IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

RYAN HOYT,

Defendant-Appellant.

Case No. S113653

[Santa Barbara Superior Court No. 1014465]

DEATH PENALTY CASE

APPELLANT RYAN HOYT'S OPENING BRIEF

Volume II, pages 185-380

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Barbara

Honorable William Gordon, Judge

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SUPREME COURT COPY

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VI. THE SUPERIOR COURT VIOLATED APPELLANT'S FIFTH AMENDMENT DUE PROCESS AND SELF-INCRIMINATION RIGHTS BY COMPELLING HIM TO TESTIFY AS FOUNDATION FOR HIS EXPERT

A. INTRODUCTION

The Superior Court violated Appellant's right to due process, his Fifth Amendment right to remain silent, and his Sixth Amendment right to counsel and to present a defense, by compelling him to choose either to testify to lay a foundation or to forego the exculpatory testimony of his psychologist, Dr. Kania. The Superior Court required that appellant personally repudiate his confession in testimony to the jury *before* he could present expert testimony concerning his personality disorder and the general phenomenon of false confession, testimony which the defense found necessary to cast doubt on the reliability of Appellant's confession. No such foundation was needed, and the effect of the Superior Court's ultimatum was to strip Appellant of his fundamental right to assess his expert's testimony before deciding whether to waive his privilege against self-incrimination. The Superior Court put Appellant in the vise of a cruel dilemma, forcing him either to waive or forego one constitutional right (the right to remain silent) in order to assert another (the right to present a defense). "It is intolerable that one constitutional right must be surrendered to assert another." *Simmons v. United States* (1968) 390 U.S. 377 (error to admit defendant's suppression hearing testimony which established his standing to challenge search against him at trial in that defendant was obliged either to give up his Fourth Amendment claim or waive his Fifth Amendment privilege against self-incrimination.) The Superior Court's litmus test - a "sincerity oath", if you will - was error akin to the "now or never" ultimatum condemned by the United States Supreme Court in *Brooks v. Tennessee*.

In this case, appellant sacrificed his Fifth Amendment right in order to pursue his Sixth Amendment right to present a defense and testified that his confession was untrue, though he said he could not remember any detail

of it. A "Pandora's box" of errors was opened thereby: damaging impeachment with the Side "B" admission which was otherwise excluded; cross-examination on two subjects of which appellant had no prior notice; and the introduction of privileged statements he had made to Dr. Kania and undisclosed prosecution experts' reports.

In addition, Appellant's alleged waiver of his Fifth Amendment privilege against self-incrimination was not knowing and intelligent where he had to make that decision without knowledge of the relevant facts – *i.e.*, Dr. Kania's testimony and the reports by the state's rebuttal witnesses. Appellant recognizes the existence of case law which holds that the act of taking the stand to testify constitutes a voluntary waiver of the Fifth Amendment right to remain silent. However, the law has always been clear that a appellant's waiver of his Fifth Amendment right must be more than a mere voluntary waiver – it must be also be knowing and intelligent. (*See e.g.*, *Miranda*, 384 U.S. 436, 444; *North Carolina v. Butler* (1966) 441 US 369, 373; *Colorado v. Connelly* (1986) 479 US 157, 168; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) In the *Miranda* context, the United States Supreme Court has held that the waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. The burden is on the state to establish waiver. (*Moran v. Burbine* (1986) 475 US 412, 421.)

Compounding these errors, the prosecution was permitted to call its own psychiatrist to testify that Appellant lied to the jury. This "Pandora's box" of errors was fundamentally unfair and a miscarriage of justice. This Court should not be inured to the scope of error by an inference that the jury disbelieved Appellant's amnesia story and convicted him on that basis. The Superior Court's rulings created a wholly different trial than the one to which Appellant was entitled, in which the spectacle of Appellant's self-damnation would have been avoided, Dr. Kania's testimony alone would have cast doubt on the reliability of the confession, in whole or in part, and the evidence would likely have been found insufficient to sustain first degree murder and kidnap-murder special circumstance convictions. On

retrial, the prosecution should not be entitled to use his coerced testimony for any purpose.

B. STATEMENT OF FACTS

1. Chosen Theories of Defenses

In opening statement, Owen offered a defense of reasonable doubt and third party culpability comprised of four related themes. First, Appellant had nothing to do with the original kidnap of Nick Markowitz. Second, Nick's kidnap terminated at various times over the ensuing 72-hours when he was free to return home, all of which occurred before Appellant became involved. Third, the jury should find a failure of proof of the prosecution's case because no fingerprints left on the victim or car, gun or duct-tape linked Appellant to the murder. Fourth, the jury should disregard Appellant's confession as unreliable, because it came on the heels of his traumatic arrest and phone calls with his histrionic mother, and Appellant gave it in order to protect his benefactor, Jesse Hollywood, the more likely culprit by motive, means, and opportunity. Owen told the jury that it was evident, from examination of the confession transcript itself, that Appellant did not know essential things one would know had one recently killed a young man. Owen added that Dr. Kania, an experienced clinical psychologist, would testify to the phenomenon of false confession (4 RT 776). Significantly, Owen did *not* tell the jury that Appellant would testify or that he had amnesia. Clearly, at the outset of the trial, the defense did not view Appellant's testimony as a necessary or helpful ingredient of his chosen defenses.

2. The Superior Court's Ruling that Appellant Must Testify as Foundation for Dr. Kania

The prosecution moved to limit the scope of Dr. Kania'a testimony[127]

127/ The prosecution sought to limit Dr. Kania to general principles of false confession, and to exclude any information which led Dr. Kania to conclude appellant gave a false confession in this case, and (ironically in light of what ensued) that appellant told Dr. Kania he could not recall the police interview. *See e.g.*, 4 RT 713, 733; 7 RT 1508.

and near the close of the case-in-chief, the Superior Court held an Evid. Code §402 hearing on that motion.

The defense proffered that Dr. Kania would testify appellant had a dependent personality disorder, and suffered from situational stress and anxiety upon arrest which were characteristic of, or at least consistent with false confession. Dr. Kania found it irrelevant to his consideration of these factors that appellant claimed amnesia for the confession (7 RT 1504). Appellant's inability to recall the event had no tendency in reason to make the content of what he had said more nor less likely true at the time he said it.

The following colloquy between the Superior Court and the prosecution ensued, based on an implicit (later made explicit) ruling that appellant must testify to the falsity of his confession before his expert could take the stand.

> THE COURT: Well, let me ask you this question, Mr. Zonen, *the defendant is going to testify in this case and I assume the defendant is going to testify that he doesn't remember giving that interview.*
>
> MR. ZONEN: And he can be cross-examined on it. There's no reason to get it of this witness, because we're not going to ask this witness what it meant anyway.
>
> THE COURT: Just a minute. To the extent that that evidence is in front of the jury, and the extent that this witness -- that the jury heard he's -- he had amnesia, he's got amnesia about that, and to the extent that this witness is prepared to testify that persons who were suffering the kinds of anxiety that can give rise to a false confession, studies have indicated that sometimes they do not recall the interview, now, I don't know why he can't comment on that if the defendant has testified that he had amnesia.
>
> MR. ZONEN: *If* he takes the stand and testifies.
>
> THE COURT: *That's what I'm talking about.*
>
> MR. ZONEN: In other words, that he should be able to say that sometimes people in this category suffer from amnesia.
>
> THE COURT: *I've already made it clear that I don't believe that this witness [Dr. Kania] can get on the stand and testify to things that he was told in that interview and, in effect,*

present the defendant's defense, the defendant's own testimony through the interview, I've said he can't do that. If the defendant testifies so he's subject to cross-examination, then to the extent, for example, that his amnesia is characteristic of someone who is under anxiety, it seems to me that he could -- he would, within the scope of testifying as to the general psychological factors that might give rise to a false confession, such as, anxiety, that that is – I mean, *I don't understand.*

MR. ZONEN: I have no problem with him testifying to anxiety. Generically, that -- well, I can't imagine there's such a thing as a defendant being interrogated by law enforcement in a murder investigation that's not experiencing anxiety, but to that extent, I have no objection to that. It's the part where he begins with, "And furthermore I interviewed the defendant, the defendant told me that he suffered from all of these symptomologies and therefore I came to this conclusion."

THE COURT: It's not necessary for him to testify as to the things that the defendant told him during the interview about the circumstances of his interview about his reaction to the interview, *he's going to testify to that I assume. I've been operating on that impression.* So that, essentially, it's going to be, at most it will be some hypothetical questions assuming he had amnesia, what characteristic, what would be, how would that fit in with these characteristics that you've described? Well, anxiety will sometimes do that. That's what I'm talking about. *He's already testified. I'm not going to let him testify as to circumstances, the things that he was told by the defendant. The defendant can testify to those things and he can be asked questions about it.* And I don't intend to allow him to give evidence -- an opinion as to the ultimate issue, which is whether or not this defendant gave a false confession. That's a credibility call for the jury based upon all the circumstances. That's kind of the way I see it.

. . .

THE COURT: *And then to the extent that the defendant has testified and he can be asked about, you know, for example, this issue of if it turns out that there's a claim of amnesia about this. But as a general proposition -- but, ultimately, I'm not going to allow him to testify, give any opinion as to whether or not this defendant under the circumstances of this case gave a false confession.*

MR. CROUTER: Very well. We understand your ruling. We

object to it on state and federal due process grounds, but we accept it.

(7 RT 1510-1515, emphasis added.)

In actuality, the Superior Court's assumption and impression that the appellant would testify were simply expressions of its own conveyance that the appellant *must* testify and personally repudiate his confession to lay a foundation for his expert's testimony. Any doubt on this score was laid to rest by the Superior Court when it denied appellant's motion for new trial:

> And then the argument goes on that somehow if the defendant should not have testified the issue should have been raised and suppression motion and if denied the defendant should not have testified. *And yet, I don't know how you can -- you can assert a false confession issue unless the defendant is going to testify and repudiate the false confession.* I don't think you can frame the issue by having the expert rely on the hearsay from the defendant. *The first step, the defendant has to repudiate the confession, so I think he was going to have to testify. And I don't know how the -- in other words, he's got to testify, he's got to repudiate it, and then this raises issues of credibility, which are jury issues, not issues for the Court during a suppression motion.*

(11 RT 2556-2557, emphases added.)

In summary, the Superior Court made two essential rulings in regard to appellant's presentation of his chosen theories of defense. First, appellant must personally repudiate his confession from the stand, and must do so *before* his expert Dr. Kania could testify to appellant's personality disorder under stress as it related to the possibility of a false confession in this case.[128] Second, Dr. Kania could *not* testify to what appellant told him as inadmissible hearsay, *or* to his opinion that appellant in fact gave a false

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128/ Nothing in the record suggests that the Appellant made a voluntary choice to testify at all, much less to testify out of order, except as an act of compliance with this ruling. Hence, Owen did not mention Appellant's testimony in opening statement, but only the logistics of accomplishing it after the Superior Court's §402 ruling and later complaint about the pace of the defense presentation of its other witnesses. *See* 7 RT 1490-1491, 1606-1607.

confession as a question of ultimate fact reserved for the jury (7 RT 1510).[129] Later, the Superior Curt made a third critical ruling, that the prosecution could present expert rebuttal to appellant's amnesia claim. All of these errors, alone or in combination, violated appellant's constitutional rights.

3. Order of Proof of Defense Case

After the prosecution rested its case-in-chief (7 RT 1551), the defense called four witnesses Stephen Blackmer, Ramon Arias, Ernest Seymour, and Detective Janet Williams toward its alibi and third party culpability (Hollywood) defense.[130] The fifth witness Detective Jerry Cornell was delayed, which led the Superior Court to adjourn the jury early for the day (7 RT 1604). The Superior Court expressed at sidebar that it was upset and misled the defense had no other witnesses available that day (7 RT 1605).[131] Crouter replied that he needed time to review prosecution

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129/ Thus, by order of the Superior Court, Dr. Kania's testimony was limited to his views of the existence of a phenomenon known as false confession, and that the Appellant in this case was predisposed to falsely confess by a combination of factors, including stress, sleep-deprivation, undue pressure from his mother and a dependent personality disorder characterized by passivity, compliance, low self-esteem, and anxiety (7 RT 1502, 1515).

130/ Blackmer, a neighbor, saw appellant at Hollywood's house two days after Hollywood moved out, around the theorized date of the murder (7 RT 1559). Arias, a laborer, saw a skinhead man (putatively, Hollywood) acting nervously in the Lemon Tree hotel parking lot on that day. Detective Williams confirmed Arias identified Hollywood from a police photograph close to the crime. Seymour, a hotel guest, identified Hollywood and Rugge (not appellant) as guests with whom he partied that night. One of them identified himself as "Hollywood" and said he lived in the San Fernando Valley (7 RT 1591, 1602). Seymour heard a loud rumbling in the next door room late that night.

131/ There is no antecedent in the record for the Superior Court's reference to being misled by the defense in regard to number of witnesses or timeliness of its order of proof. Appellant's out of sequence testimony cannot be plausibly justified from this reserve as a sanction for defense misconduct.

discovery with the appellant, including prosecution expert reports which he had not yet received. appellant was made to take the stand the next day without benefit of this disclosure.

The next day, the defense called Detective Cornell who took a purported statement by Ben Markowitz that "if Hollywood had anything to do with Nick's killing, Skidmore would be the shooter" (8 RT 1615). The Superior Court struck Cornell's testimony as inadmissible hearsay. The defense played Vicky Hoyt's phone calls with Appellant on August 17, 2000, the day after his arrest (8 RT 1621; Court Exh. 54).[132]

4. Appellant's Testimony

Appellant took the stand as the sixth out of eight defense witnesses called at trial (8 RT 1623). Significantly, Appellant was made to testify *prior to* his pivotal witness Dr. Kania, and without prosecution disclosure of its experts' reports, either of which would have convinced appellant to invoke his privilege against self-incrimination, and leave well enough alone.

Appellant testified that he drove Sheehan's car to deliver a duffel bag (which he assumed had marijuana) to Rugge in Santa Barbara in order to pay off his debt to Hollywood. Rugge and Pressley ran what they called an errand with the car, while appellant stayed in their hotel room, then walked to a Jack in the Box restaurant. When Rugge returned (around 2:30 a.m.), they drove back to Los Angeles together. Appellant asserted he lacked any knowledge that Nick was being held in the hotel room, nor of how or by whom Nick was murdered that night.[133]

132/ The parties stipulated to the identity of the three voices on the tapes in order to accommodate Owen's wish to exclude Ms. Hoyt from the courtroom (8 RT 1621). The Superior Court obtained Appellant's *express consent* to this decision, which customarily falls within the province of trial counsel. The taking of an express waiver from Appellant on this issue stands in marked contrast to the manner in which the election and timing of appellant's own testimony - the signal event at trial - transpired.

133/ The Superior Court ruled that with this denial, appellant opened the door to impeachment with his Side "B" admission that he

Appellant inferred Sheehan and Jesse Hollywood were involved in Nick's murder because neither was surprised by Jack Hollywood's questions afterwards. Upon reading the newspaper account of the discovery of Nick's body, appellant realized he had played a role in the crime, albeit unwittingly, by transporting the murder weapon in the duffel bag (8 RT 1716).

a. Amnesia

Appellant testified that his confession to murder was untrue, and that he said it only to protect Hollywood (8 RT 1734).[134] He said he did not remember either the police interview or the phone calls with his mother, which he claimed to have heard played for the first time earlier in court that day (8 RT 1721). Obviously, this aspect of Appellant's testimony did nothing to further his defense. As discussed *infra*, as ours is an adversarial, rather than an inquisitorial system of justice, residual doubt this Court may or may not harbor in regard to Appellant's amnesia claim is truly beside the point of this claim on appeal: Appellant was entitled to mount a challenge to the reliability of his confession through Dr. Kania, while maintaining his own privilege against self-incrimination. Nothing in Dr. Kania's testimony on the general phenomenon of false confession and Appellant's particular vulnerabilities in particular was predicated upon Appellant's oath of sincerity. This would be better placed as a fn.

The Superior Court excluded as speculative *any* direct testimony regarding *what Appellant meant* by answers he gave to police on the ground

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considered the wrongfulness of his act just before he pulled the trigger on the gun to kill Nick (8 RT 1689).

134/ Ruling any answers would be speculative and irrelevant, the Superior Court precluded Appellant from explaining *what* he meant by answers he gave the police, *why* he gave them, *why* he would confess if it were not true, or *why* he would want to protect Hollywood and others involved (8 RT 1729). Nonetheless, the prosecution was permitted to cross-examine him to explain independent sources of information which might explain particular details of his confession, which Appellant could not provide, except that he said he saw duct-tape balled up on the bed in the hotel room (9 RT 1867).

appellant claimed he could not recall the interview. The Court reasoned that beyond a true or not true answer, Appellant's testimonial interpretation of his interview was irrelevant. Appellant expressed confusion at the ruling, asking more than once "by true, do you mean did I say it?" The Superior Court also precluded as non-responsive Appellant's request to explain his answer that he confessed falsely in order to protect Jesse Hollywood and others who were involved in the crime (8 RT 1735).

Thus, as a result of the court's rulings, Appellant's direct testimony contributed but marginally to his third party culpability defense, while opening him up to cross-examination on the details of the confession, the implausibility of his claimed amnesia, and impeachment with his Side "B" admission which, though admitted for impeachment only, was argued as evidence of guilt. (*See* Claim 8, *infra.*) Superior Court agreed with the prosecution that Side "B" was admissible for this purpose (3 RT 723).[135] To any rational decision-maker in Appellant's shoes, the game was not worth the candle. The testimony destroyed the defense.

b. Cross-Examination

On cross-examination, Appellant contended that he had no memory from the time of his August 16, 2000 arrest and detention at the San Fernando police station until August 19, 2000, a date he got from a newspaper he received in his cell. In particular, he insisted that he could not recall any part of his confession (8 RT 1758, 1777). He reviewed police reports and met with defense counsel for one or two hours total to prepare the night before his testimony, but neither refreshed his recollection (8 RT 1784).

The next morning, the prosecution disclosed it would call two experts (Drs. Glaser and Chidekel) to rebut Appellant's claim of false confession and address what the prosecution characterized as evidence of

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135/ Appellant had objected to any use of Side "B" as an involuntarily coerced statement. *(See* Claim V, *supra.)*

appellant's malingering on the stand (9 RT 1805).[136] The prosecution then cross-examined Appellant at length about his claim of amnesia, making use of diagnostic criteria supplied by its experts (as to which Appellant had no notice): 1) lack of any documented history of unconsciousness or blackout; 2) suspicion due to this being by far the longest period of non-recollection Appellant had ever experienced; 3) contrast with Appellant's memory for events during other such periods, which sometimes returned over time; and 4) lack of corroboration of Appellant's drug and alcohol abuse preceding arrest. Appellant was blind-sided by this line of cross-examination in that he was compelled to testify without the benefit of disclosure of the prosecution experts' methods and results.

The Superior Court also permitted cross-examination with purportedly inconsistent information appellant provided to Dr. Kania, *e.g.*, his own account of sleep patterns during the week of arrest (9 RT 1819). Appellant was blind-sided by this line of questioning which took advantage of the fact that he had to testify *before* Dr. Kania, and therefore could not weigh the damaging effect of this cross-examination on otherwise privileged communications in making the decision whether to testify. The following colloquy is illustrative:

> ZONEN: Mr. Hoyt, were you able to tell your therapist, the one who conducted an evaluation who will later be testifying here, exactly how many minutes of sleep you had for five days prior to your arrest?
>
> HOYT: I don't believe it was exact. I estimated it, sir.
>
> ZONEN: But you were able to give him answers. On one day it was no sleep, on another day it was four and a half hours, on another day it was four hours. I mean, you were literally down to the half hour; is that correct?
>
> HOYT: Is that how he wrote it?

136/ The prosecution's compulsory evaluation of appellant as the basis of testimony by its two rebuttal experts was prejudicial *Verdin* error. *See* Claim VII, *infra*.

ZONEN: I'm asking you if that's what you told him?

HOYT: No, that's not what I told him, sir.

ZONEN: So what is your recollection of what your sleep pattern was like for a week prior to your arrest?

HOYT: It was erratic.

ZONEN: And by erratic, what do you mean?

HOYT: There were days where I slept two and three hours, there were days where I slept hardly at all, there were days where I slept.

ZONEN: Do you know which days?

HOYT: No, sir. That was 15 -- over 15 months ago.

ZONEN: So you'd be surprised to find out that you might have very well told him how much sleep you had on a given day?

CROUTER: Objection. That's argumentative.

THE COURT: I'm sorry, so you'd be surprised?

ZONEN: Yeah. Would it surprise you to learn that you'd given him more specific information about how much sleep you had on each specific day prior to your arrest? Would that surprise you at this time?

CROUTER: Argumentative.

THE COURT: Overruled.

ZONEN: Would that surprise you?

HOYT: Yes, it would, sir.

ZONEN: Because that's certainly not your recollection at this point?

HOYT: Not at this point.

ZONEN: Is it your recollection that you had difficulty sleeping for that week prior to your arrest?

HOYT: Prior to my arrest I believe I was partying so hard that I

wasn't sleeping at all. I mean, like I said, it was erratic.

(9 RT 1810-1820.)

The Superior Court also permitted cross-examination in regard to what Appellant *meant by, or whether Appellant could explain,* specific details of his confession - for example, the presence of duct-tape in the hotel room (9 RT 1859). Despite the prohibition of direct testimony on Appellant's *meaning or motive* to confess falsely, the prosecution was permitted to question Appellant extensively on those points which were both incriminating, and purportedly outside public knowledge, for the obvious inference of substantive truth (8 RT 1867).

c. Truncated Re-Direct Examination

Compounding this skewing of the scales, on re-direct, the Superior Court precluded Appellant from testifying that (before his arrest) he had heard that duct-tape was retrieved from the hotel room, or that Appellant would willingly spend the rest of his life in prison, if necessary, to protect Jesse Hollywood (9 RT 1868, 1872). Thus, Appellant left the stand, his theory of the defense in tatters.

