instruction was prejudicial, the true finding to the special circumstance allegation of kidnaping must be reversed. The judgment of death must also therefore be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Count one alleged that appellant committed murder. (2 CT p. 315.) It also alleged appellant murdered the victim in the commission of kidnaping within the meaning of Penal Code section 190.2, subdivision (a)(17). (2 CT p. 316.) Section 190.2, subdivision (a)(17)(B), includes the crimes of "[k]idnapping in violation of Section 207, 209, or 209.5." Ms. Kerr's body was found in her vehicle off the Interstate 70 freeway near the Rosco off-ramp. (14 RT pp. 1480-1484, 1492; 19 RT pp. 2204-2206.)

Prosecution witnesses testified to conflicting statements made by appellant about what transpired the evening of Ms. Kerr's death. Appellant told Mr. Heiserman he confronted Ms. Kerr when she got to her car after leaving Mr. Harvey's residence, strangled her, and put her in the back seat. (18 RT p. 2098.) Mr. Jayne testified appellant said he strangled Ms. Kerr at her apartment (20 RT pp. 2236-2237, 2252-2253.) Appellant told Detective Graham he argued with Ms. Kerr around 1:30 a.m., and she then left in her vehicle. (20 RT pp. 2215, 2222.) Appellate later drove down the freeway and saw her vehicle on fire. (20 RT pp. 2215-2216.) The drive from Ms. Kerr's apartment to the Roscoe off-ramp took five to 10 minutes.

(19 RT pp. 2204-2206.)

The trial court gave the following instruction for the kidnaping special circumstance:

> To find that the special circumstance referred to in these instructions as murder in the commission of kidnaping is true, it must be proved:
>
> 1. The murder was committed while the defendant was engaged in the commission or attempted commission of kidnaping in violation of section 207 of the Penal Code; and
>
> 2. The defendant had the specific intent to kill.
>
> Every person who unlawfully and with physical force or by any other means of instilling fear steals or takes or holds, detains, or arrests another person and carries that person without her consent and —or compels any other person without her consent and because of a reasonable apprehension of harm, to move for a distance that is substantial in character, is guilty of the crime of kidnaping in violation of Penal Code section 207, subsection (A).
>
> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved or whether the movement increased the risk of harm above that which existed prior to the movement or decrease the likelihood of detection or increased both the danger inherent in a victim's foreseeable attempted to escape and the attacker's enhanced opportunity to commit additional crimes.
>
> If an associated crime is involved, the movement must be more than that which is incidental to the commission of the other crime.
>
> In order to prove this crime, each of the following elements must be proved:

> A person was unlawfully moved by the use of physical force or by any other means of instilling fear;
>
> A person was unlawfully compelled by another person to move because of a reasonable apprehension of harm;
>
> The movement of the other person in distance was substantial in character (sic).

(23 RT pp. 2538-2540.)

The prosecutor's closing and rebuttal arguments are quoted below in the Prejudice portion of the argument. The prosecutor stressed the increased risk of harm from Ms. Kerr's movement and did not mention anything about the distance she was moved. (23 RT pp. 2556-2557, 2365; 24 RT pp. 2659-2660.)

C. LEGAL ELEMENTS OF THE CRIME OF KIDNAPING

Penal Code section 207, subdivision (a), provides as follows:

> (a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnaping.

The crime codified in section 207, subdivision (a), is commonly known as simple kidnaping. (*People v. Martinez* (1999) 20 Cal.4th 225, 229.) The crime codified in Penal Code section 209 is kidnaping for the purpose of committing specific crimes such as rape and robbery. A violation of section 209 is commonly referred to as aggravated kidnaping. (*Id.*, at p. 232.)

In *People v. Daniels* (1969) 71 Cal.2d 1119, this Court adopted a two-part test for the asportation requirement for aggravated kidnaping. *Daniels* held that aggravated kidnaping

requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that present in the commission of the underlying crime. (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1139.) In *People v. Stanworth* (1974) 11 Cal.3d 588, the Court distinguished the asportation requirement for simple kidnaping from the asportation requirement for aggravated kidnaping. The Court stated that "where only simple kidnaping is involved, it is clear that the victim's movement cannot be evaluated in the light of a standard which makes reference to the commission of another crime." (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 600.) Distance was the critical factor and "the victim's movement must be more than slight [citation] or trivial [citation], they must be substantial in character to constitute kidnaping under section 207." (*Id.*, at p. 601.)

People v. Caudillo (1978) 21 Cal.3d 562, further defined the asportation requirement for simple kidnaping. *People v. Caudillo* focused solely on the distance the victim was moved in finding the asportation insufficient to prove simple kidnaping. (*Id.*, at pp. 573-574.) It also expressly rejected consideration of any factor other than distance in determining whether asportation had occurred:

> The People seek to introduce considerations -- other than actual distance -- as determinative of what constitutes "sufficient movement" of the victim to constitute the offense of kidnaping pursuant to Penal Code section 207. The People claim that intimations in *Stender* suggest that, in the case before us, we should consider Maria's movement substantial because defendant moved Maria to the storage room to avoid detection, thereby increasing her danger, and then waited 20 minutes

> before he moved her to her apartment. In our view, this position is lacking in substance. Neither the incidental nature of the movement, the defendant's motivation to escape detection, nor the possible enhancement of danger to the victim resulting from the movement is a factor to be considered in the determination of substantiality of movement for the offense of kidnaping. Such factors would be relevant in a *Daniels* situation of aggravated kidnaping -- a kidnaping for the purpose of robbery (Pen. Code, §§ 209) -- but we held in *Stanworth* that the *Daniels* test was not applicable to simple kidnaping under Penal Code section 207.

(*People v. Caudillo*, *supra*, 21 Cal.3d at p. 574.)

People v. Martinez, *supra*, 20 Cal.4th 225, overruled *People v. Caudillo*, and expanded the range of factors that establish asportation for simple kidnaping. The trier of fact, in determining whether asportation has been established for simple kidnaping, could consider "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez*, *supra*, 20 Cal.4th at p. 237.) However, federal due process of law prevented the retroactive application of its decision because it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." (*People v. Martinez*, *supra*, 20 Cal.4th at p. 238.) Hence, the movement of the victim in *People v. Martinez* was insufficient as a matter of law to prove asportation. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 239, citing *People v. Brown* (1974) 11 Cal.3d 784, 789 and *People v. Green* (1980) 27 Cal.3d 1, 67.)

D. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de-novo. (See *People v. Posey* (2004) 32 Cal.4th 193, 218.)

E. THIS COURT CAN REVIEW WHETHER THE KIDNAPING INSTRUCTIONS WERE PREJUDICIALLY ERRONEOUS DESPITE THE LACK OF AN OBJECTION IN THE TRIAL COURT BY THE DEFENSE COUNSEL

The defense counsel did not object to the trial court's kidnaping instructions. Penal Code section 1259 provides as follows:

> The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

This court has applied section 1259 to review the correctness of jury instructions, despite the defendant's failure to make an objection in the trial court. (*E.g., People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Hence, this Court can review whether the kidnaping instructions were prejudicially erroneous.

F. APPLICATION TO THE INSTANT CASE

Ms. Kerr was murdered on March 24, 1999. (14 RT pp. 1480, 1492; 18 RT p. 2098.) *People v. Martinez* was decided April 8, 1999. Prior to *People v. Martinez*, the trier of fact could consider only distance in determining if the asportation element of simple kidnaping had been satisfied. After *People v. Martinez*, the trier of fact could consider distance the totality of the circumstances, including the "movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased

the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez, supra*, 20 Cal.4th at p. 237.)

The trial court's kidnaping instruction told the jury to consider, in determining if Ms. Kerr had been moved a substantial distance, the additional factors outlined above from *People v. Martinez*. The jury was not restricted to considering solely the physical distance Ms. Kerr was moved. Because appellant committed the crime prior to *People v. Martinez* being decided, and the decision did not apply retroactively, the trial court's instructions were erroneous and prejudicial. (See *People v. Morgan* 2008) 42 Cal.4th 593, 61-611 [reversing a kidnaping special circumstance allegation because the prosecutor improperly relied on the increase risk of harm to the victim from movement to establish the truth of the allegation].)

G. THE TRIAL COURT'S ERRONEOUS KIDNAPING INSTRUCTION VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

The federal due process clause forbids judicial enlargement of a statute in a manner that is unforeseeable by reference to the law which had been expressed prior to the conduct in issue. (*Pierce v. United States* (1941) 314 U.S. 306, 311, 62 S.Ct. 237, 239, 62 S.Ct. 237, 86 L.Ed. 226 [judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness]; U.S. Const., 5th and 14th Amends.) In *Bouie v. City of Columbia* (1964) 378 U.S. 347, 355, 84 S.Ct. 1697, 12 L.Ed.2d 894, the Supreme Court concluded that a judicial opinion of the South Carolina Supreme Court that expanded a trespassing statute to include not leaving premises after being asked to do so constituted an unlawful judicial expansion

of a criminal statute in violation of the due process clause. Similarly, *People v. Martinez* concluded its expansion of the kidnaping statute could not be applied retroactively because of the due process requirement of notice. (*People v. Martinez, supra*, 20 Cal.4th at pp. 238-239.) The California Constitution also guarantees criminal defendant's due process of law. (Cal. Const., Article I, section 7.) The trial court's kidnaping instruction therefore violated federal and state due process of law.

The erroneous kidnaping instruction also violated appellant's right to a jury trial under Sixth Amendment and Article I, section 16 of the California Constitution. *Ring v. Arizona* (2002) 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556, held that the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. *United States v. Gaudin* (1995) 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444, explained, "[T]he right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described "trial by jury" as requiring "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *United States v. Gaudin* concluded the defendant's Sixth Amendment right to a jury trial had been violated when the trial court, in a prosecution for making false statements, decided the issue of materiality rather than requiring the trier of fact to make that determination. Similarly, the erroneous kidnaping instruction resulted in the jury not properly finding the facts necessary to trigger appellant's eligibility for the death penalty.

The trial court's erroneous kidnaping instruction also violated the prohibition against imposition of cruel and unusual punishment in the federal and state constitutions. The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v. Alabama* (1980) 447 U.S. 625, 632, 100 S.Ct. 2382, 65 L.Ed.2d 403.) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in the guilt phase of a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) The jury determined appellant's eligibility for the death penalty based on an aggravating factor found true because of instructional error. The jury also considered this aggravating factor in assessing whether the death penalty should be imposed. Hence, appellant was found eligible for the death penalty, and given that sentence, in violation of the Eighth Amendment and Article I, section 17 of the California Constitution.

H. PREJUDICE

Because the erroneous kidnaping instruction violated appellant's federal constitutional rights, the true finding to the kidnaping special circumstance must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

The instructional error was not harmless beyond a reasonable doubt. The test under *Chapman* is whether it appears "beyond a reasonable doubt that the error complained of did

not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432, quoting *Chapman v. California*, 386 U.S. at p. 24.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403.)

The jury was never told it could consider only distance in determining if Ms. Kerr had been kidnaped. The jury was not provided with any specific information concerning the physical distance between the locations where appellant initially accosted Ms. Kerr and where her body was found. Detective Gonzalez estimated that it was a five to 10 minute drive from Ms. Kerr's apartment to the Roscoe off-ramp. (19 RT pp. 2204-2206.) The jury, therefore, lacked adequate information to determine if Ms. Kerr had been moved a geographically substantial distance. An estimate of a five to 10 minute drive from Ms. Kerr's apartment to the Roscoe off-ramp was a vague description of the distance between those locations. The description did not account for stop signs and stop lights which could have shortened the distance between the two locations. An estimate of distance based on traveling time in a vehicle was not an adequate substitute for actual measurements in yards or miles. Other than the testimony stating appellant said he strangled Ms. Kerr and then put her body in the car, there was no evidence filling the gap between her leaving Harvey's house and the discovery of her body by the side of the road. Because distance was the only relevant factor for the kidnaping allegation, information pertaining to distance was critical. Different

scenarios were possible. Ms. Kerr could have willingly got in the car with appellant and been driven to the location where she was killed and the car burned.

The prosecutor, during his closing and rebuttal arguments, stressed the increased risk of harm from Ms. Kerr's movement to convince the jury to find true the kidnaping allegation. (23 RT p. 2565; 24 RT p. 2659.) During closing argument, the prosecutor argued appellant parked Ms. Kerr's vehicle in "the only place where there's no development. It's the only place where there's no building, there's no business. It's the only place selected the farthest away from prying eyes, isn't it." (23 RT p. 2556.) Appellant did this to "avoid detection." (23 RT p. 2557.) The prosecutor argued, "Picking that embankment. Picking that embankment that is down below view, down that hill. We have pictures of that you can look at. /P/ Why does one choose that? Avoid detection and make it look like some kind of car accident." (23 RT p. 2557.) He later argued, "She leaves, and three hours later, she's found out in this isolated off ramp, 4:00 a.m., behind the back seat of a car, stuffed down behind the back seat. (23 RT p. 2564.) Finally, the prosecutor used the multi-factor test from the above jury instruction to argue appellant had kidnaped Ms. Kerr:

> Someone does not put themselves in a position laying down on floorboards, head on a ----their purse, stuffed down in between seats. That is not a position that one selects. That is a position one is placed into. Why are they placed into there? To avoid detection as they're being driven around. It's the lowest part of the car. To keep them in a place not to cause any problems, to put them—to be able to transport them and have that advantage.
>
> Either of those theories that Dr. Djabourian put forward, that

> she's unconscious or that she's restrained, show he's taking her against her will, kidnapped—kidnapped—and as a direct result of that, is taken to this place that increases the risk of harm greatly. And not only did it increase the risk of harm greatly, but in fact she died as a direct result of that.

(23 RT p. 2565.)

During rebuttal argument, the prosecutor argued, "and driving around with someone in your car, taking them to the place of their demise, of their death in such a hideous manner, is kidnaping." (24 RT p. 2659.) He continued: "Why, once again, are we so concerned about this strange fiction of a corpse breathing three hours after it's been killed? Why does that come up? Because he knows that not only is that arson, but it's kidnaping. Because you harm someone, you make them unconscious, strangle them, put them in a position of vulnerability and drive them around in that car, that's kidnaping." (24 RT pp. 2659-2660.) The prosecutor then commented, "[A]nd when you take them to that place of isolation at 4:00 a.m., in the wee hours of the morning, when no' one's there, in that one place in that entire off ramp where we are out of the view of prying eyes." (24 RT p. 2660.) He finally commented that appellant, "selected a location far away from all these other places. He selected a location at 4:00 a.m., no traffic, and even reduced the chance of detection even more, because of all the intersections, he picked the one where there was no development whatsoever, no gas stations, business, anything else." (*Ibid.*) The prosecutor, when discussing the kidnaping allegation, never mentioned once the distance Ms. Kerr had been moved. The erroneous definition of asportation in the kidnaping instruction clearly contributed to the true finding to the

kidnaping special circumstance.

People v. Morgan (2008) 42 Cal.4th 593, requires reversal of the kidnaping special circumstance in this case. In *People v. Morgan*, the defendant dragged the victim out of a bar and murdered her. The victim's body was found approximately 245 feet from the bar. The prosecutor argued that the defendant had kidnaped the victim based both on the distance he moved her and the increased risk of harm to which she was exposed as a result of the movement. One of the prosecutor's theory posited that the victim may have been forcibly moved a distance as little as 90 feet. This Court noted its decision in *People v. Martinez* which expanded the factors the trier of fact could consider to prove simple kidnaping to include an increase in the risk of harm to the victim. (*People v. Morgan, supra*, 42 Cal.4th at p. 610.) The Court concluded the prosecutor's closing argument improperly relied on the increase risk of harm to the victim to prove simple kidnaping because the crime occurred before *People v. Martinez* was decided. (*People v. Morgan, supra*, 42 Cal.4th at p. 611.) The Court also concluded the argument was prejudicial because a distance of 90 feet was inadequate as a matter of law to prove a simple kidnaping under the case law applicable prior to *People v. Martinez*. (*Id.*, at pp. 611-612.)

Similar to *People v. Morgan*, the prosecutor in this case argued the increase risk of harm to Ms. Kerr to prove appellant kidnaped her. (23 RT pp. 2556-2557, 2565; 24 RT pp. 2659-2660.) The jury instructions also incorporated the increased risk of harm theory. (23 RT pp. 2538-2540.) The kidnaping special circumstance allegation was submitted to the jury

based on an inadequate legal theory. This Court cannot determine that the jury found the kidnaping special circumstance allegation true based on an adequate legal theory. *(People v. Morgan, supra*, 42 Cal.4th at p. 613 [reversing the kidnaping conviction and true finding to the kidnaping special circumstance allegation because the Court could not determine if the guilty verdict rested on an adequate legal theory].) The true finding to the kidnaping special circumstance allegation must therefore be reversed.

I. THE JUDGMENT OF DEATH MUST BE REVERSED

In *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723, the Supreme Court articulated a new standard for determining prejudice when an aggravating factor is reversed. Under *Brown v. Sanders*, the reversal of any of the aggravating circumstances found true by the jury in this case must result in reversal of the judgment of death. *In Brown v. Sanders*, the defendant and his companion invaded a home where they bound and blindfolded the male inhabitant and his girlfriend. Both individuals were struck in the head with a blunt object. The girlfriend died from the blow. The jury found four special circumstances listed in Penal Code section 190.2 to be true. The special circumstances were robbery, burglary, the killing of a witness to a crime, and the commission of a murder in a heinous, atrocious, and cruel manner. This Court set aside the burglary special circumstance under the merger doctrine, and set aside the heinous, atrocious, and cruel manner of killing special circumstance based on unconstitutional vagueness. Because the jury properly considered the two remaining special circumstances, this Court affirmed

the judgment of death.

The defendant argued in the United States Supreme Court that reversal of the two special circumstance findings required reversal of the judgment of death. When deciding what sentence to impose, the jury was instructed to consider the existence of any special circumstances found to be true. The defendant argued that the jury's sentencing decision was erroneously skewed by the consideration of the aggravating factors that this Court reversed. The Supreme Court considered whether "the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process." (*Brown v. Sanders, supra*, 546 U.S. at p. 214.)

Brown v. Sanders rejected the distinction made in the Court's prior cases between weighing and non-weighing states. (546 U.S. 214-219.) The concluded "[t]his weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations." (*Id.*, at p. 219.) It adopted a new test for when a judgment of death must be reversed:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Brown v. Sanders, supra*, 546 U.S. at p. 220.)

Justice Breyer filed a dissenting opinion stating the sentencer's consideration of an

invalid aggravator must be found by the reviewing court to be harmless beyond a reasonable doubt regardless of the form of the State's death penalty law. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 228 [J. Breyer dissenting].) The majority opinion in *Brown v. Sanders* addressed Justice Breyer's arguments. The Court first noted, "[I]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) The Court distinguished the situation in the case before it. "The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Id.* at p. 221) The test for prejudice under that situation was as follows:

> such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

(*Brown v. Sanders, supra*, 546 U.S. at p. 221.)

The Court then applied the above test to the case before it. The Court noted the special circumstances listed in section 190.2 are the eligibility factors that satisfy *Furman v. Georgia* (1972) 408 U.S. 238, 192 S.Ct. 2736, 33 L.Ed.2d 346. (*Brown v. Sanders, supra*, 546 U.S. at pp. 221-222.)[1] Reversal of the judgment of death was not required for the following

---

[1] The Court concluded that the instruction to the jury to consider the circumstances of the crime had, "the effect of rendering all the specified factors

reason:

> the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Brown v. Sanders, supra*, 546 U.S. at p. 224.) In response to the defendant's argument that the instruction to the jury to consider the special circumstances found true in determining the penalty placed prejudicial emphasis on the invalid eligibility factors, the Court concluded any such impact was inconsequential. (*Id.*, at pp. 224-225)

The jury in this case found true the special circumstances that appellant committed the murder during the commission of torture and kidnaping. (24 RT pp. 2704-2705.) In determining the penalty, the jury was instructed to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (27 RT pp. 3034-3035.) Assuming this Court agrees that the kidnaping special circumstance must be reversed for instructional error, the holding of *Brown v. Sanders* compels reversal of the judgment of death.

Brown v. Sanders concluded "[i]f the presence of the invalid sentencing factor

---

nonexclusive, thus causing California to be (in our prior teminology a non-weighing State." (*Brown v. Sanders*, supra, 546 U.S. at p. 222.) The Court analyzed prejudice, however, under the new standards it adopted in *Brown v. Sanders*.

allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) That is the situation in the instant case. The jury considered, in determining whether to impose the death penalty, the fact that appellant kidnaped the victim. The jury's consideration of appellant's alleged kidnaping of Ms. Kerr in determining the penalty was especially prejudicial. The prosecutor emphasized appellant's concealing of Ms. Kerr in the back of her vehicle to characterize her demise as premeditated.

Due process requires reversal of a judgment of death if an invalid sentencing factor allowed the sentencer to consider evidence that would otherwise not have been before it. (*Brown v. Sanders, supra*, 546 U.S. at p. 218.) The Court discussed the situations when an invalid aggravating factor requires reversal of a judgment of death in a non-weighing state. Those situations were when the jury was allowed to draw adverse inferences from constitutionally protected conduct, attached the label "aggravating" to constitutionally impermissible or irrelevant factors or factors which should militate in favor of a lesser penalty. (*Ibid.*)

In the instant case, the label "aggravating" was attached to the constitutionally irrelevant factor of kidnaping. That factor was irrelevant because it should not have been considered an aggravating factor because of the reversal of the true finding to the kidnaping special circumstance by this Court.

Brown v. Sanders concluded it was inconsequential that the jury had considered as aggravating the special circumstances which were found to be invalid. The key difference between *Brown v. Sanders,* and the instant case, is the basis upon which the special circumstances were reversed on appeal. In *Brown v. Sanders*, the first special circumstance reversed on appeal was burglary. It was reversed because of the merger doctrine and not insufficiency of the evidence. The second special circumstance reversed on appeal was the commission of a murder in a heinous, atrocious, or cruel manner. It was reversed because of vagueness. The kidnaping special circumstance in this case applied a prejudicial label–kidnaping--to irrelevant conduct that should not have impacted whether the jury chose to sentence appellant to death. In *Brown v. Sanders*, "all of the facts and circumstances admissible to establish the `heinous, atrocious, or cruel' and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors." (*Brown v. Sanders, supra*, 546 U.S. at p. 224.)

Conversely, the reversal of a special circumstance allegation for instructional error means the facts and circumstances incident to the allegation should not have been considered as a "circumstance of the crime," because it had not been properly found by the jury. The jury's finding that appellant committed a kidnaping in association with the murder cannot be characterized as "inconsequential," (*Brown v. Sanders, supra*, 546 U.S. at pp. 224-225), when the jury was specifically told to consider that factual finding in determining the

appropriate penalty.

The decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 [hereinafter *Blakely*] also compel reversal of the judgment of death because of the reversal of the true findings to the special circumstances. This Court has consistently rejected the argument that California's capital sentencing scheme violates the holding of these cases. (E.g., *People v. Ward* (2005) 36 Cal..4th 186, 219-220; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Snow* (2003) 30 Cal.4th 43, 126-127; *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

In *Apprendi v. New Jersey*, the Supreme Court held, "the judge's role in sentencing is constrained it its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise prescribed were by definition elements of a separate offense." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 483, fn. 10.) In *Ring*, the jury found the defendant guilty of first-degree murder. The trial court, sitting without a jury, determined the presence or absence of aggravating factors and imposed the death penalty. In *Walton v. Arizona* (1990) 497 U.S. 639, 649, 110 S.Ct. 3047, 111 L.Ed.2d 511, the Supreme Court upheld the constitutionality of the Arizona sentencing scheme on the basis that the aggravating factors found by the trial court were sentencing factors and not elements of the crime. The Court in *Ring* overruled

Walton v. Arizona and concluded "[b]ecause Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' (*Apprendi*, 530 U.S. , at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ring v. Arizona, supra*, 536 U.S. at p. 609; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111, 122 S.Ct. 2428, 154 L.Ed.2d 588.)

In *Blakely v. Washington*, the defendant pled guilty to kidnaping. The maximum sentence was 53 months in state prison. The trial court, after an evidentiary hearing, decided to impose a sentence of 90 months because the crime was committed with deliberate cruelty. The Supreme Court concluded the Washington State enhancement statute was unconstitutional because "the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop, supra*, §§ 87, at 55, and the judge exceeds his proper authority." (*Blakely v. Washington, supra*, 452 U.S. at pp. 303-304.) Under Washington law, the facts justifying an exceptional sentence must be facts other than those used in computing the standard range for the sentence. Because "[t]he judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea," (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537), the sentence enhancement for commission of the crime with deliberate cruelty was unconstitutional.

Under *Apprendi*, *Blakely*, and *Ring*, the aggravating factors found true by the jury in this case were elements of capital murder. Those cases hold there is no distinction between sentencing factors and elements of a crime when fact finding is necessary to trigger the defendant's eligibility for increased punishment. In the instant case, the two special circumstances found true by the jury, i.e., kidnaping and torture, were elements of the crime of capital murder because those findings made appellant eligible for the death penalty. The jury, when it decided which sentence to impose, considered both special circumstances. Because the aggravating factors constituted elements of the crime of capital murder, reversal of any one of the two special circumstances must result in reversal of the judgment of death. "[A] jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 542 U.S. at p. 328 [J. Breyer dissenting].)

Reversal of any one of the special circumstances means the jury did not reach unanimous agreement, within the meaning of the Sixth and Fourteenth Amendments, about how appellant carried out the crime. The jury elected to impose the death penalty based on the false belief that appellant had committed all of the special circumstances which were found true. The jury's erroneous belief about how appellant committed the crime was not simply a matter of the jury erroneously considering sentencing factors but a constitutional defect in proof of the crime of capital murder. What distinguishes this case from *Brown v.*

Sanders is the reversal of findings of fact concerning the special circumstance allegations. In *Brown v. Sanders*, the special circumstance allegations that were reversed were not findings of fact.

Reversal of the judgment of death is required, furthermore, even if the harmless beyond a reasonable doubt test of *Chapman v. California, supra,* 386 U.S. at page 24, is applied to the reversal of the special circumstance finding. The jury's belief that appellant kidnaped the victim was especially prejudicial. The prosecutor used the kidnaping to characterize appellant's conduct as especially sinister.

For the reasons above, the judgment of death must be reversed.

III

THE DUE PROCESS CLAUSE AND APPELLANT'S RIGHT TO A FAIR TRIAL AND A MEANINGFUL DEFENSE, THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL, THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA CONSTITUTION, REQUIRE REVERSAL OF THE TRUE FINDING TO THE KIDNAPING SPECIAL CIRCUMSTANCE ALLEGATION BECAUSE THE TRIAL COURT REFUSED TO GIVE A MISTAKE OF FACT INSTRUCTION.

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that appellant committed murder during the commission of kidnaping. (24 RT pp. 2704-2705.) Appellant's admissions before and after his arrest showed he believed he had killed Ms. Kerr when he strangled her, and then transported her body to the location where the vehicle was set on fire. (20 RT pp. 2236-2237, 2252-2253.) The crime of kidnaping requires the movement of a live person. Appellant requested the trial court to give a mistake of fact instruction for the kidnaping allegation. (22 RT p. 2455.) The trial court refused to do so. (24 RT pp. 2677-2678.) The trial court's refusal to give a mistake of fact instruction for the kidnaping allegation was prejudicial error. The true finding to the kidnaping special circumstance allegation, and the judgment of death, must therefore be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The jury found true the special circumstance allegation that appellant killed Ms. Kerr

during the commission of a kidnaping. (24 RT pp. 2704-2705.) According to the prosecution evidence, appellant told Mr. Heiserman that he strangled Ms. Kerr when she left Mr. Harvey's residence and put her in the back seat. (18 RT p. 2098.) Appellant told Mr. Jayne he strangled and killed Ms. Kerr at her apartment. (20 RT pp. 2236-2237.) The trial court and the attorneys discussed jury instruction on May 31, 2001. (22 RT p. 2409.) The defense counsel requested the trial court to instruct the jury with the mistake of fact instruction in CALJIC Number 4.35. (22 RT p. 2455.) The defense counsel's theory was that appellant believed Ms. Kerr was dead when he set the car on fire and thus did not have an intent to kill when he committed that act. (22 RT pp. 2455-2456.) The prosecutor opposed the instruction because appellant's belief about whether Ms. Kerr was deceased when he lit the fire did not change the fact that starting the fire was a crime. (22 RT p. 2456.) The trial court declined to give the instruction subject to discussing it at a later time. (*Ibid.*)

The attorneys and the trial court discussed the mistake of fact instruction again following the prosecutor's rebuttal argument. (24 RT pp. 2671-2672.) The defense counsel noted, "There's evidence that supports the defendant didn't know anybody was alive in the car. A lot of evidence. The testimony of two people that give his account of ----is that he strangled and killed her, plus her position and all the things I argued to the jury." (24 RT p. 2676.) The trial court noted that it was not possible to kidnap a dead person. (24 RT p. 2676.) The prosecutor argued the mistake of fact instruction was limited to situations in which the mistake of fact made the defendant's conduct lawful. (*Ibid.*) Hence, the mistake of fact

instruction did not apply because there was nothing lawful about appellant driving around in a vehicle with a dead body for the purpose of disposing of evidence. (24 RT pp. 2676-2677.) The trial court responded, "But the fact is that he's driving around, and it's alleged to be kidnaping, but because she's dead, it may not be kidnaping. It may not be the fact of driving around with this body is then unlawful." (24 RT p. 2677.) The prosecutor argued, "if the fact pattern is to then destroy this evidence and conceal the crime, it's an ongoing crime, and that is before them and argued just what is said." (*Ibid.*)

The trial court refused to give a mistake of fact instruction because, "that mistake of fact would not have made any of the unlawful conduct undertaken after her strangled her lawful. /P/ If it were—even if she's dead, he had — it would have been unlawful to set the car on fire. It's arson of property. If she's dead, and even though he's not charged separately with a separate crime of kidnaping, it is a felony murder theory for first degree murder." (24 RT pp. 2677-2678.) The trial court gave the standard instruction for the kidnaping special circumstance allegation. (23 RT pp. 2538-2540.)

C. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE MISTAKE OF FACT INSTRUCTION

Penal Code section 26 provides in pertinent part, "All persons are capable of committing crimes except those belonging to the following classes: . . . Three—Person who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Penal Code section 20 provides that in every crime or public offense there must exist a union, or joint operation of act and intent, or criminal

negligence.

CALJIC 4.35 is the mistake of fact instruction. It provides as follows:

> An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful.

Simple kidnaping is a general intent crime. (*People v. Thornton* (1974) 11 Cal.3d 738, 765.) The crimes of simple kidnaping and aggravated kidnaping require a live victim. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498.) Under the mistake of fact doctrine, a person's guilt or innocence is determined based on the facts as the person perceived them. *(People v. Beardslee* (1991) 53 Cal.3d 68, 87.)

Appellant presented evidence that he believed that he had killed Ms. Kerr when he strangled her, and then he moved her body in her vehicle to the location where he set it on fire. (18 RT p. 2098; 20 RT p. 2236.) The movement of the victim is an element of kidnaping. (*People v. Martinez, supra,* 20 Cal.4th at pp. 236-237.) Because movement of the victim is a required element of kidnaping, and the victim must be alive to be kidnaped, appellant did not kidnap Ms. Kerr if he believed she was dead when he drove her vehicle from the location where he strangled her to the location where he set the car on fire. Although the medical examiner believed Ms. Kerr, who was found on the floor of the backseat of the vehicle, was alive when the car was set on fire because soot was found in her

airways, also opined that she was unconscious when she expired as a result of thermal injuries. (18 RT pp. 1983-1984, 1995-1997.)

The prosecution evidence suggests appellant believed Ms. Kerr was dead when he transported her body to the location where he started the fire because: (1) he told Mr. Jayne that he had killed Ms. Kerr when he strangled her, (20 RT pp. 2236-2237, 2252-2253); (2) Ms. Kerr's body was found in a position suggesting she was unconscious when she was being transported by appellant in her vehicle, which was consistent with appellant's belief that was dead, (14 RT p. 1492); and (3) the medical examiner believed Ms. Kerr was unconscious when she died. (18 RT pp. 1995-1997.) Appellant would not have known Ms. Kerr was alive because she was in the rear seat and appellant would not have been able to see her breathe. *People v. Beardslee, supra,* 53 Cal.3d 68, 87, noted that when "a person commits an act based on a mistake of fact, his guilt or innocence is determined as if the facts were as he perceived them." If appellant believed Ms. Kerr was dead when he transported her from the location where he strangled her to where he set the car on fire, then he did not commit a kidnaping. As discussed in the Prejudice portion of this issue, the jury instruction for the special circumstance of kidnaping did not require the jury to find that appellant knew Ms. Kerr was alive when he transported her. (23 RT pp. 2538-2540.) Hence, the jury instructions given to the jury did not address the mistake of fact defense.

The trial court believed a mistake of fact instruction was not warranted because appellant's belief that Ms. Kerr was dead when he transported her body did not make his

conduct lawful. The trial court's reasoning was erroneous. Appellant may have committed a separate crime by transporting the body of a person he killed for the purpose of disposing of evidence. Appellant's commission of a separate crime did not change the fact that he did not commit a kidnaping if he believed Ms. Kerr was dead when he transported her body. Appellant was not seeking to make lawful his act of transporting Ms. Kerr's dead body by requesting a mistake of fact instruction. He was seeking to direct the jury to whether an affirmative defense applied to a specific crime. The fact appellant may have committed some crime other than kidnaping by transporting Ms. Kerr's dead body did not negate the appropriateness of giving a mistake of fact instruction for the kidnaping allegation. A mistake of fact instruction would simply not be appropriate for any other crimes appellant may have committed by transporting what he believed was a dead person for the purpose of disposing of evidence. The wording of Penal Code section 26 supports this argument. The defense applies for any mistake of fact, "which disproves any criminal intent." This wording does not limit the mistake of fact defense to a situation in which the defendant is completely exonerated of criminal responsibility because of a mistake of fact, but applies specifically to each crime.

D. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS BY REFUSING TO GIVE THE MISTAKE OF FACT INSTRUCTION.

A defendant's right to present his theory is a fundamental right which is rooted in the due process clause, and all of his or her pertinent evidence should be considered by the trier

of fact. (*Davis v. Alaska* (1974) 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347.) *Martin v. Ohio* (1987) 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267, establishes that the trial court's failure to give a mistake of fact instruction violated appellant's right to due process of law. The Court in *Martin v. Ohio* concluded the burden of proving self-defense could be placed on the defendant without violating due process of law. (*Martin v. Ohio, supra*, 480 U.S. at p. 232-233.) The Court noted, however, "It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case . . . ." (*Martin v. Ohio, supra*, 480 U.S. at p. 233.) Appellant's mistake of fact defense to the kidnaping allegation was analogous to a claim of self-defense. The trial court's failure to give a mistake of fact instruction denied appellant his due process right to present that defense to the kidnaping allegation.

In *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, the trial court excluded evidence that a third party had confessed to the murder with which the defendant had been charged. The Court concluded that under the facts of the case, the exclusion of this evidence violated due process of law:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. E. g., *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, 333 U.S. 257 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to

> allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law.

(*Chambers v. Mississippi, supra*, 410 U.S. at p. 302.)

The trial court's failure to give a mistake of fact instruction operated in the same manner as the exclusion of relevant and exculpatory evidence. The lack of a mistake of fact instruction deprived the jury of the means to evaluate that defense in the same way the exclusion of relevant and exculpatory evidence deprives the jury of the facts necessary to determine a defendant's guilt.

The trial court's failure to give a mistake of fact instruction also deprived appellant of his right to a jury determination of all the facts pertaining to his guilt or innocence as required by the Sixth Amendment, and Article I, section 16 of the California Constitution. (*Ring v. Arizona, supra*, 536 U.S. at p. 609 [the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty]; *United States v. Gaudin, supra,* 515 U.S. at p. 510 [the right to have a jury requires the trier of fact to determine the truth of

every accusation].) Without a mistake of fact instruction, the jury had no way of determining whether appellant had not kidnaped Ms. Kerr because he believed she had died when appellant strangled her.

The trial court's failure to give a mistake of fact instruction also violated the prohibition against imposition of cruel and unusual punishment in the federal and state constitutions. The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v. Alabama* (1980) 447 U.S. 625, 632, 100 S.Ct. 2382, 65 L.Ed.2d 403.) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in the guilt phase of a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) The jury determined appellant's eligibility for the death penalty based on an aggravating factor found true because of the trial court's failure to give a mistake of fact instruction. The jury also considered this aggravating factor in assessing whether the death penalty should be imposed. Appellant was therefore found eligible for the death penalty, and given that sentence, in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. **E. STANDARD OF REVIEW**

Issues pertaining to jury instructions are reviewed de-novo. (*People v. Posey, supra*, 32 Cal.4th at p. 218.)

F. PREJUDICE

Because the trial court's failure to give a mistake of fact instruction violated appellant's federal constitutional rights, the true finding to the kidnaping special circumstance allegation must be reversed unless the error was harmless. *(Chapman v. California, supra,* 386 U.S. at p. 24.) "Instructional errors–whether misdescriptions, omissions, or presumptions — as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal." (*People v. Flood* (1998) 18 Cal.4th 470, 499.)

The trial court's failure to give a mistake of fact instruction was not harmless error. Appellant believed Ms. Kerr was dead when she was transported in her vehicle to the location where appellant set the car on fire. The location of her body on the floorboard of the back seat prevented appellant from seeing her breathe. Medical testimony indicated that she was unconscious when she died and therefore likely did not move when she was on the floorboard. Appellant told multiple people that he had strangled her. The jury instruction for the kidnaping allegation only directed the jury to the factual issues of whether appellant forcibly moved Ms. Kerr a substantial distance. (23 RT pp. 2538-2540.) The jury instruction did instruct the jury that appellant had to have the specific intent to kill in order for the kidnaping special circumstance allegation to be found true. (*Ibid.*) The jury could have found appellant had the specific intent to kill Ms. Kerr because of his out–of-court statement that he strangled her. However, the question of whether appellant had the specific intent to kill is distinct from whether appellant believed Ms. Kerr was dead at the time he moved her body. The jury instructions given to the jury did not, therefore, resolve the factual question of

whether appellant believed Ms. Kerr was dead when he moved her to the location where he set the car on fire. The true finding to the kidnaping special circumstance allegation must therefore be reversed.

G. THE JUDGMENT OF DEATH MUST BE REVERSED.

Appellant incorporates herein the argument from Issue II regarding reversal of the judgment of death. Under Brown v. Sanders, the reversal of the kidnaping special circumstance allegation requires reversal of the judgment of death. The jury was allowed to consider as an aggravating factor the kidnaping of Ms. Kerr. Assuming this Court reverses the special circumstance finding of a kidnaping for instructional error, Ms. Kerr's kidnaping was improperly considered by the jury as an aggravating factor in its assessment of whether the death penalty should be imposed. Appellant presented substantial mitigating evidence. He had a difficult childhood punctuated by witnessing severe violence against his mother. (26 RT p. 2852; 27 RT pp. 2850-2851, 2879.) Appellant saw his stepfather shoot his mother and put her in the hospital. (26 RT pp. 2856, 2884.) Ms. Kerr manipulated appellant by having him pay for her apartment, but then rejected him when it was convenient for her. (18 RT pp. 2057-2058; 20 RT p. 2304.)

The jury struggled with the decision to impose the death penalty. The jury declared several times that they were hopelessly deadlocked. (27 RT pp. 3053-3054, 3074-3075.) During the jury's penalty phase deliberations, it asked to hear from appellant. (16 CT p. 3929.) The jury was confused about the weighing process and asked for an explanation. (28

RT pp. 3091-3092.) This Court cannot conclude beyond a reasonable doubt that the jury's consideration of Ms. Kerr's kidnaping as an aggravating factor was not the factor that pushed the jury to deciding to impose the death penalty. The death sentence must therefore be reversed.

IV

THE FEDERAL AND STATE DUE PROCESS CLAUSES REQUIRE REVERSAL OF THE TRUE FINDING TO THE TORTURE MURDER SPECIAL CIRCUMSTANCE, AND THE FIRST DEGREE MURDER CONVICTION BASED ON MURDER BY TORTURE, AND THE JUDGMENT OF DEATH, BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT TORTURED THE VICTIM.

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that appellant tortured Ms. Kerr in the commission of her murder. (24 RT pp. 2704-2705.) The jury was also instructed on murder by torture and found appellant guilty of first degree murder. (23 RT pp. 2533-2534.) The state and federal due process clauses required the prosecution to prove beyond a reasonable doubt that appellant tortured Ms. Kerr in order to find the torture-murder special circumstance true or to find appellant guilty of first degree murder based on murder by torture. To prove that appellant tortured Ms. Kerr, the prosecution was required to prove that appellant intentionally performed acts that were calculated to cause extreme physical pain to Ms. Kerr and that he did so for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. The prosecution evidence failed to prove that appellant intended to cause extreme physical pain to Ms. Kerr or that he acted for any of the aforementioned purposes. Hence, the true finding to the torture-murder special circumstance must be reversed. The first degree murder conviction cannot be affirmed based on a theory of felony-murder by torture. The reversal of the special circumstance allegation that appellant tortured

Ms. Kerr requires reversal of the judgment of death.

B. SUMMARY OF LEGAL STANDARDS GOVERNING TORTURE-MURDER SPECIAL CIRCUMSTANCES AND MURDER BY TORTURE.

Penal Code section 190.2 sets forth the special circumstances which authorize imposition of the judgment of death. Section 190.2, subdivision (a)(18), lists as a special circumstance, "The murder was intentional and involved the infliction of torture." Torture is defined in Penal Code section 206. It provides that "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury, as defined in Section 12022.7 upon the person of another, is guilty of torture. /P/ The crime of torture does not require any proof that the victim suffered pain."

The torture-murder special circumstance requires proof that the defendant intentionally performed acts that were calculated to cause extreme physical pain to the victim. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136.) An intent is required to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. (*Ibid.*) The intent to torture "is a state of mind which unless established by the defendant's own statements (or other witness's description of a defendant's behavior in committing the offenses), must be proved by the circumstances surrounding the commission of the offense, which include the nature and severity of the victim's wounds." (*Id.*, at p. 1137, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 141.) This Court has cautioned against giving undue weight to severe wounds because "severe

injuries may also be consistent with the desire to kill, the heat of passion, or an explosion of violence." (*People v. Mungia, supra*, 44 Cal.4th at p. 1137.)

Penal Code section 189 provides in part that, "All murder which is perpetrated by . . . . torture . . . is murder of the first degree. Murder by torture also requires an intent to inflict "extreme pain," and "extreme and prolonged pain." (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.)

C. THE PROSECUTION EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT INTENDED TO TORTURE MS. KERR

The prosecution theory was that appellant tortured Ms. Kerr when he set her vehicle on fire. The prosecutor argued during his closing argument that, "If I know you're in that car and I burn you to death while you're alive, it's torture." (23 RT p. 2562.) The federal and state due process clauses required the prosecution to prove the truth of the special circumstance allegation beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560; *People v. Osband* (1996) 14 Cal.4th 622, 690.) The record is reviewed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the special circumstances allegation true beyond a reasonable doubt. (*People v. Mungia, supra*, 44 Cal.4th at p. 905; *People v. Osband, supra*, 13 Cal.4th at p. 690.)

The prosecution evidence failed to prove the torture-murder special circumstance allegation beyond a reasonable doubt because: (1) there was insufficient evidence appellant intended to cause cruel and extreme pain and suffering; (2) there was insufficient evidence

appellant lit the car on fire for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose; and (3) the undisputed evidence established that the victim did not feel any pain when she died of her thermal injuries.. Because the evidence was insufficient to prove that appellant tortured Ms. Kerr, the first degree murder conviction cannot stand based on the theory that appellant committed murder by torture in violation of section 189.

Dr. Graffi Djabourian, the deputy medical examiner who examined Ms. Kerr's remains, testified that she was most likely unconscious when the vehicle was set on fire and when she died. (18 RT pp. 1995-1997.) Ms. Kerr's body was found in the rear floorboard which was consistent with Dr. Djabourian's testimony that she was unconscious when she died. (14 RT p. 1492.) The crime of torture does not require the victim to feel pain. (CALJIC 9.90.)[1] However, the crime of torture does require the defendant to have acted with the intent to cause cruel and extreme pain and suffering. (*People v. Mungia, supra*, 44 Cal.4th at p. 1136.) Appellant would have known if Ms. Kerr was unconscious when the fire started and he thus could not have had the intent to cause her cruel and extreme pain and suffering.

Appellant's statements also suggests that he not tortured Ms. Kerr. Appellant told Mr. Jayne that he had followed Ms. Kerr to her apartment and strangled her. (20 RT pp. 2236-2237, 2252-2253.) Appellant commented to Mr. Jayne that he was going to jail anyways and he decided to kill her. Mr. Jayne described appellant making a C-pattern with his hand which

---

[1] Appellant's position is that the crime of torture should require the victim to experience pain. This argument is addressed below.

suggested that appellant intended to kill her in the apartment when he confronted her. (20 RT p. 2237.) Appellant could not have had the intent to inflict cruel and extreme pain and suffering if he believed Ms. Kerr was dead when he set the car on fire.

The evidence was also insufficient to prove appellant set the car on fire for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. Appellant obviously did not set Ms. Kerr's vehicle on fire for purpose of extortion or persuasion. If appellant believed Ms. Kerr was unconscious or dead, then he also could not have been acting for revenge or any other sadistic purpose. Ms. Kerr's body sustained significant thermal injury. However, "severe injuries may also be consistent with the desire to kill, the heat of passion, or an explosion of violence." (*People v. Mungia, supra*, 44 Cal.4th at p. 1137.) Hence, the fact that Ms. Kerr's body sustained significant thermal injury was not a basis to conclude appellant acted with the intent to cause Ms. Kerr cruel and extreme pain and suffering or that he acted for revenge or some other sadistic purpose. The most reasonable interpretation of the facts was that appellant burned the car to destroy evidence.

People v. Mungia demonstrates why the evidence was insufficient to prove that appellant tortured Ms. Kerr. The defendant in that case battered the victim to death with a blunt instrument. The pathologist testified that the injuries inflicted on the victim were extremely painful. Prior to the murder, the defendant had made statements that if he ever committed another robbery, he would have to kill the victim to avoid being identified. This Court found the evidence insufficient to prove the defendant tortured the victim for several

reasons. First, the defendant's statements about murdering a robbery victim was "[S]trong evidence that defendant entered Franklin's house intending to kill her, but it is not evidence from which a rational trier of fact could infer that he beat Franklin to death for a sadistic purpose." Neither the circumstances of the offenses nor the nature of the wounds provided evidence from which a rational trier of fact could infer an intent to torture. The defendant killed the victim by repeatedly hitting her in the head. "The killing was brutal and savage, but there is nothing in the nature of the injuries to suggest that defendant inflicted any of them in an attempt to torture Franklin rather than to kill her." (*People v. Mungia, supra*, 44 Cal.4th at p. 1137.)

Similar reasoning applies to the instant case. This Court in *People v. Mungia* concluded the evidence was insufficient to prove the defendant beat the victim to death for a sadistic purpose because he killed the victim to conceal his identity. Appellant did not torture the victim because he set the car on fire to conceal evidence of his crime rather than to inflict pain on Ms. Kerr.

The prosecutor argued that appellant started the fire to conceal his crime:

> It's a horrible, horrible thing, selected for two reasons: One, to secret evidence, to get rid of evidence.
>
> Now, what more evidence of planning do you have than he though that "Do you know what? Not only am I going to get this done, but I'm going to get it done in a way that minimizes my responsibility." So there's thoughts of minimization of responsibility, of concealing evidence, of secreting that which can hold me responsible well before the act ever happens.

(23 RT p. 2554.) The prosecutor continued to echo the theme that appellant left Ms. Kerr in a burning vehicle to avoid detection:

> Look at the choice here. Where was the car found? Where was Lisa found in this car, burned to death? In this area over here. What's unique about that compared to all the other three? It's the only place where there's no development. It's the only place where there's no building, there's no businesses. It's the only place selected the farthest away from prying eyes, isn't it?
>
> A choice, a very conscious choice, for a very rational reason, and that rational reason, to get done with what I'm planning to do and to avoid detection.

(23 RT pp. 2556-2557.) The prosecutor then argued appellant lit the fire for the express purpose of concealing Ms. Kerr's identity:

> To use accelerant in a fire, to pour gasoline over a car on someone and light them on fire, a choice. A choice to accomplish the purpose that they've talked about. To place the victim with her I.D. on her head—on her I.D. behind that seat, very specific choice. Why? To get rid of that I.D. when you get rid of her.

(23 RT p. 2558.) The prosecutor continued, "And doing something to avoid harm to myself. I'm going to do something to accomplish this purpose I have. I'm going to do something that is going to do hideous things to this victim, and yet I'm thinking about my own safety. I'm thinking about the safety." (23 RT p. 2559.) The prosecutor, during his rebuttal argument, continued with the theme that appellant was trying to destroy evidence when he burned the vehicle: "And remember, oh, yeah, one of his purposes in doing this, besides getting rid of Lisa Kerr, was to get rid of evidence." (24 RT p. 2651.) Similar to the defendant in *People*

v. Mungia, appellant's purpose in setting the vehicle on fire was to conceal evidence of his crime rather than inflict suffering on Ms. Kerr.

People v. Mungia also concluded the victim's injuries were not a basis to infer the defendant had the intent to torture the victim because there was nothing about them that suggested an intent to torture rather than an intent to kill. Similar reasoning applies to the instant case. There was strong evidence that appellant believed he had killed Ms. Kerr when he initially confronted her. Even if appellant believed Ms. Kerr was alive when he started the fire, he did so to kill her and conceal her identity rather than to inflict pain on her. Because severe injuries are not a sufficient basis to infer an intent to torture, (*People v. Mungia, supra*, 44 Cal.4th at p. 1137), the fact that Ms. Kerr's body sustained substantial thermal injuries was not a basis to infer appellant intended to torture her.

The insufficiency of the evidence in this case to prove that appellant intended to inflict pain on Ms. Kerr contrasts with numerous other cases in which the evidence was sufficient to prove the defendant intended to inflict pain on the victim. (See e.g. *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [defendant methodically poured hot oil on multiple portions of the victim's body]; *People v. Chatman* (2006) 38 Cal.4th 344, 390 [the defendant inflicted over 50 stab wounds all over the victim's body and later told a friend he persisted in stabbing the victim]; *People v. Elliott* (2005) 37 Cal.4th 453, 467, [the defendant inflicted 81 stab wounds, only three of which were potentially fatal, and meticulously split the victim's eyelid with a knife]; *People v. Cole, supra*, 33 Cal.4th at pp. 1212-1213 [defendant made statements

indicating he was angry at the victim, poured gasoline over her body, and set it alight]; *People v. Bemore* (2000) 22 Cal.4th 809, 842 [defendant inflicted eight unusual nonfatal wounds in the victim's flank before stabbing him to death and made statements implying that he inflicted those wounds in an effort to persuade the victim to open a safe]; *People v. Crittenden* (1994) 9 Cal.4th 83, 141 [the defendant broke one victim's jaw before killing him and inflicted fairly superficial cuts that clearly were not intended to be lethal in an attempt to persuade another victim to write a check payable to the defendant]; *People v. Proctor* (1992) 4 Cal.4th 499, 531, [the defendant severely beat the victim and inflicted a series of nonfatal incision type stab wounds to her neck, chest, and breast area before strangling her]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 [the defendant made incisions with a nearly scientific air that demonstrated a calculated intent to cause inflict pain]; *People v. Cook* (2006) 39 Cal.4th 566, 602-603 [evidence sufficient to show first degree torture-murder where the defendant kicked and beat the victim with a stick for a long period while he lay resisting in the street]; *People v. Raley* (1992) 2 Cal.4th 870, 889 [evidence sufficient to show first degree torture-murder where the defendant inflicted 41 knife wounds on the victim while she screamed, wrapped her in rugs and left her unconscious in the trunk of his car for hours before throwing down a ravine].)

For the reasons above, the prosecution evidence was insufficient to prove that appellant tortured Ms. Kerr. The true finding to the torture special circumstance allegation must be reversed. The first degree murder conviction cannot be affirmed based on the theory

of murder by torture.

D. PREJUDICE

The reversal of the true finding to the torture-murder special circumstance allegation must result in reversal of the judgment of death. Under *Brown v. Sanders*, "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.) Here, the jury's conclusion that appellant tortured Ms. Kerr added an improper element to the aggravation scale when the jury determined whether to impose the death penalty. This was a very close case with regard to imposition of a judgment of death rather than life in prison. As explained below, the trial court coerced the jury into voting for death after the jury had stated it was hopelessly deadlocked on the penalty. (27 RT pp. 3053-3055, 3075.) Even the prosecutor conceded that a penalty phase mistrial was warranted. (27 RT p. 3072.) The jury was not able to give aggravating weight to the facts and circumstances which constituted Ms. Kerr's alleged torture under any other factor in aggravation set forth in the penalty phase instructions.

Appellant had many good qualities. He was devoted to his daughter. He tried to help others who were struggling. (26 RT pp. 2828-2829.) Appellant had built a prosperous plumbing business. (26 RT p. 2830.) This was not a strong prosecution case for imposition

of a judgment of death. The jury struggled with the decision to impose the death penalty and the trial court essentially coerced a verdict from the jury by compelling it to continue deliberations even after the prosecutor had conceded that a penalty phase mistrial was warranted. (27 RT pp. 3070-3072; 28 RT pp. 3084-3086.) The true finding to the torture-murder special circumstance significantly tipped the scale towards imposition of the death penalty. Hence, the judgment of death must be reversed.

V

THE FEDERAL AND STATE DUE PROCESS CLAUSES AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, REQUIRE REVERSAL, OF: (1) THE TRUE FINDING TO THE TORTURE-MURDER SPECIAL CIRCUMSTANCE; (2) THE MURDER CONVICTION BASED ON THE THEORY OF MURDER BY TORTURE; AND (3) THE JUDGMENT OF DEATH, BECAUSE THE DEFINITION OF TORTURE WAS UNCONSTITUTIONALLY VAGUE

A. SUMMARY OF ARGUMENT

The jury found true the torture-murder special circumstance allegation. (Pen. Code, §190.2, subd. (a)(18).) Appellant was also found guilty of first degree murder and the jury was instructed on the theory of first degree murder by torture in violation of section 189. The jury was instructed on the definition of torture. The federal and state due process clauses require a statute to be sufficiently clear to provide adequate notice to ordinary people of the prohibited conduct. The prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, section 17 of the California Constitution, requires special circumstance allegations to adequately inform the jury what it must find to impose the death penalty. This Court has already rejected the argument that the torture statute is unconstitutionally vague. (*People v. Chatman* (2006) 38 Cal.4th 344, 394, cert. denied.) Appellant submits that *People v. Chatman* was incorrectly decided, but will only briefly address the issue because this Court has recently ruled on the issue.

The definition of torture given to the jury was unconstitutionally vague. The true

finding to the torture-murder special circumstance allegation must therefore be reversed. The reversal of the torture-murder special circumstance allegation must also result in reversal of the judgment of death. The first degree murder conviction cannot be affirmed to the extent it may have been based on the theory of a murder by torture.

B. THE DEFINITION OF "TORTURE" WAS UNCONSTITUTIONALLY VAGUE

Under the due process clause, a criminal statute is void for vagueness if its fails to provide adequate notice to ordinary people of the kind of conduct prohibited or if it authorizes arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903.) To satisfy due process, a statute must: (1) be sufficiently definite to provide adequate notice of the conduct that is proscribed; and (2) provide sufficiently definite guidelines for the police so as to prevent arbitrary and discriminatory enforcement. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107.) Only a reasonable degree of certainty is required and there is a strong presumption in favor of the constitutionality of statutes. A statute will not be held void for vagueness if any reasonable and practical construction can be given to its language. (*Id.*, at p. 1107.) "Vagueness challenges [under the due process clause] to statute not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 1858.)

Claims of vagueness for aggravating circumstances in death penalty statutes are analyzed under the Eighth Amendment. A slightly different approach applies to vagueness

claims for a special circumstance allegation than applies to a vagueness claim under the Due Process Clause. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statute are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362, 108 S.Ct. 1853, 100 L.Ed.2d 372.)

The trial court gave the standard murder by torture and special circumstance murder-torture instructions. The murder by torture instruction stated as follows:

> Murder which is perpetrated by torture is murder of the first degree.
>
> The essential elements of murder by torture are:
>
> 1. One person murdered another person;
>
> 2. The perpetrator committed the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose; and
>
> 3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death.
>
> The crime of murder by torture does not require any proof that the victim was aware of pain or suffering.
>
> The word "willful" as used in this instruction means intentional.

> The word "deliberate" means formed or arrived at or determined as a result upon as a result of careful though or weighing of consider for and against the proposed course of action.
>
> The word "premeditated" means considered beforehand.

(23 RT pp. 2533-2534)

The jury instruction for the torture-murder special circumstance allegation stated as follows:

> To find that the special circumstances referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved:
>
> 1. The murder was intentional;
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose;
>
> 3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.
>
> Awareness of the pain by the deceased is not a necessary element of torture.

(23 RT p. 2540.)

In *Maynard v. Cartwright, supra*, 486 U.S. 356, the Oklahoma death penalty statute listed as a special circumstance the fact that the murder was committed in an "especially heinous, atrocious, or cruel," manner. The Court noted that, "Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of

wholly arbitrary and capricious action." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 362.) The Court discussed its prior decision in *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429, 100 S.Ct. 1759, 64 L.Ed.2d 398, which held that a special circumstance allegation that murder was "Outrageously or wantonly vile, horrible and inhuman," was vague in violation of the Eighth Amendment. *Maynard v. Cartwright* concluded the "heinous, atrocious, or cruel," language was constitutionally infirm in the same manner as was the language in *Godfrey v. Georgia*:

> First, the language of the Oklahoma aggravating circumstance at issue-"especially heinous, atrocious, or cruel"-gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in *Godfrey*. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." *Godfrey, supra,* at 428-429, 100 S.Ct. at 1764-1765. Likewise, in *Godfrey* the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

(*Maynard v. Cartwright, supra*, 486 U.S. at pp. 363-364.)