5. Detective West and Dr. Kania, the Defense Denouement

As its seventh witness, the defense called Detective West to elicit that he did not test Appellant's clothing for gunshot residue or blood (9 RT 1880). As its eighth and final witness, the defense called Dr. Kania, its clinical psychologist (9 RT 1884).[137] No reasonable man in Appellant's shoes, observing this expert's testimony beforehand, would have gone forward to take the stand, opening himself to cross-examination on his claim of three-day amnesia, and impeachment with a otherwise inadmissible statement of conscious lethal wrongdoing. The defense theory of reasonable doubt made most plausibly by Dr. Kania was undermined by these surprise aspects of Appellant's cross-examination.

137/ At the time Dr. Kania testified, he had no knowledge of, or opportunity to address the prosecution experts' methods or results.

Dr. Kania stated he was retained to assess whether Appellant's confession was false, *not* whether Appellant had any psychological disorder or posed a danger to others in custody, though he formed conclusions on the former subject which were relevant to the confession issue (9 RT 1893).[138] He reviewed police reports, Appellant's phone calls with his mother, and the confession itself, but nothing else to prepare. He interviewed appellant in County Jail on October 2, 3, and 13, 2001, for 11 to 13 hours in total. He told Appellant that their meetings were confidential, and encouraged him to tell the truth. He administered the MMPI, which he regarded as an objective personality test. Appellant's MMPI personality profile was passive and dependent, and reflected a chaotic home-life, drug and alcohol problems, all of which Dr. Kania considered to be precursors of mental illness or psychosis (9 RT 1904). Appellant's MMPI profile showed evidence of depression and dependency. His overall MMPI- profile was paranoid schizophrenic, but Dr. Kania felt this diagnosis did not square with Appellant's clinical presentation.

Dr. Kania testified that Appellant grew up in a chaotic home where drugs were abused. He acted as a mediator between his father and mother. He suffered from dependency, passivity, and low self-esteem, underlying depression and drug use, with a possible genetic component (9 RT 1913).[139]

Dr. Kania opined that in general people falsely confess to crimes from either a psychotic delusion, stress or anxiety, low self-esteem, low-IQ, or a need to protect another person. The issue of amnesia was broached by Appellant's own testimony and did *not* factor whatsoever in Dr. Kania's analysis of false confession, generally or with regard to Appellant in particular. Dr. Kania felt it was extremely unusual, but credible, that Appellant could not remember his police interview. He speculated that

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139/ Dr. Kania diagnosed appellant as depressed, avoidant and dependent, and a poly-drug abuser, with a family history of bipolar disorder. Thus, Appellant fit the Axis II diagnosis of personality disorder NOS ("not otherwise specified").

Appellant's amnesia could result from traumatic emotional stress which disrupted thought-processes, not unlike a fugue state. In this regard, Appellant described feeling that the walls were closing in and pulsating, with physical relief when he was finally brought back to his cell. Under this scenario, Dr. Kania believed Appellant might have incorporated what other people told him had happened after the fact just as if he remembered it himself, which might explain appellant's fragmentary recall.[140] Appellant said he had prior drug-related intervals he could not remember, but no prior episode of full-blown amnesia (9 RT 1932).

Finally, the defense recalled Detective West who testified that Hollywood used a credit card at Outback Steakhouse at 8:15 p.m. on August 8, 2000; a pair of Appellant's pants tested negative for blood, and were not tested for gunshot residue due to the lapse of several days between the murder and his arrest (9 RT 1927, 1929). With that, the defense rested (9 RT 1932).

6. Prosecution Rebuttal

On rebuttal, the prosecution called Dr. David Glaser, a psychiatrist, who testified that appellant was simply malingering his claim of amnesia, and that Appellant had no predisposition to give a false confession (9 RT 1936, 1938, 1942, 1948).[141] For good measure, Dr. Glaser added that Appellant was *definitely aware* of the content of questions and the answers

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140/ Dr. Kania was precluded from observing Appellant's testimony by the Superior Court's witness exclusion order, and did not offer any opinion on its veracity. Although precluded on direct examination, the Superior Court permitted cross-examination of Dr. Kania in regard to what appellant told Dr. Kania he could remember of the circumstances and content of his confession.

141/ The Superior Court denied multiple objections to this line of testimony. Before trial, appellant requested an *in limine* determination under Evid. Code §402 of any medical expert testimony, and objected to any testimony assessing the credibility of another witness (5 CT 1285). With no ruling on these matters, the Superior Court admitted Dr. Glaser's testimony *carte blanche*.

he gave to police were *entirely responsive* (9 RT 1949).[142]

The prosecution called Dr. Chidekel, a neuropsychologist, who testified that Appellant's Rorshach test responses showed an exaggeration of his symptoms (9 RT 1984). She found nothing that interfered with Appellant's ability to understand the Rorshach or communicate his responses to that test (9 RT 1989).[143] With that, the prosecution rested its rebuttal.

The Superior Court denied the defense request to call Dr. Kania in sur-rebuttal regarding Drs. Glaser and Chidekel's methodology and results, which were produced to the defense *after* Dr. Kania had left the stand. Dr. Kania presumably would have driven home the point that Dr. Chidekel's findings of low-IQ and cognitive impairment supported his view that appellant fit the personality profile for vulnerability to give a false confession (9 RT 1999). The Superior Court denied the defense request to present appellant's pre-trial statements to Dr. Kania in regard to amnesia and unwittingly driving the duffel bag to Santa Barbara, which were offered as prior consistent statements to rebut the prosecution's charge of recent, *i.e.*, mid-trial fabrication (9 RT 2005).

7. <u>Closing Argument</u>

The prosecution repeatedly emphasized in closing argument that appellant's claimed amnesia was a ploy to avoid cross-examination. It was sheer nonsense, with no psychiatric basis:

> Somebody tell me, and maybe they will do so in closing argument, what was it exactly that caused this amnesia other than the desire to

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142/ Despite Dr. Glaser's concession that *he* did not believe there to be *any link* between amnesia and "quality of responses", the Superior Court overruled defense objection to this line of questioning because "given the fact the issue of amnesia is with us, any facts that might bear upon that would be relevant" (9 RT 1952, 1957).

143/ As demonstrated *supra*, Dr. Chidekel's report bolstered, rather than undermined, Appellant's voluntariness claim, though the jury would not have known this from her truncated testimony. Since Dr. Kania did not have Dr. Chidekel's report, he could not fill in that gap.

not answer any questions about his confession, which is malingering.

(9 RT 2076; *see also* 9 RT 2078.)

Significantly, on rebuttal, the prosecution argued to the jury, *"you can't believe the false confession without also believing the amnesia.* [] Nobody has said the basis for [Appellant's] convenient 24-hour amnesia" (10 RT 2150). This false linkage lies at the core of Appellant's claim on appeal as a direct expression of the Superior Court's rulings which compelled appellant to testify as the "ante" he had to pay to play, *i.e.*, to present a false confession theory of the defense.

The prosecution argued that appellant bore the burden of proof to show what caused this amnesia, which he had not met - a misstatement of law which places the ultimate evidentiary burden of proving guilt on the state (9 RT 2044).[144] Appellant's testimony was a recent fabrication woven from the facts he knew going into trial. His "manipulation" of the interview at times further disproved the sincerity of his amnesia claim (9 RT 2053).

Finally, the prosecution argued that its experts had found nothing except "bad character" to explain Appellant's claim of amnesia and false confession. Indeed, the prosecution went further by pointing to the absence of *any* testimony that in fact Appellant had made a false confession:

> I can challenge all of you right now, look in your notes as to the testimony of Dr. Kania, and none of you will find anywhere in your notes quoted Dr. Kania saying he gave a false confession.

(10 RT 2149.)[145]

144/ This line of argument lampooned the defense for suggesting that a "ridiculous" phone call with his mother was an adequate explanation for appellant's amnesia.

145/ As argued in Claim VIII, *infra*, the Superior Court erroneously overruled the defense objection to this misrepresentation of the facts as prosecution misconduct. Dr. Kania held this opinion, but was prohibited by the Superior Court's exclusion order from expressing it to the jury. Rather, the Superior Court instructed the jury that it did not allow either expert to offer opinions whether a false confession was or was not given in the case, which did not fully counteract the sting of the

C. ARGUMENT

1. Overview

For all its complicated facts, the legal error in this case is plain and simple. Two landmark cases of the United States Supreme Court - *Crane v. Kentucky* (1986) 476 U.S. 683 and *Brooks v. Tennessee* (1972) 406 U.S. 605 - set the framework for analysis. Appellant's right to wait until the end of his case to decide whether to testify is not absolute, nor his right to present all state of mind evidence without foundation. But, in this case, Appellant's testimony was irrelevant to his expert's diagnosis and general pronouncements about false confession. Similarly (according to the expert) Appellant's insistence that he had no memory of the confession was irrelevant to its truth or falsity. Under these two lead cases, Appellant could not be made to swear a sincerity oath (attesting to the falsity of the confession) to present a core element of his defense, jettisoning his right to wait until the end of his case to decide whether to testify at all, and once having taken the stand, facing surprise cross-examination and damaging impeachment which spelled doom for his defense. In this way, appellant suffered the injustice of an inquisitorial trial masquerading as adversarial.

2. Legal Standards

In *Crane v. Kentucky, supra*, the United States Supreme Court held that the exclusion of testimony as to the circumstances of a confession violated defendant's right to present a complete defense under the Fifth and Fourteenth Amendment due process clause, and Sixth Amendment compulsory process and confrontation clauses, where such testimony was offered to show that the confession was false and unreliable. The Court recognized that the circumstances surrounding the taking of a confession - including, by definition, the psychological environment - can be *highly relevant* to the ultimate factual issue of its truth or falsity. A defendant's subjective state of mind under custodial interrogation is an essential part of

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prosecution's challenge to the jury (10 RT 2149).

the mix.

> Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? . . . [a] defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.
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> *Id.* at 690.

Thus, the Superior Court cannot exclude defense evidence bearing on the credibility of a confession when such evidence is central to the Appellant's claim of innocence. Appellant is entitled to "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina* (2006) 547 U.S. 319 (*quoting Crane*, 476 U.S. at 690). The Constitution requires that a defendant be permitted "to present [his] version of the facts ... to the jury so it may decide where the truth lies." *Washington v. Texas* (1967) 388 U.S. 14, 19. In *Brooks v. Tennessee, supra*, the United States Supreme Court declared unconstitutional a Tennessee statute which required a defendant to testify *before* any other defense witness, in order to further the state's interest in truth-furthering, where it could not be achieved by sequestration. The Supreme Court held that implicit in a defendant's privilege against self-incrimination was his ability to assess the testimony of other defense witnesses before deciding whether to testify and risk cross-examination. *Id.* at 609-612. The statute also violated defendant's due process right to the advice of counsel, by requiring counsel to make an important tactical decision at a premature stage in the progress of his defense, without the opportunity to evaluate the testimony of the other defense witnesses, and realistically assess the value and risks of waiving his right to self-incrimination.[146] *Id.* at 612-613. The statute cast a heavy burden on the defendant's unconditional right not to take the stand, by

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146/ Among the risks, the Court counted the use of confession for impeachment purposes. *Id.* at 609.

requiring him to make the choice to testify first, or not at all. "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.* at 611.

> While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand.
>
> *Id.* at 614.

Under the logic of *Crane* and *Brooks*, the Superior Court could not compel appellant to choose between waiving his right to self-incrimination (as he did) or foregoing *any* evidence of his psychological circumstances of his confession, *e.g.*, personality disorder, situational stress, motive. The Superior Court's rulings deprived appellant of his right to have the prosecution's case encounter and "survive the crucible of meaningful adversarial testing," through a streamlined presentation of the defense shorn of his compulsory and prejudicial testimony. *Id.* at 691-692 (citations omitted).

3. The Superior Court Violated Appellant's Fifth And Sixth Amendment Rights by Requiring Him to Testify Prior to His Expert, Rather than at the Close of His Case

The Superior Court violated *Crane* and *Brooks* by preventing Appellant from a fair opportunity to evaluate the costs of waiving his Fifth Amendment privilege against self-incrimination. One such cost was that appellant's testimony undermined rather than strengthened Dr. Kania's opinions, but Appellant had no way to know that since he had to testify first. Appellant would have been far better served by raising and resting his third party culpability and reasonable doubt defenses through lay and expert witnesses and argument. A second cost was that the prosecution would confront him with its experts' critique of his amnesia claim, though he had no notice of it. Appellant's right to make an informed decision trumped any statutory privilege the prosecution held under Penal Code §1054 to delay

disclosure of rebuttal experts' reports until it formed the intent to present their testimony. A third cost was that the prosecution would confront him with statements he made to Dr. Kania, though he had no opportunity to prepare by observing Dr. Kania's testimony unearth these beforehand (9 RT 1819). The Superior Court's ruling that appellant "had to" repudiate his confession as the cornerstone of his defense ("he's got to testify") imposed these additional costs on appellant's premature decision to testify or remain silent (11 RT 2556-2557). Appellant's testimony was coerced in the sense of unknowing and uninformed, within the meaning of the Fifth Amendment.

The Superior Court's ruling that appellant must testify to lay a prior foundation for Dr. Kania's testimony also violated the Sixth Amendment right to the "guiding hand" of counsel in making an informed decision whether to remain silent at trial. In *Brooks*, the Supreme Court held that requiring the accused to testify prior to the close of his case denies him and his attorney "an opportunity to evaluate the actual worth of their evidence [and] restricts the defense - particularly counsel - in the planning of its case." 406 U.S. at 612. The Superior Court's finding that the relevance of Dr. Kania's testimony depended *in toto* on appellant's foundational testimony laying was error under the Sixth Amendment.

4. The Superior Court Violated Appellant's Fifth and Sixth Amendment Rights by Requiring Appellant to Swear an Irrelevant "Oath of Sincerity" as Foundation for His Expert's Limited Opinions on False Confession

As made clear by Dr. Kania, appellant's repudiation and claimed amnesia were *irrelevant to* the doctor's opinion that appellant suffered from a dependent personality disorder, drug intoxication, and acute stress reaction, which may cause a false confession (7 RT 1504). The Superior Court's applied an ancient and discredited form of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him (in this instance, the irrelevant and inflammatory claim of amnesia). Such was the process of the ecclesiastical courts and the Star

Chamber -- the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover evidence of offenses. *United States v. Hubbell* (2000) 530 U.S. 27, 35; *Doe v. United States* (1988) 487 U.S. 201, 212; *Andresen v. Maryland* (1976) 427 U.S. 463, 470-471; 8 Wigmore § 2250; E. Griswold, *The Fifth Amendment Today* 2-3 (1955).

By separate order of the Superior Court, no defense expert opinion could be, or was offered on appellant's actual state of mind at the time of the confession, or its underlying truth or falsity. Rather, Dr. Kania confined his testimony to the general bases and characteristics of Appellant's diagnoses, and the factors which may generally contribute to a false confession. Appellant's public repudiation of the confession did not contribute any necessary factual underpinning to Dr. Kania's independently-derived and carefully circumscribed opinions.

Appellant's claim of amnesia was a further red herring in terms of foundation. According to *both* state and defense experts, amnesia for the interview added *nothing of relevance* to the question at issue - truth or falsity of the confession - yet it opened the door to damaging cross-examination and impeachment.

The confession transcript and testimony of Detectives West and Reinstadler to its circumstances, the tape-recording of appellant's phone calls with his mother, his clinical interviews with Appellant and MMPI testing, and psychology of false confession literature review provided an adequate foundation for Dr. Kania's limited opinion testimony. Having reviewed this material, Dr. Kania was entitled to opine that police authority figures could have preyed upon Appellant's vulnerabilities[147] and overborne his will, and that the jury should be aware of the general phenomenon of

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147/ *E.g.*, pressure to confess from his unstable mother, dependent personality disorder, sleep-deprivation, recent drug and alcohol intoxication) through a contrived combination of implied threats of the death penalty, promises of leniency, misstatements of the legal process by which his version would be aired, and of the facts of the case and laws of murder. *See* Claim V, *supra*.

false confession in assessing the reliability of this statement in particular.[148]

Under *Crane*, *supra*, Appellant was entitled to present this evidence on the phenomenon of false confession and whether it fit the facts of the case being tried, *without taking the stand himself.* Expert opinion testimony that specific police interrogation techniques applied to a particularly vulnerable suspect might produce an unreliable acknowledgment of guilt is exculpatory evidence to refute the commonly held notion that people do not confess to crimes they did not commit. *See People v. Page* (1991) 2 Cal.App.4th 161, 181-183. Appellant's testimony was unnecessary to this line of defense, particularly as he could neither describe nor elucidate the particular set of disabilities that might have contributed to a false confession. *See e.g., United States v. Hall* (7th Cir. 1996) 93 F.3d 1337, 1341 (admitting testimony of false confession expert where defendant claimed a personality disorder that made him susceptible to suggestion and pathologically eager to please, and caused him falsely to confess in order to gain approval from police officers); *United States v. Shay* (1st Cir. 1995) 57 F. 3d 126, 129-130 (admitting psychiatrist's testimony that defendant suffered from a mental disorder which caused him to spin out webs of lies). In sum, Dr. Kania's opinion that Appellant had personality disorders which made him susceptible to police questioning was admissible without appellant's own version of events as a "foundation." By conditioning the admissibility of Dr. Kania's testimony on Appellant's willingness to take the witness stand, the Superior Court imposed an impermissible burden on the exercise of his Fifth Amendment right to remain silent, and on his right to present a defense.

The constitutional flaw in the Tennessee statute invalidated in *Brooks* was that it pressured the appellant to take the stand and foreclosed later testimony if he refused, effectively making the appellant's choice to

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148/ And had Dr. Kania been provided with Dr. Chidekel's report, he would have been able to add her findings of low-IQ and cognitive impairment to his list of factors relevant to false confession.

testify a "now or never" decision, which cast a heavy burden on a appellant's otherwise unconditional right not to take the stand. *Brooks*, 406 U.S. at 610-11.

Similarly, in *Griffin v. California* (1965) 380 U.S. 609, 614, the Supreme Court held that comments by the court or prosecution to the jury concerning the defendant's refusal to testify, and the significance the jury should attach to that refusal, imposed an impermissible burden on the defendant's exercise of his right to remain silent. At issue in *Griffin* was the trial court's jury instruction indicating that the jurors could "take [the accused's] failure [to testify] into consideration as tending to indicate the truth" of "any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge." *Id.* at 610.

The situation presented, albeit unusual, is not *sui generis*. Two cases from California courts of appeal and two cases from the Georgia and Hawaii Supreme Courts support appellant's claim of error where his testimony was mistakenly compelled as a foundation for his expert.

a. *Lawson* and *Cuccia* Share a Story-Line and Rationale Similar to This Case.

In *People v. Lawson* (2005) 131 Cal.App.4th 1242, the Court of Appeal reversed defendant's cocaine possession conviction under similar circumstances. The trial court prohibited defendant's sole witness Martinez from testifying, leaving defendant with no choice but to testify to give his version of events denying that he attempted to discard a bag of cocaine as an undercover policemen approached, though he faced impeachment with prior convictions. Defendant could have established his version of events through Martinez, without incurring the substantial downside of testifying (impeachment with prior convictions). *Id.* at 1250. Construing these facts in *Lawson*, the Court of Appeal observed:

> Defined more broadly, however, excluding Martinez put defendant in the Hobson's choice of testifying himself or foregoing any defense because he and Martinez were the only non-police witnesses to his dealings with the officers when

> they approached him. Preventing a defendant from putting on a defense, or undermining a defendant's right not to testify, arguably rises to the level of constitutional error, which is ordinarily subject to the harmless beyond a reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18.

Without assessing whether Martinez's testimony would have, or even could have established a meritorious defense, the court of appeals found the error harmful under both *Chapman* and the more restrictive test of *People v. Watson* (1956) 46 Cal.2d 818, 836, *i.e.*, that it was reasonably probable appellant would have achieved a more favorable result if the court had not committed the error. As in this case, the look and feel of Lawson's trial was fundamentally altered by his exposure to damaging compulsory cross-examination and impeachment with prior convictions.

Similarly, in *People v. Cuccia* (2002) 97 Cal. App.4th 785, 790-791, the trial court effectively compelled the defendant to take the stand by threatening to consider his case completed after a defense witness failed to appear. Unlike this case, Cuccia's counsel told the jury in opening statement that he was going to testify. Defendant took the stand and in so doing waived his constitutional privilege against self-incrimination. The court of appeal concluded that his waiver was coerced based on the trial court's threat to consider his case closed if he did not testify out-of-sequence. The trial court's ultimatum to testify or rest constituted an abuse of discretion under the circumstances, but considered alone, it was not reasonably probable defendant would have obtained a more favorable verdict. *Id.* at 792. Unlike this case, *Cuccia*'s testimony was necessary (and as to some pivotal issues, the only defense evidence offered) to explain the defense to several charges under state securities fraud laws (misrepresenting a security). Appellant's claim is stronger than *Cuccia* in that Dr. Kania testimony was sufficient to raise a reasonable doubt as to the reliability of the confession. appellant's psychological disorders fit some of the criteria Dr. Kania explained for producing false confession.