The torture instructions in this case suffered from the same infirmity as the deficient instructions in *Godfrey v. Georgia* and *Maynard v. Cartwright*. The torture by murder instruction used the phrase, "extreme and prolonged pain." (23 RT p. 2534.) The torture-murder special circumstance instruction used the phrase, "extreme cruel physical pain and

suffering." (23 RT p. 2540.) A jury composed of laymen has no standard by which to judge what constitutes "extreme and prolonged pain," or "extreme cruel physical pain and suffering." What one set of jurors could conclude was only moderate pain another set of jurors could conclude was extreme and prolonged pain. Hence, the torture instructions were unconstitutionally vague in violation of the Eighth Amendment.

For similar reasons, the definition of "torture" did not satisfy the due process requirement of notice. A statute is judged on an as-applied basis when it is challenged based on due process vagueness grounds. (*Maynard v. Cartwright, supra*, 486 U.S. at p. 1858.) The statute must be sufficiently definite to provide adequate notice of the conduct that is proscribed. (*Tobe v. City of Santa Ana, supra,* 9 Cal.4th at pp. 1106-1107.)

The definition of "torture" did not pass muster under these standards. The term "torture" is not defined in either sections 189 or 190.2, subdivision (a)(18).) The medical examiner testified that Ms. Kerr was unconscious when the fire was started and when she died. (18 RT pp. 1995-1997.) Appellant most likely believed Ms. Kerr was already dead when he set the fire and certainly knew she was unconscious. (20 RT p. 2237.) A reasonable person would not believe he could torture a deceased or unconscious person who could not feel pain. A reasonable person would not believe it would be possible to have an intent to inflict extreme cruel physical pain to an unconscious person. The definition of "torture" given in the instructions did not comport with the meaning a reasonable person would ascribe to that term. An unconscious person does not feel pain. Hence, the definition of "torture"

given in this case also violated appellant's right to state and federal due process of law.

C. THIS ISSUE CAN BE REVIEWED ON APPEAL DESPITE THE LACK OF AN OBJECTION IN THE TRIAL COURT.

Appellant did not object in the trial court to the definition of "torture" based on Eighth Amendment and due process vagueness grounds. The issue of whether the definition of "torture" was unconstitutionally vague in violation of the due process clause and the Eighth Amendment prohibition against cruel and unusual punishment, raises a pure issue of law. (*People v. Hines* (1997) 15 Cal.4th 997, 1061.) It can therefore be reviewed on appeal even in the absence of an objection in the trial court. (*Ibid.*) This issue can also be reviewed pursuant to Penal Code section 1259.

D. PREJUDICE

The reversal of the true finding to the torture-murder special circumstance allegation must result in reversal of the judgment of death. Under *Brown v. Sanders*, "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.) Here, the jury's conclusion that appellant tortured Ms. Kerr added an improper element to the aggravation scale when the jury determined whether to impose the death penalty. As argued in Issue III, the jury had a very difficult time imposing the judgment of death. The jury believed it was hung and reached a verdict only through judicial

coercion. The true finding to the torture-murder special circumstance significantly tipped the scale towards imposition of the death penalty. Hence, the judgment of death must be reversed.

VI

THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, THE RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER SIXTH AMENDMENT AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, THAT THE DEFINITIONS OF KIDNAPING AND ARSON APPLIED TO THE FELONY MURDER CHARGE.

A. SUMMARY OF ARGUMENT

Appellant was found guilty of first degree murder. The jury was given instructions for premeditated murder and felony murder. Kidnaping and arson were the felonies supporting the felony murder charge. The jury was given a definition of arson in connection with the arson count and a definition of kidnaping in connection with the kidnaping special circumstance allegation. The jury was not instructed that the definitions of kidnaping and arson applied to the felony murder charge. This omission resulted in the jury not having adequate guidance to determine whether appellant was guilty of felony murder. The evidence that appellant premeditated Ms. Kerr's death was weak and conflicting. It is not possible to determine whether the jury found appellant guilty of first degree murder based on premeditation or felony-murder. Hence, the judgment of guilt to count one must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Count one alleged appellant killed Ms. Kerr with malice aforethought in violation of section 187, subdivision (a). (2 CT p. 315.) Count one also alleged appellant killed Ms. Kerr by means of lying in wait and during the commission of kidnaping and torture. (2 CT pp. 315-316.) Appellant told Mr. Jayne that he listened to Ms. Kerr's conversation with Mr. Harvey, in which she made derogatory remarks about him, and then confronted her at her apartment and strangled her. (20 RT pp. 2236-2237, 2252-2253.) Dr. Djabourian testified that Ms. Kerr was alive, but most likely unconscious, when the fire was started and she died. (18 RT pp. 1995-1997.)

The jury was instructed that, "All murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree." (23 RT p. 2521.) The jury was further instructed that, "Malice is express when there is manifested an intention unlawfully to kill a human being." (23 RT p. 2520.) The felony murder instruction stated as follows:

> The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime as a direct causal result of arson or kidnaping is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(23 RT pp. 2522-2523.) The jury was not given a definition of kidnaping or arson in connection with the felony murder charge.

The jury was told to determine if the special circumstance allegations of lying in wait,

kidnaping, and torture were true. (23 RT p. 2535.) The jury was given a definition of kidnaping in connection with the special circumstance allegation. (23 RT pp. 2538-2540.) The jury was instructed on the elements of arson causing great bodily injury. (23 RT p. 2545.) The jury was not told this definition applied to the felony-murder charge.

C. THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY THAT THE DEFINITIONS OF KIDNAPING AND ARSON APPLIED TO THE FELONY MURDER CHARGE.

The trial court has a sua sponte duty to give correct instructions on the basic principles of the law applicable to the case that are necessary to the jury's understanding of the case. (*People v. Avila* (2006) 38 Cal.4th 491, 568,) That duty requires the trial court to instruct on all the elements of the charged offenses. (See *People v. Birks* (1998) 19 Cal.4th 108, 112.)

California law characterizes felony-murder and premeditated murder as different theories of the crime of first degree murder. (*People v. Valdez* (2004) 32 Cal.4th 73, 115, fn. 17.) The facts the prosecution must prove define the elements of a crime. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 483, fn. 10.) Despite California's characterization of premeditated murder and felony murder as separate theories of the single crime of murder, the federal constitution requires felony-murder to be treated as a separate crime, which required instructions on each of its elements.

Here, the trial court told the jury that felony murder consisted of the killing of a human being during the commission of kidnaping or arson. The trial court later defined kidnaping and arson, but the jury was not told those instructions applied to felony murder.

It cannot be assumed, furthermore, that the jury knew to apply the definitions of kidnaping and arson to the felony murder instructions. The kidnaping instruction was specifically limited to the special circumstance allegation. The introductory part of the instruction stated, "To find that the special circumstance referred to in these instructions as murder in the commission of kidnaping is true, it must be proved . . .." (23 RT p. 2538.) Hence, there was nothing in the wording of the special circumstance instruction for kidnaping which suggested to the jury that the definition of kidnaping applied to the felony murder charge.

The arson instruction suffered from a similar deficiency. Section 189 defines felony murder to include a killing in the commission of arson. The felony murder instruction given to the jury simply referred to the crime of arson. (23 RT pp. 2522-2523.) Because the arson instruction made no cross-reference to the felony murder instruction, the jury had no way of knowing that the instruction also applied to felony murder.

D. THE TRIAL COURT'S DEFICIENT INSTRUCTIONS VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

The federal due process clause requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560, 571.) The trial court's failure to instruct on the elements of an offense violates a defendant's right to due process of law under the Fourteenth Amendment and Article I, section 15, of the California Constitution. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1313.) Hence, the trial court's failure to define for the jury "kidnaping" and "arson" in the context of the felony murder instructions violated appellants's

right to due process of law.

The trial court's failure to instruct on the elements of an offense also prevented the jury from determine whether all the elements have been proved beyond a reasonable doubt in violation of the defendant's right to a jury determination of the facts under the Sixth Amendment and Article I, section 16 of the California Constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182; *People v. Breverman* (1998) 19 Cal.4th 142, 155.) Without definitions of "kidnaping" and "arson," the jury had no way to make the factual determinations that were elements of felony murder.

The Eighth Amendment, and Article I, section 17, of the California Constitution require heightened reliability during the guilt and penalty phase of a capital prosecution. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 100 S.Ct. 2382, 65 L.Ed.2d 392; *People v. Ayala* (2000) 23 Cal.4th 225, 263.) Appellant was eligible for the death penalty only if he was guilty of first degree murder. The first degree murder conviction rested in part on the felony murder theory. The jury was unable to make the factual determinations necessary to determine if appellant committed felony murder because of the instructional deficiencies identified above. This failure undermined the reliability of the jury's determination that he was eligible for the death penalty and therefore violated appellant's right to not be subject to cruel and unusual within the meaning of the Eighth Amendment and Article I, section 17 of the California Constitution.

E. PREJUDICE

Because the trial court's failure to define "kidnaping" and "arson" in the context of the felony murder charge violated appellant's federal constitutional rights, the judgment of guilt to count one must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The error was not harmless beyond a reasonable doubt because: (1) the evidence that appellant premeditated Ms. Kerr's death was weak and conflicting; and (2) the felonies were incidental to, and an afterthought, to the murder.

Appellant told Mr. Jayne that he confronted Ms. Kerr at her apartment and strangled her. He decided to kill her on the spur of the moment as a result of anger. (20 RT pp. 2237, 2244.) Ms. Kerr was most likely unconscious when the fire was started and when she died. (18 RT pp. 1995-1997.) The position of her body in the car when it was found by the firefighters corroborated Dr. Djabourian's opinion that Ms. Kerr was unconscious when the fire was started. (14 RT p. 1492.) It was unlikely the jury concluded appellant premeditated Ms. Kerr's death because he appeared to have believed that he killed her in the spur of a moment decision when he confronted her at her apartment and strangled her. Hence, the first degree murder conviction most likely rested on the felony murder charge.

For felony murder, "the killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing." (*People v. Prince* (2007) 40 Cal.4th 1179, 1259, cert. denied, 128 S.Ct. 887.) Because the

jury was not instructed on the definitions of "kidnaping" and "arson" in connection with the felony murder charge, the jury was not aware that the felonies could not be merely incidental to, or an afterthought, to a murder. The definition of kidnaping given in connection with the kidnaping special circumstance allegation, and the definition of arson given in connection with the arson count, were not therefore adequate substitutes for proper instructions addressed specifically to the felony murder charge. Those instructions did not require the jury to make the factual determination of whether the felonies were incidental to, and an afterthought, to the killing of Ms. Kerr.

There was strong evidence the kidnaping of Ms. Kerr and arson of the vehicle were incidental to, and an afterthought, to Ms. Kerr's murder. Appellant believed he had killed Ms. Kerr when he strangled her at her apartment. (20 RT pp. 2237, 2244.) The prosecutor argued that appellant drove the car to the side of the road and set it on fire to conceal evidence. (23 RT pp. 2556-2558.) If appellant, in fact, committed kidnaping and arson for that purpose after he believed he had killed her, then the kidnaping and arson were incidental to, and an afterthought, to Ms. Kerr's murder.

When the prosecution presents its case to the jury on alternate legal theories, some of which are legally correct and other legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict rested, the conviction cannot stand. (*People v. Green* (1980) 27 Cal.3d 1, 69.) The jury returned a verdict of guilty to first degree murder without specifying whether the conviction was based on premeditated

murder or felony murder. (16 CT p. 3886.) Assuming there was sufficient evidence to find appellant guilty of premeditated first degree murder, it is not possible to conclude the jury found him guilty based on that theory. This is especially true because of the evidence suggesting that appellant killed Ms. Kerr in the spur of a moment. Assuming appellant could have been found guilty of first degree murder based on felony murder, it is not possible to conclude the jury rested its verdict for count one on that theory.

For the reasons above, the judgment of guilt to count one must be reversed. If count one is reversed, appellant is no longer eligible for the death penalty. The judgment of death must also therefore be reversed.

VII

THE TRUE FINDING TO THE TORTURE SPECIAL CIRCUMSTANCE ALLEGATION, THE FIRST DEGREE MURDER CONVICTION BASED ON MURDER BY TORTURE, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FELONY ASSAULT, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, EQUAL PROTECTION, RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that appellant tortured Ms. Kerr. (16 CT p. 3886.) Special circumstance allegations are in substance an element of the crime of capital murder. Assault with a means of force likely to cause great bodily injury is a lesser included offense of torture. The evidence raised a question of fact whether appellant committed assault with a means of force likely to cause great bodily injury rather than torture. The trial court also instructed the jury on the theory of first degree murder by torture and appellant was found guilty of first degree murder. Under California law, the trial court has a sua sponte duty to instruct the jury on all lesser included offenses raised by the evidence. The United States Supreme Court has held that due process is violated when the trial court, in a capital case, fails to instruct the jury on all lesser included offenses raised by the evidence. Appellant's right to equal protection of the law, right to a jury trial, and the

prohibition against imposition of cruel and unusual punishment in the federal and state constitutions also required the trial court to give a lesser included offense instruction for the torture special circumstance allegation and the murder by torture allegation. The trial court's failure to give those lesser included offense instructions was prejudicial. Hence, the true finding to the torture special circumstance allegation must be reversed. The first degree murder conviction cannot be affirmed based on the theory of murder by torture.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

David Heiserman testified that appellant said he confronted Ms. Kerr in front of Mr. Harvey's residence, strangled her, and put her in the back seat. (17 RT p. 2098.) Appellant told Mr. Jayne that he followed Ms. Kerr to her apartment from Mr. Harvey's residence. He then strangled her. (20 RT pp. 2236-2237.) Detective Graham testified that appellant said he got into an argument with Ms. Kerr at her apartment. She left. Appellant said he went home and argued with his father. (20 RT p. 2215.) Appellant said he saw Ms. Kerr's vehicle later that morning by the side of the road. (20 RT p. 2216.)

Dr. Djabourian was the medical examiner who conducted the autopsy on Ms. Kerr's body. (18 RT pp. 1969-1973.) Dr. Djabourian held the opinion that Ms. Kerr was alive when the vehicle was set on fire because soot was found in her airway and mouth. The airway includes the larynx, trachea, and bronchi. (18 RT pp. 1977, 1983-1984, 1987.) Soot can enter the airway only if an individual is breathing. (18 RT pp. 1983-1984.) The cause of Ms. Kerr's death was smoke inhalation, thermal injuries, and other undetermined factors. (18 RT

p. 1988.) Ms. Kerr was probably unconscious when she died. (18 RT p. 1995.)

The information alleged torture within the meaning of Penal Code section 190.2, subdivision (a)(18), as a special circumstance. (2 CT p. 316.) The jury instruction for the torture special circumstance allegation stated as follows:

> To find that the special circumstance referred to in these instructions as murder involving the infliction of torture is true, each of the following facts must be proved:
>
> 1. The murder was intentional;
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose;
>
> 3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.
>
> Awareness of the pain by the deceased is not a necessary element of torture.

(23 RT p. 2540.) The jury was also instructed on the theory of murder by torture. (23 RT pp. 2533-2534.)

During closing argument, the prosecutor argued appellant tortured Ms. Kerr by putting her in a vehicle he lit on fire. (23 RT p. 2566.)

C. THE EVIDENCE RAISED A QUESTION OF FACT WHETHER APPELLANT COMMITTED THE LESSER INCLUDED OFFENSE OF ASSAULT WITH A MEANS OF FORCE LIKELY TO CAUSE GREAT BODILY INJURY RATHER THAN TORTURE

Penal Code section 245, subdivision (a)(1), provides in part, "[a]ny person who

commits an assault upon the person of another with a deadly weapon or means of force likely to produce great bodily injury . . . " is guilty of a felony. Penal Code section 206, provides, "[e]very person who with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. /P/ The crime of torture does not require any proof that the victim suffered pain."

A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Under both tests, the determination is made in the abstract without regard to the evidence. *(People v. Preston* (1973) 9 Cal.3d 308, 319.)

"Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*People v. Sloan* (2007) 42 Cal.4th 110, 117.) The statutory elements of torture include all the elements of assault with a means of force likely to cause great bodily injury. The elements of torture are: (1) the infliction of great bodily injury upon the person of another; and (2) the person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. (CALJIC No. 9.90.) The elements of assault with a means of force likely

to cause great bodily injury are: (1) an assault; and (2) the assault was committed by means of force likely to cause produce great bodily injury. (CALJIC No. 9.02.) Because torture requires the infliction of great bodily injury upon the person of another, it necessarily also involves an assault with a means of force likely to cause great bodily injury. This conclusion is consistent with case law. Assault with a deadly weapon is not a lesser included offense of assault with a deadly weapon. (*People v. Martinez* (2005) 125 Cal.App.4th 1035, 1044.) However, "an assault by means of force likely to produce great bodily injury is arguably an included offense within the crime of torture . . .." (*Id.*, at p. 1043 [applying the elements test for a lesser included offense].)

Under the accusatory pleading test, the courts look to whether the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified some lesser offense is necessarily committed. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) Count one alleged appellant committed murder by means of lying in wait, kidnaping, and the infliction of torture. (2 CT pp. 315-316.) The facts alleged for the murder count include the commission of an assault with a means of force likely to cause great bodily injury. This conclusion is reinforced by count three, that alleged appellant committed arson causing great bodily injury to Ms. Kerr. (2 CT p. 316.)

The trial court has a duty to instruct the jury on a lesser included offense "when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged."

(*People v. Breverman* (1989) 19 Cal.4th 142, 154-155.) The trial court should instruct the jury on "lesser included offenses that find substantial support in the evidence." (*Id.*, at p. 162.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*)

The first element of torture is the infliction of great bodily injury with the specific intent to cause cruel or extreme pain and suffering. The infliction of great bodily injury occurred because Ms. Kerr was killed by the fire. The second element was whether the person inflicting the injury did so for revenge, extortion, persuasion, or any sadistic purpose. Dr. Djabourian testified that Ms. Kerr was probably unconscious when she died. (18 RT p. 1995.) Because Ms. Kerr was unconscious when the fire was set, there was no evidence that appellant started the fire to cause pain and suffering or for the purpose of revenge, extortion, persuasion, or a sadistic purpose. Appellant had no reason to believe starting the fire would cause her pain because he believed that she was already dead. Appellant was guilty only of assault with a means of force likely to cause great bodily injury if he caused Ms. Kerr great bodily injury by starting the fire, but did not have the intent to cause her pain and was not seeking revenge. .

For the reasons above, the evidence was sufficient to raise the question of appellant's guilt of assault with a means of force likely to cause great bodily injury as a lesser included offense of the special circumstance allegation of torture and the first degree murder by torture charge.

D. THE TRIAL COURT'S DUTY TO GIVE LESSER INCLUDED OFFENSE INSTRUCTIONS APPLIES TO SPECIAL CIRCUMSTANCE ALLEGATIONS

This Court has held a trial court does not have a *sua sponte* duty to instruct the jury on lesser included offenses for special circumstance allegations in death penalty proceedings when the special circumstance allegation has not been separately charged as a felony. (*People v. Valdez* (2004) 32 Cal.4th 73, 110-111; *People v. Combs* (2004) 34 Cal.4th 821, 856; *People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) This Court has also held that the trial court's sua sponte duty to instruct on lesser included offenses does not extend to felonies alleged under the felony murder rule. *(People v. Memro* (1995) 11 Cal.4th 786, 888-890.) This Court should reconsider and reverse its earlier rulings and hold that the trial court does have a *sua sponte* duty to instruct the jury on lesser included offenses when the greater offense is alleged as a special circumstance allegation but the special circumstance allegation is not separately charged as a felony. The same rule duty to instruct on lesser included offenses should also be extended to murder by torture.[1]

---

[1] Penal Code section 189 is the California felony murder statute. Murder by torture is listed as first degree murder in that statute. Murder by torture, however, is not true felony murder but its own substantive crime. The commission of murder by torture should therefore be subject to the normal rule that the trial court has a sua sponte duty to instruct the jury on all lesser included offenses, and the rule in *People v. Memro* that instructions on lesser included offenses alleged as felonies for the felony-murder rule is not applicable. This argument is addressed more fully later in this issue. To the extent this Court deems murder by torture to be a form of felony-murder, then it would arguably be subject to the rule in *People v. Memro* that jury instructions on lesser included offenses are not necessary for felonies alleged under the felony-murder rule. However, as argued

Due process required the trial court to instruct the jury on assault with a means of force likely to cause great bodily injury as a lesser included offense of the torture special circumstance allegation and the murder by torture charge. In *Beck v. Alabama* (1980) 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, the defendant was found guilty of the capital offense of robbery after a victim was intentionally killed. Under the Alabama death penalty scheme, the required intent to kill necessary to impose the death penalty could not be based on the felony-murder doctrine. Felony-murder was therefore a lesser offense of the capital crime of robbery-intentional killing. Alabama law, however, prohibited the judge from giving jury instructions on lesser included offenses in a capital prosecution. Alabama law provided for the giving of lesser included offenses in non-capital prosecutions "if there is any reasonable theory from the evidence which would support the position." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 630, fn. 5, quoting *Fulghum v. State* (1973) 291 Ala. 71, 75, 277 So.2d 886, 890.) The State conceded that, under the above standard, the evidence was sufficient to raise the question of the defendant's guilt of the lesser included offense of felony-murder. The trial court judge did not give jury instructions on the lesser included offense of felony murder because of the prohibition in Alabama law against such instructions in capital prosecutions.

The defendant argued before the Supreme Court that the Alabama prohibition on

---

above, this Court should change that rule and hold that lesser included offense instructions are required for felonies alleged under the felony-murder rule.

giving jury instructions on lesser-included offenses in capital proceedings violated his rights under the Sixth, Eighth, and Fourteenth Amendments by "substantially increasing the risk of error in the factfinding process." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 632.) The Supreme Court agreed with the defendant:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

(*Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

The Court's precedent had invalidated sentencing rules which impaired the reliability of the sentencing determination in a capital case. (*Ibid.*, at p. 638.) Hence, "the same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Ibid.*) Procedures that undermine the reliability of the fact finding process in a capital prosecution thus violate the Eighth and Fourteenth Amendments. (*Ibid.*) Alabama's prohibition on giving lesser included offenses also violated the Fifth and Fourteenth Amendments requirement of proof beyond a reasonable doubt: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its

burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 642.)

The reason why *Beck v. Alabama* required instructions on lesser included offense for a murder charge also apply to the giving of a lesser included offense for a special circumstance allegation. "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense–but leaves some doubt with respect to an element that would justify conviction of a capital offense–the failure to give the jury the `third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) The trial court's failure to instruct the jury on assault by means of force likely to cause great bodily injury as a lesser included offense of the special circumstance allegation of torture and the murder by torture charge erroneously increased the risk that appellant would become eligible for, and receive, the death penalty. Hence, due process of law required the trial court to give jury instructions for assault with a means of force likely to cause great bodily injury as a lesser included offense of the torture special circumstances allegation and the first degree murder by torture charge.

This Court's holding that instructions on lesser included offenses are not necessary for special circumstance allegations falls squarely within the procedure condemned by the Supreme Court in *Beck v. Alabama*. *Beck v. Alabama* found the Alabama death penalty statute unconstitutional because it deprived the jury of the option of finding the defendant

guilty of a lesser offense which would have removed him from eligibility for the death penalty. (*Beck v. Alabama, supra*, 447 U.S. at pp. 636-638.) Similarly, this Court's failure to require jury instructions on lesser included offense for the special circumstance allegation deprives the jury of the option of finding appellant committed a crime less than that charged and which would make him ineligible for the death penalty. This outcome cannot be reconciled with *Beck v. Alabama.*

The prohibition against cruel and unusual punishment in the Eighth Amendment, as applied to the States through the Fourteenth Amendment, also requires the above result. The function of special circumstance findings is to narrow the class of defendants eligible for the death penalty to the worst offenders. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244, 208 S.Ct. 546, 98 L.Ed.2d 568 [to pass constitutional muster under the Eighth Amendment, a capital sentencing scheme must genuinely narrow the class of person eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to the others found guilty of murder].) The special circumstances listed in section 190.2, subdivision (a), that make a defendant eligible for the death penalty do not include assault with a means of force likely to cause great bodily injury. The statutory scheme erected in California to determine the defendants eligible for the death penalty cannot perform the narrowing function required by the Eight Amendment if the jury is precluded from considering whether the defendant committed a lesser included offense which would exclude him from eligibility for the death penalty.

This Court reason for not requiring lesser included offense instructions for a felony-murder charge and special circumstance allegation is flawed. *People v. Silva* cited *People v. Miller* (1994) 28 Cal.App.4th 522 and *People v. Memro* (1995) 11 Cal.4th 786, 888-890 (conc. & dis. opn. of Kennard, J.) for the proposition that the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as to predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) In *People v. Memro*, Justice Kennard dissented from language in the majority opinion that could be interpreted to imply a defendant had the right to a jury instruction on a lesser included offense when the greater crime only served as a predicate offense for a felony-murder charge. The majority opinion concluded that a lesser included offense instruction was not required because the evidence did not raise the defendant's guilt of that offense. (*People v. Memro, supra*, 11 Cal.4th at pp. 870-873.)

Any language in *People v. Memro* from the majority opinion, or Justice Kennard's concurring and dissenting opinion, concerning instructions on lesser included offenses for predicate felonies under the felony-murder doctrine constitutes dicta. Neither opinion addressed how the trial court's failure to instruct on lesser offenses for special circumstances impacted the constitutionality of California's sentencing scheme under the Eighth Amendment.

People v. Silva erred by relying on Justice Kennard's concurring and dissenting opinion in *People v. Memro*, and the opinion in *People v. Smith*, for the proposition that in

a capital prosecution, the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) Neither case supported this broad conclusion.

In *People v. Cash, supra*, 28 Cal.4th 703, this Court revisited the above issue. The defendant argued the trial court's failure to instruct the jury on theft as a lesser included offense of the robbery that formed the basis for the felony murder charge, and the special circumstance allegation, violated his Sixth Amendment right to present a defense and Eighth Amendment right not to be subject to cruel and unusual punishment. This Court rejected the argument because "[d]efendant's claim does not fall within the limited situations in which such claims implicate rights under the federal Constitution. California requires a sua sponte instruction on lesser included charged offenses regardless of whether the case is a capital, or a noncapital, one. Therefore, the unavailability of a lesser included offense instruction to an uncharged crime does not operate to weight the outcome in favor of death for defendants facing capital charges." (*People v. Cash, supra*, 28 Cal.4th at p. 738, citing *Hopkins v. Reeves* (1998) 524 U.S. 88, 96, 118 S.Ct. 1895, 141 L.Ed.2d 76, *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638 and *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn.5.)

The reasoning in *People v. Cash* was flawed because the failure to give jury instructions for a lesser included offense does weigh the outcome in favor of imposition of the death penalty. The failure to give the instruction makes the defendant eligible for the

death penalty when he otherwise would not be eligible for that punishment. Furthermore, because special circumstances are factors that make some murders worse than other types of murders, each special circumstance found true by the jury presumably played some role in convincing the jury to select death as the appropriate punishment.

This Court's conclusion that lesser included offenses should not be given for felonies alleged under the felony-murder doctrine or as special circumstances because the included offense doctrine applies only to charged offenses cannot withstand the decisions in *Jones v. United States* (1999) 526 U.S. 227, 143 L.Ed.2d 311, 119 S.Ct. 1215, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348, *Ring v. Arizona* (2002) 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428, *Blakely v. Washington* (2004) (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856.)

In *Jones v. United States*, the Court considered the federal carjacking statute, which provided for three maximum sentences depending on the level of harm sustained by the victim; 15 years in jail if there was no serious injury to a victim, 25 years if there was "serious bodily injury," and life in prison if death resulted. The structure of the statute suggested that bodily harm was a sentencing provision. The Court nevertheless concluded that harm to the victim was an element of the crime. (*Jones v. United States, supra*, 526 U.S. at p. 232.) The Court reached this conclusion in order to avoid reducing the jury's role " to the relative importance of low-level gatekeeping," (*Id.*, at p. 244), and noted that its decision

was consistent with a "rule requiring jury determination of facts that raise sentencing ceiling" in state and federal sentencing guideline systems. (*Id.*, at p. 251.)

In *Apprendi v. New Jersey*, the defendant pled guilty to a number of charges. The trial court enhanced the defendant's sentence by 10 years because it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or a group of individuals because of race. The issue, according to the Court, was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." (*Apprendi v. New Jersey*, 120 S.Ct. at p. 2351.) The Court noted there was no historical distinction between an "element" of an offense and a "sentencing factor." Hence, "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition elements of a separate offense." (*Id.*, at p. 2359, fn. 10.)

In *Blakely v. Washington*, the Supreme Court concluded a Washington State enhancement statute that depended on findings of fact made by the trial judge was unconstitutional:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring*, *supra*, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the

> jury verdict alone'" (quoting *Apprendi, supra*, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); *Harris* v. *United States,* 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop, supra*, §§ 87, at 55, and the judge exceeds his proper authority.