Moreover, in *Cuccia*, the combination of this error and the trial court's erroneous failure to permit defendant to take the stand again after

the prosecution was permitted to reopen its rebuttal was sufficient to compel reversal. The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349. The court of appeal concluded that there was a reasonable probability the jury would have reached a verdict more favorable to defendant in the absence of both errors. Similarly, in this case, there is a reasonable probability the jury would have reached a verdict more favorable to Appellant - acquitting him of the special circumstance kidnap-murder charge, if not the first degree murder - in the absence of these errors. *The only evidence of Appellant's personal involvement in a forceful asportation of the victim was the reference to duct-tape at the hotel.* Absent Appellant's damaging cross-examination and impeachment, the jury would have had ample reason to credit Dr. Kania's opinion that Appellant could have learned of this detail elsewhere, but incorporated it in his confession as though it were his own recollection from the time.

Thus, even if the jury rejected Dr. Kania's testimony on the larger issue of false confession, it would have entertained a reasonable doubt whether Appellant used duct-tape at the hotel, based on Natasha Adams and Kelly Carpenter's contrary testimony that the victim was told he was being taken home to Los Angeles, and hence no force or threat would have been needed or employed to prompt him to leave the safety of the hotel that night.

b. *Kido* and *Childress* Also Reversed Criminal Convictions under Circumstances Analogous to This Case

Two out-of-state cases also lend support to the claim of Fifth Amendment error. In *State v. Kido* (2003) 76 P.3d 612, the Hawaiian Court of Appeals reversed a defendant's drug possession conviction where the trial court ordered him to testify before his other defense witnesses, finding this constitutional error was not harmless beyond a reasonable doubt. The *Kido* court gave heavy weight to two factors which are both present in this case too. First, there was no indication on the record in *Kido* that defendant

had already decided to testify before the trial court's ultimatum. In this case, Owen described her theories of the defense in opening statement without making any allusion to appellant's testimony. Second, in *Kido*, the defendant did not himself create any exigency warranting his being sent to the head of the witness list. 76 P.3d at 620. The same is true here.

The Court found the error violated Kido's rights against self-incrimination and to due process. The error was not harmless beyond a reasonable doubt because the case was essentially a credibility contest, and hearing another important defense witness's testimony first "would surely have enlightened Kido's decision whether to testify in his own defense, especially in the light of its otherwise inconsistent and contradictory details." *Id.* at 623. On direct appeal, no definitive answer was possible whether defendant would have recognized the obvious pitfalls of testifying and decided to leave well enough alone. Yet, the Court perceived at least a reasonable possibility that the trial court's error contributed to Kido's conviction based upon the denial of his constitutionally-mandated means and opportunity to make that decision, so informed. *Id.* This logic applies with equal force to appellant's dilemma at trial.

Finally, in *Childress v. State* (1996) 367 S.E.2d 865, the Georgia Supreme Court unanimously reversed defendant's murder conviction and death sentence under similar circumstances to this case.[149] The trial court required defendant to testify to lay a foundation for impeaching a critical state witness with her prior inconsistent statements, which cast doubt on her version of events. The court expressed that the prior inconsistent statement was "irrelevant" until and unless defendant testified to his own version of events. Defendant testified and was cross-examined extensively about various damaging admissions, prior probation, and various acts of dishonesty.

The Georgia Supreme Court found several errors in this situation in

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149/ Because of the cumulative weight of errors, the Georgia Supreme Court did not need to address the standard for reversal under *Brooks*, or whether it was separately met.

Childress, which bear resemblance to this case. First, the state witness's alleged statements (whether or not true) tended to suggest she may have witnessed the killing, which would contradict her trial testimony. Hence the statements were admissible non-hearsay, which required no separate foundation. Similarly, as discussed *supra*, Dr. Kania's testimony, limited as it was to a diagnosis of Appellant and general observations of the factors that may contribute to false confession, was admissible without *any* foundation from Appellant. Dr. Kania's review of the confession and phone calls, his interviews and MMPI testing of Appellant, and his review of psychology literature on false confession, provided a fully adequate basis for the limited opinions he offered to the jury. The Superior Court's dictate (whether styled at the time an assumption or impression, but confirmed after trial to have been a requirement) was error.

Second, in *Childress*, the court erred in refusing to permit the defense to recall the state witness herself to lay a foundation for admission of the statements. To introduce the statements, defendant "had to pay a very high price":

> The court's rulings forced Childress to choose between forgoing admission of highly relevant evidence which the jury could interpret to impeach Jolene's critical account of events, and testifying before he could assess whether his testimony was needed in light of the strength of the balance of his evidence. By forcing this choice, the trial court committed a grave error.
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> *Id.* at 873.

The trial court's ruling ran afoul of *Brooks* in that it compelled defendant to choose to take the stand, and open the door to impeachment and otherwise inadmissible evidence, without the benefit of observing other witnesses' testimony to assess whether testifying is worth the risks involved. The trial court thereby impermissibly restricted Childress's decision whether and when in the course of presenting his evidence, to

testify.[150]

The *Childress* Court held that the trial court abused its discretion by putting defendant's right of self-incrimination on a collision course with his right to present a defense, where one had to yield to the other. *Id.* at 1247. Significantly, the "high price" Childress paid by testifying (in terms of damaging admissions or impeachment) did not defeat the claim, or convince the appellate court that the cause of truth and justice would be defeated by a remand for retrial. The same is true here.

Thus, this quartet of cases - *Lawson, Cuccia, Kido and Childress* - apply the framework of *Brooks* to the situation in which appellant testifies out of sequence or in the face of some other court-imposed disadvantage. None of the cases suggest that the substance of the appellant's compelled testimony can be cited on appeal as grounds to uphold the jury's verdict nonetheless.

c. This Court's Decision in *Lancaster* is Distinguishable

On close inspection, nothing in this Court's opinion in *People v. Lancaster* (2007) 41 Cal.4th 50, 102-105, dictates a contrary result. In *Lancaster*, the trial court accommodated a defense request to hear defendant's testimony at penalty phase in the midst of his expert's cross-examination so the expert could leave for a camping trip. This Court distinguished *Cuccia* because the trial court in *Lancaster* did not threaten to consider the defense case closed if defendant did not take the stand. Rather, the court "merely exercised its discretion to regulate the order of proof in response to defense counsel's desire to accommodate a witness's vacation plans." *Id.* at 105.

Unlike *Lancaster*, the issue in this case arose at guilt not penalty

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150/ The Georgia Supreme Court rejected the state's argument that the error was harmless because Childress would have testified anyway. By contrast to this case, Childress's counsel alluded to his testimony in opening statement. Nonetheless, the Court observed that, "nothing bound Childress to do so, and it remained his right throughout trial to decline to testify." *Id.* at 875. The same is true here.

phase and therefore, like *Brooks* itself, transpired at a time when appellant enjoyed a presumption of innocence and the state bore the burden of proof. *Here, the Superior Court's rulings altered the contour of that landscape far more dramatically than would be the case at penalty phase, where no presumption or burden applies.* Moreover, here, Appellant was made to testify or risk exclusion of his defense expert, and did so without any ability to assess the direct testimony of his expert. By contrast, in *Lancaster*, the defendant had the opportunity to observe his penalty expert (Dr. Romanoff's) direct testimony, and the interruption of his cross-examination for defendant's testimony was itself an accommodation for the defense. Hence, this case falls within the ambit of *Brooks, not Lancaster,* which should be confined to its facts.

In sum, this is a case in which the appellant was forced to make a decision to testify or his expert would be excluded, and was forced to testify before he heard the critical testimony of that expert. When appellant made this far-less-than voluntary, knowing or informed decision to testify, he was not fully informed of all the evidence for or against him. The constitutional protections at issue in *Brooks* were violated in this case.

5. The Superior Court Violated Appellant's Due Process Right Under the Fifth Amendment by Its Mid-Trial Determination That His Testimony Was Necessary

The timing of the Superior Court's mid-trial ruling conditioning Dr. Kania's testimony on Appellant's laying a prior foundation upset the defense's settled expectation in regard to the presentation of its case. Specifically, Owen relied on the assumption that Dr. Kania would testify in making that assertion to the jury during her opening. At the same time, she said nothing about Appellant taking the stand. The understanding of the parties and the Superior Court was not predicated upon any express commitment that appellant would testify. Hence, when the Superior Court ruled mid-trial that appellant must testify before Dr. Kania or not at all, it added a significant cost to the defense to follow through on its pledge to call Dr. Kania for the jury. This mid-trial *volte face* separately deprived

Appellant of his right to due process under the Fifth Amendment.

6. The Trial Record Does Not Support a Finding of Waiver by Appellant, or that the Superior Court Acted Merely to Regulate the Order of Proof or Sanction Defense Delay

Under *Brooks*, as discussed *supra*, Appellant retained a constitutional right to reserve decision on whether to take the stand until the end of his case. The Superior Court's assumption, intuition or impression that Appellant would testify, expressed in connection with Dr. Kania's offer of proof, but without any basis in the record, lends no support for a finding that Appellant voluntarily waived his privilege against self-incrimination. Had Appellant observed Dr. Kania's testimony first (shorn of its irrelevant digression into amnesia), he surely would have left well enough alone, and not ventured onto the stand, and into the waters of damaging cross-examination and impeachment. Moreover, as discussed *supra*, the state cannot carry its burden of establishing that Appellant's waiver under these circumstances was both intelligent and knowing.

Nor did the Superior Court's authority to regulate the order of proof, Evid. Code §320, extend this far. Judge Gordon's assumption and impression, and later-confirmed ruling, that Appellant must repudiate his confession as a foundation for Dr. Kania's testimony, obviously went to the heart of the defense and how it would present its case. The chosen theories of defense - termination of kidnap, third-party culpability and reasonable doubt on reliability of confession did not mandate Appellant's personal version of events.

Finally, nothing in the record supports the Superior Court's decision as an effort to avoid trial delay. Specifically, there is no evidence that the defense was dilatory in its scheduling or questioning of any witness. Judge Gordon's grumblings about excusing the jury early for the day when Detective Cornell was late en route to the courthouse were only that - grumblings with no explanation of why the blame should be placed on the defense, rather than the prosecution, which was in privity with this witness. Moreover, even if avoidance of delay was a real factor in how the order of

defense witnesses unfolded, Dr. Kania was available to testify at the time appellant took the stand. The Superior Court had no legitimate ground to interfere with appellant's discretion whether and when to testify. This crucial decision determined the outcome of trial, and cannot be considered harmless error.

7. The Superior Court Erred by Unfairly Limiting Appellant's Direct Testimony, while Giving Free Range to the Prosecution on Cross-Examination

Under *People v. Webb* (1993) 6 Cal.4th 494, 535, "a appellant's absolute right to testify cannot be foreclosed or censored based on content." The excluded testimony which Appellant sought to give was relevant to his defense of third party culpability, alibi and false confession. Specifically, the Superior Court precluded Appellant from explaining what he *meant* by any part of his confession, ruling that any answer would be speculative and irrelevant in light of his amnesia claim (8 RT 1729). The unfairness of the ruling was demonstrated by Appellant's confused answer - "by true, do you mean did I say it?" In fact, Appellant was entitled (though, as argued *supra*, not required) to tell the jury that he gave a false confession because of undue pressure from his mother, and to protect his benefactor Jesse Hollywood (a line of questioning relevant to both guilt and a penalty mitigation theme of substantial domination). Appellant was precluded from answering why or whether he would risk the death penalty to protect Hollywood, or how his confession would accomplish that goal (9 RT 1872). The Court also excluded Appellant from explaining if he heard about duct-tape before his arrest, which would have provided a plausible alternate explanation for the linchpin of the prosecution's case on kidnap and kidnap-murder special circumstance (9 RT 1869). All of these rulings exceeded the bounds of *Webb*.

By contrast, the Superior Court permitted the prosecution to cross-examine Appellant whether he had any explanation for particular incriminatory details in the police interview, and why he would say he put duct-tape on Nick in the hotel, unless it were true (9 RT 1859, 1867).

Although Appellant disagrees with the trial court's rationale for limiting his direct testimony concerning his confession, clearly that same rationale would apply equally to the prosecution's cross-examination about the details provided by Appellant during his police interview. If Appellant's direct testimony answers about the contents of his confession would be speculative and irrelevant in light of his amnesia claim, the same would be true for the questions permitted on cross-examination. Although the Superior Court enjoys "wide discretion" in determining the scope of relevant cross-examination, *People v. Farnam* (2002) 28 Cal.4th 107, 187, its bounds are not unlimited and any ruling applied to one party must be equally and fairly applied to the other party. The Superior Court abused its discretion because of the asymmetry in its position toward the parties.

8. The Superior Court Violated Appellant's Sixth Amendment Right to Present a Complete Defense by Curtailing Dr. Kania's Testimony

The Superior Court unfairly restricted Dr. Kania's direct testimony in the following respects: 1) categorically excluded testimony regarding Appellant's statements during clinical interviews of October 2, 3, and 14, 2001, for non-hearsay purpose such as laying a proper foundation for the expert's psychological diagnoses, or defending the validity of his MMPI test results; and 2) excluding Dr. Kania from explaining the anxiety effect on Appellant of his mother's histrionic phone calls, or the effect of Appellant's personality disorders, subservient relationship to Hollywood, sleep deprivation and drug intoxication during the days preceding arrest on the actual likelihood of a false confession. The Superior Court's rulings lost whatever justification might exist once appellant took the stand, and was cross-examined on his amnesia for these events. Moreover, the Superior Court erred in failing to reconsider these limitations when the prosecution opened the door to such testimony by asking Appellant "why he would mention duct-tape, if it weren't true." These rulings, alone or in combination, deprived Appellant of his Sixth Amendment right to mount a defense to the charges.

9. The Superior Court Erred by Permitting Dr. Glaser to Opine that Appellant Lacked Credibility as a Witness

Dr. Glaser testified on state rebuttal that he was asked in part to assess whether Appellant was malingering his claim of amnesia, and that Appellant was simply malingering (9 RT 1936, 1948). "Malingering" is commonly defined as a medical term that refers to *fabricating* or *exaggerating* the symptoms of mental disorders for a variety of "secondary gain" motives, which may include getting lighter criminal sentences. *See* http://en.wikipedia.org/wiki/malingering. Popular synonyms for the term include "deceive," "fudge," "evade," and "weasel". *See* http://thesaurus.com/browse/malinger. The jury would surely and inescapably have understood Dr. Glaser to mean that Appellant was lying. Since the amnesia issue had not surfaced until Appellant testified, Dr. Glaser's reference was unmistakably to his lack of credibility as a witness.

The Superior Court also created an asymmetry between the parties in regard to the latitude given their experts to express opinions on the ultimate fact in issue. Dr. Kania was not permitted to share his opinion that Appellant's confession was false in most respects. On the other hand, Dr. Glaser testified that Appellant in particular (as opposed to people with his type of disorders generally) most likely did not falsely confess. There was an analogous asymmetry between the parties in regard to expert assessment of Appellant's actual state of mind during the interview. Dr. Kania was not permitted to address this issue which, as argued *supra*, lends further support to Appellant's claim on appeal that no personal testimonial foundation was needed. On the other hand, Dr. Glaser was permitted to testify that Appellant "definitely understood" questions he was asked by police, and the consequences of his answers, and that his responses were "appropriate," and finally that there was no evidence his mental function was impeded in terms of the "quality of responses" he gave (9 RT 1957). This was sheer hogwash, and unfair.

California Code of Civil Procedure §2051 provides that a witness

may be impeached by "contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad," or by evidence of conviction of a felony. Section 2052 provides that a witness may be impeached by evidence of prior inconsistent statements. These two statutory provisions set forth the exclusive methods of impeachment; the state psychiatrist expert's assessment of Appellant's truthfulness is nowhere to be found among such acceptable methods.

In *Ballard v. Superior Court* (1966) 64 Cal.2d 159, while eschewing a bright-line prohibition, this Court enumerated the dangers of admitting a psychiatrist's testimony on the credibility of a witness; the opinion cited Judge Jerome Frank's warning against needlessly embarking "on an amateur's voyage on the fog-enshrouded sea of psychiatry." *Id.* at 176 (*quoting United States v. Flores-Rodriguez* (1956) 237 F.3d 405, 412). Such dangers fully materialized in this case: 1) the testimony was not relevant; 2) the techniques used and theories advanced were not generally accepted, or at the least, the defense had no opportunity to challenge them on such grounds; 3) the psychiatrist was not in a better position to evaluate Appellant's credibility than the jury; and 4) too much reliance would naturally be placed by laymen upon the testimony of a psychiatrist on an essential question.

The Superior Court justified its ruling on the tenuous basis that "given the fact the issue of amnesia is with us, any facts that might bear upon that would be relevant" (9 RT 1952). This dealt a foul blow to the defense, particularly as neither expert regarded amnesia (present non-recollection) as relevant to the truth or falsity of the confession itself. The Court erred in permitting Dr. Glaser to opine that appellant lied from the stand in claiming amnesia, which was a question of witness credibility, reserved exclusively for the jury. *Cf. People v. Stitely* (2005) 35 Cal.4th 514, 546-547. Such an attack upon appellant's veracity was in violation of state law rules restricting expert opinion testimony on the issue. *See* Evid. Code §§ 800, 801; *People v. Melton* (1988) 44 Cal.3d 713, 744. The ruling usurped the jury function thereby violating the Fifth, Eighth, and Fourteenth

Amendments, and allowed the prosecution to exploit its expert's characterization of appellant's testimonial "lies" in its closing argument.

Unlike Officer Coffey in *Stitely* who merely "highlighted the twists and turns in a long interrogation" from the stand, in this case Dr. Glaser offered an opinion on the issue of Appellant's testimonial credibility for direct jury consideration. Any reasonable juror would have viewed Dr. Glaser's testimony in this way, since the issue of amnesia did not arise until Appellant testified, and was collateral to the truth or falsity of the confession itself. *Cf. Stitely*, 35 Cal. 4th at 547 (Detective Coffey testified to specific interview techniques he used at particular moments when defendant "seemed" to be lying; the process exposed "apparent" lies on defendant's part).

10. The Superior Court Erred by Excluding Dr. Kania's Rebuttal Testimony

After Drs. Glaser and Chidekel testified as prosecution rebuttal experts, the defense asked for leave to recall Dr. Kania to respond. Two issues of paramount importance are raised. First, Appellant and Dr. Kania had testified without benefit of any disclosure of these experts' reports. Appellant was blind-sided by cross-examination on the experts' criteria for assessing the validity of an amnesia claim. In addition, at the time of his original testimony, Dr. Kania did not have access to Dr. Chidekel's findings that Appellant had a very low-IQ which she measured as in the 69-range, and that he suffered from significant cognitive impairment, both of which facts would have bolstered Dr. Kania's analysis of the possibility of false confession. Nonetheless, the Superior Court denied the defense request to recall Dr. Kania (9 RT 1957.) This was fundamental error.

The Superior Court premised its ruling on the merest technicality that Dr. Kania was "excused" after his testimony, even though the Court had granted a subsequent defense request for Dr. Kania to observe Dr. Glaser's testimony. Thus, the Court observed that the defense was asking for leave to "re-open" its case, rather than rebuttal, and denied the request on this basis. Surely, the Court should not have let form triumph over

substance at such a critical juncture of Appellant's capital murder trial.

Any of the reasons proffered, alone or in combination, were sufficient to justify the defense request for additional testimony from Dr. Kania. First, both Appellant and Dr. Kania had testified without benefit of disclosure of the prosecution experts' reports. Second, Dr. Chidekel's findings in her report (though only expressed on the stand when she testified several months later at a Evid. Code §402 hearing in co-defendant Pressley's case) added critical support to Dr. Kania's factors, and rebutted Dr. Glaser's opinion that appellant had presented no evidence of low-IQ, organic brain disease, or cognitive impairment (9 RT 1999). Third, the defense was entitled to rebut the prosecution's theory of mid-trial fabrication by recalling Dr. Kania to testify to Appellant's prior consistent statements made to him during their clinical interviews on October 2, 3 and 14, 2001, several weeks before trial.

The Superior Court did not address the first or second theories of admissibility. As to the third, the Court merely stated that the defense had not provided adequate notice, and the prosecution's expert did not address it. The defense argued that as a matter of fundamental fairness, Appellant should be allowed to rebut a claim of recent fabrication with the only possible evidence he can - his pre-trial interviews with Dr. Kania, and that the defense could not have presented this evidence earlier because it was hearsay until the prosecution raised the recent fabrication charge. The Superior Court's conclusion that the party experts' disagreements with one another had been "fully aired" was plainly in error (9 RT 2005.) The Court abused its discretion by excluding any favorable testimony by Dr. Kania on these salient points.

11. All of These Errors Had a Prejudicial Effect on the Outcome of Appellant's Trial

The standard of prejudice was left unresolved in *Brooks*, because the state made no claim that the error was harmless. *Brooks*, 406 U.S. at 614. The case law draws no distinction for these purposes between *Brooks*, in which appellant chose not to take the stand, and instances in which

appellant's testimony was essentially compelled by actions of the trial court. In *Lawson* and *Cuccia*, the court of appeals found that spectacle to be harmful error under either *Chapman* or *Watson* standards. This Court should follow suit.

Nonetheless, if this Court must choose, the appropriate measure of these constitutional errors is the *Chapman* beyond a reasonable doubt standard. Because the trial court's rulings deprived Appellant of his Fifth, Sixth, and Fourteenth Amendment rights under the federal constitution, reversal is required unless the State is able to show that this error was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S., 23-24.)

There can be no doubt that Appellant's case was torpedoed by his own testimony. He gained little from a self-serving repudiation of his confession, and lost the world due to his claim of amnesia for its having happened at all, and the damaging cross-examination and impeachment that ensued. Significantly, his defense of reasonable doubt as to the reliability of his confession was far stronger without his testimony, particularly as it related to the duct-tape at the hotel, and the possibility that the victim was lured by a false promise of safe return. This was the linchpin of the prosecution's case against appellant on kidnap and kidnap-murder, a critical prop in its case for the death penalty. The defense was entitled to rely for this piece of the puzzle on testimony of Kelly Carpenter and Natasha Adams, and on Dr. Kania.

The surest proof of prejudice is the attention paid to Appellant's testimony (and in particular, the red herring of amnesia) in the prosecution's closing argument. The prosecutor linked the sincerity of the amnesia claim to the truth or falsity of the confession itself despite the absence of any expert opinion to that effect: "you can't believe the false confession without also believing the amnesia" (10 RT 2150). Later, the prosecution returned to this theme, making it a centerpiece of its argument: "somebody tell me, and maybe they will do so in closing argument, what was it exactly that caused this amnesia other than the desire to not answer any questions about

his confession, which is malingering" (9 RT 2076).

The Superior Court employed a tempting, yet by our history thoroughly discredited, inquisitorial method for ascertaining Appellant's guilt - compelling him to personally deny his confession on the stand. The result was precisely the spectacle which the Constitution was designed to avoid: the prosecution damning Appellant with his own words. A new trial at which Appellant's prior compelled testimony shall be excluded for all purposes is the appropriate remedy in the name of justice and fundamental fairness.

VII. THE SUPERIOR COURT'S ERROR IN ORDERING APPELLANT TO SUBMIT TO PSYCHIATRIC EXAMINATIONS BY TWO PROSECUTION EXPERTS AND ALLOWING THOSE EXPERTS TO TESTIFY AGAINST APPELLANT IN REBUTTAL AT THE GUILT PHASE, WAS PREJUDICIAL AND REQUIRES REVERAL OF APPELLANT'S CONVICTIONS.

A. INTRODUCTION

At the guilt phase, Appellant presented testimony by a defense-retained psychologist, Dr. Kania, who testified to Appellant's personality traits which might have produced a false confession. The trial court erred by granting the prosecution's motion to compel Appellant to undergo psychiatric examination by a prosecution expert and ordering Appellant to submit to psychiatric evaluations by two mental health experts retained by the prosecution: Drs. Glaser and Chidekel, a psychiatrist and neuoro-psychiatrist. These evaluations and the subsequent testimony of these doctors against Appellant in rebuttal at the guilt phase violated Appellant's right to silence, to effective assistance of counsel, to a fair trial, to due process, and to a reliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. The prosecution's use of this testimony at both the guilt and penalty phases of appellant's capital trial was prejudicial, requiring reversal of his convictions and sentence of death.

B. SUMMARY OF APPLICABLE LAW – *VERDIN* ERROR

In *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116, this Court held that a "trial court's order granting the prosecution access to [a defendant] for purposes of having a prosecution expert conduct a mental examination is a form of discovery that is not authorized by the criminal discovery statutes or any other statute, nor is it mandated by the United States Constitution." Under Proposition 115, effective June 5, 1990, and the exclusivity guidelines of Penal Code §1054(e) enacted therein, the Superior Court exceeds its statutory authority by authorizing the prosecution to undertake such discovery in a criminal case. *See id.* at 1106.

In *Verdin*, this Court issued a pre-trial writ of mandate directing the Superior Court to deny the prosecution's motion for compulsory psychiatric examination, even though the defendant had announced his intention to rely on a "diminished actuality" defense. *Id.* at 1099. The long-established rule in California authorizing the prosecution *to counter a mental state defense* by conducting its own mental examination of defendant was abrogated by the criminal discovery statute in 1990 and nothing in that statute (§1054 et seq.) authorizes a trial court to issue an order granting such access. *Id.* at 1109. The *Verdin* Court did not consider the potential applicability of Evidence Code §730, which permits the trial court on its own motion or motion of a party to appoint its own expert, because the trial court had ordered the defendant to submit to an examination by an expert retained by the prosecution.[151] Hence, *Verdin* was not the comparatively easy case in which the trial court's order was "right for the wrong reason." *Id.* at 1110. Rather, the theoretical applicability of Evid. Code §730 to such a situation

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151/ Evid. Code §730 authorizes the trial court to appoint one or more experts "to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required." As discussed below, the Superior Court in this action did not appoint its own expert, specify the fact or matter subject to such expertise, or receive a report. The statute is simply not relevant to this action as it was tried.

was simply not preserved by the prosecution on appeal.[152]

This Court enumerated the means available to a California prosecution to counter a mental state defense at trial, without running afoul of *Verdin*: to cross-examine the defense expert's professional qualifications and reputation, perceptions and preparation; to cross-examine the defense expert's reports, statements or test results; to call its own expert to review such materials and comment on the alleged mental condition. *Id.* at 1116. What the prosecution cannot do, as happened in this case, is prove its theory, or defeat the defense theory by the "simple, cruel expedient of forcing it from [Defendant's] own lips" through compulsory psychiatric examination.[153] *Verdin*, 43 Cal. 4th at 1116; *Culombe v. Connecticut* (1961) 367 U.S. 568, 581-582.

Subsequently, in *People v. Wallace* (2008) 44 Cal.4th 1032, a case tried between the §1054 enactment date of June 5, 1990 and the *Verdin* decision date of June 2, 2008, this Court addressed the question whether Verdin error, which occurred during the penalty phase of a capital case, was prejudicial. *Wallace* did not address the standard of prejudice to be applied to *Verdin* error, but rather whether the error was prejudicial. Thus, the issue remains open: does the standard for federal constitutional violations (*Chapman*'s harmless beyond a reasonable doubt standard) apply or does the prejudice standard for state violations (*Watson*'s *reasonably probable* standard) apply? *Wallace* simply held, with no discussion whatsoever of the question whether this error violates federal and state law or only state law, that "it is not reasonably possible" that the jury would have returned a

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152/ The prosecution was free on remand in *Verdin* to move the trial court to appoint an expert pursuant to Evid. Code §730 if, in its discretion, the trial court decides that expert evidence "is or may be required." *Id.* at 1117. Such an option is of course also available *on retrial* to the prosecution in this case, provided it does not avail itself of the materials improperly generated by Drs. Glaser and Chidekel in the first trial.

153/ The issue whether the Fifth Amendment right against self-incrimination is *always* violated by such a procedure was reserved for another day. *Id.* at 1112 n.6.

life sentence had the error not occurred. Appellant contends that the *Chapman* standard applies because the error in his case affected his substantial constitutional rights. At the same time, because of the centrality of the rebuttal experts to the prosecutor's argument, the error warrants reversal even under the more deferential *Watson* standard.

Verdin applies to cases pending on appeal at the time it was decided. The defense presented two experts as part of its mitigation case, both of whom testified to stressors and chronic moderate depression defendant had experienced over the course of his life, and his cerebral "inefficiency." 44 Cal. 4th 1084-1086. After this testimony, the trial court granted the prosecution's request for an order compelling defendant to undergo a psychiatric evaluation by the prosecution's rebuttal expert. Relying on *People v. McPeters* (1992) 2 Cal.4th 1148, the trial court granted the request on the ground the defendant had tendered his mental state as a mitigating factor.[154] The next day, the defendant refused to participate in the court-ordered examination. Over objection, the prosecution expert was permitted to testify that his attempts to conduct a psychiatric examination of defendant were thwarted by defendant's refusal to participate. The prosecution expert also questioned defense expert findings as based on insufficient evidence and flawed testing methods.

This Court recognized that the trial court's authorization *and* the prosecution rebuttal expert's testimony regarding defendant's refusal to cooperate with the court-ordered examination, were *both* contrary to its recent opinion in *Verdin*. Nonetheless, for several reasons, defendant had suffered "no possible prejudice." 44 Cal. 4th at 1087. Specifically, the examining expert's testimony challenging defense expert methodology and conclusions was "substantially similar" to testimony of another prosecution rebuttal expert who had not examined defendant, and in regard to this testimony, the expert did not rely on defendant's refusal to participate in the

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154/ In *Verdin*, this Court observed that the rule announced in *McPeters* did not survive the passage of Proposition 115. 43 Cal. 4th at 106-1107.

court-ordered examination. Additionally, the brutality of defendant's crimes - beating to death a frail and elderly woman in the course of burglarizing her home and attempting to rape her - weighed heavily in aggravation under §190.3(a). Hence, this Court concluded in *Wallace* that it was not reasonably possible that the jury would have returned a penalty verdict of life without parole rather than death if the trial court had not allowed the prosecution expert to testify regarding defendant's refusal to cooperate with the court-ordered psychiatric examination. *Id.* at 1087-1088.

This case requires the Court to affirm the principle established in *Verdin*, and affirmed in *Wallace*, that the prosecution cannot prove its case by the simple cruel expedient of compelling it from defendant's lips. However, unlike *Wallace*, the *Verdin* error in this case did constitute harmful error, for the testimony of the prosecution experts at appellant's guilt phase was significantly prejudicial.

C. SUPERIOR COURT PROCEEDINGS

1. Prosecution's Request

By written motion filed September 28 2001, the prosecution moved the Superior Court to compel Appellant to undergo a psychiatric examination by a prosecution expert (1 RT 213; 5 CT 1225). "*There is no substitute*" the prosecution wrote, "*for the prosecutor's expert confronting defendant because the personal interview is the basic tool of psychiatric study*" (6 CT 1230, emphases added). The prosecution argued the defense intended to call a psychiatrist to testify Appellant's confession was *involuntarily coerced* (6 CT 1225, emphasis added). In actuality, this was not the basis of the referral to the defense expert, psychologist Dr. Michael Kania.[155]

155/ One week *after* this disclosure, Dr. Kania met with Appellant for the first time and the scope of his referral (which was limited to false confession) did not encompass the issue of voluntariness. In granting the prosecution's motion on this limited and inaccurate presentation of facts, the Superior Court significantly expanded the reach of *People v. Danis*

On October 16th, defense attorneys notified the Superior Court they *would* call Dr. Kania to testify at trial.[156] They objected orally to the prosecution's motion on statutory and constitutional privilege grounds (2 RT 204; 6 CT 1593).[157] Specifically, the defense attorneys argued that there was no legitimate basis to compel appellant to undergo a second hostile interrogation under the guise of a prosecution expert's interview (6 CT 1596).

The Superior Court heard argument and granted the prosecution request for *"a psychiatrist* to rebut evidence about the workings of defendant's mind by access to defendant's mind"[158] (5 CT 1306; 2 RT 306). The Court suggested the interview be limited to "circumstances which might bear on false confession," *e.g.*, relevant personality traits in appellant's MMPI test-profile or manifest under extreme pressure, but not facts of the crime, whether Appellant was present in Santa Barbara or at the crime scene, or other elements of the crime (7 RT 1521). It later became clear that the interviews and testing of prosecution experts were not so

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(1973) 31 Cal.App.3d 782, 786, which authorized appointment of a prosecution expert examination *only after* the defense psychiatrist testified at trial.

156/ At the time the Superior Court granted the prosecution's request, Dr. Kania still had not formulated his report (2 RT 312). The prosecution anticipated Dr. Kania would testify to Hoyt's vulnerability to police coercion, but his opinions were confined to false confession (5 CT 1226). The prosecution received Dr. Kania's report the next day (2 RT 370).

157/ Hoyt's attorneys also contended that Dr. Kania's testimony on the general characteristics of false confession would not tender Hoyt's mental state at issue. As argued *infra*, Dr. Kania's testimony did not concern a mental state defense to the crimes charged. Rather, Dr. Kania's testimony as to mental state concerned only the collateral issue whether Hoyt fit a false confession "profile." The prosecution's right to obtain rebuttal evidence in the form of compulsory psychiatric examination was therefore not as strong as it would have been had Hoyt raised a *mens rea* defense.

158/ The prosecution examined Appellant with *two experts, not one.*

limited. The Court authorized the prosecution expert to ask Appellant to identify what was or was not false in his confession. The Court denied the defense request that Dr. Kania be permitted to observe Appellant's compulsory interview.

In short, the Superior Court granted the prosecution motion for compulsory examination of the defendant by experts retained by the prosecution, and the Court neither referred to, nor exercised its own prerogative under Evidence Code §730 to select an expert, commission a report, or limit the examination and resulting testimony.

The defense attorneys filed a petition for writ of prohibition in the Court of Appeal, but this was dismissed for failure to file the record of proceedings in the Superior Court (9 CT 2444).

2. Scope of the Order

On November 6, 2001, during the prosecution's case-in-chief, the Superior Court convened an Evidence Code §402 hearing in response to the prosecution's motion to limit Dr. Kania's testimony (7 RT 1494). Outside the presence of the jury, Dr. Kania testified Appellant possessed personality traits commonly associated with false confession, particularly under stress or when deprived of sleep, and these included passivity, dependency, compliance with authority, anxiety and low self-esteem (7 RT 1502).[159]

According to Dr. Kania, Appellant had no recollection of having confessed to the murder, and this claim was in itself "unusual." Appellant even said he had told his attorney there *"couldn't be"* a tape-recording of his confession because it hadn't taken place.[160] Dr. Kania believed the information Appellant gave police *was false for the most part*, and while he might have been present at the scene, Appellant did *not* kill the victim (7

159/ Dr. Kania based his opinion on his experience as a clinical psychologist and review of literature, interviews with Appellant and his mother, Appellant's MMPI personality test result, and his own review of Appellant's confession.

160/ The Superior Court excluded any testimony regarding Appellant's statements to Dr. Kania or to his attorney.

RT 1506).

The Superior Court proceeded to issue several rulings which are the subject of this appeal. (*See* Claim VI, *supra.*) *First, only in the event* appellant himself took the stand and testified he *had* amnesia could Dr. Kania offer his opinion that amnesia *is* consistent with the kind or degree of anxiety that characterizes a false confession (7 RT 1510). *Second,* Dr. Kania was not permitted to testify to *anything* Appellant had told him. *Third,* Dr. Kania could *not* offer his opinion Appellant gave a false confession or the basis for his belief Appellant did not pull the trigger, as the Court considered this to invade the province of the jury (7 RT 1512, 9 RT 1895). *Fourth,* Dr. Kania was permitted to testify in regard to the field and literature of false confession, whether Appellant had personality traits consistent with false confession, and any objective factors such as the duration of the police interview (7 RT 1515).

Two days later, on November 8, 2001, after the prosecution rested its case, the defense called Appellant to testify in order to comply with the Superior Court's Order that only Appellant himself could lay a foundation for Dr. Kania's testimony. (*See* Claim VI, *supra.*) The prosecution began its cross-examination that day, but did not conclude it before the trial adjourned for evening recess. The prosecution disclosed its expert Dr. Glaser's notes to the defense at 9:30 p.m. during the overnight recess. As a result, Appellant was precluded from discussing this material with defense attorneys at the County Jail to prepare for further cross-examination (9 RT 1938, 1959).[161]

The following morning, November 9, 2001, when defense attorneys brought the situation to the attention of the Superior Court, their request for time to prepare to cross-examine the prosecution experts was denied (9 RT

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161 Appellant's preparation was limited to 1.5 to 2 hours with his attorney's on the evening of November 7 (8 RT 1784).

1808). Both experts testified later that day (9 RT 1884-1992).[162]

With reference to Dr. Kania's report, the prosecution cross-examined Appellant in regard to statements he made to a "defense therapist who will testify" including whether Dr. Kania mistakenly reported what Appellant had said his sleep pattern was for the week leading up to his arrest (9 RT 1819). The prosecution also asked Appellant *why* would he tell police he had put duct-tape on Nick at the hotel, unless this were in fact true.

3. The Experts' Testimony

Psychologist Dr. Kania was the second defense witness to take the stand. On direct, he testified Appellant had a passive and dependent personality. Appellant had grown up in a chaotic home and had drug and alcohol problems, which were precursors to mental illness.[163] He exhibited symptoms of avoidant personality disorder. In summary, Appellant's low self-esteem and the stress of his arrest "could have" produced a false confession.

Dr. Kania remarked that Appellant's inability to remember anything of the police interview was an unusual, but credible response to the highly traumatic emotional situation in which he found himself. As such, it represented a disruption in his thinking (9 RT 1915). The Superior Court precluded the defense from asking Dr. Kania's finding as to what Appellant's motivation *might have been* for giving a false confession.

The prosecution cross-examined Dr. Kania on what little Appellant had said he *could* remember in regard to the police interview (that the walls were pulsating at the start and a feeling of relief when it was over), and

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162/ The prosecution produced Dr. Chidekel's test-data and Dr. Glaser's interview questions to the defense attorneys in court that morning (9 RT 1806). The Superior Court's denial of continuance prevented them from analyzing the work product prior to the resumption of Appellant's cross-examination, to their own cross-examination of the experts, or from referring it to their own expert Dr. Kania.

163/ Dr. Kania was surprised by appellant's MMPI profile of schizophrenia which did not *"seem"* to fit him.

elicited Dr. Kania's opinions that Appellant had no prior history of amnesia and was not psychotic at the time of arrest (9 RT 1922). The cross-examination was brief, lasting seven minutes (5 CT 1401).

After the defense rested its case, the prosecution called Drs. Glaser and Chidekel, its psychiatrist and neuro-psychologist, respectively, as rebuttal experts. Dr. Glaser had received extensive specialized training in psychiatry in addition to his training as a medical doctor, experience which far exceeded Dr. Kania's degree in clinical psychology. To formulate his opinions, Dr. Glaser had interviewed Appellant for *three hours*, reviewed Dr. Chidekel's testing of the same day, and relied extensively on both sources (9 RT 1939-1940, 1942, 1960). Over objection, Dr. Glaser testified Appellant did not suffer from any major mental illness and nothing in his psychiatric make-up would predispose Appellant toward false confession, including Dr. Kania's finding of avoidant and dependent personality disorder (9 RT 1942).[164]

Dr. Glaser then turned to the subject of Appellant's amnesia. To evaluate this issue, as he would any "patient's complaint," Dr. Glaser spent "as much time as possible" with the patient himself, or in this case the Appellant. He asked Appellant what things he could recall of the police interview, as opposed to what things had he been told by his attorney (9 RT 1946). He obtained a *"comprehensive"* medical history from Appellant which *"absolutely"* precluded neurologic illness or frontal lobe head injury.

It was Dr. Glaser's view that complete amnesia is extremely rare in general and patients can usually be "cued" to remember something. Because Appellant did *not* respond appropriately during the compelled psychiatric examination to Dr. Glaser's cues by recalling adequately parts of the interview, Dr. Glaser opined unequivocally that Appellant's amnesia

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164/ Dr. Glaser was permitted to offer his opinion of Appellant's personal predisposition or lack of predisposition, rather than mere testimony concerning avoidant personality disordered individuals in general.

was "faked" and "simply malingering" (9 RT 1948).[165] In support, Dr. Glaser alluded to how Appellant's memory was "crisp and solid" except for the two-day period of police interview. In Dr. Glaser's estimation, this simply was not how the brain functions or memory works.

Over objection, Dr. Glaser testified Appellant *keenly* understood where he was, what he was being asked by the police and why, and his answers were *responsive* and *appropriate*, if *evasive* (9 RT 1952, 1975).[166] The prosecution then called Dr. Chidekel who had, pursuant to the prosecution's interpretation of the Superior Court's Order, administered three hours of tests to Appellant just prior to Dr. Glaser's assessment.[167] Dr. Chidekel found *no condition* that interfered with Appellant's ability to see, understand or communicate (9 RT 1989).[168]

The defense attorneys sought to call Dr. Kania in sur-rebuttal to critique the prosecution experts' assessment, methodology and results, and to counter Dr. Glaser's testimony that Appellant was "faking" and "simply malingering" as a matter of brain behavior and memory function (9 RT

165/ Dr. Glaser did not say what "cues" he used, or how he was able to discount the effect of Appellant's recent exposure in court to the prosecution's playback of both the videotape and audiotape of his confession during case-in-chief.

166/ Dr. Glaser based this testimony on watching the video of Appellant's body language and "nature and quality of responses" during the police interview, in comparison with his own encounter with Appellant (9 RT 1972). For this reason, the error of *this* testimony was *Verdin* and that it exceeded the scope of Dr. Kania's testimony and invaded the exclusive province of the jury as the finders of fact. In addition, Dr. Glaser conceded he did not understand what "quality of response" had to do with amnesia (9 RT 1957).

167/ Dr. Chidekel tested Appellant from 6:00 to 9:00 p.m. on November 6 and shared her results with Dr. Glaser to prepare his testimony.

168/ Claims relating to the prosecution's inconsistent theories of culpability and the defense attorneys' ineffectiveness with regard to Dr. Chidekel's findings of Appellant's visual spatial problem-solving and right brain hemisphere function are briefed elsewhere, in Claims V (involuntariness of confession) and XIV (*Fosselman* error).

1999). The defense also sought to introduce Dr. Kania's testimony as to what appellant had told him *before* trial, to counter the prosecution's charge of recent fabrication.[169] The Superior Court precluded Dr. Kania from re-taking the stand (9 RT 2005).

4. Prosecution Closing Argument

The central issue at trial was the identity of Nick Markowitz's killer. The prosecution presented Appellant's admission of responsibility to the police, his statement to Sheehan, and his motive to erase a $1,200 debt to Hollywood. Appellant presented an alibi that in order to extinguish his $200 debt, he delivered a duffel bag to Rugge in Santa Barbara which may have contained the gun, but he did not participate in the kidnap or the murder, and was not even aware that Nick was being held in the hotel. No forensic evidence linked Appellant to either duct-tape, the murder site or the murder weapon. The veracity of Appellant's confession therefore loomed as *the* critical guilt phase question for the jury - and the jury alone - to decide.

The prosecution argued the jury should disbelieve Appellant's self-serving testimony, and in particular his claimed amnesia which was simply a ruse to avoid cross-examination. However, the prosecution went considerably, and impermissibly further, drawing upon seemingly definitive examinations of defendant by its rebuttal experts:

> Amnesia occurs with head trauma, accidents, long-term sexual abuse, dis-associative disorders. . . . We subjected appellant to six hours of psychiatric and neuropsychological evaluation. The experts concluded there was nothing - other than perhaps "bad character" - that makes appellant more prone to amnesia or false confession. . . . appellant does not suffer from mental illness or thought disturbance. What appellant has is a poor character.