(*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.)

In *United States v. Booker* (2005) 543 U.S.220, 125 S.Ct. 738, 160 L.Ed.2d 621, the Court further explained its decisions in *Apprendi v. New Jersey* and *Blakely v. Washington.* The Court noted under those decisions, any fact that impacted the defendant's maximum potential sentence constituted an element of a crime:

> The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.,* at 478, 120 S.Ct. 2348. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.,* at 476, 120 S.Ct. 2348.

(*United States v. Booker, supra*, 125 S.Ct. at p. 748.)

In *Ring v. Arizona* (2002) 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428, the Court considered the constitutionality of the capital sentencing scheme in Arizona. In Arizona, the

jury determined the defendant's guilt of first-degree murder. The trial judge then determined the presence or absence of aggravating facts and whether a judgment of death should be imposed.[2] In *Walton v. Arizona* (1990) 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, the Supreme Court had upheld the constitutionality of Arizona's sentencing scheme because the additional facts found by the trial judge were sentencing considerations and not "element[s] of the offense of capital murder." (*Walton v. Arizona, supra*, 497 U.S. at p. 649.)

Ring v. Arizona reconsidered *Walton v. Arizona* in light of its decision in *Apprendi v. New Jersey*. The Court noted "Apprendi repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question, 'who decides,' judge or jury." (*Ring v. Arizona, supra*, 536 U.S. at pp. 604-605.) The Court thus concluded "[b]ecause Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S. at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ring v. Arizona, supra*, 536 U.S. at p. 609.) The Ninth Circuit has similarly concluded California's special circumstance allegations operate as the functional equivalent of an element of a greater offense. (*Webster v. Woodford* (9th Cir. 2004) 369 F.3d 1062, 1068.)

In *Cunningham v. California*, the Court concluded California's determinate

---

[2] Under Arizona law, the aggravating facts included the defendant's criminal background as well as facts concerning the commission of the charged murder.

sentencing scheme violated the holding of *Blakely v. Washington*. The Court concluded, "because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, see supra, at 862, the DSL violates Apprendi's bright line rule: Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Cunningham v. California, supra*, 127 S.Ct. at p. 868, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.)

The above cases eliminated the concept of a "sentencing factor" as it pertains to facts that must be found to determine the maximum sentence for which a defendant is eligible. The torture special circumstance allegation in this case is the functional equivalent of the aggravating factors in *Ring v. Arizona* which the Supreme Court concluded had to be found by the jury. If the above cases require the felonies alleged as aggravating circumstances to be treated as elements of an offense, then this Court's conclusion that lesser included offenses should not be given for such allegations because the included offense doctrine applies only to charged offenses cannot withstand constitutional scrutiny. The Fifth and Fourteenth Amendments right to due process of law, and the Sixth and Fourteenth Amendments right to a jury trial, as interpreted in the above cases, requires that special circumstance allegations be treated as elements of an offense.

The equal protection clause also requires the above result. California law imposes a sua sponte duty on the trial court to instruct the jury on all lesser included offenses in non-

capital prosecutions. (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 979.) It also imposes a duty to instruct on lesser included offenses for special circumstance felonies also alleged as substantive crimes. (*People v. Combs, supra*, 34 Cal.4th at p. 856.) The equal protection guarantees of the federal and state constitutions require that persons "similarly situated" receive like treatment under the law. (See e.g., *In re Gary W.* (1971) 5 Cal.3d 296, 303.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) Hence:

> The basic rule of equal protection is that those persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." . . . "The 'equal protection' provisions of the federal and state Constitutions protect only those persons similarly situated from invidiously disparate treatment. [Citations.]" . . . Accordingly, "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner."

(*People v. Macias* (1982) 137 Cal.App.3d 465, 472; emphasis in original].)

All defendants subject to the criminal process are similarly situated and entitled to the same protections as other defendants. A defendant charged with a capital offense and special circumstance allegations, which are not also alleged as substantive crimes, should have the same entitlement to sua sponte instructions on lesser included offenses as a defendant charged with a non-capital crime, or a defendant charged with capital crimes and special circumstances, which are also alleged as substantive offenses.

For the reasons above, this Court should reverse its holdings in *People v. Valdez*, *People v. Cash*, and *People v. Silva* that jury instructions on lesser included offenses are not required for special circumstance allegations. Hence, the trial court erred by failing to instruct the jury on the lesser included offense of assault with means of force likely to cause great bodily injury as a lesser included offense of the special circumstance allegation of torture and murder by torture.

The above argument assumed that murder by torture was a species of felony-murder. The first degree felony-murder appears in Penal Code section 189. However, section 189 contains sets forth two different types of first degree murder. The first portion of section 189 provides that all murders "perpetrated by means of . . . " certain enumerated crimes constitute first degree murder. Murder by torture appears in this portion of the statute. The second part of section 189 applies to all murder "committed in the perpetration of . . . " certain enumerated crimes constitutes first degree murder. The phrase, "committed in the perpetration of," is language rooted in the common law understanding of felony-murder. Felony murder "has never required proof of a strict causal relationship between the felony and the homicide." (*People v. Chavez* (1951) 37 Cal.2d 656, 669.) The language "by means of" requires a causal connection between the murder and torture. (*People v. Chatman* (2006) 38 Cal.4th 4th 344, 389-390.) Hence, the "perpetrated by means of . . ." phrase is not adoption of the felony-murder rule. The felonies following the "by means of" language in section 189 simply reflects the adoption by the Legislature of a substantive form of first degree murder.

Therefore, the rule in *People v. Memro* that lesser included offense instructions for felonies alleged under the felony murder rule are not required does not apply to the crime of murder by torture.

E. PREJUDICE

The trial court's failure to instruct the jury on the lesser included offense of assault with means of force likely to cause great bodily injury violated appellant's federal right to due process of law, right to a jury trial, and the Eighth and Fourteenth Amendments prohibition against cruel and unusual punishment. Hence, the true finding to the special circumstance finding of torture must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The first degree murder conviction cannot be affirmed based on the theory of murder by torture. The trial court's failure to instruct the jury on assault with a means of force likely to cause great bodily injury violated appellant's state constitutional rights because appellant had a due process right to have the state follow its own laws and procedures. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The violations of appellant's state constitutional rights must result in reversal of the true finding to the torture special circumstance unless that error was harmless beyond a reasonable doubt. Because the first degree murder conviction cannot be affirmed based on the theory of murder by torture, that conviction must be reversed because there were not other valid grounds upon which to affirm the conviction.[3]

---

[3] This argument is addressed more fully in a separate argument, *infra*.

The failure to instruct the jury on assault with a means of force likely to cause great bodily injury as a lesser included offense of the torture special circumstance, and murder by torture, was not harmless beyond a reasonable doubt. There was no evidence that appellant started the fire to cause Ms. Kerr cruel and extreme pain because appellant thought she was dead when the fire was started. This Court cannot conclude beyond a reasonable doubt the jury would have found the torture allegation true if an instruction on assault with means of force likely to cause great bodily injury had been given. This Court also cannot conclude the jury would have found appellant committed murder by torture if the lesser offense instruction had been given.

The reversal of the true finding to the torture special circumstance allegation must result in reversal of the judgment of death. Under *Brown v. Sanders*, "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.) Here, the jury's conclusion that appellant tortured Ms. Kerr added an improper element to the aggravation scale when the jury determined whether to impose the death penalty. It also provided an invalid basis to find appellant guilty of first degree murder. Hence, the judgment of death must be reversed.

VIII

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED THE VICTIM'S HEARSAY STATEMENTS OVER DEFENSE OBJECTION AND THEREBY VIOLATED: (1) APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW; (2) APPELLANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION; AND (3) THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

A. SUMMARY OF ARGUMENT

Appellant was charged with murder, stalking and arson. Over defense objection, the trial court admitted the victim's hearsay statements that she feared appellant. The statements were offered to prove the state of mind of Ms. Kerr. The state of mind of the victim is an element of the crime of stalking. Ms. Kerr's hearsay statements were not admissible to prove the murder or arson charges. The trial court committed error by admitting Ms. Kerr's hearsay statements because it was inevitable the jury would use those statements to conclude appellant intentionally and with premeditation killed Ms. Kerr rather than killing her in the heat of passion. The admission of Ms. Kerr's hearsay statements violated appellant's federal and state constitutional rights and was prejudicial with regard to the murder conviction. The conviction for count one, and the judgment of death, must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Mark Harvey testified about the conversation he had with Ms. Kerr the evening she was killed. During direct examination, the prosecutor asked Mr. Harvey about a statement Ms. Kerr had made to him during the discussion. The defense counsel made a hearsay objection. (15 RT p. 1698.) The prosecutor responded he was offering the testimony to show "the effect on the listener." (15 RT p. 1699.)

The trial court held a sidebar hearing. (15 RT p. 1699.) The trial court asked the prosecutor if the question was being asked to show state of mind and the prosecutor said yes. (15 RT p. 1699.) The prosecutor said the evidence was also being offered to "show her conduct and conformity with it." (15 RT p. 1699.) The trial court stated the evidence was being offered for a nonhearsay purpose and overruled the objection. (15 RT pp. 1699-1700.) Mr. Harvey testified that Ms. Kerr went outside to smoke a cigarette. (15 RT pp. 1701-1702.) When she returned, Mr. Harvey asked her what was wrong. The defense counsel made a hearsay objection. (15 RT p. 1702.) The prosecutor stated the evidence was being offered for the same purpose as the prior statement. (15 RT pp. 1702-1703.)

The trial court held another sidebar hearing. (15 RT p. 1703.) The trial court asked if the evidence was being offered to show the effect the statements had on the listener. (15 RT p. 1703.) The prosecutor said the statements were being offered to prove Ms. Kerr's fear of appellant because the victim's fear was an element of stalking. (15 RT pp. 1703-1704.) The statements were also being offered "to indicate what the relationship was between the parties

. . . ." (15 RT p. 1704.) The defense counsel repeated his hearsay objection. (15 RT p. 1704.) The trial court overruled the objection because the statements were relevant to prove Ms. Kerr's fear of appellant. (15 RT p. 1704.) Ms. Kerr said that it would not be a good idea for her to live with Mr. Harvey because appellant had threatened her. (15 RT p. 1705.) When the prosecutor attempted to elicit additional hearsay statements by Ms. Kerr, the defense counsel made another hearsay objection. (15 RT pp. 1706-1708.)

The trial court held another sidebar hearing. (15 RT p. 1708.) The defense counsel argued the prosecutor was attempting to elicit hearsay statements that were not admissible under Evidence Code section 1250 because the statements did not reflect Ms. Kerr's state of mind. (15 RT pp. 1708-1709.) The prosecutor argued Ms. Kerr's hearsay statements were admissible for the independent legal purpose of proving the fear element of stalking and thus were not hearsay. (15 RT p. 1709.) The defense counsel argued the enactment of a crime did not alter the Evidence Code. (15 RT p. 1710.) The defense counsel argued the statements were inadmissible under section 1250 and Evidence Code section 352. (15 RT p. 1711.) The statements were inadmissible under section 352 because "the jury could never disregard evidence that the defendant said, 'I'm going to kill you'." (*Ibid.*)

The defense counsel also argued the statements were inadmissible under section 1250. The trial court commented that Ms. Kerr's statements were admissible to prove her state of mind and appellant's statements to Ms. Kerr were admissible as an admission of a party opponent. (15 RT pp. 1711-1712.) The defense counsel argued that both Ms. Kerr's

statements and appellant's statements to Ms. Kerr were not admissible as hearsay statements and because of the confrontation clause. (15 RT pp. 1712-1713.)

Following additional argument by the attorneys, the trial court's tentative ruling was Ms. Kerr's hearsay statements, including appellant's hearsay statements to Ms. Kerr, were admissible under sections 352 and 1250. The trial court stated, however, that a limiting instruction would be given that the statements could only be considered by the jury for the purpose of proving the victim's state of mind with regard to the count for stalking. (16 RT pp. 1729-1730.)

The defense counsel argued that section 352 prevented the admission of the statements to the extent the trial court's analysis was correct. (16 RT p. 1731.) He argued the jury could not limit its consideration of the hearsay statements to the stalking count and would use the hearsay statements to resolve infer premeditation for the murder count. (16 RT pp. 1731-1732.) The defense counsel also argued appellant was being denied his right of confrontation. (16 RT pp. 1732-1733.) He repeated again his objection to the trial court's conclusion that appellant's statements to Ms. Kerr were admissible and argued all the statement were inadmissible under section 352. (16 RT p. 1733.) The prosecutor stated he agreed with the trial court's reasoning. (16 RT pp. 1734-1735.)

The defense counsel continued to argue against the admission of the statements. He also offered to stipulate Ms. Kerr had told Mr. Harvey that she was afraid of appellant. (16 RT p. 1738.) The prosecutor refused to stipulate. (*Ibid.*) The defense counsel commented

that Ms. Kerr's fear of appellant at the time was not an issue and he did not intend to argue it. (16 RT pp. 1738-1739.) The trial court finally ruled that Ms. Kerr's hearsay statements, and appellant's statements to Ms. Kerr, were admissible. The jury would be given a limiting instruction. (16 RT pp. 1741-1742.) The defense counsel asked the jury to be instructed that the statements were "not being offered to show that Mr. Brooks actually did say this to Lisa Kerr, that he said to her `if you move into Mark Harvey's house, I will kill you . . ..'." (16 RT p. 1743.) The trial court refused to give the instruction. (*Ibid.*)

The prosecutor asked Mr. Harvey about a conversation he had with Ms. Kerr concerning her living with him. (16 RT p. 1823.) Mr. Harvey testified Ms. Kerr told him, "Louie threatened to kill me and my children, if he had to, to get to her." (16 RT p. 1824.) The trial court instructed the jury it could consider the evidence as proof only of the fear element of the stalking charge. (16 RT pp. 1824-1825.) The jury was told not to consider it as proof of intent to murder or premeditation. (16 RT p. 1825.) The prosecutor also attempted to elicit evidence appellant had threatened Mr. Harvey and his children. The trial court sustained an objection to this testimony. (16 RT pp. 1826-1831.)

Over a defense hearsay objection, Mr. Harvey testified Ms. Kerr said she was afraid of appellant because he had threatened her. (17 RT p. 1846.) Mr. Harvey then testified Ms. Kerr told him appellant said he would kill Mr. Harvey and his children if Ms. Kerr moved in with Mr. Harvey. (17 RT p. 1846.) The trial court struck the answer and instructed the jury to ignore the answer. (*Ibid.*) Ms. Kerr also told Mr. Harvey that appellant had threatened

to kill her and was following her to work and Alcoholics Anonymous meetings. (17 RT pp. 1847-1848.)

Lynda Farnand testified about going to the police station in September 1998 with Ms. Kerr to file a report. (17 RT pp. 1913-1916.) The defense counsel made a hearsay objection to Ms. Farnand testifying about Ms. Kerr's hearsay statements. (17 RT pp. 1916-1918.) The trial court stated the objection raised the same issues that had previously been argued when Mr. Harvey testified and overruled it. (17 RT pp. 1919-1920.) Ms. Farnand testified Ms. Kerr mentioned in three conversations she was afraid of appellant. The conversations took place the day they went to the police station. (17 RT p. 1923.) Ms. Kerr spoke very fast and sounded scared. (17 RT p. 1924.) The trial court again gave a limiting instruction that the evidence could be considered only to prove the fear element of the stalking count. (17 RT pp. 1925-1926.)

The trial court and the attorneys then discussed, outside the presence of the jury, the admissibility of additional hearsay statements the prosecution was offering through Ms. Farnand's testimony. (17 RT pp. 1926-1929.) The defense counsel objected to the admission of the testimony based on hearsay and section 352. (17 RT p. 1929.) He also argued the jury could not confine its consideration of the evidence to the stalking charge. (17 RT p. 1930.) The trial court again ruled the evidence was admissible only to prove the fear element of the stalking charge. (17 RT p. 1931.) Ms. Farnand then testified Ms. Kerr had played telephone messages from appellant which called her a "slut" and "whore," and said that no one could

have her if he could not. (17 RT pp. 1937-1938.) Appellant sounded angry. Ms. Kerr was upset. (17 RT p. 1938.)

The prosecutor called Cheryl Zornes to testify about Ms. Kerr's hearsay statements about fearing appellant and being stalked by him. (17 RT pp. 1953-1954.) The defense counsel again objected and the trial court ruled the statement was admissible to prove the fear element of the stalking count. (17 RT p. 1955.) In December 1998, Ms. Zornes had a telephone conversation with Ms. Kerr. Ms. Kerr said she was scared of appellant because he was following her. (17 RT pp. 1958-1959.) She also said appellant was present every time she turned around. (17 RT p. 1959.)

Kim Hyer also testified for the prosecution. (18 RT p. 2007.) Approximately 10 days before Ms. Kerr's death, she dropped Ms. Hyer off at the Los Angeles airport. (18 RT p. 2008.) Ms. Kerr was scared. (18 RT p. 2009.) Over a defense hearsay and section 352 objection, Ms. Hyer testified that Ms. Kerr told her four times to promise and take care of her son if anything happened to her. (18 RT pp. 2012-2013.) The trial court again told the jury the evidence was being received only on the stalking count. (18 RT pp. 2013-2014.)

C. THE TRIAL COURT VIOLATED EVIDENCE CODE SECTION 352 AND APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, RIGHT TO CONFRONT WITNESSES, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS IN THE CALIFORNIA CONSTITUTION, BY ADMITTING MS. KERR'S HEARSAY STATEMENTS

The trial court and the attorneys agreed Ms. Kerr's hearsay statements that she feared appellant, and appellant's threats to her, were not admissible on the murder charge. The trial

court gave limiting instructions to the jurors not to consider the hearsay statements for the murder charge. (16 RT pp. 1824-1825; 17 RT pp. 1925-1926; 18 RT pp. 2013-2014.) Assuming that Ms. Kerr's hearsay statements were relevant to prove the fear element of stalking, the trial court nevertheless violated appellant's right to due process of law, and abused its discretion, by admitting Ms. Kerr's those statements because: (1) a limiting instruction was not adequate to prevent the jury from using the evidence as proof of premeditation for murder; (2) the penal consequence of a stalking conviction was minor compared to consequence of a murder conviction; and (3) the prejudice from the jury using the hearsay statements to prove appellant committed a premeditated murder was substantial.

"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 . . . can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) "You can't unring a bell." (*People v. Hill* (1998) 17 Cal.4th 800, 845, citing *People v. Wein* (1958) 5 Cal.2d 382, 423.) The Court of Appeals for the Fifth Circuit observed, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." (*United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 666 [internal quotation marks omitted].)

There was no realistic way the jury could have limited its consideration of the victim's hearsay statements to the stalking charge and not considered it to prove appellant committed a premeditated murder. The entire case was about whether appellant was guilty of intentional and premeditated murder or voluntary manslaughter based on heat of passion. The stalking

charge was essentially an afterthought and a subterfuge for the prosecutor to admit the prejudicial hearsay statements of the victim. The victim's statements appellant had threatened her, and she feared him, was used by the prosecution to try and convince the jury that appellant premeditated Ms. Kerr's murder.

People v. Coleman (1985) 38 Cal.3d 69, demonstrates the trial court committed error by admitting Ms. Kerr's hearsay statements. The defendant in *People v. Coleman* was convicted of two counts of first degree murder and one count of second degree murder. The defendant shot his wife and then shot his son and niece. Psychiatrists and psychologists testified about the defendant's mental state because he entered a plea of not guilty by reason of insanity. Over defense objection, the trial court allowed the prosecutor to admit three emotional and inflammatory letters written by the wife. The trial court admitted the letters for the limited purpose of impeaching the defendant's credibility and to challenge the basis for the opinions of the mental health professionals. The letters stated that appellant threatened to hurt and kill the family. The letters thus suggested the murders were not rash acts which were uncharacteristic of the defendant. The trial court gave the jury a limiting instruction that the letters could be used only to impeach appellant's credibility and to challenge the basis for the expert's opinion.

The Court concluded, "because the trial court did not here admit the wife's letters under the state of mind exception to the hearsay rule, we find the court's attempt to limit the jury's consideration of the contents of the letters was equally futile." *(People v. Coleman,*

supra, 38 Cal.3d at p. 85.) The Court explained why a limiting instruction was futile:

> The cases discussed above recognize two primary dangers from the admission of hearsay declarations of the victim. First is the danger that the hearsay declarations will be regarded as true in spite of a complete absence of legally recognized indicia of their trustworthiness. For example, in both *Hamilton* and *Talle* the appellate court recognized that the victim may have had a motive to misrepresent or exaggerate the conduct of the accused. In the present case there was testimony that the accuracy of the declarant's perceptions and allegations might have been adversely affected by her own psychiatric problems. According to Dr. Axelrad, it was by no means certain that her reports of defendant's behavior were accurate.
>
> The second danger is presented when declarations pertaining to threats of future conduct by the accused are attempted to be admitted for the limited purpose of demonstrating the mental state of the declarant. Both the *Shepard* and *Hamilton* decisions recognize "that it is impossible for the jury to separate the state of mind of the declarant from the truth of the facts contained in the declarations ...." (*People v. Hamilton, supra*, 55 Cal.2d at p. 895.) "... [I]t must be inferred that the declarant had this mental state of fear only because of the truthfulness of the statements contained in the assertion. ... Logically it is impossible to limit the prejudicial and inflammatory effect of this type of hearsay evidence." (*Id.*, at p. 896.)

(*People v. Coleman, supra*, 38 Cal.3d at pp. 85-86.)

Shepard v. United States (1933) 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed.2d 196, also demonstrates the trial court's limiting instruction was inadequate to prevent undue prejudice to appellant. The defendant *Shepard v. United States* was an Army physician who was convicted of murdering his wife by poisoning her. The wife uttered the phrase, "Dr. Shepard has poisoned me," before dying. The Court first rejected the argument the phrase was

admissible as a dying declaration because there was no evidence the declarant believed she was going to die. The Court also rejected the argument the statement was admissible to rebut the defense contention the victim was suicidal because it was not offered for the purpose. Finally, the Court rejected the argument the jury had the capacity to limit its use of the statement to proving the victim's state of mind:

> [The Government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

(*Shepard v. United States, supra*, 290 U.S. at p. 104.)

Similar reasoning applies to the instant case. It was impossible for the jury to confine its consideration of the victim's hearsay statements that appellant had threatened her, and she feared him, to determining whether the prosecution had proved the fear element of stalking. The jury inevitably would have used the hearsay statements to infer appellant premeditated Ms. Kerr's murder despite the limiting instructions given by the trial court. Because the jury

inevitably would have used the above statements for the inadmissible and prejudicial purpose of concluding appellant premeditated Ms. Kerr's murder, the trial court abused its discretion under section 352 by admitting the evidence.

The trial court also violated appellant's right to due process of law by admitting the evidence. The due process clause is violated when the admission of evidence results in a fundamentally unfair trial. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70, 112 S.Ct. 475, 116 L.Ed.2d 385; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564, 87 S.Ct. 648, 17 L.Ed.2d 606; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; see also *Duncan v. Henry* (1995) 513 U.S. 364, 366 [115 S.Ct. 887, 130 L.Ed.2d 865].) A violation of state law does not by itself give rise to a due process violation. (*Estelle v. McGuire, supra,* 502 U.S. at p. 70.) The trial court's failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting relief on federal due process grounds. (*Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 919-920.)

The trial court's admission of Ms. Kerr's hearsay statements that appellant had threatened her, and she feared him, rendered appellant's trial fundamentally unfair. The trial court and the attorneys agreed Ms. Kerr's hearsay statements were not admissible to prove the murder charge. There was no way the jury was able to confine its use of Ms. Kerr's hearsay statements to the stalking charge and not use the hearsay statements as evidence of premeditation. The prosecution offered no evidence that the murder was premeditated, deliberated first degree murder other than the hearsay statements which the trial court

acknowledged were not admissible to prove premeditation. The jury most likely used Ms. Kerr's inflammatory statements to improperly find the murder was premeditated. Appellant's own description of what occurred supported a voluntary manslaughter or second degree murder conviction. Appellant told Mr. Jayne he confronted Ms. Kerr after she denigrated him to Mr. Harvey and strangled her. (20 RT pp. 2237, 2244.) The medical examiner testified Ms. Kerr was alive when the vehicle was set on fire. (18 RT pp. 1983-1984.) There was no evidence appellant knew Ms. Kerr was alive when the fire was started.

The jury heard the following evidence which likely led them to improperly conviction appellant of first degree murder: (1) Ms. Kerr told Mr. Harvey it would not be a good idea for her to live with him because appellant had threatened her, (15 RT p. 1705); (2) Ms. Kerr told Mr. Harvey, "Louie threatened to kill me and my children, if he had to, to get to her," (16 RT p. 1824); (3) Ms. Kerr told Mr. Harvey she was afraid of appellant because he had threatened her, (17 RT p. 1846.); (4) Ms. Kerr said appellant said he would kill Mr. Harvey and his children if Ms. Kerr moved in with Mr. Harvey, (17 RT p. 1846); (5) Ms. Kerr told Mr. Harvey appellant had threatened to kill her and was following her to work and Alcoholics Anonymous Meeting, (17 RT pp. 1847-1848); (6) Ms. Kerr told Ms. Farnand in three conversations she was afraid of appellant, (17 RT p. 1923); (7) Ms. Kerr told Cheryl Zornes appellant was following her and was present every time she turned around, (17 RT pp. 1958-1959); and (8) Ms. Kerr told Ms. Hyer that she had to promise to take care of her child if anything happened to her. (18 RT pp. 2012-2013.)

The most damaging evidence appellant premeditated Ms. Kerr's murder was the evidence not admitted for that purpose. However, as *People v. Coleman* and *Shepard v. United States* demonstrate, it was impossible for the jury to limit its consideration of the above hearsay statements to consideration of the stalking charge. Appellant's trial was rendered fundamentally unfair because the jury used the above hearsay statements to conclude appellant premeditated Ms. Kerr's murder.

The trial court's admission of the above hearsay statements also violated appellant's right to a jury trial under the Sixth and Fourteenth Amendments and the Eighth Amendment prohibition against cruel and unusual punishment. The Sixth Amendment right to a jury trial requires the jury to find a defendant guilty based only on competently admitted evidence. *Turner v. Louisiana* (1965) 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424, explained that, "[t]he requirement that a jury's verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." The jury's finding that appellant premeditated the murder of Ms. Kerr was based on the fiction the jury did not consider the above hearsay statements to prove premeditation. Because the jury must have considered Ms. Kerr's hearsay statements to prove appellant premeditated her murder—when those hearsay statements were not admissible for that purpose—appellant's was convicted of murder based on inadmissible evidence in violation of the Sixth Amendment right to a jury determination of the facts.

The prohibition against cruel and unusual punishment in the Eighth and Fourteenth

Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v. Alabama, supra,* 447 U.S. at p. 632.) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in the guilt phase of a capital prosecution. (*People v. Ayala, supra,* 23 Cal.4th at pp. 262-263.) Appellant was not eligible for the death penalty unless the jury concluded that he committed an intentional murder.[1] The admission of the above hearsay statements resulted in appellant being found guilty of first degree murder and the jury finding the torture murder special circumstance true. Appellant was therefore found eligible for the death penalty in an unreliable manner that violated the prohibition against cruel and unusual punishment in the federal and state constitutions.

D. THE TRIAL COURT ERRED BY ADMITTING MS. KERR'S HEARSAY STATEMENTS BECAUSE THE STATEMENTS WERE NOT ADMISSIBLE UNDER EVIDENCE CODE SECTIONS 352, 1250, OR 1252 AND APPELLANT OFFERED TO STIPULATE TO THE FEAR ELEMENT OF THE STALKING CHARGE.

The prosecutor argued Ms. Kerr's hearsay statements to Mr. Harvey, Ms. Farnand, and Ms. Zornes were admissible to prove she feared appellant. (15 RT pp. 1699, 1704, 1709.) The defense counsel made hearsay objections and argued the statements were not admissible under Evidence Code section 1250 and 1252. (15 RT p. 1704, 1706-1708, 1710-1712; 17 RT pp. 1916-1918, 1955.) He also argued that Ms. Kerr's fear of appellant was not in issue and he did not intend to argue she was not afraid of appellant. (16 RT pp. 1738-1739.)

---

[1] The kidnaping and torture special circumstance allegations both required appellant to intend the victim's murder. (16 CT p. 3861, 3864.)

The trial court concluded Ms. Kerr's hearsay statements were admissible under section 1250 because: (1) Ms. Kerr's statements she feared appellant were admissible to show her mental state; (2) appellant's statements to Ms. Kerr were admissible as party admissions; and (3) the statements were admissible under section 352. (16 RT pp. 1729-1730.)

Hearsay evidence is "evidence of a statement that was made other by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." (Evid. Code, §1200, subd. (a).) Hearsay statements are inadmissible unless a hearsay exception applies. (Evid. Code, §1200, subd. (b).) The trial court admitted Ms. Kerr's statements she feared appellant, and appellant's alleged threats to Ms. Kerr, pursuant to section 1250. That statute provides as follows:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory of belief to prove the fact remembered or believed.

Evidence Code section 1251, subdivision (b), provides that a statement of prior mental or physical state is not made inadmissible by the hearsay rule if the witness is unavailable as a

witness, (subd. (a)), and the evidence is offered when the statement of state of mind, emotion, or physical sensation is an issue in the action and not offered to prove any other fact. Evidence Code section 1252 provides that, "[e]vidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate it lack of trustworthiness."

The hearsay statements in issue fall into two categories: (1) Ms. Kerr's hearsay statements, which do not contain appellant's hearsay statements; and (2) Ms. Kerr's hearsay statements, which contained appellant's hearsay statements. Appellant will initially address the admissibility of the latter statements. The statements falling into this category were Mr. Harvey's testimony that: (1) Ms. Kerr said appellant had threatened her; (2) Ms. Kerr said appellant said he would kill Mr. Harvey and his children if necessary to get to Ms. Kerr; (3) Ms. Kerr said appellant said he would kill Mr. Harvey if Ms. Kerr moved in with him; and (4) Ms. Kerr said appellant had threatened to kill her and was following her to work and Alcoholic Anonymous meetings. (15 RT p. 1705; 16 RT p. 1824; 17 RT p. 1846-1848.)

The trial court erred by admitting the above statements pursuant to section 1250 because it failed to properly identify the declarant under the statute. Under section 1250, the hearsay statement must be offered to prove the "declarant's then existing state of mind, emotion, or physical sensation . . .." Appellant's statements to Ms. Kerr that he would kill her if she moved in with Mr. Harvey, or that he would kill Mr. Harvey, were statements of appellant's state of mind. Appellant, however, was not the declarant. Ms. Kerr was the

declarant. The fact that Ms. Kerr repeated to Mr. Harvey statements appellant allegedly made to her did not make appellant the declarant within the meaning of section 1250. Hence, Ms. Kerr's hearsay statements, which contained appellant's hearsay statements, were inadmissible under the plain wording of section 1250.

Case law, and the Advisory Committee Notes to section 1250, makes it clear that Mr. Harvey's testimony concerning statements made by Ms. Kerr, which repeated appellant's statements, were not admissible. In *People v. Lew* (1968) 68 Cal.2d 744, the defendant was convicted of the second-degree murder of his girlfriend. The defendant claimed he accidently shot her while showing her a gun. The prosecution admitted into evidence seven hearsay statements. The first four hearsay statements were threats the defendant made to the victim that she told to friends. The next three hearsay statements were statements the victim made to friends that reflected her attitude towards the defendant. The Court first concluded the defendant's threats to the victim could not be admitted:

> We start by analyzing the first group of statements, which constitute hearsay on hearsay: in each instance the prosecution witnesses reiterated what Karen reported defendant had told her. Had any witness himself overheard defendant threaten Karen, that witness could have properly testified to the content and manner of the threat. As long as the alleged threat was not too remote in time, such testimony would have been relevant to defendant's intent, a material issue, and admissible under the admissions exception to the hearsay rule. (See Evid. Code, §§ 1220.) In the instant case, by contrast, not a single witness produced by the prosecution actually heard defendant threaten Karen. "While threats made by defendant are, of course, material, they must be testified to by the person who heard them, not by someone who was told by someone else that they had

> been made." (*People v. Merkouris* (1959) 52 Cal.2d 672, 696 [344 P.2d 1] (Peters, J., dissenting).) Thus the threats allegedly made by defendant may well be highly relevant in determining his intent at the time of Karen's death (i.e., whether his conduct was intentional or not), but as double hearsay they cannot be admitted under the admissions exception.

(*People v. Lew, supra*, 68 Cal.2d at p. 778.)

The testimony offered in the instant case involves precisely the double hearsay situation the Court found inadmissible in *People v. Lew*; the victim communicating to third parties threats allegedly made by the defendant to the victim, and the third party testifying to those statements in court. Hence, Mr. Harvey's testimony that Ms. Kerr had said appellant would kill her and Mr. Harvey was double hearsay and inadmissible under *People v. Lew*.

The Attorney General in *People v. Lew* argued the defendant's threats to the victim were admissible to show her state of mind at the time of death. The Court stated the circumstances under which the state of mind exception applied to threats made by the defendant to the victim:

> Undoubtedly, in a proper case, and in a proper manner, testimony as to the 'state of mind' of the declarant, where there is an issue in the case is admissible, but only when such testimony refers to threats as to future conduct on the part of the accused, where such declarations are shown to have been made under circumstances indicating that they are reasonably trustworthy, and when they show primarily the then state of mind of the declarant and not the state of mind of the accused.

(*People v. Lew, supra*, 68 Cal.2d at p. 779, quoting *People v. Hamilton* (1961) 55 Cal.2d 881,

893.) The above language identified the precise problem with admitting Mr. Harvey's testimony that Ms. Kerr said appellant said he would kill her and kill Mr. Harvey. The statements showed appellant's state of mind and not Ms. Kerr's state of mind.

In *People v. Merkouris* (1959) 52 Cal.2d 672, the trial court admitted testimony from witnesses who testified to statements made by the victims relating threats made by the defendant. The Court concluded the statements were admissible. (*People v. Merkouris*, 52 Cal.2d at p. 682.) According to the Advisory Committee Notes, the enactment of section 1250 overruled the holding of *People v. Merkouris*:

> A major exception to the principle expressed in Section 1250(b) was created in *People v. Merkouris*, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that certain murder victims' statements relating threats by the defendant were admissible to show the victims' mental state--their fear of the defendant. Their fear was not itself an issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct engendering the fear, *i.e.,* that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. . . .
>
> The doctrine of the *Merkouris* case is repudiated in Section 1250 (b) because that doctrine undermines the hearsay rule itself. Other exceptions to the hearsay rule are based on some indicia of reliability peculiar to the evidence involved. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957). The exception created by *Merkouris* is not based on any probability of reliability; it is based on a rationale that destroys the very foundation of the hearsay rule.

(Adv. Comm. Notes to section 1250.) The Advisory Committee Notes concluded "when

such evidence is used as a basis for inferring that the alleged threatener must have made threats, the evidence falls within the language of Section 1250 (b) and is inadmissible hearsay evidence." (*Ibid.*) The trial court admitted Ms. Kerr's hearsay statements, which contained appellant's hearsay statements, because it was relevant to prove she feared appellant. However, Ms. Kerr's statements only proved she feared appellant if appellant, in fact, threatened her. Hence, Ms. Harvey's testimony was admitted to infer appellant made the threats to Ms. Kerr that Ms. Kerr communicated to Mr. Harvey. Mr. Harvey's testimony was thus "used as a basis for inferring that the alleged threatener [i.e., appellant] must have made the threats," (Adv. Comm. Notes to section 1250), and was therefore inadmissible under section 1250, subdivision (b).

The next set of statements consisted of Ms. Kerr's statements that she feared appellant. The statements falling into this category include: (1) Ms. Farnand's testimony that Ms. Kerr told her three times she was afraid of appellant, (17 RT p. 1923); and (2) Ms. Zornes' testimony that she was scared of appellant because he was following her and was present every time she turned around. (17 RT pp. 1958-1959.) These statements showed Ms. Kerr's state of mind and did not contain appellant's hearsay statements. The statements therefore fell within section 1250, subdivision (a). The victim's fear is an element of stalking. (Pen. Code §646.9, subd. (a).) Ms. Kerr's statements she feared appellant were relevant to prove the fear element of stalking. The defense counsel, however, stated he did not intend to contest that Ms. Kerr feared appellant, (16 RT pp. 1738-1739), and her statement were

therefore inadmissible. (See Evid. Code, §1250, subd. (a)(1) [the state of mind hearsay exception applies when the declarant's state of mind "is itself an issue in the action].)

The defense counsel also offered to stipulate that Ms. Kerr feared appellant. The prosecutor refused the stipulation and the trial court did not force the prosecutor to accept the stipulation. (16 RT p. 1738.) This was error under section 352 and the Due Process Clause. In *Old Chief v. United States* (1997) 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574, the Supreme Court held it was error to not allow the defendant to stipulate to the existence of a prior felony conviction. Old Chief was charged with violating United States Code Section 922, subdivision (g), subsection (1), being an ex-felon in possession of a firearm. The court analyzed the probative value from allowing the jury to hear of the prior conviction against its potential for prejudice. The court stated that:

> In dealing with the specific problem raised by §922 (g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning.

(*Old Chief v. United States, supra*, 519 U.S. at p. 185.) The court held that

> In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse

> of discretion to admit the record when an admission was available.

(*Old Chief v. Unites States, supra*, 519 U.S. at p. 191.)

Old Chief v. United States was decided in the context of the prejudice arising from the jury unnecessarily learning of a prior conviction. Its reasoning, however, applies to the instant case. The prosecutor's need to admit evidence Ms. Kerr feared appellant in order to prove the stalking charge resulted in prejudicial hearsay statements being admitted which suggested appellant premeditated Ms. Kerr's murder and which were not admissible for that purpose. The need to admit these prejudicial hearsay statements could easily have been obviated if the trial court had compelled the prosecutor to accept the stipulation proposed by the defense counsel. The trial court should have compelled the prosecutor to accept the defense counsel's proposed stipulation pursuant to section 352.

Old Chief v. United States acknowledged that the prosecution generally cannot be deprived of the evidentiary force of its evidence by a compelled stipulation. "Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them." (*Old Chief v. United States*, *supra*, 519 U.S. at p. 187.) Hence, "the accepted rule that the prosecution is entitled to prove

its case free from any defendant's option to stipulate the evidence away rests on good sense. (*Id.*, at p. 189.) The Court concluded, however, that this principle "virtually has no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." (*Id.*, at p. 190.)

Appellant proposed a stipulation regarding evidence pertaining to the charged crimes rather than to his legal status. Appellant's proposed stipulation, however, did not in any way prevent the prosecutor from proving the charges with the "persuasive power of the concrete and particular," (*Old Chief v. United States, supra*, 519 U.S. at p. 187), because: (1) the stipulation satisfied the fear element of the stalking charge and the prosecution did not therefore need to admit Ms. Kerr's hearsay statements to prove that issue; and (2) the prosecution was not entitled to the "persuasive power of the concrete and particular" of Ms. Kerr's hearsay statements with regard to the murder charge because the statements were not admissible for that purpose.

The federal due process clause mandated the trial court to accept the defense counsel's proposed stipulation. The due process clause is violated when the admission of evidence results in a fundamentally unfair trial. (See *Estelle v. McGuire* (1991) 502 U.S. at p. 70.) "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." (*Spencer v. Texas* (1967) 385 U.S. 554, 563-564, 87 S.Ct. 648, 17 L.Ed.2d 606.)

Old Chief v. United States rested upon the Court's application of the Federal Rules of Evidence, rule 403. (*Old Chief v. United States, supra*, 519 U.S. at p. 180.) *Estelle v. McGuire* observed that, "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire, supra*, 519 U.S. at p. 69.) The Court in dicta has suggested due process does not entitle the defendant to force the prosecution to try a case through stipulation. (E.g. *Singer v. United States* (1965) 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630 [it has never been seriously suggested that a defendant can compel the Government to try the case by stipulation].) *Spencer v. Texas* held that Due Process was not offended when the prosecution proved the defendant's prior convictions in a single proceeding when the defendant was charged under a recidivist statute. (*Spencer v. Texas, supra*, 385 U.S. at pp. 562-564.) *Spencer v. Texas* is distinguishable from the instant case because it dealt with the admissibility of evidence rather than a stipulation being offered in lieu of evidence.

Fundamental fairness as guaranteed by the Due Process Clause must be tied to the facts of each case. While *Old Chief v. United States* was decided under the Federal Rules of Evidence, its discussion of fundamental fairness and undue prejudice is rooted in the concept of fundamental fairness. Appellant's trial was rendered fundamentally unfair because: (1) Ms. Kerr's hearsay statements were admissible to prove only the fear element of stalking to the extent the statements were admissible at all; (2) the hearsay statements were not admissible to prove the murder charge but carried a significant risk the jury would conclude

appellant premeditated Ms. Kerr's murder based on those statements; (3) the proposed stipulation would have allowed the prosecution to prove the fear element of the stalking charge but obviated the prejudice to appellant with regard to the murder charge; and (4) the penal consequences of the stalking charge was minor compared to the penal consequences of the murder charge. Appellant was therefore deprived of due process because the trial court did not compel the prosecutor to accept appellant's proposed stipulation.

The trial court also violated appellant's right of confrontation and the prohibition against cruel and unusual punishment in the federal and state constitutions. The trial court admitted Ms. Kerr's hearsay statements and she of course did not testify and was not available for cross-examination. In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court substantially revised the test for the admissibility of hearsay statements under the Sixth Amendment Confrontation Clause. The Court rejected the "indicia of reliability" standard adopted in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, 65 L.Ed.2d 597, 100 S.Ct. 2531:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner:

> by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").
>
> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.

(*Crawford v. Washington, supra*, 541 U.S. at p. 1370.) The Court cited as examples of testimonial statements testimony given at a preliminary hearing, a grand jury, a trial, and during police interrogations. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) The Court cited business records, statements in furtherance of a conspiracy, (*Id.*, at p. 56), and casual remarks to acquaintances, as examples of non-testimonial statements. (*Id.*, at p. 51.) The California Constitution also guarantees criminal defendants the right to confront witnesses. (*People v. Bunyard* (2009) 45 Cal.4th 836, 848; Cal. Const., art. I, §15.)

Ms. Kerr's hearsay statements that she was being stalked by appellant and feared him was testimonial in nature and thus subject to exclusion under the confrontation clause. The statements were testimonial in nature because they were accusatory. The statements did not constitute mere casual remarks to a friend or acquaintance.

The admission of Ms. Kerr's hearsay statements also violated the prohibition against

cruel and unusual punishment in the federal and state constitutions. The prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, section 17 of the California Constitution, requires heightened reliability in the fact finding process when the state seeks a judgment of death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973.) The jury determined that appellant was guilty of first degree murder based on evidence it should not have heard. The admission of Ms. Kerr's hearsay statements improperly infected the first degree murder conviction, but also allowed the jury to hear prejudicial and inflammatory evidence pertaining to the penalty. The trial court erred by admitting Ms. Kerr's hearsay statements over defense objection.

E. PREJUDICE

Because the trial court's admission of Ms. Kerr's hearsay statements violated appellant's federal constitutional rights, the judgment must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Reversal is required, furthermore, under the more likely than not standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

The admission of Ms. Kerr's hearsay statements was not harmless beyond a reasonable doubt. Appellant's defense was that he committed voluntary manslaughter based on heat of passion and not murder. Mr. Harvey, Ms. Farnand, and Ms. Zornes testified to two types of hearsay statements by Ms. Kerr: (1) Ms. Kerr's statements that she feared appellant; and (2) Ms. Kerr's hearsay statements which contained appellant's hearsay statements. The

admission of these two types of statements were prejudice singularly and in combination.

Appellant told Mr. Heiserman two or three occasions that he wanted to kill Ms. Kerr and the only way he could obtain peace and quiet was to get rid of her. (18 RT pp. 2081-2082, 2083-2084.) Appellant also told Mr. Heiserman that he wanted to start a family with Ms. Kerr. (19 RT p. 2146.) Hence, appellant's statements to Mr. Heiserman about his desire to kill Ms. Kerr were contradictory. Ms. Farnand heard a phone message in which appellant angrily called Ms. Kerr a "slut" and a "whore," and said that nobody could have her if he could not. (17 RT pp. 1937-1938.)

Ms. Kerr's statements that she feared appellant suggested appellant was engaging in a long standing pattern of stalking and obsession with Ms. Kerr. Appellant told Mr. Jayne that he confronted Ms. Kerr after she left Mr. Harvey's residence and the decision to kill her was made on the spur of the moment caused by anger. (20 RT p. 2244.) The medical examiner believed Ms. Kerr was unconscious when the vehicle was set on fire. (18 RT pp. 1995-1997.) There was no evidence appellant knew Ms. Kerr was alive when the fire was started. Hence, appellant's description of how the incident established a voluntary manslaughter. The admission of Ms. Kerr's statements she feared appellant, and in particular her statements which repeated appellant's threats, was the evidence the jury most likely used to conclude appellant premeditated Ms. Kerr's murder. Mr. Heiserman and Ms. Farnand testified only to isolated statements by appellant about his desire to kill Ms. Kerr. Absent the admission of Ms. Kerr's hearsay statements, the prosecution had substantially less evidence

appellant premeditated Ms. Kerr's death. This Court cannot conclude beyond a reasonable doubt that the jury would not have found appellant guilty of voluntary manslaughter if Ms. Kerr's hearsay statements had been excluded. The judgment of guilt must therefore be reversed.

IX

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT MADE A SERIES OF ERRONEOUS RULINGS WHICH INDIVIDUALLY AND CUMULATIVELY (1) DEPRIVED APPELLANT OF THE FAIR TRIAL GUARANTEED BY THE FEDERAL AND STATE DUE PROCESS CLAUSES; (2) DEPRIVED APPELLANT OF HIS RIGHT TO A JURY DETERMINATION OF THE FACTS AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS; (3) DEPRIVED APPELLANT OF HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION; AND (4) VIOLATED THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHT AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

The trial court made a series of evidentiary rulings. Several of the ruling excluded evidence offered by appellant and other rulings admitted prosecution evidence over defense objection. The due process clauses of the federal and state constitutions guarantee a defendant a fair trial. The individual and cumulative impact of the trial court's ruling was to deprive appellant of due process and a fair trial, his Sixth Amendment right to a jury determination of the facts, his right of confrontation under the Sixth and Fourteenth Amendments and the California Constitution, and to violate the prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and the California Constitution. The judgment of guilt and the penalty must therefore be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

1. The Defense Offer of Proof Pertaining to Mr. Harvey's Sexual Conduct.

Mr. Harvey initially testified during a section 402 hearing. (15 RT p. 1669.) Mr. Harvey had been attending A.A. meeting for the last 20 years. (15 RT p. 1674.) Mr. Harvey developed romantic relationships with four woman he met at A.A. meetings. He denied having a sexual relationship with Ms. Kerr. (15 RT p. 1675.) The prosecutor objected to the admission of evidence that Mr. Harvey had developed sexual relationships with women he met at A.A meeting based on relevance and Evidence Code section 352. (15 RT p. 1678.) The trial court commented that Mr. Harvey's relationship with Ms. Kerr was relevant to the heat of passion defense, but Mr. Harvey's relationships with other women he met at A.A. meeting was not relevant. (15 RT pp. 1679-1680.)

The defense counsel argued Mr. Harvey's relationships with the women he met at A.A. meeting was relevant because, "I can show that Mr. Brooks knew about what Mr. Harvey did and how he hit on the girls at the A.A. club. Mr. Wolff spoke with the manager of the club. I can produce this as testimony if the court wants. Mr. Wolff is here. And the manager said that Mr. Harvey, if I may quote, 'screws everything that walks in the club'." (15 RT p. 1680.) The trial court stated that it would allow evidence of Mr. Harvey's relationship with Ms. Kerr, but not allow of his relationships with other women. (15 RT pp. 1680-1681.) The defense counsel argued that the fact appellant had heard about Mr. Harvey's relationship with other women made it relevant. (15 RT p. 1681.) The trial court reaffirmed

its ruling based on lack of relevance and section 352. (15 RT p. 1681.)

2. Appellant's Threats Against Casey Kerr.

Mr. Harvey testified that he had a conversation with appellant about Ms. Kerr approximately seven months prior to her death. (17 RT pp. 1850.) Appellant was very upset during the conversation. (17 RT pp. 1850-1851.) The jury was excused and the trial court conducted a section 402 hearing. (17 RT p. 1852.) Mr. Harvey testified that appellant said he was confused and frustrated because he was having an affair with a married woman. (17 RT pp. 1852-1853.) Mr. Harvey testified that appellant said he wanted to get rid of Casey Kerr or stab him, and just get him out of the picture. (17 RT p. 1854.)

The defense counsel objected to the admission of this evidence. (17 RT p. 1855.) The trial court commented that the defense position was that appellant's threats against a third person were not relevant and inadmissible under section 352. The defense counsel agreed. (17 RT p. 1855.) The trial court overruled the objection and admitted the evidence. (17 RT p. 1856.) Mr. Harvey testified in front of the jury that appellant said he wanted to stab Casey Kerr or get him out of the picture. (17 RT p. 1857.)

3. Ms. Kerr's Reference to Herself as Lisa Brooks.

During cross-examination, the defense attorney asked Mr. Harvey if he had heard Ms. Kerr refer to herself as Lisa Brooks. (17 RT p. 1900.) The trial court sustained a prosecution hearsay objection to this question. (17 RT p. 1901.)

4. The Trial Court's Exclusion of the Panties

Yreneo Joseph Lujano testified during the defense case-in-chief. (21 RT p. 2319.) He was a plumber who knew appellant. (21 RT p. 2320.) Mr. Lujano was aware of appellant's relationship with Ms. Kerr. (21 RT pp. 2320-2321.) The defense counsel asked Mr. Lujano about tape recorded messages played for him by appellant in which Ms. Kerr said she loved appellant, thanked him for everything, and thanked him for the lawyer. (21 RT p. 2322.) The prosecutor's objection to this testimony was overruled and Mr. Lujano testified to those statements before the jury. (21 RT pp. 2323-234, 2326.) The defense counsel also wanted to ask Mr. Lujano about "a pair of underwear panties that he saw Mr. Brooks get in the mail from Lisa." (21 RT p. 2322.) The purpose of admitting the panties was to rebut the prosecution evidence that Ms. Kerr feared appellant. (*Ibid.*)

The prosecutor objected because there was no way to know who mailed the panties and therefore a lack of foundation. (21 RT p. 2322.) The trial court agreed with the prosecutor and sustained the objection. (21 RT pp. 2322-2323.) The defense counsel argued there was a sufficient foundation for the panties because, "first of all, he— I believe he can testify that he was standing there and a package came and the defendant opened the package and there were panties in it. I'm pretty sure he can testify to that. /P/. Well, that alone, there's an inference maybe that can be drawn that they came from her, without any other evidence. But what about a statement—then he testifies, defendant said these are from Lisa." (21 RT pp. 2323-2324.) The trial court responded that appellant's statements could not be admitted. It excluded the panties from evidence because of lack of foundation and speculation. (21 RT

p. 2324.)

5. The Trial Court's Exclusion of Evidence that Casey Kerr beat Lisa Kerr.

Sheila Peet was called as a witness during the defense case-in-chief. (21 RT p. 2378.) She owned a plumbing business which used appellant to provide plumbing services. (21 RT pp. 2378-2379.) Ms. Kerr came into Ms. Peet's business two or three times. (21 RT p. 2380.) The prosecutor made an objection when the defense attorney attempted to ask Ms. Peet a question. (*Ibid.*) The prosecutor stated he believed the defense was going to introduce evidence that "Lisa would tell Sheila and Lindsay----Lindsay is this woman's husband—how her husband, Casey, was trying to kill her, her husband was very violent and would try to beat her, that is why Lisa left her husband." (21 RT p. 2381.)

The defense counsel agreed that he was attempting to introduce this evidence. (*Ibid.*) The trial court stated that it had allowed evidence of Ms. Kerr's statements pertaining to her lack of fear of appellant, but admission of evidence that Casey Kerr had beat her did not pertain to that issue but was evidence designed to "dirty-up" Ms. Kerr. (21 RT p. 2382.) The defense counsel argued the evidence was relevant because, "it would explain the fact that rather than being afraid of Mr. Brooks, Lisa had a motivation to be with him." (*Ibid.*) The trial court affirmed its ruling and excluded any evidence pertaining to the relationship between Ms. Kerr and her husband. (*Ibid.*)

6. The Exclusion of Ms. Kerr's Prior Conviction to Impeach her Credibility.

The prosecutor admitted into evidence numerous hearsay statements of Ms. Kerr. At the end of the defense-case-in-chief, the defense counsel attempted to offer proof of Ms. Kerr's welfare fraud conviction into evidence. He stated that "this conviction was in March of 1998, and we have certified copies of the conviction, felony welfare fraud, in this Court, in the Los Angeles Superior Court." (21 RT p. 2387.) The conviction was being offered because, "Your Honor has allowed statements by Mrs. Kerr to prove the truth of the matter asserted. . . . So that put—our position is that put her credibility in issue." (*Ibid.*) The defense counsel stated Ms. Kerr's statements to Mark Harvey that she feared appellant was an example of a statement that had been admitted for the truth of the matter asserted. (*Ibid.*) The prosecutor opposed the admission of the conviction because it was simply an attempt to "trash this victim," and it was inadmissible under section 352. (21 RT pp. 2388-2389.) The trial court ruled the conviction was inadmissible under section 352 and was not relevant. (21 RT pp. 2389-2390.)

C. THE ABOVE RULINGS BY THE TRIAL COURT WERE ERRONEOUS AND DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND FEDERAL AND STATE DUE PROCESS OF LAW, HIS SIXTH AND FOURTEENTH AMENDMENTS RIGHT TO A JURY DETERMINATION OF THE FACTS, HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION, AND VIOLATED THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION.

"Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." (*Spencer v. Texas* (1967)

385 U.S. 554, 563-564, 87 S.Ct. 648, 17 L.Ed.2d 606.) A defendant's right to present his theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact. (*Davis v. Alaska* (1974) 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347.) Section 352 must "bow to the due process right of a defendant to present all relevant evidence of significant probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

In *Holmes v. South Carolina* (2006) 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503, the trial court excluded evidence a third party committed the murder and sexual assault because of a state statute which precluded the admission of such evidence when forensic evidence tied the defendant to the crime. The defendant in *Holmes v. South Carolina* attempted to present the testimony of several witnesses who placed another individual near the crime scene around the time period of the victim's murder. The Court concluded the exclusion of the evidence violated the defendant's fundamental constitutional right to present a defense. (*Holmes v. South Carolina, supra*, 547 U.S. at pp. 328-331.) The Court specifically rejected any rule allowing the trial court to exclude third party culpability evidence based on its own assessment of the strength of the prosecution case. (*Id.*, at p. 331; see also *Chambers v. Mississippi* (1973) 410 US. 284, 302-303, 93 S.Ct. 1038, 34 L.Ed.2d 297 [finding a due process violation because of the trial court's exclusion of a confession to the charged crime by a defense witness because of the voucher rule].)

The trial court's rulings above denied appellant his due process right to present a

defense. It also denied appellant his Sixth Amendment right to a jury determination of the facts determining his guilt. (*Ring v. Arizona, supra*, 536 U.S. at p. 609 [holding that the Sixth Amendment requires Arizona's enumerated aggravating factors to be found true beyond a reasonable doubt because they operate as the functional equivalent of an element of a greater offense].)

Under the Sixth and Fourteenth Amendments, and the California Constitution, appellant had a meaningful right to confront witnesses. "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (*Davis v. Alaska, supra*, 415 U.S. at pp. 315-316.) As explained below, the above rulings by the trial court impaired appellant's ability to conduct effective cross-examination of key defense witnesses in violation of his right of confrontation. The rulings also resulted in the jury rendering its verdict of death based on unreliable evidence in violation of the requirement for heightened reliability in death penalty cases. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973; Cal. Const., art. I, §17.)

1. The Exclusion of Evidence Pertaining to Mark Harvey was Erroneous

Appellant's theory of the case was that he was guilty of voluntary manslaughter rather than murder because he acted in the heat of passion. Appellant believed Ms. Kerr was

engaged in a relationship with Mr. Harvey. Appellant became enraged when he heard Ms. Kerr discuss a sexual relationship with Mr. Harvey and refer to appellant as "squirrel boy." (17 RT pp. 1860-1861; 18 RT p. 2098; 20 RT pp. 2236-2237, 2252-2253.) He confronted Ms. Kerr and strangled her. (20 RT pp. 2236-2237, 2252-2253.) Evidence that Mr. Harvey had engaged in sexual relationship with women he met at A.A. meetings was fundamental to appellant's defense. It directly bolstered appellant's argument that he acted with sufficient provocation to establish his guilt of voluntary manslaughter rather than murder. It was relevant to the reasonableness of appellant's belief that Mr. Harvey and Ms. Kerr were engaged in a sexual relationship. According to the manager of the A.A. club, Mr. Harvey, "screws everything that walks in the club." (15 RT p. 1680.) Mr. Harvey and appellant had known each other for approximately nine years and appellant confided in Mr. Harvey about his frustrations with his relationship with Ms. Kerr. (15 RT pp. 1706; 17 RT p. 1857.) It was a reasonable inference he knew of Mr. Harvey's relationships with women he met at A.A. meetings give the closeness and duration of their relationship.

The trial court excluded evidence of Mr. Harvey's sexual relationship with women he met at A.A. meetings in order to protect Mr. Harvey's right of privacy. This was error. Mr. Harvey did not object to disclosing this information. Mr. Harvey revealed during the section 402 hearing that he had developed sexual relationships with four women he met at A.A. meeting. (15 RT p. 1675.) This disclosure waived Mr. Harvey's right of privacy with regard to that information. The defense counsel therefore should have been allowed to ask Mr.

Harvey in front of the jury if he had engaged in sexual relations with four women he met at A.A. meetings, even if the explicit details of those relationship were not admissible because of Mr. Harvey's right to privacy.