169/ The Superior Court denied the defense in regard to "recent fabrication" on the ground it was a new theory of defense as to which no notice had been given, nor had the prosecution experts been prepared to speak to it (9 RT 2001). The Court did not address the denial of due process argument. This erroneous ruling is addressed separately below.

(9 RT 2078-2079.)[170]

In rebuttal argument, the prosecution compounded this error with error of another sort:

> Nobody testified that defendant made a false confession. I can challenge all of you right now, look in your notes as to the testimony of Dr. Kania, and none of you will find anywhere in your notes quoted Dr. Kania saying he gave a false confession. . . . You can't believe the false confession without also believing the amnesia. Nobody has said the basis for appellant's convenient 24-hour amnesia.
>
> (10 RT 2149.)

The Superior Court instructed the jury neither expert was permitted to offer opinion as to the truth or falsity of Appellant's confession (10 RT 2150). More tellingly, Dr. Glaser was permitted to testify that Appellant was faking or simply malingering, which amounted to an opinion about Appellant's credibility and Appellant's guilt through the chain of reasoning laid out in the prosecution's rebuttal argument.

At penalty phase, the prosecution reiterated that Appellant had been examined "very carefully by a number of different people, two psychologists and one psychiatrist," and that none of them found any evidence Appellant had a mental disease or thought disorder, or that

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170/ The prosecution also argued that Appellant was "not in such extreme distress that he can't actually recall any of it," and Appellant's efforts to "manipulate" the interview were inconsistent with amnesia (9 RT 2049, 2053). "Somebody tell me, and maybe they will do so in closing argument, what was it exactly that caused this amnesia other than the desire to not answer any questions about his confession, which is malingering" (9 RT 2076). On rebuttal, Appellant was "lucid," "responsive," and "evasive" (10 RT 2153). The potency of this argument was bolstered by the Superior Court's exclusion of Dr. Kania's rejoinder testimony.

The prosecution also revived the charge of recent fabrication it had foresworn to keep Dr. Kania from retaking the stage (9 RT 2007), arguing "on the stand, appellant tried to weave his story "into the facts as he knew it going into the trial" (9 RT 2079).

Appellant's judgment was in any way clouded whatsoever by a personality disorder so as to diminish his culpability for the murder (11 RT 2340). This line of argument - like the guilt-phase - was entirely based upon Dr. Glaser's adversarial examination of the defendant.

5. Post-Trial Motion

Defense attorneys again raised the issue that testifying experts of the prosecution had examined the defendant in violation of his statutory and constitutional rights (6 CT 1597). The prosecution opposed on the new ground that Appellant submitted "quite willingly on advice of counsel." The prosecution argued that the jury placed great weight on:

> Defendant's unwavering insistence in his testimony - as well as in his interview with Dr. Glaser - that he had no memory of the police interview - considered in light of Dr. Glaser's expert testimony that the claim of amnesia was clear evidence of malingering *may have prompted* the jury to conclude that defendant lied on the stand.
>
> (6 CT 1643,emphasis added).

Thus, the prosecution argued then, and is estopped from denying now, that the jury could and did give decisive effect to Dr. Glaser's damaging testimony. On February 7, 2003, the Superior Court denied the defense motion for new trial on this ground (11 RT 2542).

D. ARGUMENT

1. The Superior Court Erred in Compelling Appellant to Undergo Prosecution Psychiatric Examinations

As this Court recognized in *Verdin*, Penal Code §1054.9 superceded *People v. Carpenter* (1997) 15 Cal.4th 312 and *People v. Danis* (1973) 31 Cal. App. 3d 782, the cases upon which the prosecution's motion, and the Superior Court order in this case were based. That order was clear state law error under *Verdin*.[171]

171/ The California Legislature recently amended the criminal discovery statutes to provide: "Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action . . . places in issue his or her mental state at any phase of the criminal action . . .

2. The Superior Court Violated Appellant's Fifth Amendment Privilege Against Self-Incrimination

a. Testimonial Effect

Appellant contends that the trial court order violated his Fifth Amendment privilege under *Estelle*. The *Verdin* case also contains language suggesting this possibility, although the Court did not decide *Verdin* on constitutional grounds, leaving that issue open. Thus the error must be deemed prejudicial unless the prosecution can prove beyond a reasonable doubt that the error did not contribute to the verdict.

While *Verdin* left open the possibility that not every interaction between a psychiatrist and defendant would necessarily involve testimonial evidence, *Verdin*, 44 Cal. 4th at 1114, such is not *this* case. Stated bluntly, what the prosecution sought, because "the personal interview is the basic tool of psychiatric study" (6 CT 1230), the prosecution found in Dr. Glaser's questioning of Appellant about his "perceptions, memory and interpretation of the events in question." *Verdin*, 43 Cal. 4th at 1112. Dr. Glaser based on his conclusions principally on the clinical interview and testing, and there can be no doubt his conclusions were adverse to defendant. He obtained what he felt was a "comprehensive" medical history *from* defendant, upon which he "absolutely" precluded any physiologically-induced amnesia. He questioned Appellant and on the basis of Appellant's answers concluded his memory was "crisp and solid" except for a two-day period of amnesia, as to which no memory could be cued, which was simply faked and malingered. If there were any doubt that these conclusions were based on the personal interview, the prosecution's closing argument put it to rest. "We subjected Appellant to six hours of psychiatric

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through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant . . . submit to examination by a prosecution-retained mental health expert." (Penal Code §1054.3(b)(1).) That amendment took effect on January 1, 2010, and has no application to *Verdin* error in appellant's case.

and neuropsychological evaluation. The experts concluded there was nothing - other than perhaps "bad character" - that makes Appellant more prone to amnesia or false confession" (9 RT 2078).

In *Estelle v. Smith* (1981) 451 U.S. 454, 461-469, the United States Supreme Court held that admission of a prosecution psychiatrist's testimony at penalty phase violated defendant's Fifth Amendment privilege against compelled self-incrimination, since the defendant was not advised before the pretrial examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing proceeding. *Estelle* governs this case. There is no showing that appellant was advised and waived his Fifth Amendment privilege before the prosecution psychiatrist evaluations in this case. To the contrary, the Superior Court order compelling him to undergo such evaluations foreclosed his exercise of the privilege.

In *Satterwhite v. Texas* (1988) 486 U.S. 249, 257-260, the United States Supreme Court held that the admission of a prosecution psychiatrist's testimony taken in violation of *Estelle* was not harmless error beyond a reasonable doubt because the psychiatrist was the only licensed physician to testify on a contested point (future dangerousness) and the prosecution placed significant weight on his powerful and unequivocal testimony. In this case, the record demonstrates that the *Verdin* error did contribute to both the guilt and penalty verdicts. Certainly, Respondent can not prove, as is its burden to prove, *beyond a reasonable doubt,* that Dr. Glaser and Dr. Chidekel's testimony in light of the attention it received in the prosecution's closing argument had *no effect or no influence* on the verdicts in this case.

In *Satterwhite*, Justice O'Connor observed:

> Dr. Grigson was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson was the only licensed physician to take the stand. He informed the jury of his educational background and experience . . . he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation.

> The District Attorney highlighted Dr. Grigson's credentials and conclusions in his closing argument. . . . Having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury.
>
> 486 U.S. at 259-260.

The same is true of Dr. Glaser's expert testimony on the closely-intertwined issues of amnesia and false confession in this case. Dr. Glaser was the only psychiatrist who testified at trial. His opinions, seasoned by his examination of defendant, were as emphatic as they were adverse to defendant. *See also Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1130-1131 (reversing special circumstance retrial where prosecution psychiatrist testimony admitted in violation of *Miranda* was not harmless because prosecution used the expert not only to discredit the testimony and theories of the two defense experts, *but also to attack defendant's own credibility and truthfulness regarding his memory loss*). The Superior Court violated Appellant's Fifth Amendment privilege against self-incrimination by admitting the prosecution psychiatrist testimony at guilt phase.

b. Weighted Scales

The rulings of the Superior Court in regard to expert testimony weighted the scales between the parties and compounded the *Verdin* error of compulsory psychiatric examination. On the one hand, the Superior Court precluded the defense expert Dr. Kania from testifying about what Appellant had told him, what might motivate Appellant to falsely confess, or what portions of the confession he felt were false and why. On the other hand, the Superior Court permitted the prosecution expert Dr. Glaser to testify about what Appellant told him or failed to tell him, what would motivate Appellant to fake amnesia, and why he felt Appellant was keenly aware and responsive, if evasive, during the entirety of the confession. The prosecution was permitted to ask Appellant why he would say he duct-taped Nick in the hotel unless it were true. These evidentiary rulings permitted

the prosecution expert to testify to matters far beyond the scope of the defense expert's testimony.

"The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming the opinion on the subject to which his or her testimony relates." *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371. Dr. Glaser's opinion that Appellant was faking amnesia was not such a subject. When an expert testifies to conclusions which even a lay jury can draw, the expert is no longer testifying "on a question of science, art or trade" in which he is more skilled than the jury. *People v. Brown* (1981) 116 Cal.App.3d 820, 828. When Dr. Glaser testified Appellant was lying about amnesia, that Appellant was keenly aware and responsive during the confession, and that his answers, body language and nature and quality of responses were appropriate, his opinions were tantamount to an opinion that Appellant was guilty of the crimes charged. The jury was as qualified as Dr. Glaser to determine whether Appellant was lying or telling the truth on the stand and in his confession. The admission of this testimony was reversible error.

Dr. Glaser never explained how his methodology for critiquing Appellant's claim of amnesia, *i.e.*, Appellant's failure to recall portions of the confession despite Dr. Glaser's cuing, would account for Appellant's recent exposure to the very same evidence through the in-court playback of the confession videotape and audiotape. It seems highly implausible that Dr. Glaser could independently determine anything about Appellant's claim of amnesia, much less that Appellant's lack of independent recollection was feigned. It was separate error to permit the prosecution to obtain a psychiatric evaluation of Appellant on this issue *after* Appellant had watched and listened to the confession in court, and had testified and been cross-examined about it, since this was the very essence of the evaluation itself. The timing of the evaluation made the entire exercise, and Dr. Glaser's testimony in particular, a ludicrous sophistry, but one that inured greatly to defendant's detriment.

c. Buchanan v. Kentucky

In *Buchanan v. Kentucky* (1987) 483 U.S. 402, the United States Supreme Court upheld the admission of a psychologist's report by the prosecution to rebut a mental status defense of extreme emotional disturbance to a non-capital murder charge. Any suggestion that Buchanan stands for the proposition that when a defendant offers mental health evidence at trial, a court can compel that defendant to undergo psychiatric evaluations by prosecution-retained experts must be rejected; *Buchanan* is distinguishable for four reasons. *First*, the prosecution and defense jointly requested the psychological evaluation of Buchanan pursuant to the Kentucky procedure for involuntary hospitalization. By contrast, in this case, the defense objected to Dr. Glaser's evaluation. *Second*, Buchanan did not take the stand, and hence the prosecution had no means of responding to the defense except by asking the defense expert to read from the psychologist's report, a limited rebuttal purpose. *Id.* at 423-424. By contrast, here, Appellant took the stand and was fully cross-examined, albeit in a coerced and unknowing waiver of his Fifth Amendment privilege. *See* Claim VI, *supra*. The prosecution also had Dr. Kania's report and could call Dr. Glaser to critique his methods and results. *Third*, it could be assumed that Buchanan had consulted with counsel prior to the psychological evaluation before deciding to go forward with knowledge of its potential adverse uses. Here, the Superior Court Order compelling Appellant to undergo examination by prosecution experts foreclosed any effective assistance of counsel, because the doctors could comment upon, and the jury draw an adverse inference from, any refusal by Appellant to participate in the evaluations. *Fourth*, in *Buchanan* the United States Supreme Court found any error harmless because the defense of extreme emotional disturbance required a showing of provocation and cannot be established by mental illness alone, and provocation was not established. *Id.* at 425. In this case, the alibi defense was founded on Appellant's and Dr. Kania's affirmative testimony in regard to the giving of a false confession. If the jury believed Appellant's sworn testimony, it would entertain a reasonable

doubt of his guilt. On the other hand, the prosecution had the potential means to counter this defense without recourse to the cruel expedient of hearing it from Appellant's own lips or compelling an examination of the inner working of his mind.

3. Prejudice

Appellant submits that the trial court order was clear error under state law, *Verdin, supra*, and as a matter of federal constitutional law, *Estelle*, *Satterwhite, supra,* and requires the reversal of both his convictions and his sentence of death. The trial court's psychiatric examination order forced Appellant to provide evidence which the prosecution used against him at both guilt and penalty phases, and in so doing, heavily weighted the scales between the parties.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Appellant's murder conviction and remand for a new trial.

VIII. THE PROSECUTION VIOLATED APPELLANT'S FIFTH, SIXTH AND EIGHTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE PENALTY BY PREJUDICIAL MISCONDUCT IN ITS GUILT PHASE CLOSING ARGUMENT

A. INTRODUCTION

This was a single victim case involving a 21-year old Appellant with no prior record. The prosecution's case in aggravation was victim impact testimony of the slain boy's mother. Uncontested evidence from the guilt phase portrayed Appellant's mother as dysfunctional, Appellant as without any stable parenting or home-life, and Appellant himself as highly subservient to Jesse Hollywood at whose beck and call he had committed the murder. On the face of things, this was not an easy case for guilt of kidnap-murder, or the death penalty.

The prosecution committed three major errors during guilt phase closing argument: (1) arguing facts not in evidence; (2) reneging on an agreement not to argue a theory as to which defense rebuttal evidence was

excluded; (3) improperly vouching for the credibility of an immunity witness; and (4) emphasizing the tragic and inflammatory facts of the co-defendants' August 6th kidnap and 48-hour detention of the victim, which was irrelevant to Appellant's subsequent role in his death. These errors, separately or cumulatively, warrant reversal of the guilt and penalty verdicts.

B. STATEMENT OF FACTS

1. Guilt Phase

a. Arguing "Facts" Outside the Record

Appellant's theory of the case was that, despite his confession, he was not present at the murder scene. A critical issue was whether details of his confession and corroborating evidence proved he was there. For the "limited purpose" of establishing a connection between co-appellant Pressley and Appellant, the prosecution was permitted to present a redacted statement by Pressley that "he" dug the grave (7 RT 1434).[172] Yet Detective Cornell, who took the statement, testified in violation of the restriction that Pressley said "he dug the grave that *they* used to bury Nicholas Markowitz" (7 RT 1471). The defense objected and asked Judge Gordon to strike the response. The trial court did and, after a recess, instructed the jury to disregard the plural pronoun "they." (7 RT 1478-1479). The prosecution, however, cautioned that it would "call the jury's attention to it," and that, in fact, it did. (*Ibid.*) Again, in violation of the restriction, the prosecution argued in guilt phase closing that Appellant "did considerably more than shoot the victim"; "he was probably involved in the taping and the burial process, if not digging the grave." There were no facts in evidence to support this claim.

On rebuttal, the prosecution argued there was gun shot residue on

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172/ This basis for admission was inadequate in that the redaction ("he" replacing "they") necessary for *Bruton/Aranda* purposes eliminated any syntactical "connection" between Pressley and Appellant, particularly in terms of joint presence at the crime scene. It was only by Cornell's improper reference to "they" in his testimony that such a foundation for such connection was laid.

three shovels, which meant three people were at the grave site; Pressley and Rugge were the two, and Appellant must have been the third (10 RT 2144). The only evidence concerning shovels was offered by Detective Kathyrn Galante, who testified that she seized and tested four shovels from Rugge's house for gun shot residue, but did not testify to the results (7 RT 1424). Galante conceded she did not obtain any fingerprints or trace evidence of hair, fiber or dirt on the shovels, nor was she able to match trace soil on the shovels to the crime scene (7 RT 1426, 1430). There was no evidence in the record that gun shot residue was found on *any* shovel, *much less on three shovels.* On defense objection, Judge Gordon instructed the jury that argument is not evidence, but not to disregard the prosecution's misstatement.

b. Manipulating Inferences From Excluded Defense Evidence

Three critical rulings at trial gave the prosecution an unfair advantage which it exploited in closing argument. First, at the prosecution's request and over defense objection, Judge Gordon precluded defense expert Dr. Kania from offering his opinion that Appellant's confession was "for the most part false", finding this to be a credibility call for the jury alone to make (7 RT 1509, 1512; 5 CT 1348).[173] Having won an exclusion order, the prosecution whipsawed the defense by arguing to the jury "nobody testified that Appellant made a false confession . . . I can challenge all of you right now, look in your notes as to the testimony of Dr. Kania, and none of you will find anywhere in your notes quoted Dr. Kania

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173/ At the Evid. Code §402 hearing, the prosecution argued "I don't think he should be allowed to offer an opinion that this Appellant gave a false confession, nor should he be allowed to present to the jury any of the information that specifically causes him to believe that this is a false confession" (7 RT 1509). By "any of the information," the prosecution referred in its motion *in limine* to any link between the principles or factors in general to the reliability of Appellant's confession in particular (5 CT 1348-1349).

saying he gave a false confession"(10 RT 2149).[174] Judge Gordon denied a defense objection.[175]

Second, at the close of prosecution rebuttal, the defense offered Dr. Kania's rebuttal testimony to rebut the prosecution's charge of "recent fabrication", *i.e.*, that Appellant tailored his testimony to fit what he had heard at trial (9 RT 2001). Judge Gordon rejected the defense proffer that Appellant made prior (*i.e.*, pre-trial) consistent statements to Dr. Kania in regard both to his amnesia for certain details of his confession and its circumstances and that he drove a duffel bag to Santa Barbara without knowledge of its contents, which account was provided to the prosecution by way of Dr. Kania's raw notes (9 RT 2006). The prosecution agreed *not* to argue that "he fashioned his testimony based on the testimony he heard," reserving the right to argue that he had access to information before trial by

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174/ The prosecution's argument on this point went as follows:

> Counsel talks about Dr. Kania. Understand what Dr. Kania did do and what he didn't do. What all these experts did and didn't do. Nobody, nobody testified, nobody testified that the Appellant either did or did not make a false confession. Nobody testified to that. The extent of what any of the experts talked about, to some extent is whether or not there were certain personality conditions that he may or may not have had, that may or may not have been consistent with the people who give false confessions. There's a difference between that. It's for you to decide whether there was or was not a false confession. I can challenge all of you right now, look in your notes as to the conversation or the testimony of Dr. Kania, and none of you will find anywhere in your notes quoted Dr. Kania saying he gave a false confession.
>
> (10 RT 2149.)
>
> The Court denied the defense objection on the ground that the prosecution was "arguing the extent of the testimony, the extent to which they -- the scope of their opinion was, did not encompass whether or not in this particular case there was a false confession." *Id.*

175/ For the reasons stated *infra*, Judge Gordon's instruction that neither expert was allowed to give an opinion on this issue did not cure the prejudice of the prosecution's argument.

way of police report that could have influenced his testimony (9 RT 2007). Appellant's uncontradicted testimony was that he did not have pretrial access to police report, and that he heard his confession for the first time in the courtroom (8 RT 1720, 1781, 1784).

The prosecution reneged on its agreement by arguing Appellant "tried to weave his story [on the stand] into the facts as he knew it going into the trial" (9 RT 2080). "He fashioned a defense of bringing a package to the hotel" because he knew he had confessed to a meeting at the hotel (9 RT 2057).[176] The two instances are egregious situations where the court excluded defense evidence which showed the prosecution argument was false (or at least contradicted it) and the prosecutor then used such opportunity of exclusion to make an argument he knew to be false or at the very least, contradicted his argument.

Third, over defense objection, Judge Gordon admitted Side "B" of Appellant's confession only as impeachment of his testimony. *See infra.* Yet, the prosecution argued it as critical substantive evidence of guilt:

> MR. ZONEN: [Quoting from Side "B"] 'I just can't help but wonder, is there ever a time when right before you pull the trigger that you just thought, you know, 'I shouldn't do this. This is wrong,' because I haven't heard that from you yet.'
>
> That's on Side "B". That's at the very end of the interview. That's Ken Reinstadler looking at him and asking him, 'What were you thinking when you did this? Didn't it occur to you at some point that there's something seriously wrong here?' And his answer, [Quoting Side "B"] "Honestly?" "Uh-huh." He says, "Hell yes. Right before."
>
> But look at the words that are used. He says, "before you pulled the trigger that you just thought, isn't this wrong?" *Now, that's an admission that there was no question at this point it wasn't one of the others that pulled the trigger, but he*

176/ To further counter Appellant's stress-based amnesia claim, the prosecution argued "nobody forgets the next 48-hours after watching 9/11 on TV . . . all of you remember in vivid detail the horrors of that day." There was no foundation in the record for this argument, which played upon the fears of that traumatic event - just two-months earlier - in the nation's history.

> *was the one.* He had the ability to deny, in the course of that interview, and did deny things that he believed he was less responsible for, taping him up, digging the grave, engaged in the kidnapping, the things that he believed he was less responsible for he had the ability to deny. *Does he deny that he pulled the trigger? No, he admits it.*
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> (9 RT 2061-2062.)

The Court did not curatively instruct the jury at that time.[177]

c. Arguing Witness Sheehan Wouldn't "Have Even Needed" Immunity, If Appellant were Innocent

As discussed *infra*, Casey Sheehan was an important state witness who provided a vehicle and an alibi to Hollywood, and testified to post-crime admissions by Appellant. Sheehan's memory and credibility were hotly-contested; the defense even contended he might have knowingly facilitated Hollywood in the murder. The prosecution granted Sheehan immunity.[178]

Against that backdrop, the prosecution argued in regard to Sheehan, "if you lie while testifying, immunity does not protect you from a perjury prosecution," and can nullify the immunity (9 RT 2067).

> MR. ZONEN: So you actually have greater assurances that a witness with immunity will be as strictly truthful as they possibly can be, because they understand the consequence of lying. All of that is made clear to them.
>
> *In this particular case, even of more significance to you is the fact that he would not have even needed a grant of immunity if*

177/ During general instruction, the Court gave CALJIC No. 2.13.1 which informed jury if it found the Appellant made an out of court statement in Side "B" inconsistent with his trial testimony, the out of court statement should be used only for the purpose of assessing Appellant's credibility as a witness, and must not be considered as evidence of guilt (10 RT 2168; 5 CT 1432).

178/ Sheehan's immunity agreement was not in evidence nor did the prosecution preserve it for inclusion in record-augmentation. Six other witnesses testified under immunity, but their status was not made known to the jury.

Ryan Hoyt was innocent of this crime, because he would not have been harboring a fugitive. All he would have been doing was harboring a friend. So the fact that he even needs a grant of immunity is only to the extent that his friend, the defendant, is guilty of a crime.

(9 RT 2068, emphasis added.)

The Court granted a defense objection, but did not instruct the jury either that the prosecution's exercise of its authority to grant immunity was irrelevant to appellant's guilt, and should play no role in jury deliberations, or that immunity status was a factor to evaluate in terms of caution, rather than to bolster witness credibility.

C. ARGUMENT

1. Legal Standards

An appellant's due process rights are violated when prosecution misconduct at closing argument renders his trial "fundamentally unfair." *Darden v. Wainwright* (1986) 477 U.S. 168, 181. Under *Darden*, the first issue is whether the prosecution's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1112; *Comer v. Schriro* (9th Cir. 2006) 463 F.3d 934, 961. In particular, a due process violation arises when the prosecution misstates or manipulates the evidence. "It is decidedly improper for the prosecution to propound inferences that it knows to be false, or has very strong reason to doubt." *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968. "Evidence matters, closing argument matters; statements from the prosecution matter a great deal." *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.

Conduct that falls short of *Darden* "may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the jury." *People v. Panah* (2005) 35 Cal.4th 395, 462.

2. The Claims Were Preserved for Appeal by Objection at the Time, Or by Exception to the *Green/Hill*[179] Rule

Defense attorney timely objected to the prosecution guilt phase arguments of gun shot residue on three shovels, that Dr. Kania was unwilling to say the confession was false, and Sheehan wouldn't even have needed immunity if Appellant were innocent. These claims were clearly preserved for appeal. *People v. Bonilla* (2007) 41 Cal.4th 313, 336.

As to the other instances of prosecution misconduct, the failure to object should be excused because, under the circumstances, objection would have been futile, or admonition would not have cured the harm. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Avila* (2009) 46 Cal.4th 680, 710-711. The Superior Court's prior pattern of unresponsiveness to defense objections - rather than "ritual invocation" - warrant application of the futility exception to the *Green/Hill* contemporaneous objection-rule. (*See People v. Hill*, *supra*, 17 Cal.4th at 821 (excusing further objections as futile where prosecutorial misconduct was interspersed during proceedings and trial court failed to curb it when counsel did object.).) Alternately, as noted *infra*, the misrepresentations of fact and reasonable inference therefrom were so flagrantly improper than no admonition would have sufficed to undo the harm.

Judge Gordon failed to address several expressed concerns prior to closing argument, ignoring and thereby thwarting defense requests for an Evid. Code §402 foundational hearing for any expert opinion testimony, exclusion of any uncharged offenses for any purpose, and permission to object during closing argument without elaborately setting forth all applicable grounds and request for curative instruction, and excluding any questioning as to the truthfulness of another witness (5 CT 1281, 1283,

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179/ The rule had its genesis in *People v. Green*, 27 Cal.3d 1, 28 (1980) and the exceptions were clarified in *People v. Hill,* 17 Cal.4th 800 (1998). The contemporaneous objection rule, as applied to cases of prosecutorial misconduct, is commonly referred to as the *Green* or *Hill* rule or *Green/Hill* Rule.

1285, October 21, 2001 defense motion *in limine*).

At the pretrial conference, the defense objected to *any* hearsay statements of or conversations between co-defendants Rugge and Pressley and immunity witnesses Adams and Carpenter, or co-defendant Hollywood and attorney Hogg (which the prosecution contended were admissible in furtherance of conspiracy) and asked for a foundational hearing whether the statements were made to promote any conspiracy of which Appellant was a member (2 RT 287, 4 RT 709-711, 5 CT 1354, defense hearsay objections).

On October 29, 2001, after the jury was sworn, Judge Gordon declared the issue too "nebulous" to rule upon before witnesses were called (4 RT 711-712). The Superior Court did not rule on the issue or respond to the request for foundational hearing; in the event, the prosecution presented the hearsay testimony, without establishing Appellant's joinder in the same conspiracy. Finally, Judge Gordon failed to address defense objection to the prosecution's "second kidnap" argument as a variance from the indictment (10 RT 2137). These were all significant issues which the Superior Court ignored, to Appellant's detriment. Under these circumstances, further objection to each and every instance of prosecution misconduct would have been futile, and this Court should consider and address the merits of all of Appellant's claims regarding the prosecution's closing argument misconduct.

3. The Prosecution Committed Prejudicial Misconduct in its Guilt Phase Closing Argument

The prosecution's closing argument at guilt phase "so infected the trial with unfairness as to make the resulting conviction [and sentence] a denial of due process." *Darden*, 477 U.S. at 181 (*quoting Donnelly v. DeChristoforo* (1974) 416 U.S. 637).

a. Arguing Extrinsic "Facts" Known to the Prosecution to Be Contradicted By Evidence Not Before the Jury

The prosecution may vigorously argue his case, *People v. Bandhauer* (1967) 66 Cal.2d 524, 529, but cannot make statements of personal belief

based on purported facts *not* in evidence. *People v. Love* (1961) 56 Cal.2d 720, 730, *disapproved on other grounds in People v. Morse* (1964) 60 Cal.2d 631, 637-638, n.4; *People v. Fosselman* (1983) 33 Cal. 3d 572, 580-581.

The prosecution has a special duty not to impede the truth. "A prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young* (1985) 470 U.S. 1, 18-19. For this reason, it is highly improper for the prosecution to present to the jury statements or inferences it knows to be false or has very strong reason to doubt. *See United States v. Reyes* (9th Cir. 2009) 2009 U.S. App. LEXIS 24575, *16 (reversing chief executive officer's securities fraud conviction where prosecutor argued that finance department did not know of false accounting, when prosecutor knew they did). This is true, notwithstanding the ritual incantation in jury instruction that argument of the attorneys is not evidence. "Deliberate false statements by those privileged to represent [the State] harm the trial process and the integrity of our prosecutorial system. *(Id.* at *19.)

In this case, the prosecution did not confine its argument to the evidence before the jury or reasonable inferences derived therefrom. Rather, the prosecution asserted various propositions as "fact" that it knew were contradicted by evidence *not* before the jury. In direct contravention of the redaction of Pressley's statement to Detective Cornell and of the limited testimony of Detective Gallante (that gun shot residue tests of four shovels were performed, but no results adduced), the prosecution asserted in closing argument that Appellant was the one who dug the grave, using a shovel linked forensically to the site and/or to the murder weapon. Thus, the prosecution sought the jury to infer corroboration by independent evidence of Appellant's participation in the crime (Pressley's statement and gun shot residue tests of Rugge's shovels), when the prosecution knew no such independent corroboration existed.

b. Arguing Improper Inferences

Compounding the error, the prosecution emphasized two significant inferences of guilt from the absence of defense evidence, where, at the prosecution's request, Judge Gordon had excluded defense evidence directly on point: 1) that Dr. Kania would not say Appellant's confession was false, and 2) that Appellant's testimony was a recent fabrication. These arguments exploited the exclusion orders in a way that whipsawed the defense. The prosecution knew Dr. Kania felt Appellant's confession was false, but was barred from saying so. The prosecution also knew Appellant had given a consistent account to Dr. Kania before trial, but was barred from putting it before the jury to rebut the recent fabrication charge.[180] Indeed, the prosecution agreed not to make this argument, then reneged on its agreement. These were foul blows. Particularly in a capital case, the prosecution cannot argue its case by resort to misrepresentations of facts or inferences it knows would be rebutted by excluded evidence.

The prosecution's reference to Side "B" of Appellant's confession as substantive proof that Appellant was *the one* who pulled the trigger, violated the limited purpose of impeachment for which Side "B" (taken in deliberate violation of *Miranda*) was admitted. This too was a foul blow. Instruction would not and could not cure the prejudice of these misrepresentations.

c. Vouching for Sheehan's Immunity

The prosecution may *not* vouch for the credibility of a witness *based on personal belief or by referring to evidence outside the record.* (*People v. Martinez* (2010) 47 Cal.4th 911, 958 (*citing People v. Turner* (2004) 34 Cal.4th 406, 432-433).) It is permissible for the prosecution to comment upon the credibility of witnesses *based on facts contained in the record, and any reasonable inferences that can be drawn from them.*

The prosecution overstepped the bounds of permissible argument in

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180/ The prosecution reserved the right to argue that Appellant tailored his testimony to fit the police report, but there was no evidence in the record he had it before he met with Dr. Kania.

regard to witness Casey Sheehan. Neither Sheehan's immunity agreement, the prosecution's criteria for granting it, nor the process by which actionable perjury would be assessed, were in evidence. Thus, the prosecution's assertion that Sheehan would forfeit immunity if he didn't tell the truth, or even how that would be assessed, was unfounded. Moreover, the prosecution asserted that Sheehan "would not even have needed immunity if Appellant were innocent; he would be harboring a friend, not a fugitive" (9 RT 2068). This was a flagrant assertion of an advocate's personal belief, carrying with it the imprimatur of the executive office. The jury did not know that the power to grant immunity lies with the executive, not the judicial branch. No reasonable inference of guilt could arise from the prosecution's unfettered exercise of *its* immunity power on behalf of a witness. No instruction could cure the harm of this impropriety. *(Cf. Martinez*, 47 Cal. 4th at 959 (denying claim where prosecution vouched for credibility of a witness whose purported inconsistency was "collateral" and could not reasonably have affected the outcome of trial).) Sheehan's testimony was anything but collateral. He provided the car and the alibi to Hollywood, disclaiming any knowledge to which these were put, and he was the source of damaging post-crime admissions purportedly by his "friend," the Appellant, admitting participation in a capital crime. If the jury chose not to believe Sheehan, acquittal was likely, if not certain. The prosecution's assertion that Sheehan's immunity was on its own terms proof of Appellant's guilt infected the trial with unfairness.

d. Arguing Guilt Imputed From Original Kidnap

It is clear that one of the horrific aspects of this crime, which both the media and the prosecution seized upon, was the original kidnap of this young boy and its attending tragic circumstances – that had he walked away, he would still be alive today. As discussed in Claim IV *supra*, there was no evidence that Appellant played any part in Nicks's original kidnap in San Fernando or 60-hour "on-again, off-again" detention in Santa Barbara. Yet, in guilt phase closing argument, the prosecutor trumpeted

these tragic, yet irrelevant and inflammatory facts repeatedly: It was "stupid in every way, but it was planning" (9 RT 2035). A kidnap for ransom or extortion, that began spontaneously; Nick was duct-taped, and a lengthy period of detention ensued, lasting more than two days. Notably, the prosecutor named every co-defendant, but not Appellant, as kidnappers who told Nick if he cooperated, they would let him go (9 RT 2039-2040). So Nick went swimming, socialized with girls, went to the market. The prosecutor devoted six pages of argument to making the point that Appellant was "responsible" along with the others who were involved (9 RT 2041). On rebuttal, the prosecutor returned to some of the facts which had lent the case its notoriety as a study in casual youthful ennui, where "on their standard, life generally doesn't make sense" (10 RT 2141):

> At one point I counted I think 12 people who knew about the abduction, the grabbing of Nicholas Markowitz and the different places where he had stayed and gone to. There was minimal effort on the part of this collection of characters to try to keep this a secret.
>
> (10 RT 2140.)

Yet, these sordid and tragic facts, particularly the poignancy that the victim could have walked away, and was urged to do so by one of the witnesses, were utterly irrelevant to Appellant's involvement. Incomprehensibly, there were 12 people who knew about Nick's abduction, and minimal effort to keep it a secret (10 RT 2142). This line of argument contravened well-established United States Supreme Court death penalty jurisprudence and, of course, the Eighth Amendment itself, which requires both uniformity (non-arbitrariness), *Godfrey v. Georgia* (1980) 446 U.S. 420, and individualized determinations whether death is the appropriate punishment based on a focus on the defendant as a "uniquely individual human being." *Woodson v. North Carolina* (1976) 428 U.S. 280, 304. It contravenes these guiding principles to allow consideration of antecedent facts of a crime, in which appellant played no part and of which he had no

knowledge,[181] to play a part in the jury's conviction or imposition of a death sentence for appellant. *See Booth v. Maryland* (1987) 482 U.S. 496 (Eighth Amendment prohibits prosecutor from eliciting family members' opinions and characterizations of the crime at penalty phase), *overturned on other grounds, Payne v. Tennessee* (1991) 501 U.S. 808; *Caldwell v. Mississippi* (1985) 472 U.S. 320 (Eighth Amendment prohibits prosecutor from introducing irrelevant and prejudicial information at penalty phase). Even after *Payne*, the cornerstone of capital sentencing remains only those factors *related to* the personal moral blameworthiness of a particular defendant, not factors about which a defendant was unaware, or were irrelevant to the decision to kill. *Id.* at 505.

e. The Errors Were Prejudicial

The prosecution committed a pattern of misconduct during the guilt phase summation by arguing facts outside the record and unreasonable inferences where defense rebuttal evidence was excluded, and improperly vouching for an immunity witness based on personal belief. At penalty phase, the prosecution converted factor (k) evidence to aggravation, misapplied factor (i), argued facts outside the record, and appealed to the victim-family's right of retaliation. These acts, separately and cumulatively, denied Appellant due process, a fair trial and a reliable determination of the facts in a capital trial in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and their state constitutional analogues. The prosecution's conduct in this case "infected the trial with such unfairness as to make the conviction a denial of due process." *Darden*, 77 U.S. at 181; *People v. Morales* (2001) 25 Cal.4th 34, 44. Alternately, the prosecution's misconduct violated California law because it involved the repeated "use of deceptive or reprehensible methods to attempt to persuade the jury." *People*

181/ The trial record showed Appellant was not responsible in any way for the original kidnap: he didn't conspire, did not take part in it, did not know about it. In sum, he had nothing to do with that crime. *See* Claim IV, *supra*.

v. Farnam (2002) 28 Cal.4th 107, 167.

Claims of prosecutorial misconduct are typically assessed for prejudice under California's "miscarriage of justice" test, *i.e.*, reversal is required if there exists a reasonable probability that, in the absence of the error, the jury would have returned a verdict more favorable to the accused. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Misconduct implying that the prosecutor has knowledge of facts beyond the evidence implicating the appellant violates the Sixth Amendment right of confrontation and cross-examination by permitting the prosecutor to act as his own, unsworn witness. (*Bolton, supra,* 23 Cal.3d at 215 n. 4.) Further, misconduct that is sufficiently pervasive and damaging raises due process concerns about the fundamental fairness of the proceedings as guaranteed by the due process clause of the Fourteenth Amendment. (U.S. Const., amends. V & XIV; *Darden v. Wainwright, supra,* 477 U.S. 168, 180-181.) In this capital case, the errors ultimately affect the right to a reliable penalty determination under the Eighth Amendment. Because the misconduct at issue implicated these federal constitutional guarantees, it is appropriate to use the *Chapman* standard for federal constitutional error, *i.e.*, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

The harmful effect of the misconduct in the present case was strong for several reasons. The closing argument of a prosecutor "carr[ies] great weight" (*People v. Talle* (1952) 111 Cal.App.2d 650, 677), and constitutes an "especially critical period" during which misconduct may prejudice the jury. (*People v. Alverson* (1964) 60 Cal.2d 803, 805). Much of the misconduct occurred during the prosecutor's rebuttal argument, right before the jury began its guilt phase deliberations. This was when its impact was sure to be the greatest. (*Cf.*, *People v. Williams* (1976) 16 Cal.3d 663, 669 (that jury convicted soon after hearing read back of wrongly admitted evidence tends to show that the evidence affected the verdict).)

Further, even if each individual instance of misconduct did not rise

to the level of reversible error, the cumulative effect of the prosecutor's multiple acts of misconduct resulted in prejudice to Appellant in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prosecutor's remarks (1) arguing facts not in evidence; (2) reneging on an agreement not to argue a theory as to which defense rebuttal evidence was excluded; (3) improperly vouching for the credibility of an immunity witness; and (4) emphasizing the tragic and inflammatory "first kidnap" period in which Appellant played no part clearly complemented each other in the way in which each undermined the proper functioning of the adversarial process. Neither's effect would have been as harmful without the other's supporting role. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077 (cumulative effect of prosecutorial misconduct may be prejudicial even if each individual instance is not).)

Additionally, the prejudicial effect of the prosecutor's improper remarks was augmented because they occurred on multiple occasions and were interspersed throughout the argument. *(People v. Kirkes* (1952) 39 Cal.2d 719) The trial court did nothing to minimize the resulting prejudice. (*People v. Hill* (1998) 17 Cal.4th 800, 845) (trial court's sustaining certain defense objections may have reduced the prejudicial effect of the prosecutor's course of misconduct).) Appellant urges this Court to reverse his conviction and death sentence on the claims of prosecution misconduct at both phases of trial.

IX. APPELLANT WAS DENIED HIS FIFTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT JURY TRIAL RIGHTS BY ERRONEOUS INSTRUCTIONS ON ACCOMPLICES AND IMMUNITY

A. INTRODUCTION

The Superior Court made three related errors in its jury instructions on accomplices and immunity witnesses. *First*, Judge Gordon omitted Jesse Hollywood and William Skidmore from CALJIC No. 3.16, which identified for the jury only Rugge and Pressley as accomplices as a matter of law, whose out-of-court statements should be viewed with care and caution and

subject to the rule of corroboration. Since the prosecution cast Hollywood as *the* mastermind of Nick's kidnap and murder, and Skidmore as a principal in the original kidnap and aider and abettor of the murder cover-up, their omission from CALJIC No. 3.16 was significant.[182] The defense theorized that Hollywood was also the actual killer, and Skidmore present at the scene. The defense had requested that both be named in CALJIC No. 3.16. By any reckoning, both Hollywood and Skidmore were accomplices as a matter of law.

Second, Judge Gordon did not give CALJIC No. 3.19 which would have informed the jury of its obligation to consider whether to apply accomplice rules of caution and collaboration to a witness whose status as an accomplice was disputed, in this case Casey Sheehan. Sheehan furnished Hollywood with a car and an alibi, and gave damning testimony of Appellant's post-crime admissions. Again, the defense had requested that Sheehan be named as an accomplice in CALJIC No. 3.16, and that CALJIC 3.19 be given. In its absence, the jury was foreclosed from applying accomplice corroboration rules to Hollywood and Skidmore's out-of-court statements or Sheehan's testimony, a flawed calibration of the prosecution's proof.

Third, at the prosecution's request, Judge Gordon gave only the standard version of CALJIC No. 2.20 on witness credibility, and did not give any pinpoint instruction that directed the jury to consider whether or which witnesses' testimony was "affected by" grant of immunity, prejudice against Appellant, or interest in testifying in a manner acceptable to the prosecution. The standard version of CALJIC 2.20 instruction given (10 RT 2169) did not identify anyone whose testimony was subject to careful scrutiny along these lines. Sheehan was such a witness and, though the jury did not know it, six other witnesses had immunity grants as well, though this fact was considered significant enough to warrant its disclosure and

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182/ The parties agreed that Hollywood and Skidmore kidnapped Nick on August 6, Hollywood planned Nick's murder, and Skidmore warned witness Affronti that he was the "weak link" (5 RT 900).

instruction to the grand jury. The cumulative effect of these errors was to reduce the prosecution's burden to prove Appellant's guilt beyond a reasonable doubt.

B. STATEMENT OF FACTS

1. Summary of Accomplice Testimony

The prosecution presented out-of-court statements by two principals in the kidnap and murder, Hollywood and Skidmore, and testimony by seven witnesses under immunity, of whom the defense contended Sheehan was an aider and abettor of Hollywood as the actual killer. This evidence featured prominently in the prosecution's case against Appellant on conspiracy, motive, planning and manner of the kidnap-murder, and on Appellant's post-crime admissions.

a. Jesse Hollywood

Brian Affronti testified under immunity about the circumstances of Nick's kidnap by Hollywood, Skidmore, and Rugge on August 6, and Hollywood's threat that Nick's brother pay back his drug-debt (5 RT 873). The next day (August 7), at Rugge's house, Hollywood told the others (accomplices-by-law Rugge and Pressley, and Hollywood's girlfriend Lasher, and the teenage girls Adams and Carpenter, all three of whom testified under immunity), "well, we'll just tie [Nick] up and throw him in the back of the car and go to the Biltmore and get something to eat [] or Fess Parker's" (5 RT 976 Adams).

On August 8, Hollywood told his attorney Stephen Hogg (who testified under immunity) that "some friends" had picked up the brother of the guy who destroyed his house (6 RT 1191). Hogg advised that "if they took this fellow against his will, the maximum penalty was eight years. But, if they asked for ransom, they could get life." The prosecution theorized that Hollywood decided to arrange Nick's murder to eliminate the *corpus delicti* of kidnap.