Mr. Harvey's right of privacy, furthermore, had to yield to appellant's due process right to present evidence fundamental to his defense. (See *Holmes v. South Carolina, supra,* 547 U.S. at pp. 328-331; *Chambers v. Mississippi*, supra, 410 U.S. at pp. 302-303.) The single most important issue in the case was whether appellant killed Ms. Kerr in the heat of passion because he believed she was engaged in a sexual relationship with Mr. Harvey. Mr. Harvey's sexual behavior was directly relevant to appellant's defense. Appellant's due process right to present key evidence was based on the federal constitution. The United States Supreme Court has recognized an individual's right of privacy under the due process clause. (*Griswold v. Connecticut* (1965) 381 U.S. 479, 482-486, 85 S.Ct. 1678, 14 L.Ed.2d 510.) There are no Supreme Court cases, however, allowing a witness in a court proceeding to refuse to answer relevant questions about his or her sexual relationship with another individual based on the right of privacy. Hence, resolving whether appellant had the right to elicit evidence of Mr. Harvey's sexual conduct with women he met at A.A. meetings was not a matter of balancing appellant's right to present evidence against Mr. Harvey's right of privacy.

Appellant had an absolute right under the federal constitution to admit relevant evidence of Mr. Harvey's relationships with women he met at A.A. meetings. Just as the

defendant in *Chambers v. Mississippi* had a due process right to admit the confession of the actual killer, appellant had a right to present evidence which directly impacted his voluntary manslaughter theory. The trial court had the authority under section 352 to impose reasonable limitations regarding the admission of the details of Mr. Harvey's sexual conduct with the women, but it could not exclude the evidence altogether. The trial court therefore erred by preventing the jury from hearing Mr. Harvey's testimony that he had sexual relations with four women he met at A.A. meetings. The trial court also erred by not allowing additional details of those relationships such as their duration.

2. The Trial Court Erred by Admitting Appellant's Threats Against Casey Kerr

The trial court also erred by admitting evidence that appellant had threatened Casey Kerr during a conversation with Mr. Harvey. The conversation occurred seven months prior to Ms. Kerr's death and was therefore remote in time. The conversation was inflammatory because it contained threats of death. Casey Kerr was not the victim in this case. Appellant's threats unnecessarily inflamed the passions of the jury against appellant. The jury most likely concluded appellant would have killed other people if necessary to get to Ms. Kerr. This was an unfair inference because Ms. Kerr was the sole victim. The issue in this case was whether appellant killed Ms. Kerr in the heat of passion when he heard her disparaging remarks about him to Mr. Harvey. The fact that appellant made a threat to kill Casey Kerr to a third person months seven months before Ms. Kerr was killed had no relevance to whether appellant made a spur of the moment decision to kill Ms. Kerr as the result of anger. The trial court therefore

erred by failing to exclude from evidence appellant's threats to kill Casey Kerr.

3. The Trial Court Erred by Admitting Evidence that Lisa Kerr referred to herself as Lisa Brooks.

Mr. Harvey's testimony that Ms. Kerr had referred to herself as "Lisa Brooks" was also admissible. The fact that Ms. Kerr referred to herself as appellant's wife suggested she did not fear appellant and wanted to be with him. The trial court refused to admit the statement because of a prosecution hearsay objection. (17 RT p. 1901.) The statement was clearly not being offered to prove the truth of the matter asserted.[1] It was not being offered to prove that Ms. Kerr was named Lisa Brooks. It was being offered to show her state of mind and to rebut the prosecution evidence that Ms. Kerr feared appellant.

4. The Trial Court erred by Excluding Evidence of the Panties.

The trial court also erred by excluding Mr. Lujano's testimony that he saw appellant open a package containing a pair of panties. The trial court incorrectly concluded the foundation was inadequate to admit the panties. (21 RT p. 2322-2323.) It was undisputed that appellant had carried on a sexual relationship with Ms. Kerr. This undisputed fact, combined with appellant's receipt of the panties in a package mailed to him, was sufficient to allow the jury to infer the panties came from Ms. Kerr. Appellant did not need to prove with certainty that the panties came from Ms. Brooks in order for Mr. Lujano's testimony about seeing the panties to be admissible. Relevant evidence means evidence "having any

---

[1] The statement was also admissible under Evidence Code section 356. This argument is explained more fully below.

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The fact that Ms. Kerr sent panties to appellant demonstrated her romantic interest in appellant and rebutted the prosecution evidence that she feared appellant and believed she was being stalked.

Case law dealing with the authentication of writing provides a useful analogy in determining whether there was sufficient evidence the panties came from Mr. Kerr. If there is sufficient evidence to sustain a finding that the writing is what the proponent claims, the authenticity of the document becomes a question of fact for the trier of fact. (*McAllister v. George* (1977) 73 Cal.App.3d 258, 261.) By parity of reasoning, the facts and circumstances of appellant's relationship with Mr. Kerr, and his receipt of panties, was sufficient for the trier of fact to infer Ms. Kerr mailed appellant the panties.

5. The Trial Court erred by Excluding Evidence that Casey Kerr beat Lisa Kerr.

The trial court also erred by excluding evidence that Ms. Kerr told Sheila Peet that her husband, Casey Kerr, had physically abused her. The trial court excluded this evidence because it was hearsay and "it's dirty up the victim time, it's, you know, let's put in anything we can on a hearsay basis about what Lisa Kerr told her husband." (21 RT p. 2382.) The defense theory was that Ms. Kerr had a motivation to be with appellant because her husband was beating her. The trial court's conclusion that the evidence was being offered to "dirty up the victim," was erroneous. The evidence portrayed Casey Kerr, and not Lisa Kerr, in a negative manner. The prosecution offered a great deal of evidence suggesting Ms. Kerr

feared appellant and was being stalked by him. Evidence that Ms. Kerr had a motive to be with appellant because she had been being physically abused by her husband rebutted this prosecution evidence.

The hearsay rule did not bar admission of Ms. Kerr's statement to Ms. Peet that her husband had beat her. The trial court admitted into evidence numerous hearsay statements made by Ms. Kerr which were offered by the prosecution. (15 RT p. 1705; 16 RT p. 1824; 17 RT pp. 1846-1848, 1923, 1937-1938, 1958-1959; 18 RT p. 2009.) Most of the prosecution evidence offered to prove appellant premeditated Ms. Kerr's death consisted of her hearsay statements.

Evidence Code section 356 provides in part that, "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party." Because the prosecutor offered into evidence numerous statements by Ms. Kerr establishing her fear of appellant, appellant should have been allowed to admit related statements.

Ms. Kerr's statement to Ms. Peet that her husband beat her did not occur in the same conversations in which Ms. Kerr said she feared appellant. The prosecution, however, offered Ms. Kerr's statements of fear of appellant made between September 1998 through March 1999. (16 RT p. 1824; 17 RT pp. 1913-1916.) The defense offer of proof concerning Ms. Kerr's statement to Ms. Peet that her husband has physically abused her did not specify exactly when the statement was made. Ms. Peet, however, testified that she saw Ms. Kerr and

appellant during 1998 and the early part of 1999. (21 RT p. 2379.) Hence, it was a reasonable inference that Ms. Kerr told Ms. Peet that her husband had physically assaulted her during the time period in which Ms. Kerr was telling third parties that she feared appellant.

The proximity in time between Ms. Kerr's statements to Ms. Peet that her husband physically abused her, and Ms. Kerr's statements to third parties that she feared appellant, satisfied the requirements of section 356. Ms. Kerr's statements of fear of appellant were "part of [a] . . . conversation given in evidence by one party." Ms. Kerr's statements that her husband assaulted her were "the whole on the same subject . . ." because that statement made it less likely true that Ms. Kerr did not want to be with appellant. Ms. Kerr's statement that her husband had physically assaulted her had to have some have "some bearing upon, or connection with," (*People v. Harris* (2005) 37 Cal.4th 310, 334-335), Ms. Kerr's statements that appellant had threatened her. The connection between the statements was the likelihood that Ms. Kerr was actually turning to appellant for protection and comfort from her husband because he was physically assaulting her.

"The purpose of this section [i.e., Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Williams* (2006) 40 Cal.4th 287, 319.) Here, it was fundamentally unfair and misleading to allow the prosecutor to admit numerous hearsay statements from Ms. Kerr suggesting she feared appellant without allowing appellant

to admit other hearsay statements made by Ms. Kerr which suggested she either did not fear appellant or had a reason to be with him.

6. The Trial Court Erred by Excluding Evidence that Ms. Kerr referred to herself as Lisa Brooks.

Similar reasoning applies to Mr. Harvey's testimony that Ms. Kerr had referred to herself as Lisa Brooks. The fact Ms. Kerr referred to herself as "Lisa Brooks" directly responded to the prosecution evidence that Ms. Kerr told third parties that she feared appellant.

Ms. Kerr's credibility was in issue because the prosecution offered into evidence numerous hearsay statements from her. Indeed, much of the prosecution case was built on Ms. Kerr's hearsay statements concerning her fear of appellant. The trial court instructed the jury that these statements were admitted to prove the fear element of stalking. (17 RT pp. 1925-1926.) However, it was inevitable the jury would use those statements as proof that appellant premeditated Ms. Kerr's murder. Evidence Code section 1202 provides that evidence of a "statement or other conduct" of a hearsay declarant which is inconsistent with the evidence presented by the declarant may be introduced to attack the declarant's credibility. Section 1202 further provides, "Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." In *People v. Jacobs* (2000) 78 Cal.App.4th 1444, the defendant admitted his exculpatory out-of-court statement to explain how he acquired possession of stolen property. The defendant did not testify. The Court of Appeal held that

the defendant's prior conviction was admissible for impeachment because the defendant had put his credibility in issue by offering his out-of-court exculpatory statement. (*People v. Jacobs, supra*, 78 Cal.App.4th at pp. 1449-1450.)

Similar reasoning applies to the instant case. The prosecutor put Ms. Kerr's credibility in issue by offering her out-of-court statements into evidence to prove she feared appellant and that he was stalking her. Appellant was entitled to attack her credibility. Much of the prosecution case rested on Ms. Kerr's hearsay statements made to third parties and were offered into evidence through the testimony of those third parties. Appellant was not trying to "trash" Ms. Kerr's character, but to demonstrate she was a person willing to lie. It was fundamentally unfair, and a violation of due process, to allow Ms. Kerr's hearsay statements to be cloaked with an air of truthfulness without allowing appellant the opportunity to demonstrate she was willing to lie. Finally, Ms. Kerr's hearsay statements that she referred to herself as Lisa Brooks was admissible to prove her state of mind and as substantive evidence demonstrating her affection for appellant and lack of fear of him. Hence, the trial court erred by refusing to allow the defense counsel to admit into evidence Ms. Kerr's felony conviction for welfare fraud.

D. THE STANDARD OF REVIEW

The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. (*People v. Cox (*2003) 30 Cal.4th 916, 955.)

E. PREJUDICE

The individual and cumulative impact of a trial court's rulings can deprive a defendant of the due process guarantee of fundamental fairness. (*Taylor v. Commonwealth* (1978) 436 U.S. 478, 488, fn. 15, 98 S.Ct. 1930, 56 L.Ed.2d 468.) Hence, the judgment of guilt must be reversed unless the errors ere harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The trial court's rulings also deprived appellant of his right federal and state constitutional rights as explained above.

The jury rejected appellant's claim that he killed Ms. Kerr as the result of heat of passion. Instead, the jury found that appellant committed a deliberate and premeditated murder. The trial court erroneously excluded evidence that was critical to the question of whether appellant acted in the heat of passion when he killed Ms. Kerr. The fact that Mr. Harvey, "screws everything that walks in the club," (15 RT p. 1680), suggested appellant had a basis to believe that Ms. Kerr was having a sexual relationship with Mr. Harvey. Appellant would obviously be enraged by Ms. Kerr having a sexual relationship with Mr. Harvey because she had manipulated appellant with sex in order to get him to pay for her apartment rent and other benefits. Appellant's anger at Ms. Kerr because he believed she was having sexual relations with Mr. Harvey suggested he killed her as the result of a heat of passion.

Mr. Harvey, Ms. Farnand, Ms. Zones, and Ms. Hyer were all allowed to testify to numerous statements by Ms. Kerr which attested to her fear of appellant. The trial court's exclusion of Ms. Kerr referring to herself as Ms. Brooks, and her sending appellant her panties, allowed the prosecution to portray a one-sided version of the facts. The fact that Ms.

Kerr referred to herself as Lisa Brooks, and sent appellant panties, demonstrated that she either felt genuine closeness to appellant at one point in time or was overtly manipulating him. The fact that appellant could have felt both betrayed by Ms. Kerr, and manipulated, was relevant to prove that he acted in the heat of passion when he killed her. The fact that Casey Kerr beat Lisa Kerr demonstrated her motive to be with appellant and contradicted the prosecution stalking theory. The admission of appellant's threats against Casey Kerr only inflamed the passions of the jury to believe appellant was an out-of-control psychopath who needed the harshest punishment available.

The trial court's failure to admit evidence of Ms. Kerr's felony fraud conviction also deprived appellant of a fair trial. She was an out-of-court declarant. The jury never had the opportunity to see her testify. This gave Ms. Kerr's out-of-court statements an unfair quality of truthfulness because the jury never had any opportunity to conclude she was not credible based on observing her. Ms. Kerr's felony fraud conviction was appellant's only opportunity to attack Ms. Kerr's credibility. Had the jury known of Ms. Kerr's felony conviction, it would have given far less weight to her out-of-court statements that she feared appellant. The jury would also have seen her as manipulative for financial reasons, which also would have bolstered appellant's heat of passion defense. The jury would have realized that Ms. Kerr had indeed manipulated appellant for financial reasons.

The individual and cumulative impact of the trial court's rulings was to deprive appellant of a fair trial. Appellant incorporates the discussion of prejudice from Issue V in

this portion of the Opening Brief. Those arguments will not be repeated for purpose of brevity. Appellant presented a strong case for voluntary manslaughter. Appellant's own description of how Ms. Kerr died suggested he was guilty of voluntary manslaughter. Appellant was enraged by her disparaging remarks about him. (17 RT pp. 1860-1861; 20 RT pp. 2236-2237, 2252-2253.) Ms. Kerr manipulated appellant's emotions, used him for money and to escape her abusive husband, and then discarded him. (20 RT pp. 2223-2225, 2228.) The jury's failure to find appellant guilty of voluntary manslaughter was attributable to the above erroneous rulings. The judgment of guilt must therefore be reversed.

X

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED THE DEFENSE REQUEST TO OMIT THE "VIEWED WITH CAUTION" LANGUAGE FROM CALJIC 2.71, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW, SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION OF THE FACTS, THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

The trial court admitted into evidence a number of out-of-court statements made by appellant in which he said he had strangled Ms. Kerr. These statements were inculpatory because appellant admitted to killing Ms. Kerr, but also exculpatory because the statements suggested appellant committed voluntary manslaughter rather than premeditated murder. CALJIC 2.71 is the standard jury instruction for admissions by a defendant. The defense counsel requested the trial court to delete the language in the instruction which told the jury to view with caution the defendant's oral out-of-court statements. The ostensible purpose of this language is to benefit defendants by instructing the jury to view inculpatory statements by the defendant with caution. The instruction, however, prejudices a defendant to the extent the jury is told to view with caution his exculpatory out-of-court statements. The trial court should have omitted the "view with caution" language from CALJIC 2.71. The trial court's failure to do so deprived appellant of a fair trial and violated the prohibition against cruel and

unusual punishment in the Eighth and Fourteenth Amendments and Article I, Section 17, of the California Constitution. The judgment of guilt must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The prosecution theory of the case was that appellant knowingly and intentionally killed Ms. Kerr's by lighting her vehicle on fire with her inside it. The medical examiner testified that Ms. Kerr was alive when her body was consumed by flames. The cause of death was smoke inhalation and thermal injuries. (18 RT p. 1988.) Appellant told Mr. Jayne that he confronted Ms. Kerr at her apartment and strangled her. He also told Mr. Jayne that the decision to kill her was made on the spur of the moment. (20 RT pp. 2236-2237, 2244.) Appellant spoke with David Heiserman after he had been arrested. Appellant said he overheard Ms. Kerr's conversation with Mark Harvey. He confronted Ms. Kerr when she got to her car, strangled her, and left her in the back seat. (18 RT p. 2098.)

During discussion of jury instructions, the defense counsel requested the last paragraph of CALJIC 2.71 be deleted. (22 RT p. 2442.) The defense counsel argued that the prosecution had admitted statements made by appellant which helped the defense case and the view with caution language should not apply to those statements. (22 RT p. 2443.) The prosecutor argued the language should be given. The trial court agreed with the prosecutor and overruled the defense objection. (22 RT pp. 2443-2444.)

The trial court gave the following instruction:

> An admission is a statement made by the defendant which does not itself acknowledge his guilt of the crimes for which the

> defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made an admission and, if so, whether that statement is true in whole or in part.
>
> Evidence of an oral admission of the defendant not made in court should be viewed with caution.

(23 RT pp. 2514-2515.)

C. THE TRIAL COURT ERRED BY FAILING TO EXCISE THE "VIEW WITH CAUTION" LANGUAGE FROM CALJIC 2.71.

This Court has approved of the "view with caution" language in CALJIC 2.71 in a number of opinions. (E.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128-129.) However, the facts of this case are distinguishable from the cases approving that language in the instruction over defense objection.

In *People v. Bacigalupo*, the defendant made statements to the police about two murders. The defendant argued, "the cautionary instruction was error in this case because it advised the jury to distrust defendant's exculpatory statements." (*People v. Bacigalupo*, supra, 1 Cal.4th at p. 129.) This Court noted the instruction told the jury an admission was a statement by the defendant showing guilt. Hence, "the instruction did not tell the jury to distrust those portions of defendant's statements to the police that did not either acknowledge or tend to show guilt." (*People v. Bacigalupo, supra,* 1 Cal.4th at p. 129; see also *People v. Williams* (2008) 43 Cal.4th 584, 639-640; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1158 [rejecting the defense argument that the "view with caution" language instructed the jury to

ignore the defendant's exculpatory statements].)

In the instant case, appellant's out-of-court statements that he killed Ms. Kerr by strangling her met the definition of an admission in CALJIC 2.71 because it tended to prove his guilt. The jury was therefore instructed that such statements should be "viewed with caution." (23 RT p. 2515.) The problem, however, was that appellant's statements he killed Ms. Kerr shortly after hearing her talk about a sexual relationship with Mr. Harvey and disparaging appellant, was the evidence upon which appellant was relying to prove he acted in the heat of passion rather than with premeditation. Appellant's case presents the unusual situation in which an admission–a statement which tended to show his guilt–was also exculpatory because it showed appellant's guilt of manslaughter rather than murder.

The fact that appellant's out-of-court statements, in which he admitted killing Ms. Kerr, were exculpatory because they showed his guilt of a lesser included offense, is what distinguishes this case from *People v. Bacigalupo* and *People v. Zambrano*. In both those cases, the "view with caution" language would not be applied by the jury to the defendants' exculpatory out-of-court statements because there was nothing about those statements that met the definition of an "admission" in CALJIC 2.71. In the instant case, the jury did apply the "view with caution," language in CALJIC 2.71 to appellant's out-of-court statements that he strangled Ms. Kerr. This was error because it was those statements upon which appellant relied to prove he was guilty of voluntary manslaughter and not murder. Hence, the trial court erred by denying the defense request to remove the "view with caution" language from

CALJIC 2.71.

D. THE TRIAL COURT'S REFUSAL TO REMOVE THE "VIEW WITH CAUTION" LANGUAGE FROM CALJIC 2.71 VIOLATED APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW, SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION OF THE FACTS, THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS IN THE CALIFORNIA CONSTITUTION.

The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. (*Spencer v. Texas, supra*, 385 U.S. at pp. 563-564.) A defendant's right to present his theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact. (*Davis v. Alaska, supra*, 415 U.S. at p. 317.) The due process clause requires the prosecution to prove beyond a reasonable doubt each element of an offense. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560, 571.)

The trial court's failure to excise the "view with caution" language from CALJIC 2.71 violated appellant's right to due process of law. The instruction lightened the prosecutor's burden of proof beyond a reasonable doubt because the jury was told that appellant's statements should be given extra scrutiny before it accepted the truth of his statements. It was critical, however, for the jury to conclude that appellant believed he had killed Ms. Kerr when he initially confronted and strangled her. The allegation of murder by torture, and the special circumstance allegation of a murder committed during the commission of torture, both required the jury to find that appellant intended to inflict extreme pain upon a living human being. (23 RT pp. 2533, 2540.) Appellant was not guilty of first degree felony murder based on torture if he believed Ms. Kerr was dead when he set the car on fire. Similarly, the

jury could not have found the torture murder special circumstance true if it reached that conclusion. The "view with caution" language made it substantially less likely the jury would believe appellant's out-of-court statements that he killed Ms. Kerr when he confronted her shortly after she left Mr. Harvey's residence.

The trial court's failure to excise the "view with caution" language from CALJIC 2.71 also violated appellant's right to a jury determination of the facts under the Sixth Amendment and the California Constitution. The Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.) The Sixth Amendment right to a jury trial requires the jury to determine the truth of each accusation. (*United States v. Gaudin, supra*, 515 U.S. at p. 510.) The jury was not able to accurately determine the factual question of whether appellant believed he had killed Ms. Kerr when he confronted her after she left Mr. Harvey's residence and he strangled her because of the "view with caution" language.

The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v. Alabama*, supra, 447 U.S. at p. 632.) The trial court's failure to excise the "view with caution" language impaired the reliability of the jury's fact finding during its guilt phase deliberations by requiring the jury to view with scrutiny and skepticism appellant's statements which supported his theory of the case that he was guilty of voluntary manslaughter and not murder.

In *People v. Williams, supra*, 43 Cal.4th 584, the prosecution admitted into evidence the defendant's tape recorded statement to a detective. The statement contained inculpatory and exculpatory statements. The defendant argued the "view with caution" language in CALJIC 2.71 had erroneously instructed the jury to disregard his exculpatory statements. This Court rejected that argument because CALJIC 2.71 defined an admission and "we are confident the jury understood the instruction did not apply to the exculpatory aspects of defendant's statements." (*People v. Williams, supra*, 43 Cal.4th at p. 640.) The Court also rejected the argument that the instruction constituted an improper comment on the evidence. (*Ibid.*) Similar reasoning cannot be applied to the instant case. The jury clearly applied the "view with caution" language to appellant's statements that he killed Ms. Kerr by strangling her. The trial court's failure to excise that language from the instruction was error.

E. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de-novo. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

F. PREJUDICE

Because the trial court's failure to excise the "view with caution" language from CALJIC 2.71 violated appellant's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The judgment must also be reversed under the more likely than not standard of prejudice for state law error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Appellant's theory of the case was that he was guilty of voluntary manslaughter and not murder. Appellant's only hope of being found guilty of voluntary manslaughter was having the jury credit his out-of-court statements that he believed he had killed Ms. Kerr when he first confronted her after she left Mr. Harvey's residence. A period of time elapsed between when Ms. Kerr left Mr. Harvey's residence and when appellant left her in the vehicle and set it on fire. This period of time was sufficiently long for the jury to conclude that the provocation which caused appellant to attack Ms. Kerr had subsided. If the jury rejected appellant's statements that he believed he had killed Ms. Kerr during the initial confrontation, it inevitably concluded appellant knew she was alive when Ms. Kerr's vehicle was set on fire. Appellant's statement to Mr. Jayne that he strangled Ms. Kerr based on the spur of a moment decision motivated by anger was made under circumstances suggesting it was reliable. (20 RT p. 2237.) Appellant had no reason or motive to tell Mr. Jayne anything about the incident or to tell him a lie. After appellant was arrested, he told Mr. Heiserman that he had confronted Ms. Kerr at her vehicle and strangled her. (18 RT p. 2098.) This statement was also made under circumstances suggesting it was reliable because it was an admission to a criminal act. The "view with caution" language in CALJIC 2.71 undermined the jury's willingness to believe appellant was stating what he believed was the truth when he said he killed Ms. Kerr by strangling her. Hence, the judgment of guilt must be reversed.

XI

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH CALJIC 8.75, OVER A DEFENSE OBJECTION AND IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW, THE EIGHTH AMENDMENT PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT, AND THE CORRESPONDING RIGHTS IN THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT

The trial court instructed the jury with CALJIC 8.75. This instruction told the jury that the trial court could not accept a verdict to a lesser included offense of murder until it had unanimously reached a verdict on the greater offenses. The defense counsel objected to the instruction. This Court approved the procedure set forth in CALJIC 8.75 in *Stone v. Superior Court* (1983) 31 Cal.3d 503. CALJIC 8.75 deprived appellant of his right to the jury's fair consideration of his guilt of the lesser included offense of voluntary manslaughter because it required the jury to reach an unanimous agreement regarding his guilt of murder. Due process of law, and the Eighth Amendment prohibition against cruel and unusual punishment, required the jury to make only a reasonable effort to resolve appellant's guilty of murder before it decided whether he was guilty of voluntary manslaughter. Because the giving of CALJIC 8.75 was prejudicial, the judgment of guilt must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

During discussion of jury instructions, the defense counsel objected to the trial court

instructing the jury with CALJIC 8.75. (23 RT p. 2495.) He argued the instruction was long and confusing and the jury knew of its option to find appellant guilty of murder or voluntary manslaughter. (23 RT pp. 2495-2496.) The instruction was prejudicial because "to line up second degree murder and voluntary manslaughter as both lessers is—I think will confuse the jury. I don't want them to view second degree murder as a lesser the same as they view voluntary manslaughter." (23 RT p. 2496.) The trial court overruled the objection. (*Ibid.*) CALJIC 8.75 told the jury that "The court cannot accept a verdict of guilty of voluntary manslaughter unless the jury also unanimously finds and returns a signed not guilty verdict form as to both murder in the first degree and murder in the second degree." (23 RT p. 2531.)

C. THE TRIAL COURT ERRED BY GIVING CALJIC 8.75 OVER DEFENSE OBJECTION

Federal and state due process of law, and fundamental fairness, required appellant's jury to only make a reasonable effort to determine his guilt of first degree murder before it considered his guilt of the lesser included offenses of second degree murder and voluntary manslaughter. CALJIC 8.75 required the jury to find appellant not guilty of first degree murder before it considered his guilt of any lesser included offenses. This procedure unfairly tipped the scale in favor of conviction of first degree murder by precluding the jury from considering appellant's guilt of the lesser included offenses.

In determining whether the jury must decide the defendant's guilt of the greater offense before it may consider his guilt of a lesser included offense, several states and some federal courts use the "optional approach," which allows the defendant to choose whether

the jury is instructed with the "acquittal-first" rule or a "reasonable efforts" instruction. (*See United States v. Tsanas* (2nd Cir. 1978) 572 F.2d 340, 346; *Catches v. United States* (8th Cir. 1978) 582 F.2d 453, 459; *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1469 (9th Cir.1984); *Jones v. United States* (D.C. 1993) 620 A.2d 249, 252; *State v. Powell* (Ct. 1992) 158 Vt. 280, 608 A.2d 45, 47.) California and Alaska use a modified acquittal-first rule, which allows the jury to consider lesser-included offenses before acquitting on the greater offense, but still requiring the jury to unanimously acquit on the greater offense before returning a verdict on the lesser-included offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328; *People v. Dresnek* (Ct.App. Al. 1985) 697 P.2d 1059, 1060-1064.) Finally, some states utilize the acquittal-first approach. (See e.g., *United States v. Moccia* (1st Cir. 1982) 681 F.2d 61, 64; *State v. Sawyer* (S.Ct. Conn. 1993) 227 Conn. 566, 577-578, 630 A.2d at 1075; *State v. Raudebaugh* (Idaho S.Ct. 1993) 124 Idaho 758, 864 P.2d 596, 598-601; *Walker v. State* (Miss. S.Ct. 1995) 671 So.2d 581, 607-08; *State v. Taylor* (N.H. S.Ct. 1996) 141 N.H. 89, 677 A.2d 1093, 1097; *People v. Boettcher* (Ct. App. N.Y., 1987) 69 N.Y.2d 174, 513 N.Y.S.2d 83, 505 N.E.2d 594, 598; *State v. Daulton* (N.D. S.Ct. 1994) 518 N.W.2d 719, 722-23; *State v. Wilson* (Or. Ct.App. 2007) 216 Or.App. 226, 173 P.3d 150, 152.)