Later that day, Hollywood borrowed his friend Sheehan's car, purportedly without explaining why he needed it (6 RT 1280 Sheehan). Sheehan testified under immunity. They went out to eat dinner at an

Outback Steakhouse in the San Fernando Valley to celebrate Lasher's birthday (6 RT 1352, 7 RT 1413). Hollywood slept at Michele's house that night. The prosecution theorized that, through Sheehan, Hollywood set up both a car for Appellant and an alibi for himself. The defense contended that Sheehan supplied the car to Hollywood with knowledge he would drive it to commit the murder, and through his testimony sought to cover for both of them by shifting blame to Appellant. The defense argued that Hollywood committed the murder and set Appellant up as the "fall guy" (10 RT 2130).

On August 9th (the day after the murder), Hollywood told his father Jack "some friends" were holding the kid [Ben Markowitz's brother], drinking beer and eating ribs, but there was trouble because they took him against his will" (6 RT 1230). The prosecution classified this as a false exculpatory statement in furtherance of a conspiracy; the defense contended it was a false implied accusation of Appellant.

b. William Skidmore

Affronti identified Skidmore as one of Nick's kidnappers. After the murder, Skidmore warned Affronti that he was the "weak link" (5 RT 900). Skidmore said Hollywood spoke with his father and they decided Affronti needed to be careful about what he did, so nothing happened to him, which Affronti took as a warning (5 RT 911).

Appellant testified that Skidmore confided "Ben's brother had been killed" on August 10, which was several days before Nick's body was found (9 RT 1843).

c. Casey Sheehan

On August 9th, Sheehan came home from work to find his car returned. He claimed no knowledge of how it was used or by whom. Hollywood said "they" had taken Nick to Santa Barbara. Later, Appellant told Sheehan "a problem was taken care of [but] best we left things unsaid" (6 RT 1292). Sheehan asked if there was a problem with Nick. Appellant said "not anymore" (6 RT 1296). Appellant said "Nick had been killed - we killed him" (6 RT 1301). While they were clothes-shopping, Appellant said

his debt to Hollywood was "taken care of" or "the problem in Santa Barbara had been taken care of" (6 RT 1370).

At his birthday party the following evening August 10, Appellant told Sheehan that Nick was dead (6 RT 1376), which Sheehan had not heard before (7 RT 1404). On August 13, during a drive to Malibu, Appellant said,

> Nick was dead. *They* shot him and put him in a ditch. It took place in Santa Barbara. He used a bush to cover him [Nick]. *They* had picked Nick up at a hotel and taken him to the site.

(6 RT 1306, 1380).

Appellant also said Skidmore was in Santa Barbara and involved in some manner. Sheehan inferred "they" meant Appellant, Skidmore, Rugge and one other person (7 RT 1410).

2. Jury Instructions

Appellant's proposed that CALJIC Nos. 2.24, 2.40, 2.72, 3.10, 3.11, 3.12, 3.13, 3.14, 3.16, and 3.19 be given to the jury and that CALJIC No. 3.16 expressly direct the jury to consider Hollywood, Rugge, Pressley, Sheehan, and Affronti accomplices as a matter of law (5 CT 1379).[183] The prosecution did not propose any accomplice instructions (5 CT 1377). The totality of Judge Gordon's explanation for the instructions he gave was "I think I have to give" [CALJIC No. 3.16] as to Pressley to whom the statement "we" or "I" dug the grave" was attributed, and the statements of the "two young men" (Rugge and Pressley) to Kelly Carpenter (9 RT 2019).[184]

183/ Judge Gordon conducted an earlier "informal" conference with the attorneys to discuss jury instructions, the contents of which were neither recorded nor settled. Appellant should not be faulted for the trial judge's laxity in conducting proceedings off the record. The claim of erroneous denial of appellant's request that Hollywood, Skidmore and Sheehan be named in CALJIC No. 3.16 and for CALJIC No. 3.19 should be deemed preserved for appeal.

184/ Judge Gordon conducted an earlier "informal" conference with the attorneys to discuss jury instructions, the contents of which were

The totality of the accomplice instructions given to the jury were as follows:

> An accomplice is a person who's subject to prosecution for the identical offense charged against the Appellant on trial by reason of being a member of a criminal conspiracy. (5 CT 1452, CALJIC No. 3.10 Accomplice defined; 10 RT 2177). (*The Court deleted the phrase "aiding or abetting" between "by reason of" and "being", which eliminated Skidmore and Sheehan from any jury consideration as accomplices.)*
>
> You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense. Testimony of an accomplice includes any out-of- court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of- court was true. (5 CT 1453, CALJIC No. 3.11 - Corroboration of Accomplice Testimony.)
>
> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime, which if believed by itself, and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. However, it is not necessary that the evidence of corroboration be sufficient in and of itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. (5 CT 1454, CALJIC No. 3.12 - Sufficiency of Corroboration Evidence.)
>
> In determining whether an accomplice has been corroborated you must first assume that the testimony of the accomplice has been removed from the case. You must then determine whether there's any remaining evidence which tends to connect the defendant with the commission of the crime. If there's no independent evidence which tends to connect the defendant with the commission of the crime, the testimony of the accomplice is not corroborated. If there is independent evidence which you believe, then the testimony of the accomplice is corroborated. (5 CT 1314, CALJIC No. 3.12 - Sufficiency of Assets to Corroborate an Accomplice)

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neither recorded nor settled. Appellant should not be faulted for the trial judge's laxity in conducting proceedings off the record. The claim of erroneous denial of Appellant's request that Hollywood, Skidmore and Sheehan be named in CALJIC No. 3.16 and for CALJIC No. 3.19 should be deemed preserved for appeal.

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of the other accomplices. That must come from other evidence. (5 CT 1455, CALJIC No. 3.13 - One Accomplice may not Corroborate Another.) *(The Court failed to instruct that the jury could not use Appellant's confession or admissions he made to Sheehan to corroborate accomplice testimony.)*

Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator, and without the intent or purpose of committing, encouraging or facilitating the commission of the crime, is not criminal. Thus, a person who assents to or aids or assists in the commission of a crime without that knowledge, and without an intent or purpose, is not an accomplice in the commission of the crime. (5 CT 1456, CALJIC No. 3.14 - Criminal Intent Necessary to Make One an Accomplice.)

In the crime -- if the crimes charged in this case -- if you find any of the crimes charged in this case were committed by anyone, *then Jesse Rugge and Graham Pressley were accomplices as a matter of law, and their testimony is subject to the rule requiring corroboration.* And that includes any out of court statements attributed to them which was heard by you in this case. (5 CT 1457, CALJIC No. 3.16 - Witness Accomplice as a matter of law, 10 RT 2179, emphasis added).[185] *(The Court failed to instruct that Hollywood and Skidmore were accomplices as a matter of law if the jury believed a conspiracy existed, and that any out-of-court statements attributed to either of them were subject to the rule of corroboration.)*

To the extent that an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution in light of all the evidence in the case. (5 CT 1458, CALJIC No. 3.18 - Testimony of Accomplice to be Viewed with Care and Caution.)

The Court did *not* give CALJIC No. 3.19 - Burden to Prove

185/ The notation "requested by Appellant" at the bottom of CALJIC No 3.16 (5 CT 1457) is misleading in that the defense asked the Superior Court to include Hollywood, Affronti, and Skidmore as named accomplices in that instruction.

Corroborating Witness is an Accomplice, which would have informed the jury in context:

> You must determine whether the witness Casey Sheehan was an accomplice as I have defined that term. The defendant has the burden of proving by a preponderance of the evidence that Casey Sheehan was an accomplice in the crimes charged against the defendant.
>
> (CALJIC No. 3.19.)

3. Immunity Instruction

The totality of immunity-related instruction given to the jury was as follows:

> In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including, but not limited to any of the following:
>
> [Nine factors involving witness's ability to perceive and relate event, character and quality of testimony, demeanor, bias or interest, prior statement, prior felony conviction] . . .
>
> Whether the witness is testifying under a grant of immunity.
>
> (10 RT 2169, CALJIC No. 2.20.)

The Superior Court did *not* instruct the jury that, contrary to the prosecution's argument,[186] immunity may not be considered as a factor enhancing witness credibility (*See* 10 RT 2169-70). Nor did Judge Gordon direct the jury to consider whether the testimony of any of the seven witnesses testifying under grants of immunity was affected by immunity, prejudice against Appellant, or interest in testifying in a manner acceptable

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186/ *See* Claim 8, *supra,* challenging the prosecution's arguments that immunity provides the jury with "greater assurances a witness will be as strictly truthful as they possibly can be" and Sheehan wouldn't even need immunity if appellant were innocent, because he would be harboring a friend, not a fugitive (9 RT 2067-2068.)

to the prosecution.[187]

By contrast, the grand jury was instructed that *ten* witnesses received immunity from prosecution: Natasha Adams-Young, Brian Affronte, Kelly Carpenter, Steven Hogg, John Hollywood, Laurie Hollywood, Michele Lasher, John Roberts, Chas Saulsbury, and Casey Sheehan (10 CT A 2720).[188]

4. The Evidence Supported the Defense Request that Hollywood and Skidmore be Identified as Accomplices by Law in CALJIC No. 3.16

a. CALJIC NO. 3.16

The Court did *not* instruct the jury under CALJIC No. 3.16 that Hollywood and Skidmore were accomplices as a matter of law, or even under CALJIC No. 3.19, discussed *infra*, that the jury must decide whether they were before giving their out-of-court statements weight in their deliberation, or requiring collaboration. Hollywood's out-of-court statements in particular provided the prosecution case a motive to kill and the existence of a conspiracy and cover-up. CALJIC No. 3.16, as given, directed the jury to apply accomplice corroboration rules to Rugge and Pressley, and by power of exclusion, no other witness or out-of-court declarant. This was error.

187/ The seven immunity witnesses at trial were Adams, Affronte, Carpenter, Hogg, John Hollywood, Lasher, and Sheehan (10 CT A 2720). The other three grand jury witnesses Laurie Hollywood, John Roberts, and Chas Saulsbury were not called at trial.

188/ The Grand Jury instruction read, "a number of witnesses were granted immunity from prosecution as a condition of their truthful testimony. They were assured that they would not be prosecuted for any crimes they may have committed in connection with this case if - but only if - they testified fully and truthfully concerning their involvement in such crimes. A grant of immunity requires that the witness answer all questions on the witness stand truthfully and honestly. Should an immunized witness give deliberately false and misleading information about a material fact during his or her testimony the witness could then be prosecuted for perjury."

When there is sufficient evidence that a witness is an accomplice,[189] the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices, including the need for corroboration. *People v. Frye* (1998) 18 Cal.4th 894, 965-966.[190] These cautionary instructions are grounded in the English common law that an accomplice is inherently untrustworthy because of his incentives to curry favor and shift blame. *People v. Tobias* (2001) 25 Cal.4th 327, 331.

The evidence permitted only a single inference as to Hollywood and Skidmore: they committed the original kidnap and under either of the parties' theories of the murder, Hollywood was chargeable as a principal, as co-conspirator or actual killer; Skidmore as aider and abettor. The Superior Court breached its *sua sponte* duty to identify Hollywood and Skidmore by name in the accomplice instructions it gave (CALJIC Nos. 3.12-3.18)

189/ Penal Code §1111 defines an accomplice as "one who is liable [] for the identical offense charged against the appellant." *People v. Miranda* (1987) 44 Cal. 3d 57, 99. In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33). *People v. Balderas* (1985) 41 Cal.3d 144, 193-194, n. 22. An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and shares the perpetrator's criminal purpose. *Id.* at 194. It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. *Id.*; *People v. Beeman* (1984) 35 Cal.3d 547, 556-561.

190/ In applying CALJIC 3.11, the instruction requiring corroboration of the testimony of an accomplice, such testimony includes not only testimony rendered by accomplice witnesses at trial but any out-of-court statements purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true. Penal Code §1111 (requiring corroboration of testimony by an accomplice) applies to an accomplice's out-of-court statements when these statements are used as substantive evidence of guilt. (*See People v. Belton* (1979) 23 Cal.3d 516, 524-25; *People v. Andrew* (1989) 49 Cal.3d 200, 215, fn. 11.) In the CALJIC 6th Edition, CALJIC 3.11 was amended to include out-of-court statements within the meaning of accomplice testimony: "Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true."

because there was amply sufficient evidence that both were accomplices. *People v. Tobias* (2001) 25 Cal. 4th 327, 331. The failure to name these principals in CALJIC 3.16, in combination with the failure to give CALJIC No. 3.19 discussed *infra*, foreclosed the jury from considering either Hollywood or Skidmore as accomplices, or viewing their out-of-court statements with care and caution, and subject to rules of collaboration.

b. CALJIC No. 3.19

"Where the facts are in dispute as to the knowledge and intent of the asserted accomplice, the witness' liability for prosecution for the identical offense is a question of fact for the jury." *People v. Gordon* (1973) 10 Cal.3d 460, 467; *see also People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103 ("whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed"); *People v. Hayes* (1999) 21 Cal. 4th 1211, 1271-1272 (accomplice status was properly left to the jury as to witness who drove victims to location where they were killed because the record did not dictate whether witness's intent qualified for aider and abettor liability); *People v. Sully* (1991) 53 Cal.3d 1195, 1227 ("accomplice status is a question of fact for the jury unless the evidence permits only a single inference").

Sheehan was a friend of Hollywood's and supplied him with a car and an alibi. Sheehan denied knowledge of Hollywood's plan to murder Nick, yet received immunity for his testimony. He purported that Appellant admitted having participated in the murder. Appellant countered that Sheehan was *in pari delicto* with Hollywood's scheme, *i.e.*, a knowing facilitator of both murder and cover-up. The jury should have been instructed under CALJIC No. 3.19 that Sheehan's accomplice status (and corroboration requirement) was a question of fact for its determination, upon which Appellant bore the burden of proof by a preponderance of evidence.

c. Constitutional Violation

While the accomplice testimony rule is a creature of statute and not constitutionally based, *In re Mitchell P.* (1978) 22 Cal.3d 946, 949; *People*

v. Frye (1998) 18 Cal. 4th 894, 968, once a state adopts an accomplice corroboration rule, as California has, it creates a corollary federal constitutional right to apply the rule fairly. A constitutional problem is posed when, as here, Judge Gordon singled out by name two, and only two of the prosecution's accomplice witnesses for "care and caution," thereby excluding two other principles and an aider and abettor from the same, or even the possibility of the same requirement of corroboration. The misinstructions had the effect of substantially reducing the prosecution's burden of proof, in contravention of *In re Winship* (1970) 397 U.S. 358. In so doing, the error violated Appellant's Sixth Amendment right to trial by jury, as well as his right to due process under the 14th Amendment.

By lowering the barrier to the consideration of inherently untrustworthy prosecution testimony (eliminating the need for independent corroboration), Judge Gordon reduced the level of proof necessary for the prosecution to carry its burden. As the prosecution's case rested largely on accomplice testimony, the effect of the judge's mis-instructions was to permit the prosecution to establish guilt by a quantum of evidence less than beyond a reasonable doubt. *(See e.g. Cool v. United States* (1972) 409 U.S. 100, 105; *see also People v. Rivers* (1993) 20 Cal.App.4th 1040, 1047 (evaluating "probability of truth" standard of CALJIC 2.21.2 (witness willfully false), as applied to prosecution witness who provided critical evidence against Appellant, as matter of federal constitutional error because it lowered prosecution's burden of proof, requiring analysis of prejudice under *Chapman* beyond a reasonable doubt standard).) Because such re-calibration of the scales of justice is inconsistent with the constitutionally-rooted presumption of innocence, Appellant's convictions should be reversed.

5. Failure to Modify CALJIC No. 2.20 to View Testimony of Immunity Witnesses with Care and Caution, and Examine Motives

Seven witnesses received immunity from the prosecution in exchange for their testimony against Appellant. The jury only knew about

one of them, Casey Sheehan, but the prosecution considered immunity germane enough to inform the grand jury of all seven (plus another three who didn't appear at trial).

The Indictment charged Appellant with Nick's kidnap from August 6 through 9. The most plausible reading of their testimony suggested that all seven witnesses with immunity facilitated Rugge and Pressley in concealing Nick's whereabouts, or facilitated Hollywood by furnishing the car, or other forms of aid or advice, until Hollywood formed a plan to kill Nick. At the very least, the evidence was disputed whether these witnesses aided the principals with intent that the principals avoid criminal liability and with knowledge that the principals were committing a felony, and could have been charged as aiders and abettors, rather than as accessories. Cf. §§ 31, 32; *People v. Fauber (1992)* 2 Cal.4th 792, 833-834 (accessories after the fact are not accomplices whose testimony requires corroboration.) In light of the Superior Court's failure to give CALJIC No. 3.19, the jury received no direction to view these witnesses' testimony with "distrust" (CALJIC No. 3.18), even if it believed they could have been charged as aiders and abettors. Nor did the trial court's standard CALJIC 2.20 instruction on witness credibility cure this inequity.

In *People v. Hunter* (1989) 49 Cal.3d 957, 976-978, this Court addressed the issue of the proper jury instruction to be given in cases involving witnesses with immunity. Hunter was a murder case. Three prosecution witnesses testified under a grant of immunity from prosecution for their roles as accessories after the fact in helping the Appellant flee to Mexico. The trial court gave a modified instruction in addition to CALJIC No. 2.20, directing the jury to determine *whether an immunized witness's "testimony has been affected by it or by his prejudice against the Appellant,"* but to weigh the witness's credibility by the same standards by which they would determine the credibility of other witnesses." *Id.* (emphasis added). This Court found no error in the trial court's refusal to

give an additional defense-requested instruction,[191] *in light of the modified instruction which specially directed the jury to determine whether the immunized witness's credibility had been affected by the grant of immunity*. *Id.* at 978. This court concluded that the "general instruction on witness credibility, *coupled with the modified instruction adequately informed the jury of the necessity to weigh the motives of the immunized witnesses." Id.* at 976 (emphasis added).

In this case, the Superior Court had a *sua sponte* duty to identify witness who received immunity and to instruct the jury on the necessity to weigh their motives with distrust, above and beyond the general instruction of CALJIC No. 2.20, which merely told the jurors they could consider whether the witness was testifying under a grant of immunity, a factor which might prove or disprove the truthfulness of the witness' testimony, in determining the believability of that witness. By way of comparison, in *Hunter*, 49 Cal. 3d at 976, the jury was instructed to determine whether the witness's testimony was *affected by* the grant of immunity or *prejudice against* the Appellant.

Ignoring circumstantial evidence that all seven immunity witnesses (Natasha Adams-Young, Brian Affronte, Kelly Carpenter, Steven Hogg, John Hollywood, Michele Lasher, and Casey Sheehan) had a strong motive to slant their testimony, Judge Gordon gave only CALJIC No. 2.20, which was framed in neutral terms as to whether immunity was a factor enhancing or undermining witness credibility. No other instruction informed the jury of the necessity of weighing Sheehan or the other six immunity witnesses' motive to testify in a manner acceptable to the prosecution.[192] The grand

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191/ The appellant in *Hunter* requested an instruction that the testimony of the immunized witnesses "must be viewed with suspicion and examined with greater care and caution than the testimony of an ordinary witness."

192/ CALJIC No. 2.20 was given at the prosecution's request (45 CT 1376). The prosecution argued, as discussed in Claim XIII *supra*, that Sheehan came to court "with greater assurances" of trustworthiness, and wouldn't even need immunity if appellant were innocent; "he would be

jury transcript was lodged with the Superior Court in connection with Appellant's §995 motion to dismiss the indictment, and notice thereby provided that seven of the state's witnesses were granted immunity for their testimony against Appellant. It was incumbent upon Judge Gordon under these circumstances to instruct the jury to view immunity testimony with distrust, or alternately, to obtain a personal waiver from Appellant.

Because neither occurred in this case through no fault of Appellant or his counsel, the jury did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. In *Banks v. Dretke* (2004) 540 U.S. 668, 701-702, the United States Supreme Court discussed the "serious questions of credibility" informers pose. *On Lee v. United States* (1952) 343 U.S. 747, 757. *See also* Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses,* 47 Hastings L. J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable."). The Supreme Court recommended submission of the credibility issue to the jury "with careful instructions." *On Lee*, 343 U.S. at 757; *accord Hoffa v. United States* (1966) 385 U.S. 293, 311-312. *See also* 1A K. O'Malley, J. Grenig, & W. Lee, *Federal Jury Practice and Instructions*, Criminal § 15.02 (5th ed. 2000) (jury instructions from federal circuits regarding the "special caution" appropriate in assessing informant testimony). The absence of any instruction was a violation of Due Process in light of Sheehan's crucial testimony on Appellant's post-crime admissions in particular, and, more generally, the impact of the other six state witnesses who testified with immunity. An exception exists in certain cases where the court, of its own volition, must deliver certain instructions, *Lewis v. United States* (9th Cir.

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harboring a friend, not a fugitive" (9 RT 2068.) In context, CALJIC No. 2.20 misled the jury to give Sheehan's testimony undue weight (precisely as the prosecution advocated) because he was granted immunity from prosecution. This form of prosecution misconduct - arguing appellant's guilt from its own exercise of discretion to grant Sheehan immunity - warranted the supplemental instruction.

1967) 373 F.2d 576, 579. and this was such an unusual case.

6. The Errors Were Prejudicial

The out-of-court statements of Hollywood and Skidmore, and Sheehan's testimony with immunity, were vital to the prosecution's case. CALJIC No. 3.16 as given (and the absence of CALJIC 3.19) permitted the jury to convict Appellant on their words alone, in violation of California law. Hollywood, first and foremost, but Skidmore and Sheehan too, had every incentive to lie: If Appellant did not kill Nick Markowitz, then he or they most likely did the deed. Moreover, Sheehan and six other witnesses had deals to avoid prosecution in exchange for their testimony against Appellant, yet the jury was not told who (beside Sheehan) or whether to consider their motive or prejudice against Appellant. The purpose of California's corroboration rule is to offset the danger that accomplices may fabricate testimony and inculpate an innocent person in order to purchase immunity from prosecution, or lenient treatment for their own complicity in the crime.