Other states use the "reasonable efforts," or "unable to agree" instruction, which allows the jury to consider lesser included offenses if it cannot reach a verdict on the greater offense after having made reasonable efforts to do so. (See, e.g., *State v. LeBlanc* (S.Ct. Az. (1996) 186 Ariz. 437, 439-440; 924 P.2d 441; *People v. McGregor* (Col. Ct. App. 1981) 635

P.2d 912, 914; *Cantrell v. State* (Ga. S.Ct. 1996) 266 Ga. 700, 469 S.E.2d 660, 662; *State v. Ferreira* (Haw.Ct.App. 1990) 8 Haw.App. 1, 791 P.2d 407, 408-09; *State v. Korbel* (Kan. 1982) 231 Kan. 657, 647 P.2d 1301, 1305); *People v. Handley* (Mich. 1982) 415 Mich. 356, 329 N.W.2d 710, 712; *Tisius v. State,* (Mo. 2006) 183 S.W.3d 207, 217; *Green v. State* (Nev. 2003) 119 Nev. 542, 80 P.3d 93, 95-96; *State v. Chamberlain* (N.M. 1991) 112 N.M. 723, 819 P.2d 673, 680-81; *State v. Thomas* (Ohio 1988) 40 Ohio St.3d 213, 533 N.E.2d 286, 292-93; *Graham v. State (Okla. 2001)* 27 P.3d 1026, 1027; *State v. Gardner* (Utah 1989) 789 P.2d 273, 284; *State v. Labanowski* (Wash. 1991) 117 Wash.2d 405, 816 P.2d 26, 35-37; *State v. Truax* (Wis. Ct. App. 1989) 151 Wis.2d 354, 444 N.W.2d 432, 436).

In *Stone v. Superior Court, supra*, 31 Cal.3d 503, this Court held that the trial court has two options when the jury must decide the defendant's guilt of a charged offense and lesser included offenses. The trial court may let the case go the jury with verdict forms of guilty and not guilty as to each offense. Alternatively, the trial court may wait to see if the jury is unable to reach a verdict. It so, the trial court should inquire whether the jury has been unable to eliminate any offense. If the jury is hopelessly deadlocked on the lesser offense yet unanimous for acquittal on the greater offense, the trial court must accept a partial verdict on the greater offense. The trial court may order further deliberations on the lesser included offense if it perceives a reasonable probability that a verdict will be reached that will dispose of the case. (*Stone v. Superior Court, supra*, 31 Cal.3d at pp. 519-520.) The Use Note to CALJIC 8.75 states the instruction has been drafted "to conform with the two alternatives

permitted by Stone without precluding the jury from deliberating on the charged and lesser included offenses in whatever order they wish." (Use Notes, CALJIC 8.75.) The Use Note also states the trial court has the discretion to give the jury CALJIC 17.10 and 17.49 at the outset of deliberations or give CALJIC 8.75.

The acquittal first rule has been criticized for being unfairly prejudicial to defendants. In *State v. LeBlanc, supra*, 186 Ariz. 437, the Arizona Supreme Court abandoned the acquittal-first rule. It concluded, "requiring a jury to do no more than use reasonable efforts to reach a verdict on the charged offense is the better practice and more fully serves the interest of justice and the parties." (*State v. LeBlanc, supra*, 186 Ariz. At p. 439.) Hence, "jurors may render a verdict on a lesser-included offense, if, after full and careful consideration of the evidence, they are unable to reach agreement with respect to the charged crime. Thus, the jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty of the on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge." (*State v. LeBlanc, supra*, 186 Ariz. at p. 438.)

State v. LeBlanc explained what the above procedure was preferable to the acquittal-first rule:

> We believe the "reasonable efforts" procedure is superior to the acquittal-first requirement for a number of reasons. First, it reduces the risks of false unanimity and coerced verdicts. When jurors harbor a doubt as to guilt on the greater offense but are convinced the defendant is culpable to a lesser degree, they may be more apt to vote for conviction on the principal charge out of fear that to do otherwise would permit a guilty person to go free. *See State v. Fletcher,* 149 Ariz. 187, 193, 717 P.2d 866, 872

> (1986) (Feldman, J., concurring); *State v. Allen,* 301 Or. 35, 717 P.2d 1178, 1180-81 (1986); *U.S. v. Jackson,* 726 F.2d 1466, 1469 (9th Cir.1984). The "reasonable efforts" approach also diminishes the likelihood of a hung jury, and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered. *State v. Labanowski*, 117 Wash.2d 405, 816 P.2d 26, 34 (1991). Lastly, because such an instruction would mandate that the jury give diligent consideration to the most serious crime first, the state's interest in a full and fair adjudication of the charged offense is adequately protected.

(*State v. LeBlanc, supra*, 186 Ariz. at pp. 438-439.)

The State argued the acquittal-first rule was preferable because: (1) the coercion referred to in the Court's opinion was present with either the acquittal-first rule or the reasonable efforts rule; (2) a jury should not be encouraged to reach a compromise verdict; (3) the greater offense may not be reached and considered at all by the jury if the acquittal-first rule were abandoned; and (4) one holdout juror could force his or her will on the majority. The Court rejected these fears as unfounded because "experience teaches us that they possess both common sense and a strong desire to properly perform their duties." *(State v. LeBlanc, supra*, 186 Ariz. at p. 439.) The Court concluded, however, that the acquittal-first rule did not violate the United States Constitution. (*Id.*, at pp. 439-440.)

Other jurisdictions have rejected the acquittal-first rule for reasons similar to that articulated in *State v. LeBlanc*. The Ohio Supreme Court rejected the acquittal-first rule because, "such an instruction encroaches on the province of the jury to decide questions of fact and to arrive at a verdict based on all the evidence before it and all the various offenses

on which it has been properly instructed." (*State v. Thomas* (1988) 40 Ohio St.3d 213, 219.) *State v. Thomas* concluded, "[w]hen the jury is instructed in accordance with the `acquittal first' instruction, a juror voting in the minority probably is limited to three options upon deadlock: (1) try to persuade the majority to change its opinion; (2) change his or her vote; or (3) hold out and create a hung jury. [Citation omitted.] Because of its potential for a coerced verdict, the `acquittal-first' instruction is improper and may not be charged to the jury in this state. [Citation omitted.]." (*State v. Thomas, supra*, 40 Ohio St.3d at p. 220.) The Georgia Supreme Court in *Cantrell v. State, supra*, 266 Ga. at p. 702, rejected the acquittal-first rule because, "[j]urors favoring the lesser offense, unless they can dissuade those favoring the greater, must either hold out until a mistrial is declared because of the deadlock or surrender their opinions and vote for the greater offense."

This Court should abandon the acquittal-first rule in favor of the "reasonable efforts" rule adopted in *State v. LeBlanc*. The reasonable efforts rule minimizes the risk of a coerced verdict in favor of conviction of the greater offense and gives the jury a reasonable opportunity to convict the defendant of the lesser included offense.

State v. LeBlanc declined to rule that the acquittal-first rule violated the defendant's federal constitutional right to due process of law. (*State v. LeBlanc, supra*, 186 Ariz at pp. 439-440.) A defendant's sixth amendment right to a jury determination of his guilt, and federal due process of law, forbids the trial court from instructing the jury with the modified acquittal-first rule used in this case and California generally. There is no functional

difference between the acquittal-first rule and the modified acquittal-first rule used in California. The acquittal-first rule requires the jury to acquit the defendant of the greater offense before it may consider the defendant's guilt of the lesser offense. The modified acquittal-first rule allows the jury to discuss the lesser offense, but still requires the jury to acquit the defendant of the greater offense before it may return a guilty verdict on the lesser included offense. The pressure on the minority jurors to give in to the majority jurors and vote for guilt on the greater offense remains the same under the modified acquittal-first rule because the jurors must first acquit the defendant of the greater offense before being able to return a verdict on the lesser offense.

The defendant's right to due process of law is violated by a jury verdict that has been coerced. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-239, 108 S.Ct. 546, 98 L.Ed.2d 568; *Jiminez v. Myers* (9th Cir. 1994) 40 F.3d 976, 979.) The Sixth Amendment required the jury to engage in the fact finding necessary to determine appellant's guilt. (*Ring v. Arizona* (2002) 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556; *United States v. Gaudin* (1995) 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444.) The Eighth Amendment requires a greater degree of reliability when the death sentence is imposed,. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973), and also requires the jury to decide the facts necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at pp. 606-607.)

The use of the modified acquittal first rule, set forth in CALJIC 8.75, coerced appellant's jury into reaching a verdict in violation of appellant's right to federal due process

of law, Sixth Amendment right to a jury trial, and the Eighth Amendment prohibition against cruel and unusual punishment. A coerced verdict is neither a reliable verdict nor a verdict in which the jury has properly determined the facts. The jury's fact finding function was impaired because it was improperly precluded from returning a verdict of guilt to second degree murder or voluntary manslaughter. The coercion of a verdict is prejudicial per-se. (*People v. Carter, supra*, 68 Cal.2d at p. 820; *Jimenez v. Myers, supra*, 40 F.3d at p. 981; *Jenkins v. United States* (1965) 380 U.S. 445, 446, 85 S.Ct. 1059, 13 L.Ed.2d 957; Cf. *Brasfield v. United States, supra*, 272 U.S. at p. 450.) Hence, the judgment of guilt must be reversed.

The judgment of guilt must be reversed, furthermore, if the error is tested for prejudice under the harmless beyond a reasonable doubt standard for federal constitutional error, (*Chapman v. California, supra*, 386 U.S. at p. 24), or the more likely than not standard for state law error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Appellant presented a strong case that he was guilty of voluntary manslaughter. Appellant made statements to Mr. Jayne and Mr. Heiserman which strongly suggested appellant had killed Ms. Kerr in the heat of passion and thus should have been found guilty of voluntary manslaughter. (18 RT p. 2098; 20 RT pp. 2236-2237, 2244.) Ms. Kerr manipulated appellant's emotions for her own benefit and then berated him when she thought he was not listening. Appellant was obviously not justified in killing her. However, appellant should have been convicted of voluntary manslaughter. The giving of CALJIC 8.75 improperly prevented the jury from determining

whether appellant should have been convicted of voluntary manslaughter. The judgment of guilt must be reversed.

Hence, the sentence of death must be reversed. The coercion of a jury verdict is inherently prejudicial and requires reversal of the judgment of guilt. The use of CALJIC 8.75 was not harmless beyond a reasonable doubt.

XII

THE FEDERAL AND STATE DUE PROCESS CLAUSES, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND PUNISHMENT IN THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION, AND EVIDENCE CODE SECTION 352, REQUIRE REVERSAL OF THE JUDGMENT OF CONVICTION BECAUSE THE TRIAL COURT ADMITTED INFLAMMATORY PHOTOGRAPHS OF THE VICTIM OVER DEFENSE OBJECTION.

A. SUMMARY OF ARGUMENT

The trial court admitted gruesome photographs of the victim over defense objection. The admission of these photographs was unnecessary and extremely inflammatory. The trial court erred by admitting the photographs. Because the admission of the photographs was unnecessary and inflamed the passions of the jury, the judgment of guilt must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Dr. Djabourian was the medical examiner who testified about the cause of Ms. Kerr's death. (18 RT pp. 1969-2005.) He testified that he found soot in the airway of Ms. Kerr's larynx and trachea. (18 RT p. 1977.) The presence of soot in the airway was the most significant finding suggesting Ms. Kerr was alive when the car was on fire. (18 RT pp. 1983-1984.) Exhibit 5 was a series of photographs of the charred remains of Ms. Kerr. (18 RT p. 1972.) Exhibit 27 was a series of photographs of Ms. Kerr's trachea and larynx. (18 RT pp. 1985-1986.) The defense counsel objected to the admission of photographs of Ms. Kerr's showing Ms. Kerr's windpipe and other internal organs because they were gory and

inflammatory. He also objected to the admission of the other photographs which had been referred to by Dr. Djabourian based on Evidence Code section 352. (18 RT p. 1981.) The prosecutor explained that the admission of the photographs was necessary to prove that Ms. Kerr was alive when the vehicle was set on fire. (18 RT p. 1981.) The trial court overruled the objection. (18 RT p. 1982.)

C. THE TRIAL COURT ERRED BY ADMITTING THE PHOTOGRAPHS OVER DEFENSE OBJECTION

The admission of evidence, including gruesome photographs, is within the discretion of the trial court. (*People v. Richardson* (2008) 43 Cal.4th 959, 1005.) A federal due process violation occurs by the introduction of graphic, gruesome photographs of the victim which renders the trial fundamentally unfair. (*Villafuerte v. Stewart* (9th Cir. 1997) 111 F.3d 616, 627; *Jamal v. Van de Kam* (9th Cir. 1991) 926 F.2d 918, 919.) The Eighth Amendment requires a greater degree of reliability when the death sentence is imposed. (*Lockett v. Ohio*, supra, 438 U.S. at p. 604.)

The admission of the photographs in exhibits 5 and 27 was unnecessary and inflammatory. There was no dispute appellant killed Ms. Kerr. The medical examiner could have testified that he found soot in the larynx and trachea, and the significance of those findings, without exhibit 27. The defense counsel never contested that there was soot in the larynx and trachea. Because the defense counsel never contested these findings, photographs of the larynx and trachea which showed the soot were completely unnecessary. The defense counsel only questioned the mechanism through which soot could have entered the trachea

and larynx. This prosecutor did not need the photographs in exhibit 27 to respond to that line of questioning.

Similar reasoning applies to the photographs in exhibit 5. These photographs were especially inflammatory because they showed the charred remains of Ms. Kerr's body and were not necessary to prove any fact in dispute. There was no question Ms. Kerr's body was charred in the fire and that it was found in the back floorboard. The photographs in exhibit 5 were simply a subterfuge to inflame the emotions of the jury.

The emotional impact of these photographs cannot be underestimated. *(United States v. Drozdowski* (3rd Cir. 2002) 313 F.3d 819, 821 [a photograph is worth a thousand words].) Photographs of the charred remains of Ms. Kerr could only have stirred the jury to anger and revenge. This case is not similar to other cases in which this Court approved of the admission of gruesome photographs because they were relevant to some fact in dispute. (E.g., *People v. Stewart* (2004) 44 Cal.4th 425, 480.) The only purpose of the admission of the photographs in exhibits 5 and 27 was to urge the jury to exact revenge by sentencing appellant to death. The admission of these photographs violated appellant's right to federal and state due process of law, violated the prohibition against the imposition of cruel and unusual punishment in the federal and State Constitutions, and violated Evidence Code section 352. The heightened reliability required in a death penalty case could not have occurred with a jury whose passions were inflamed against the defendant.

D. PREJUDICE

Because the admission of exhibits 5 and 27 violated appellant's right to federal due process of law and the Eighth Amendment prohibition against imposition of cruel and unusual punishment, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The judgment must be reversed, furthermore, if the error is tested for prejudice under the more likely than not standard in *People v. Watson* (1956) 46 Cal.2d 818, 836.

Appellant presented a strong case that he was guilty of voluntary manslaughter. Appellant made statements suggesting he believed he had killed Ms. Kerr in the heat of passion when he confronted her after leaving Mr. Harvey's residence. Appellant had no reason to lie to Mr. Jayne and Mr. Heiserman when he told them he had strangled Ms. Kerr as a result of heat of passion. (18 RT p. 2098; 20 RT p. 2237, 2244.) Because appellant had personal knowledge of his own conduct, and no incentive to inculpate himself in a crime, his statements that he had killed Ms. Kerr by strangling her had indicia of reliability as a statement against penal interest. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334 [in determining if a statement is admissible as a declaration against penal interest, the trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry].) Appellant should have been found guilty of voluntary manslaughter if he honestly believed that Ms. Kerr had

died when he strangled her and thus was not alive when the car was set on fire. The medical examiner believed Ms. Kerr was unconscious when she died. (18 RT pp. 1995-1997.) Hence, there was compelling evidence that appellant believed Ms. Kerr was already dead when he set the fire. The emotional impact on the jury of seeing the photographs in exhibits 5 and 27 was strong, especially since Ms. Kerr was the mother of a young child. The judgment of guilt must be reversed. Even if the judgment of guilt were not reversed, the admission of the photographs inflamed the passion of the jury and must result in reversal of the judgment of death.

XIII

THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER IN THE COMMISSION OF KIDNAPING SHOULD BE REVERSED BECAUSE THE EVIDENCE FAILED TO PROVE APPELLANT COMMITTED THE KIDNAPING FOR AN INDEPENDENT FELONIOUS PURPOSE IN VIOLATION OF APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, TO A JURY TRIAL, A RELIABLE GUILT AND DEATH VERDICT, AND HIS RIGHTS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

A. SUMMARY OF ARGUMENT

The jury found true the special circumstance allegation that appellant committed murder while engaged in the kidnaping of Ms. Kerr. These findings made appellant eligible for the death penalty. Under *People v. Green* (1980) 27 Cal.3d 1, the law governing at the time the crime was committed, the true finding to the kidnaping special circumstances could be upheld only if appellant had an independent felonious purpose for committing that felony. The evidence showed, at most, that appellant committed a murder which involved the commission of a kidnaping. This was not sufficient to satisfy the requirement of an independent felonious purpose. Under *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Booker v. United States*, the requirement of an independent felonious purpose constituted an element of an offense for purpose of determining appellant's eligibility for the death penalty. Hence, the state and federal due process clause required the

prosecution to prove beyond a reasonable doubt that appellant had an independent felonious purpose when he committed the kidnaping. Because the prosecution failed to prove this required element, the true findings to the kidnaping special circumstances allegation must be reversed.

B. LEGAL STANDARDS GOVERNING TRUE FINDINGS TO SPECIAL CIRCUMSTANCES

Penal Code section 190.2, subdivision (a), specifies the special circumstances that make a defendant eligible for the death penalty. Subdivision (a)(17) list the following as a special circumstance:

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, or attempted commission of, or the immediate flight after committing, or attempting to commit, the following:
>
> . . . .
>
> (B) Kidnaping in violation of Section 207, 209, or 209.5.

Penal Code section 190.4, subdivision (a), requires the trier of fact to find true beyond a reasonable doubt the special circumstances alleged in the information. This Court has ruled that the commission of acts listed in section 190.2, when merely incidental to a murder, cannot support true findings to special circumstances.

In *People v. Green* (1980) 27 Cal.3d 1, the defendant murdered his wife. The jury found that the murder was willful, deliberate, and premeditated, and committed by the defendant during the course of a robbery and a kidnaping. The defendant was sentenced to

death. The defendant drove his wife to a secluded area where he had intercourse with her and then shot her. To support the robbery special circumstance finding, the prosecution argued that the defendant had taken his wife's clothes, purse, and ring. The defendant challenged on appeal the sufficiency of the evidence to support the special circumstances findings.

The Court concluded that although the evidence was technically sufficient to support the defendant's robbery conviction, section 190.2 required the defendant to commit the murder "during the commission or attempted commission" of the crime constituting the special circumstances.[1] (*People v. Green*, *supra*, 27 Cal.3d at p. 59, quoting former Pen. Code §190.2, subd. (c)(3). The occurrence of a crime listed as a special circumstance and a murder does not necessarily satisfy the "during the commission or attempted commission" requirement of the statute:

> in his closing argument the district attorney correctly told the jurors that in order to find the charged special circumstances to be true they must first find defendant guilty of the underlying crimes of robbery and kidnaping. After discussing the evidence bearing on those crimes, however, the district attorney in effect told the jurors that was *all* they needed to do: i.e., that if they found defendant guilty of the underlying crimes, the corresponding special circumstances were ipso facto proved as well. The latter reasoning was unsound, as it ignored key language of the statute: it was not enough for the jury to find the defendant guilty of a murder *and* one of the listed crimes; the statute also required that the jury find the defendant committed the murder "during the commission or attempted commission of" that crime. (Former §§ 190.2, subd. (c)(3).) In other words, a valid conviction of a listed crime was a necessary condition to

---

[1] Similar language appears in section 190.2, subdivision (a)(17).

> finding a corresponding special circumstance, but it was not a sufficient condition: the murder must also have been committed "during the commission" of the underlying crime.

(*People v. Green*, *supra*, 27 Cal.3d at p. 59.) In *People v. Green*, the jury asked a question which suggested that it believed that the robbery may have been incidental to the murder. This Court stated the following requirement in order for special circumstances to be found true:

> The Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a "willful, deliberate and premeditated" murder "during the commission" of a robbery or other listed felony. (Former §§ 190.2, subd. (c)(3).) The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim or witness to a holdup, a kidnaping, or a rape.

(*People v. Green*, *supra*, 27 Cal.3d at p. 61.) The *Green* opinion finally concluded:

> The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder -- "a second thing to it," as the jury foreman here said -- because its sole object is to facilitate or conceal the primary crime. In the case at hand, for example, it would not rationally distinguish between murderers to hold that this defendant can be subjected to the death penalty because he took his victim's clothing for the purpose of burning it later to prevent identification, when another defendant who committed an identical first degree murder could not be subjected to the death penalty if for the same purpose he buried the victim fully clothed -- or even if he doused the clothed body

> with gasoline and burned it at the scene instead. To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in *Gregg*. (428 U.S. at p. 189, [49 L. Ed. 2d at p. 883].) We conclude that regardless of chronology such a crime is not a murder committed "during the commission" of a robbery within the meaning of the statute.

(*People v. Green*, *supra,* 27 Cal.3d at pp. 61-62.)[2] The Court thus found the evidence insufficient as a matter of law to prove the special circumstances. (*Id.*, at p. 62.)

This Court has adhered to the holding of *People v. Green*. (E.g., *People v. Reyes* (2004) 32 Cal.4th 73, 113-114; *People v. Raley* (1992) 2 Cal.4th 870, 902-903; *People v. Kimble* (1988) 44 Cal.3d 480, 501-503; *People v. Weidert* (1985) 39 Cal.3d 836, 842; *People v. Thompson* (1980) 27 Cal.3d 303, 322-323.) The holding of *People v. Green* has been implicitly adopted and approved of by the Legislature. Section 190.2 was amended in 1998 to create an exception to the *Green* rule for the special circumstances of kidnaping and arson by the enactment of subdivision (a)(17)(m). (Stats. 1998, ch. 629, §1.) The holding of *People v. Green* has also been incorporated in the second paragraph of CALJIC Number 8.81.7. (*People v. Horning* (2004) 34 Cal.4th 871, 907.)

In *People v. Thompson*, *supra*, 27 Cal.3d 303, the defendant entered the victims' residence. He shot and killed one victim, and injured a second victim. The jury found true

---

[2] The holding of *People v. Green* has been incorporated in CALJIC Number 8.81.17.

the special circumstances of robbery and first degree burglary, and sentenced the defendant to death. According to the Court, "[t]he question presented under *People v. Green* is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such thefts were `merely incidental to the murder.'" (*People v. Thompson, supra*, 27 Cal.3d at p. 324.) After reviewing the evidence, the Court concluded that "[w]hen the whole record is viewed in a light most favorable to the verdict, it establishes at most a suspicion that appellant had an intent to steal independent of his intent to kill." (*Ibid.*) Hence, the evidence was insufficient as a matter of law to prove the true findings to the special circumstances.

In *People v. Ainsworth* (1988) 45 Cal.3d 984, the defendant kidnaped the victim, put her in his car, and let her bleed to death over several hours. The Court stated that "*Green* and *Thompson* stand for the proposition that when the underlying felony is merely incidental to the murder, the murder cannot be said to constitute a `murder in the commission of' the felony and will not support a finding of felony-murder special circumstance." (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1026.) This court adhered to that formulation of the *Green* decision to the present day. (*E.g., People v. Valdez*, *supra*, 32 Cal.4th at pp. 113-114 [*Green* simply made it clear that a robbery, in a special circumstance allegation, cannot be merely incidental to the murder].)

C. APPLICATION TO THE INSTANT CASE

Under *People v. Green*, the true findings to the kidnaping special circumstances can

be upheld only if appellant had an independent felonious purpose during the commission of the murder. If the kidnaping was incidental to Ms. Kerr's murder, the true findings cannot be upheld.

The prosecution theory was that stalked Ms. Kerr for an extended period of time because of his obsession with her, and then killed Ms. Kerr in a fit of rage and jealousy when she berated him to Mr. Harvey. If the prosecution theory is accepted, appellant was not engaged in the commission of a kidnaping when he murdered Ms. Kerr. Appellant's sole purpose was to commit a murder. Appellant believed Ms. Kerr was dead when he transported her to the location of the highway where he lit the car on fire. (18 RT p. 2098; 20 RT pp. 2236-2237, 2244.) Whether the jury accepted the prosecution theory that appellant drove Ms. Kerr's vehicle to the shoulder of the highway to murder her---or accepted appellant's claim that he had killed Ms. Kerr when he strangled her—the only logical conclusion was that Ms. Kerr's kidnaping was incidental to her murder. *People v. Green* concluded the robbery of the victim was incidental to her murder–and hence the murder was not committed during the commission of the robbery–because the defendant's only objective was to murder the victim. Similar reasoning applies to the instant case. Appellant's only purpose was to kill Ms. Kerr. He had no desire to kidnap Ms. Kerr. Hence, the true finding to the kidnaping special circumstance must be reversed.

D. THE FEDERAL AND STATE DUE PROCESS CLAUSE REQUIRED THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT HAD AN INDEPENDENT FELONIOUS PURPOSE WHEN HE COMMITTED THE KIDNAPING

Under *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Booker v. United States*, the requirement of an independent felonious purpose constituted an element of an offense which the prosecution had to prove beyond a reasonable doubt.

In *People v. Kimble, supra*, 44 Cal.3d 480, the jury found true special circumstance allegations of two counts of robbery, and one count of burglary and rape. The defendant argued that the special circumstances had to be reversed for instructional error and insufficiency of the evidence. The defendant argued that the instructions should have been tailored to incorporate the holding of *People v. Green*. The Court rejected the defendant's argument that Green's clarification of the felony-murder special circumstances had become an element of special circumstance findings which required instructions in all cases regardless of the evidence. (*People v. Kimble, supra*, 44 Cal.3d at p. 50; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 767 [citing *People v. Kimble* for the proposition the *People v. Green* did not add an element to felony-murder or special circumstance allegations but simply clarified the scope of those doctrines]; *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204.)

The Ninth Circuit has not agreed with this Court's characterization of the "independent felonious purpose" requirement, and suggested that an "independent felonious purpose" is an element of a special circumstances finding. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476 [stating that the requirement of an independent felonious purpose for a special circumstance finding provides the narrowing function required to make

California's death penalty statute constitutional].)

The United Supreme Court's recent decisions affirm that the characterization in *Williams v. Calderon* of the "independent felonious purpose" as an element of a crime which must be proved beyond a reasonable doubt was correct. Under *Apprendi v. New Jersey* and *Blakely v. Washington*, the trier of fact had to find beyond a reasonable doubt the facts which make the defendant eligible for the maximum sentence that may be imposed for the crime of which or she was convicted. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; *Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.) *Ring v. Arizona* clearly demonstrates that the "independent felonious purpose" requirement constitutes an element of an offense with regard to the special circumstance allegation. The Court decided in that case that special circumstance allegations which made a defendant eligible for the death penalty had to be found by the jury beyond a reasonable doubt rather than the trial judge. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.) "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ibid.*) The kidnaping special circumstance operated as the functional equivalent of a greater offense. This Court has concluded that an "independent felonious purpose" must be found in order for the aggravating circumstances to be found true. *Ring v. Arizona* thus requires that the jury find beyond a reasonable doubt that appellant had an "independent felonious purpose" when he committed kidnaped Ms. Kerr in order to find true the kidnaping special

circumstance allegation

For the reasons above, the true finding to the kidnaping special circumstance allegation must be reversed. Appellant incorporates herein the discussion of prejudice from Issue II. The reversal of the true finding to the kidnaping special circumstance allegation requires reversal of the penalty of death.

XIV

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ADMITTED OVER DEFENSE OBJECTION AND IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, A PHOTOGRAPH OF THE VICTIM WHILE SHE WAS STILL ALIVE.

A. SUMMARY OF ARGUMENT

During the testimony of Detective Gligorijevic, the trial court admitted over defense objection a photograph of Ms. Kerr while she was still alive. The photograph was not relevant to any issue in dispute. The trial court abused its discretion by admitting the photograph because it created an undue risk of creating sympathy for Ms. Kerr and prejudice against appellant. The admission of the photograph also violated appellant's right to federal due process of law and the prohibition against cruel and unusual punishment in the federal and state constitutions. Because the admission of the photograph was prejudicial, the judgment of guilt must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Detective Gligorijevic was the lead detective assigned to the investigation of Ms. Kerr's death. (15 RT p. 1610-1613.) She testified about her investigation of Ms. Kerr's death the morning the body was discovered. (15 RT pp. 1610-1630.) During redirect examination, the prosecutor showed Exhibit 13 to Detective Gligorijevic. It was a photograph of Ms. Kerr. (15 RT p. 1636.) The defense counsel objected to the admission of the photograph

based on lack of relevance and hearsay. The trial court overruled those objections. (15 RT p. 1636.) Detective Gligorijevic testified that her partner obtained the photograph from Cheryl Zornes. The trial court then sustained an objection to the admission of the photograph based on the witness's lack of personal knowledge. (15 RT p. 1637.) The prosecutor later showed the photograph to witnesses Mark Harvey, Lynda Farnand, Cheryl Zornes, Dwayne Kari, and Scott Schiffman. (15 RT p. 1690; 17 RT pp. 1914, 1952; 20 RT pp. 2280, 2303.)[1] Exhibit 13 was admitted into evidence. (21 RT p. 2318.)

C. THE TRIAL COURT ERRED BY ADMITTING THE PHOTOGRAPH OF MS. KERR

This Court has stated, "Courts should be cautious in the guilt phase about admitting photographs of murder victims alive, given the risk that the photograph will merely generate sympathy for the victims." (*People v. Harris* (2005) 37 Cal.4th 310, 331; see also *People v. Osband* (1996) 13 Cal.4th 622, 677.) "[T]he possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. (*Ibid.*) The decision to admit a photograph is within the discretion of the trial court. (*Id.*, at pp. 331-332.)

Exhibit 13 was first offered into evidence when Detective Gligorijevic testified. The defense counsel objected at that time to its admission based on lack of relevance. The trial court summarily overruled the objection and did not ask the prosecutor for an offer of proof regarding the relevance of the photograph. (15 RT p. 1636.) However, it was apparent the

---

[1] The testimony of witness Schiffman was received through stipulation. (20 RT p. 2304.)

photograph was offered only to generate sympathy and not for any relevant purpose. There was nothing depicted in the photograph such as jewelry or unique clothing which was relevant to a robbery or burglary charge. The prosecutor showed the photograph to a series of witnesses listed above. All of these witnesses knew Ms. Kerr and did not need to be shown a photograph in order to identify her or give their testimony. The photograph served no purpose other than to generate sympathy for Ms. Kerr and anger towards appellant.

D. THE ADMISSION OF MS. KERR'S PHOTOGRAPH VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

The defense counsel objected to the admission of the photograph based on lack of relevance, hearsay, and lack of foundation. (15 RT pp. 1636-1637.) The defense counsel did not specifically cite Evidence Code section 352, or the due process clause, as the basis for excluding the photograph. An objection under Evidence Code section 352 is adequate to preserve a federal due process claim. (*People v. Perry* (2006) 38 Cal.4th 302, 317, fn. 6.) Similarly, the relevance objection made by the defense counsel was sufficient to preserve claims under section 352 and the due process clause. The relevance objection was obviously based on the photograph's failure to prove a fact in dispute and its prejudicial nature because of its inevitable tendency to create sympathy for Ms. Kerr and prejudice against appellant. Hence, this Court can review whether the admission of the photograph violated appellant's federal constitutional rights.

The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*Estelle v. McGuire*

(1991) 502 U.S. 62, 70, 112 S.Ct. 475, 481, 116 L.Ed.2d 385.) Here, the admission of Exhibit 13 rendered appellant's trial fundamentally unfair. The prosecutor paraded the photograph in front of six witnesses. The jury heard testimony during the guilt phase of the trial that Ms. Kerr was the mother of a boy age nine or 10. (18 RT pp. 2021, 2025, 2028.) The photograph of Ms. Kerr, combined with the knowledge that she was a mother, must have inflamed the passions of the jury against appellant. The loss becomes significantly more concrete, and its emotional impact greater, when the jury has a photograph to view of the victim. The photograph did not prove any fact in dispute. It was simply a tool of emotional manipulation in the hands of the prosecutor.

The admission of the photograph also violated the prohibition against cruel and unusual punishment in the federal and state constitutions. Under the federal due process clause and the Eighth Amendment, the jury's "discretion [in a capital case] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Zant v. Stephens, supra*, 462 U.S. at p. 874.) Article I, section 7 of the California Constitution grants a defendant the right to due process of law. Article I, section 17 of the California Constitution prohibits the imposition of cruel and unusual punishment. Both provisions have been interpreted to require reliability in the procedure utilized to impose the death penalty. (*People v. Ayala* (2000) 23 Cal.4th 225, 263.)

Appellant was eligible for the death penalty only because the jury found him guilty of first degree murder and two special circumstances. Appellant's Eighth Amendment right

against the imposition of cruel and unusual punishment was violated because the jury returned findings making appellant eligible for the death penalty which were infected by emotion and prejudice. The reliability required in determining appellant's eligibility for the death penalty was compromised by emotionally charged and inflammatory evidence.

E. PREJUDICE

Because the admission of Exhibit 13 violated appellant's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The error, furthermore, was prejudicial under the more likely than not standard applicable to state law error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant's defense was that he was guilty of voluntary manslaughter. The defense counsel admitted during opening statement that appellant had killed Ms. Kerr. (14 RT pp. 1470-1471.) Because appellant admitted to killing Ms. Kerr, it was especially important the passions of the jury not be inflamed against appellant. Jurors obviously had a difficult time not being prejudiced against appellant because of the admission that he needlessly had taken the life of a young mother. Appellant presented a classic case of voluntary manslaughter. Appellant was taken for an emotional roller coaster ride by Ms. Kerr. He paid for her apartment so she could escape her husband. (18 RT pp. 2057-2058; 20 RT p. 2304.) She used him for money, had sexual relations with him, and then berated him behind his back to another individual with whom appellant believed she was having sexual relations.(17 RT pp.

1860-1861; 20 RT pp. 2236-2237, 2252-2253.) Appellant finally snapped and killed her in the heat of passion.

Several witnesses corroborated the emotional torment experienced by appellant because of Ms. Kerr. Joseph Lujano was a plumber who worked with appellant. (21 RT pp. 2319-2321.) Mr. Lujano heard several recorded statements in which Ms. Kerr thanked appellant for helping her afford a divorce attorney and she said she loved him. (21 RT pp. 2326-2327.) He also saw a card Ms. Kerr had sent to appellant in which she said she loved him. (21 RT p. 2327.) Mr. Lujano saw appellant's behavior change dramatically in the two weeks preceding Ms. Kerr's death. Appellant stopped taking care of his customers. Appellant was obsessed with Ms. Kerr and distraught over his relationship with her. (21 RT p. 2332.)

Jody Wheeler worked at Charlie O's Saloon and knew Ms. Kerr. (21 RT p. 2339.) Up to the time of Ms. Kerr's death, she frequently called the bar and asked for appellant. She sometimes called as many at 10 times a day. (21 RT p. 2344.) Ms. Wheeler told appellant to get away from Ms. Kerr because she was using him. (21 RT p. 2351.) Ms. Kerr never said anything to Ms. Wheeler about being afraid of appellant. (21 RT p. 2352.)

Sheila Peet knew appellant from the plumbing business. Ms. Peet met Ms. Kerr when she came into her store. (21 RT p. 2378-2379.) Ms. Kerr appeared happy with appellant and talked about getting her own place to live and an attorney. (21 RT p. 2384.) Ms. Peet believed Ms. Kerr's dress was too revealing. (21 RT p. 2386.)

The emotional impact on the jury of seeing a photograph of Ms. Kerr cannot be

underestimated. The photograph must have had a significant impact on convincing the jury to find appellant guilty of first degree murder rather than voluntary manslaughter. The judgment of guilt must therefore be reversed.

XV

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRONEOUS RULINGS DURING THE GUILT PHASE OF THE TRIAL WAS TO DEPRIVE APPELLANT OF: (1) A FAIR TRIAL IN VIOLATION OF HIS STATE AND FEDERAL RIGHT TO DUE PROCESS OF LAW; (2) HIS RIGHT TO A JURY DETERMINATION OF THE FACTS AS REQUIRED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTION 16 F THE CALIFORNIA CONSTITUTION.

As explained above, the trial court made a series of errors during the guilt phase of the trial. The cumulative effect of the trial court's errors was to deprive appellant of federal and state due process of law and a fair trial. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488, 56 L.Ed.2d 468; 98 S.Ct. 1930 [cumulative errors as denial due process right to fair trial]. "Where, as here, there are a number of errors, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *(United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.) Hence, the judgment of guilt must be reversed. Furthermore, even if the judgment of guilt to first degree murder is not reversed, the reversal of one or more of the special circumstance findings requires reversal of the judgment of death.

The first degree murder conviction was based on a premeditated killing, the felony murder rule, and murder by torture. (23 RT pp. 2519-2523; 24 RT pp. 2704-2706.) Appellant was eligible for the death penalty because of the true finding to the special circumstance

allegations. The true finding to the kidnaping allegation must be reversed because the trial court gave an erroneous definition of asportation and failed to give a mistake of fact instruction. The true finding to the kidnaping count also contributed to the jury erroneously finding appellant guilty of first degree murder.

Appellant's defense to the murder charge was that he killed Ms. Kerr in the heat of passion when he strangled her at her apartment. If the jury erroneously concluded appellant kidnaped Ms. Kerr, it was more likely to conclude that her death was a premeditated act by appellant and he had therefore committed first degree murder. The transportation of a victim to a specific location where the body is left inside a vehicle and set on fire suggests premeditation. This Court cannot conclude beyond a reasonable doubt the jury would not have accepted appellant's theory that he had committed voluntary manslaughter in the heat of passion had the jury not erroneously concluded that appellant had kidnaped Ms. Kerr. Hence, appellant's conviction of first degree murder based on a premeditated killing cannot be affirmed.

Appellant was also found guilty of first degree capital murder because he killed Ms. Kerr during the commission of a kidnaping and committed murder by torture. Appellant's first degree murder conviction based on a kidnaping cannot be affirmed if the kidnaping instructions were prejudicially erroneous. Appellant cannot be found guilty of first degree capital murder based on the theory of murder by torture because of the trial court's failure to instruct the jury on the lesser offense of felony assault. The first degree murder

conviction, based on the commission of kidnaping or torture, cannot therefore be affirmed. The special circumstance finding of torture cannot be affirmed because of the trial court's failure to instruct the jury on the lesser offense of felony assault.

The trial court's erroneous rulings regarding the admissibility of Ms. Kerr's hearsay statements that appellant had been stalking her, the erroneous evidentiary rulings discussed in Issue IX, the inclusion of the "viewed with caution" language in CALJIC 2.71, the giving of CALJIC 8.75, the admission of the inflammatory photographs of Ms. Kerr's remains, and the photograph of Ms. Kerr while she was alive, all contributed to the jury erroneously finding appellant guilty of first-degree murder rather than voluntary manslaughter.

Appellant presented a strong case that he should have been convicted of voluntary manslaughter. Appellant was an emotionally vulnerable person who was manipulated by Ms. Kerr. Ms. Kerr allowed appellant to pay for her apartment while she berated him to others. She had sexual relations with appellant when it was convenient for her. Appellant finally fell apart emotionally and killed Ms. Kerr when he could no longer deal with the rejection and manipulation. The admission of Ms. Kerr's hearsay statements that appellant stalked her must have substantially influenced the jury's conclusion that appellant committed a premeditated murder. The admission of the statements made it appear that Ms. Kerr's death was the predictable outcome of the path elected to pursue when he started stalking and threatening her. Absent the admission of these statements, there was little if any evidence of premeditation.

The erroneous evidentiary rulings discussed in Issue IX magnified the prejudice from the admission of the stalking evidence. The trial court's erroneous evidentiary rulings prevented the jury from having the full portrait of appellant's relationship with Ms. Kerr. The exclusion of evidence regarding Mark Harvey's predatory sexual behavior with women he met at AA meetings was especially damaging. It made appellant's belief that Ms. Kerr was having sexual relations with Mr. Harvey appear to be the result of his paranoia and obsessiveness rather than a belief that had some basis in reality. The exclusion of Ms. Kerr's statements referring to herself as Lisa Brooks deprived the jury of understanding the depth of Ms. Kerr's manipulation of appellant and why he was obsessed with her. Most men would believe a woman was committed to them if she started referring to herself with his last name. The exclusion of this evidence magnified the prejudice from the stalking evidence because it made it appear that Ms. Kerr had done nothing to result in appellant being obsessed with her. Similar reasoning applies to the exclusion of the evidence about the panties. Ms. Kerr had a strong motive to be with appellant if her husband, Casey Kerr, was beating her. The exclusion of this evidence resulted in the jury not knowing that Ms. Kerr had an additional reason to manipulate appellant into paying for her apartment and spending time with him.

The exclusion of the "view with caution" language from CALJIC 2.71, and the giving of CALJIC 8.75, magnified the prejudice from the trial court's ruling regarding the admissibility of the stalking evidence and the evidentiary rulings discussed in Issue IX. Appellant relied on his own statements to third parties and law enforcement to establish his

claim that he was guilty only of voluntary manslaughter. The "view with caution" language in CALJIC 2.71 prevented the jury from giving proper weight and credit to appellant's out-of-court statements which established that he committed the killing in the heat of passion. The jury's erroneous discounting of appellant's statements that he killed Ms. Kerr in the heat of passion when combined with the stalking evidence and the erroneous rulings discussed in Issue IX had the practical effect of eviscerating appellant's voluntary manslaughter theory. The jury only saw a stalker who made statements that, according to CALJIC 2.71, should be deemed unreliable.

Finally, the emotional impact of seeing the photographs of Ms. Kerr's remains and the photograph of her alive compounded the prejudice from the above errors. The photographs had no evidentiary value. The contrast between the live photograph of Ms. Kerr and the photographs of her burnt remains must have moved the jury to anger against appellant. This anger, combined with the belief appellant had stalked Ms. Kerr during her final days, prevented the jury from fairly assessing whether appellant was guilty only of voluntary manslaughter rather than first degree murder. The convictions and judgment of death must be reversed.

XVI

THE FEDERAL AND STATE DUE PROCESS CLAUSES, THE RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 16, OF THE CALIFORNIA CONSTITUTION, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, REQUIRE THE JUDGMENT OF GUILT TO COUNT ONE, AND THE JUDGMENT OF DEATH, TO BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE WHETHER APPELLANT WAS GUILTY OF FIRST DEGREE MURDER BASED ON FELONY MURDER OR BASED ON PREMEDITATION.

A. SUMMARY OF ARGUMENT

Appellant was found guilty in count one of first degree murder. The jury was instructed on the theories of first degree murder by premeditation and the felony murder rule. The felonies were kidnaping and torture. (23 RT pp. 2519-2523, 2533-2534.) The jury was not instructed that it had to unanimously agree whether appellant was guilty of murder based on premeditation or the felony-murder doctrine. The federal and state due process clauses, the right to a jury determination of the facts under the Sixth Amendment and Article I, section 16 of the California Constitution, and the prohibition against the imposition of cruel and unusual punishment in the Eighth Amendment and Article I, section 17, of the California Constitution, required the jury to unanimously agree whether appellant was guilty of premeditated murder or felony murder. This Court has rejected the argument that the jury

must unanimously agree whether the defendant was guilty of first degree murder based on a theory of premeditation or the felony-murder rule. (*People v. Morgan* (2008) 42 Cal.4th 593, 617.) This Court should reconsider its prior decisions. The trial court's failure to give a unanimity instruction was prejudicial because the jurors could have disagreed whether appellant was guilty of first degree murder based on a theory of premeditation or the felony-murder rule. Hence, the judgment of guilt to count one, and the judgment of death, must be reversed.

B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Count one alleged that appellant committed murder in violation of Penal Code section 187, subdivision (a). (2 CT p. 315.) It also alleged as special circumstances that the murder was committed by means of lying in wait, in the commission of a kidnaping, and involved the infliction of torture. (2 CT pp. 315-316.)

The facts surrounding Ms. Kerr's death were unclear. Mr. Heiserman testified that appellant told him that he wanted to get rid of Ms. Kerr. (18 RT pp. 2081-2082, 2084-2085.) Appellant was allegedly following Ms. Kerr around in the weeks leading up to her death. (19 RT pp. 2139-2140.) Appellant told Mr. Jayne that he confronted Ms. Kerr after she left Mark Harvey's residence and strangled her at her apartment. (20 RT p. 2237.) Appellant also told Mr. Jayne that the decision to kill her resulted from anger and was made on the spur of the moment. (20 RT p. 2244.) The medical examiner testified that Ms. Kerr was alive but unconscious when the fire started. (18 RT pp. 1995-1997.) Ms. Kerr's body was found

resting on the rear floorboard, which suggests she was indeed unconscious when the flames consumed the vehicle. (14 RT p. 1492.) During his closing argument, the prosecutor argued that appellant was guilty of first degree murder based both the premeditation theory and the felony-murder theory. (23 RT pp. 2549-2568.)

The jury was instructed on premeditated murder and felony murder. The jury was instructed that, "All murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree." (23 RT p. 2521.) The jury was later instructed that, "The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime as a direct causal result of arson or kidnaping is murder of the first degree when the perpetrator had the specific intent to commit that crime." (23 RT pp. 2522-2523.) The jury was also instructed that, "Murder which is perpetrated by torture is murder of the first degree." (23 RT p. 2533.) The trial court then defined torture. (23 RT p. 2534.)

C. THE TRIAL COURT ERRED BY NOT GIVING A UNANIMITY INSTRUCTION FOR THE MURDER CHARGE

It is a fundamental principle of criminal justice system that a criminal conviction requires a unanimous verdict. (Cal. Const., Art I, sec. 16; *People v. Wheeler* (1978) 22 Cal.App.3d 258, 265.) When evidence exists of more than one incident in which a defendant might have committed a charged offense, the trial court has a sua sponte duty to instruct that jurors must unanimously agree on the particular act on which they base a conviction. (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 792, fn. 6.) When the evidence presented shows a

greater number of distinct violations of the charged crime than charged, the trial court must instruct the jury that it must reach unanimous agreement on the distinct criminal act or event supporting each charge, unless the prosecution has elected a specific criminal act or event upon which it relies for each allegation. *(People v. Davis* (1992) 8 Cal.App.4th 28, 41; *People v. Salvato* (1991) 234 Cal.App.3d 872, 879.) This is because a criminal defendant "is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged." (*People v. Jones* (1990) 51 Cal.3d 294, 305.)

Jury unanimity requires that the entire jury must agree on the act or acts of which the defendant is guilty. (*People v. Castro* (1901) 133 Cal. 11, 13.) After *Castro*, the "so-called either/or rule emerged requiring that either the prosecution must select the specific act relied upon to prove the charge or the jury must be instructed on unanimity." (*People v. Moore* (1989) 211 Cal.App.3d 1101, 1111.) The trial court is required, sua sponte, to instruct the jurors that they must unanimously agree beyond a reasonable doubt upon the particular act constituting the crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 280-282.)

In *People v. Beardslee* (1991) 53 Cal.3d 68, the defendant argued the jury was required to unanimously agree whether he guilty of first degree murder based on premeditation or felony-murder. This Court rejected that argument: "A jury may convict a defendant of first degree murder, however, without making a unanimous choice of one or more of several theories proposed by the prosecution, e.g., that the murder was deliberate and premeditated or that it was committed in the course of a felony." (*People v. Beardslee, supra*,

53 Cal.3d at p. 92.) Hence, "It is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by the statute." (*People v. Beardslee, supra*, 53 Cal.3d at p. 92, quoting *People v. Milan* (1973) 9 Cal.3d 185, 195.)

Premeditated murder and felony murder are different theories of the single offense of murder. (*People v. Valdez* (2004) 32 Cal.4th 73, 115, fn. 17.) This Court has continued to adhere to the view that premeditated murder and felony murder are different theories of the single crime of first-degree murder and a unanimity instruction is therefore not needed for that crime. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 89-90; *People v. Morgan* (2008) 42 Cal.4th 593, 617; *People v. Nakahara* (2003) 30 Cal.4th 705, 712.) *People v. Morgan* rejected the argument that the line of cases beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435], required the giving of a unanimity instruction when the prosecution is proceeding on a theory of premeditated murder and felony-murder. (*People v. Morgan, supra*, 42 Cal.4th at p. 617.)

This Court's holding that a unanimity instruction is not required when the jury is instructed on premeditated murder and felony murder to support a first degree murder charge is erroneous. The requirement of unanimity is rooted in the due process requirement of proof beyond a reasonable doubt. (*Richardson v. United States* (1999) 526 U.S. 813, 816-817, [119 S.Ct. 1707, 143 L.Ed.2d 985] [holding that jury must unanimously agree which specific violations make up a continuing series of violations in a prosecution for engaging in a

continuing criminal enterprise because in a federal criminal case the jury cannot convict unless it unanimously finds that the Government has proven each element]; *Schad v. Arizona* (1991) 501 U.S. 624, 634 , fn. 5, 111 S.Ct. 2491, 115 L.Ed.2d 555.)

Richardson v. United States noted that crimes are made up of factual elements which are listed in the statute and define the crime. (*Richardson v. United States, supra*, 526 U.S. at p. 817.) The jury may disagree about the means by which the defendant committed the crime, but that disagreement is irrelevant as long as 12 jurors unanimously conclude that the prosecution had proved the necessary factual elements. (*Ibid.*) *Richardson v. United States* interpreted the continuing criminal enterprise statute codified at 21 United States Code section 848, subdivision (a). It required the prosecution to prove a series of violation of the narcotics law. The defendant requested the trial court to instruct the jury that it must agree on the three acts constituting the violations of the narcotics law. The trial court refused the instruction.

The issue was whether the phrase, "series of violations" in the statute referred to one element in which the "violations" constituted a means or whether the phrase created separate elements in which each had to be proved beyond a reasonable doubt. The Court adopted the latter interpretation for several reasons. The language of the statute referred to "violations." That term was used to refer to violations of the law. "To hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law."

(*Richardson v. United States, supra*, 526 U.S. at pp. 818-819.) The Court also concluded that because the word "violations" covered a multiplicity of crimes, it increased the "likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among jurors about just what the defendant did, or did not, do." (*Richardson v. United States, supra*, 526 U.S. at p. 819.) Treating the violations of simply the means to commit the crime also "aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say of bad reputation, that where there is smoke there must be fire." (*Ibid.*) The Court finally noted that, "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." (*Id.*, at p. 820.)

In *Schad v. Arizona, supra*, 501 U.S. 624, the Court rejected the argument that jury had to unanimously agree whether the defendant was guilty of murder based on premeditation or the felony murder rule. *Schad v. Arizona* was a plurality opinion written by Justice Souter and joined by Chief Justice Rehnquist and Justices O'Conner and Kennedy. Justice Scalia concurred in part in the opinion and concurred in the judgment. The plurality opinion noted that, "Judicial restraint necessarily follows from a recognition of the impossibility of determining, as an *a priori* matter, whether a given combination of facts is

consistent with there being only one offense." (*Schad v. Arizona, supra*, 501 U.S. at p. 638.) The Court then observed that, "[I]t is significant that Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echos." (*Id.*, at p. 640.) Justice Scalia concurred with the plurality because, "[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of the commission." (*Schad v. Arizona, supra*, 501 U.S. at p. 649.)

Justice White filed a dissenting opinion which was joined by Justices Marshall, Blackmun, and Stevens. The dissenting opinion was a harbinger of the reasoning adopted in the line of cases commencing with *Apprendi v. New Jersey* because it focused on facts to determine the elements of a crime. The dissent focused on the different states of mind required for premeditated murder and felony murder:

> Unlike premeditated murder, felony murder does not require that the defendant commit the killing or even intend to kill, so long as the defendant is involved in the underlying felony. On the other hand, felony murder-but not premeditated murder-requires proof that the defendant had the requisite intent to commit and did commit the underlying felony. (Citation omitted.) Premeditated murder, however, demands an intent to kill as well as premeditation, neither of which is required to prove felony murder. Thus, contrary to the plurality's assertion, see *ante,* at 2501, the difference between the two paths is not merely one of a substitution of one *mens rea* for another. Rather, each contains separate elements of conduct and state of mind which cannot be mixed and matched at will. It is particularly fanciful to equate an intent to do no more than rob with a premeditated intent to

murder.

(*Schad v. Arizona, supra*, 501 U.S. at pp. 654-655 [dis. opn. of J. White].) Hence, "The problem is that the Arizona statute, under a single heading, criminalizes several alternative patterns of conduct. While a State is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt." (*Id.*, at p. 656 [dis. opn. of J. White].)

In *Apprendi v. New Jersey*, the defendant's sentence following his guilty plea was enhanced because the judge found by a preponderance of the evidence that the defendant committed the crime to intimidate a group of people because of their race. The Court concluded this violated the defendant's right to due process and right to a jury trial because, "Facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition `elements' of a separate legal offense." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 483, fn. 10.)

In *Blakely v. Washington* (2004) 542 U.S. 296, [124 S.Ct. 2531, 159 L.Ed.2d 403], the defendant's sentence was enhanced 90 months by the trial judge because he committed the crime with deliberate cruelty. The Court concluded the enhanced sentence was illegal because the "'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has

not found all the facts 'which the law makes essential to the punishment,' Bishop, § 87, at 55, and the judge exceeds his proper authority." (*Blakely v. Washington, supra*, 542 U.S. at pp. 303-304; see also *Cunningham v. California* (2007) 549 U.S. 270, 288-289, [127 S.Ct. 856, 166 L.Ed.2d 856].)

The *Apprendi* line of cases was concerned with the situation in which the defendant's sentence was increased based on facts not found by the jury. The Court, however, focused on "facts" that must be proven to define the elements of a crime. By focusing on "facts" to define the scope of a criminal statute, it is apparent that premeditated murder and felony murder are separate crimes. This Court's characterization of murder as a single crime with premeditated murder and felony murder as merely separate theories of that crime cannot withstand scrutiny based on *Apprendi v. New Jersey* and its progeny.

This case demonstrates why a unanimity instruction was required for the murder charge. The felony-murder theory required the prosecution to prove that appellant killed Ms. Kerr in the commission of a kidnaping or torture. Some jurors may have believed appellant did not intend to torture Ms. Kerr when he started the fire because appellant believed she was dead or unconscious, and a person in either of those conditions would not feel pain. Hence, appellant did not have the intent to inflict cruel and extreme pain when he started the fire. According to appellant's out-of-court statements, he confronted Ms. Kerr and killed her on the spur of the moment because he was angry. (20 RT pp. 2237, 2244.) Some jurors may have believed appellant was not guilty of kidnaping because he believed he had killed Ms.

Kerr during the initial confrontation at her apartment, and a dead person cannot be kidnaped. Some jurors may not have even resolved whether appellant committed a premeditated murder if they concluded appellant was guilty based on a felony-murder theory. The different theories advanced by the prosecution allowed the jury to convict appellant, but never reach agreement what he actually did to commit first degree murder.

In *People v. Beardslee, supra*, 53 Cal.3d at p. 93, this Court noted that, "A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." As explained above, the jurors in this case could disagree what act appellant committed to cause Ms. Kerr's death. A unanimity instruction was therefore required for the murder charge.

D. THE TRIAL COURT'S FAILURE TO GIVE A UNANIMITY INSTRUCTION VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

As argued above, the federal and state due process clauses require the jury to unanimously agree what acts the defendant committed to be guilty of a crime. (*Richardson v. United States, supra*, 526 U.S. at pp. 819-820.) The Sixth Amendment, and Article I, section 16 of the California Constitution, require the jury to find the facts to support a criminal conviction. (*United States v. Gaudin* (1995) 515 U.S. 506, 510, [115 S.Ct. 2310, 132 L.Ed.2d 444] [The Sixth Amendment right to a jury trial requires a criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged].) The jury has not made the requisite factual determinations necessary to support a conviction beyond a reasonable doubt when it is not required to agree on the

specific facts the defendant committed. Hence, the trial court's failure to give a unanimity instruction for the murder count violated appellant's Sixth Amendment to a jury determination of the facts supporting the conviction.

The prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, section 17 of the California Constitution, requires heightened reliability in the fact finding process when the state seeks a judgment of death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973.) The Eighth Amendment requires the jury to decide the facts necessary to impose the death penalty. (*Ring v. Arizona* (2002) 536 U.S. 584, 606-607, [122 S.Ct. 2428, 153 L.Ed.2d 556].) The heightened reliability required in death penalty proceedings was undermined by the trial court's failure to give a unanimity instruction. Some jurors may have viewed a premeditated murder as more culpable conduct than a felony murder. Some jurors may have viewed a murder by torture as more culpable than a premeditated murder or a murder by kidnaping. The lack of a unanimity instruction prevented the jurors from reaching agreement on exactly what appellant did to be guilty of first degree murder and assess the degree of culpability associated with how he killed Ms. Kerr.

E. PREJUDICE

Because the trial court's failure to give a unanimity instruction for the murder charged violated appellant's federal constitutional rights, the murder conviction must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The failure to give a unanimity is harmless when disagreement by the jury is not reasonably probable. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299.)

For the reasons explained above, this Court cannot conclude beyond a reasonable doubt that the jury did not disagree what appellant did to kill Ms. Kerr and what mental state he possessed with regard to each of the different ways he could have killed her. Some jurors may have concluded appellant believed he had killed Ms. Kerr when he confronted her at the apartment and strangled her. Some jurors may have believed appellant did not torture Ms. Kerr because he believed she was dead or unconscious. Some jurors may not have even reached the issue of premeditation.

The jury found true the special circumstance allegations that appellant kidnaped and tortured Ms. Kerr. These findings do not make harmless the trial court's failure to give a unanimity instruction for murder. The kidnaping finding must be reversed for instructional error and because of the lack of an independent felonious purpose. (*See* Arguments II and XIII, *supra.*) The evidence was insufficient to prove appellant tortured Ms. Kerr. (*See* Argument IV, *supra.*) Hence, the findings upon which this Court could conclude the jury unanimously concluded appellant committed felony-murder, or murder by torture, must be reversed. This Court cannot conclude beyond a reasonable doubt that the jury found appellant premeditated Ms. Kerr's murder because the felony-murder instructions allowed the jury to find appellant guilty of first degree murder without reaching the issue of premeditation.

For the reasons above, the trial court's failure to give a unanimity instruction for the murder charge was not harmless beyond a reasonable doubt. The reversal of the murder conviction means that appellant has not been convicted of a crime making him eligible for the death penalty. (Pen. Code, §190.2, subd. (a).) Hence, the judgment of death must also be reversed.