These instructional errors (CALJIC Nos. 3.16, 3.19, 2.20) warrant reversal because, under the *Chapman* standard, this Court cannot find the errors harmless beyond a reasonable doubt. Alternately, even under the *Watson* standard, the errors warrant reversal because there is a reasonable probability that the result of this proceeding would have been different had the correct instructions been given. *Henderson v. Kibbe* (1977) 431 U.S. 145, 155 (observing that trial court's misstatement of the law is more likely to be prejudicial than an omission, or an incomplete instruction); *United States v. Span* (1996) 75 F. 3d 1383, 1390. These errors, viewed in combination, critically misstated the law of accomplice corroboration and distrust of immunized testimony as it applied to the state's witnesses. Appellant need not establish that the jury was more likely than not to have been impermissibly influenced by the instruction." *Boyde v. California* (1990) 494 U.S. 370, 380. "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in [an impermissible] way." *Middleton v. McNeil*

(2004) 541 U.S. 433, 437; *see also Cool,* 409 U.S. at 102 (instruction that jury could convict *solely* on the basis of accomplice testimony without telling it that it could acquit on this basis was fundamentally unfair, and even without other error, warranted reversal on that basis alone).

California's accomplice rule is meant to address the precise scenario of this case in which two principals and a plausible aider and abettor had incentives to implicate Appellant to hide their own culpability. The corrupted jury instructions were *not* corrected by other instructions. The Superior Court's instructions on accomplices and immunity as a whole directed the jury *not* to consider Hollywood or Skidmore as accomplices (either by law or by resolution of disputed fact), *not* to resolve disputed facts whether Sheehan so qualified, or was otherwise influenced against Appellant by his grant of immunity, and *not* to consider with distrust whether immunity adversely affected the credibility of six other witnesses. The jury's attention was diverted from the critical question of Hollywood, Skidmore and Sheehan's credibility and whether independent evidence existed for their assertions as a predicate for conviction. Under these circumstances, reversal is warranted.

Special Circumstance Claim

X. APPELLANT WAS DENIED HIS FIFTH AMENDMENT DUE PROCESS RIGHT AND EIGHTH AMENDMENT RIGHT TO A RELIABLE PENALTY BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE "INDEPENDENT PURPOSE" ELEMENT OF THE KIDNAP-MURDER SPECIAL CIRCUMSTANCE

A. INTRODUCTION

The evidence of premeditation for murder was Appellant's confession that, in the afternoon of August 8, Appellant agreed and later that evening for that purpose drove to Santa Barbara in order to commit the murder of the victim, using a weapon placed at his disposal at the Lemon Tree Hotel. Pressley told police he went up to Lizard's Mouth and dug the

grave in advance (7 RT 1471). This evidence demonstrated that no reasonable juror could conclude that the movement of the victim from the Lemon Tree Hotel to Lizard's Mouth had a purpose independent of his murder.

Special Circumstance 1 alleged, as to all defendants except Skidmore, that "the above offense of murder occurred during the commission of a felony, to wit, kidnapping in violation of Penal Code §207, and within the meaning of Penal Code §190.2(a)17(B) (1 CT 20).[193] Yet, the death penalty cannot rationally be applied to conduct which is essentially kidnap in the commission of murder, not the other way around. Under the merger doctrine of *People v. Green* (1980) 27 Cal.3d 1, 60-61, the kidnap-murder special circumstance must be reversed. To the extent Penal Code §190.2(a)(17)(M), enacted by the voters of California and effective March 8, 2000 (five months before the crime in this case), purported to reverse the narrowed construction of the kidnap-murder special circumstance which this Court effected in *Green* in order to comply with the requirements of *Furman v. Georgia* (1972) 408 U.S. 238, and *Gregg v. Georgia* (1976) 408 U.S. 153, §190.2(a)(17)(M) is unconstitutional.

B. STATEMENT OF FACTS

Appellant incorporates by reference the statement of facts in Claim IV, *supra*, which addresses the material variance in proof from the Indictment, lack of jury instruction on the prosecution's belated "second kidnap" theory, and erroneous admission of conspiracy theory without any nexus to him.

193/ §190.2(a)17(B) provided that, "the penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: (B) Kidnapping in violation of Section 207, 209 or 209.5.

In regard to the kidnap-murder special circumstance, the Superior Court instructed the jury as follows:

> To find that the special circumstance referred to in these instructions, murder in the commission of kidnap is true, it must be proved, one, the murder was committed while the appellant was engaged in the commission of a kidnapping; or, two, the murder was committed in order to carry out or advance the commission of the crime of kidnap, or to facilitate the escape therefrom, or to avoid detection. *In other words, the special circumstance referred to in these instructions is not established if the kidnap was merely incidental to the commission of the murder*
>
> (10 RT 2193-2194, emphasis added).

C. ARGUMENT

1. The Evidence of Appellant's Commission of a Kidnap-murder Special Circumstance Was Insufficient in Three Respects

The Superior Court erred in failing to dismiss the special circumstance of kidnap-murder under Penal Code §190.2(a)(17) based upon insufficient evidence that 1) the victim's asportation by foot and by car from the Lemon Tree Hotel to the Lizard Mouth trail head was accomplished by force or fear, not false pretense of safe return home to Los Angeles; 2) the victim's movement 60 to 80 yards from the road to the prearranged grave site was not so substantial in character to qualify as a kidnap; or 3) any kidnap on August 8-9 was entirely incidental to the murder. The test of sufficiency is whether any reasonable juror could have found beyond a reasonable doubt that the appellant committed the crime charged. *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *United States v. Jones* (9th Cir. 1996) 84 F.3d 1206, 1210. As the jury acquitted Appellant of the Count 2 special allegation that his participation in a §209 kidnap for ransom resulted in the victim's death, it may be presumed that the jury based its special circumstance finding on one of two theories of §207 simple kidnap liability. Evidence on all three elements of the kidnap-murder special circumstance was sparse, and failed to meet constitutional

muster.

In closing argument, the prosecutor emphasized that, on Tuesday, August 8 (while Nick was in Santa Barbara), at the same time in San Fernando Valley, Hollywood got advice from his attorney Hogg that the penalty for kidnap for ransom was life. "The decision was made to kill Nick". They made the decision to kill Nick and "immediately activated Mr. Hoyt in that endeavor".

The Superior Court erred in failing to dismiss the kidnap-murder special circumstance on the basis that the August 8 movement of the victim, even if any part of it was not induced by fraud, was simply part and parcel of the manner of killing. Viewed in the light most favorable to the prosecution, Appellant agreed to commit the murder to discharge his debt. He drove to Santa Barbara in a pre-arranged car and obtained the gun from a pre-arranged location, while Pressley dug the grave at a separately pre-arranged site. They enticed the victim into the car on the false pretense of a ride home to Los Angeles, but drove him instead to the Lizard's Mouth trail head, leading him to the grave-site, where he was bound, and shot to death. Only in the course of the final 60 to 90-yards of this peregrination were the fatal intentions of the participants made clear to the victim, as Appellant presumably brandished the weapon for the very first time. This was "kidnap" solely as a means of murder, with no purpose other than bringing the victim to heel at the grave-site, rather than in the hotel room or the backseat of the car.

2. This Court Should Avoid a Decision on the Constitutionality of Proposition 18, by Declining to Apply it to Appellant's Case, or Alternately, Proposition 18 Is Void for Vagueness as Applied

The Superior Court instructed the jury under §190.2(a)(17) that, "it must be proved, one, the murder was committed while the Appellant was engaged in the commission of a kidnapping; or, two, the murder was committed in order to carry out or advance the commission of the crime of kidnap, or to facilitate the escape therefrom, or to avoid detection. The special circumstance is not established if the kidnap was merely incidental

to the commission of the murder" (10 RT 2194). As discussed *supra*, the jury may have applied an incorrect theory if it believed Appellant committed the murder in order to assist Hollywood in avoiding detection for *the August 6*th completed kidnap, which was by far the most plausible reading of the prosecution's evidence.[194] This was an incorrect standard because it bootstrapped a predicate kidnap of which the jury acquitted Appellant into the basis for a special circumstance conviction.

As discussed *supra*, there was insufficient evidence to prove beyond a reasonable doubt that the movement of the victim from the Lemon Tree Hotel to Lizard's Mouth on August 8th was independent of, rather than merely incidental to the murder. Viewed in the light most favorable to the prosecution, Appellant agreed to murder Nick on August 8, drove a pre-arranged car to Santa Barbara and obtained a gun from a pre-arranged location there for this purpose, and accompanied the victim from the Hotel to a pre-arranged grave-site at Lizard's Mouth for this purpose.

The last sentence of CALJIC 8.81.17 as given was obsolete at the time of trial. Although the jury was not so instructed, at the time of Appellant's trial, the recently-enacted Penal Code §190.2(a)(17)(M) provided that "to prove the special circumstances of kidnapping in subparagraph (B) or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven, even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder." This language became effective on March 8, 2000, (Stats. 1998, ch. 629, § 2; Prop. 18, approved by voters, Primary Elec. Mar. 7, 2000), four months before the crime in this case.[195] However, this Court cannot and should not apply §190.2(a)(17)(M) to

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194/ No special circumstance of murder of a witness to prevent their testimony was alleged as per Penal Code §190.2(a)(10).

195/ The Use Note to CALJIC No. 8.81.17.1 (Oct. 2005 ed.) at 435 specifies that this instruction, rather than CALJIC 8.81.17, was to be used for crimes committed on or after March 8, 2000.

Appellant's case on appeal, because as applied, it is separately void for vagueness.[196]

The intent of the California Legislature in enacting 1998 Cal ALS 629 (which was then put to the voters by means of Proposition 18) was to create a statutory exception to the "independent purpose" requirement of *People v. Weidert* (1985) 39 Cal.3d 836 and *People v. Green* (1980) 27 Cal. 3d 1, for the special circumstance of kidnapping, when specific intent to kill is proven. (1998 Cal ALS 629 Sections 1, 3.)

In *People v. Green* (1980) 27 Cal.3d 1, 61-62, this Court held the kidnap-murder special circumstance is inapplicable where the kidnapping was for the purpose of facilitating or concealing the murder, and therefore merely incidental to the murder. *See also People v. Weidert* (1985) 39 Cal.3d 836, 842 (special circumstance finding cannot be sustained unless the kidnapping was committed to advance an independent felonious purpose). This Court observed that, to comply with the mandate of *Furman v. Georgia* (1972) 408 U.S. 238 and *Gregg v. Georgia* (1976) 428 U.S. 153, the Legislature must intend 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." *Id.* at 61. The distinction applied to appellants who killed in cold blood in order to advance an independent felonious purpose. The Legislature's goal is not achieved, however, when the appellant's intent is not to kidnap but to kill and the kidnap is merely incidental to the murder, *because its sole object is to facilitate or conceal the primary crime of murder. Id.*

In *Green* itself, a husband killed his wife and subsequently took her

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196/ This Court has discretion to consider the issue on appeal, despite its absence from the trial record, because it raises strictly questions of law on undisputed facts which are fully briefed. *See Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599, n.6. Given the prosecution's failure to request, and the trial court's failure to instruct with, the newly-revised CALJIC 8.81.17.1 instruction, there was no error below to which appellant could possibly object.

clothes, rings and purse in order to conceal her identity. This felonious robbery of the wife's belongings was insufficient to support a felony-murder special circumstance conviction because Green did not commit the robbery for a reason independent of the murder, and then commit the murder to advance the purpose of committing the robbery. Rather, Green committed the robbery in order to facilitate or conceal the murder. *Clark v. Brown* ((th Cir. 2006), 450 F.3d 898, 905. The same is true here. The "kidnap" (if any) was a means to the end of killing Nick Markowitz.[197]

Appellant challenges any retrospective application of §190.2(a)(17)(M) to his case on grounds of unconstitutional vagueness. "Vagueness challenges to statutes 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* (1988) 486 U.S. 356, 361. A statute can be impermissibly vague if either "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado* (2000) 530 U.S. 703, 732; *see also Anderson v. Morrow* (9th Cir. 2004) 371 F.3d 1027, 1032 ("A statute is vague if it does not provide explicit standards to those who apply them, so as to avoid arbitrary and discriminatory enforcement"); *Forbes v. Napolitano* (9th Cir. 2000) 236 F.3d 1009, 1011 ("In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement.").

With the passage of Proposition 18, the kidnap-murder special

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197/ This case, like *Green* itself, is distinguishable from the line of cases in which this Court has found appellant harbored some purpose for the kidnapping apart from murder. *See e.g., People v. Barnett* (1998) 17 Cal.4th 1044, 1158-1159 (appellant considered letting victim leave campsite before the murder, and may have intended victim to be left wounded and exposed to the elements for several days before being rescued, so had not finally decided victim's fate at the time of the asportation); *People v. Raley (1992)* 2 Cal.4th 870, 903 (appellant drove his victims to his home in the trunk of his car before killing them, indicating he may have been undecided as to their fate at that point).

circumstance was broadened to apply "even if the felony of kidnapping is committed *solely* for the purpose of facilitating the murder." (§190.2(a)(17)(M), emphasis added.) As a practical matter, this definition encompasses *any* murder in which the killer and victim interact more than instantaneously and in one spot. Viewed through the prism of the murder itself, such interaction will always appear coercive, and any movement of the two in tandem any distance whatsoever can always be characterized as either having increased the risk of escape, or the likelihood of concealment. In this sense, the special circumstance is functionally indistinguishable from murder itself. Proposition 18 rendered the special circumstance of kidnap-murder unconstitutionally vague in that it provided no specific definition of an *actus reus* or *mens rea* required beyond the predicate act of murder itself, to satisfy its elements. The Legislature's stated intent in enacting 1998 Cal ALS 629 Section 1, was exactly that - to write the "independent purpose" exception of *Green* out of the law.

Section 190.2(a)(17)(M), as enacted by the voters in 2000 through the passage of Proposition 18, is unconstitutionally vague and leads to arbitrary and capricious application of the death penalty in violation of both the Eighth Amendment and due process. There is no meaningful distinguishable line between first degree murder by premeditation and deliberation and special circumstance kidnap-murder in cases such as this where a person has the intent to murder and does so by means of a movement of the victim. There is no direction in the statute to assist in the decision of choosing to subject a person to the death penalty, and the amendment to §190.2(a)(17)(1) effected under (a)(17)(M) is unconstitutionally vague. As applied to the circumstances of this case, the kidnap-murder special circumstance finding should be reversed, notwithstanding the prior enactment of §190.2(a)(17)(M). Further proceedings on this allegation are barred by the double jeopardy clause. *Burks v. United States* (1978) 437 U.S. 1.

Penalty Phase Claims

XI. THE PROSECUTION VIOLATED APPELLANT'S FIFTH, SIXTH AND EIGHTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE PENALTY BY PREJUDICIAL MISCONDUCT IN ITS PENALTY PHASE CLOSING ARGUMENT

A. INTRODUCTION

This was a single victim case involving a 21-year old Appellant with no prior record. The prosecution's case in aggravation was victim impact testimony of the slain boy's mother. Uncontested evidence from the guilt phase portrayed Appellant's mother as dysfunctional, Appellant as without any stable parenting or home-life, and Appellant himself as highly subservient to Jesse Hollywood at whose beck and call he had committed the murder. On the face of things, this was not an easy case for the death penalty.

At penalty phase closing argument, the prosecution crossed the constitutional line in three areas of advocacy: (1) improperly converting mitigation to aggravation; (2) speculating on the creature-comforts of life in prison as a basis for imposing death; and (3) advocating for the bereaved mother's personal right of retaliation. These errors, separately or cumulatively, warrant reversal of the penalty verdict.

B. STATEMENT OF FACTS

1. Penalty Phase

a. Arguing Factor (K) Evidence Was Aggravation

The prosecution argued that the jury could weigh *any* evidence from either party as aggravation under §190.3(k), the catch-all factor (11 RT 2337).[198] In particular, it referred to the dysfunction of Appellant's family,

198/ Penal Code §190.3 provides that in determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (k) Any other circumstance which extenuates the gravity of the

the criminality of Appellant's brother, and heroin addiction of his sister as factor (k) aggravation warranting the death penalty (11 RT 2346.) "They batted zero with all three children . . . Appellant's family history should count as a factor in aggravation, not mitigation . . . The end product is two brothers who pose a serious danger to others." The prosecution argued these inferences from Jonathan Hoyt's crime, which was not before the jury: "Jonathan committed a crime at 16 so scary and so horrible that he's not only tried as an adult in this home-invasion, but given a 12-year state prison sentence. That's a remarkable sentence for a teenager to receive (11 RT 2346)." Judge Gordon denied defense objection and request for curative instruction (11 RT 2350).

b. Arguing Factor (I) Evidence of Appellant's Age Was Aggravation by Comparison to a Co-Defendant's Status as a Minor

The prosecution argued that "if [Appellant] had been 17 at the time of this offense, as was one of the co-defendants, Mr. Pressley, then maybe that would be a factor to give a lot of consideration to" (11 RT 2344).[199] Yet, under Penal Code §190.5(a), the death penalty could not be imposed upon Pressley under any circumstances since he was under the age of 18 at the time of the commission of the crime. The prosecution also suggested that, at age 21, Appellant would have been "one of the older ones" fighting in Afghanistan (11 RT 2343), which was an inference beyond the record, and contrasted Appellant with U.S. servicemen in the wake of 9/11.

c. Arguing Life Imprisonment Would Be Insufficiently Punitive Due to Lax Conditions of Confinement and Using Factor (K) Evidence as Aggravation

A centerpiece of the prosecution's argument was that Appellant did not deserve the relative leniency of life in prison, a stabler and more

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crime even though it is not a legal excuse for the crime.

199/ Under §190.3(i), the trier of fact shall take into account if relevant "the age of the appellant at the time of the crime."

predictable environment than what he had as a child. The gist of the argument was that life without parole meant three hot meals every single day and a warm bed every night in the same place, which is better than his life outside . . . he can play basketball, family visits, have friends and even a girlfriend, and read the classics" (11 RT 2352).[200]

200/ The prosecution's argument, covering three-pages of transcript, was as follows:

> MR. ZONEN: What's the alternative for Ryan Hoyt? That he go to prison for the rest of his life. That he have three hot meals every single day. He hasn't had that so far. How is prison going to be that different from his life up to that point? He won't have freedom of movement like he had before, but other than that, he'll have three meals every single day. Hot meals. He hasn't had that up until this point unless he's been able to scavenge for it. He'll have a hot bed, a warm bed that he'll be able to sleep in every night. He hasn't had that. He had to go find a place to sleep every single night up to this point. He'll have companionship. He'll have friends. His friends will be not much different than the friends he's had, they will be other criminals and other thugs. He'll have the opportunity to play basketball. He'll have the opportunity to feel the rush of running to a basket and being able to score. He'll have the companionship of friends. He'll be able to, potentially, have a girlfriend. He won't have sex with her, but he could have a girlfriend. He can have visits with his family as regularly as they can see fit to come up and visit with him or talk to him.
>
> The Markowitzs will have visitation with their child when they go to Mt. Sinai Cemetery, that will be their visits with their child. How is this punishment? How is it punishment that is equal to the quality of the crime that he committed?
>
> He'll be able to read. He can read as much as he wants. He can read the classics, he can read modern books, he can read the Russian authors from Dostoevsky to the French authors to American authors. He can start with Dickens and he can end up with Tom Clancy if he wishes. How is that punishment?
>
> Should the Markowitzs have to spend the balance of their days wondering if he's enjoying his basketball game at that moment, and wondering whether justice was really done in this particular case? Let me suggest to you that that's why we

4. Arguing "Facts" Not in Evidence

The prosecution argued - purportedly to the lack of factor (h) intoxication evidence - that Appellant "had to figure out how to dig a grave, get shovels and duct-tape." The prosecution reiterated the theme: "What was Appellant thinking as . . . they got the shovels and dug the grave, and picked up duct-tape" (11 RT 2349). Yet, there was no record evidence that Appellant did either of these tasks - dug the grave or got the shovels. The prosecution's presentation was inconsistent with the evidence it presented at Pressley's trial, that Appellant's impairments rendered him unable even to navigate the Lizard's Mouth trail by himself.

5. Arguing for the Victim-Family's Right of Personal Retaliation

The prosecution told the jury that it "represented" "the thoughts" of the Markowitz family (and was honored to do so), and argued their unsubtle preference for the death penalty. The prosecution summed up its argument in one portentous sentence: "Should the Markowitz family have to wonder if Appellant is playing basketball or whether justice was done?" (11 RT 2354).

C. ARGUMENT

1. Legal Standards

Appellant incorporates by reference the discussion of legal standards in Claim VII, *supra*, which applies to claims of prosecution misconduct in guilt as well as penalty phase closing arguments. *People v. Guerra* (2006) 37 Cal. 4th 1067, 1153; *People v. Valdez* (2004) 32 Cal.4th 73, 132.

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have a death penalty.

(11 RT 2351-2353.)

2. The Claims Were Preserved for Appeal by Objection at the Time, Or by Exception to the *Green/Hill*[201] Rule

Appellant incorporates by reference the discussion in Claim VIII *supra*, in that his trial attorney timely objected to the penalty phase argument that factor (k) evidence was aggravation. This claim was clearly preserved for appeal. *People v. Bonilla* (2007) 41 Cal. 4th 313, 336.

As to the other instances of prosecution misconduct, the failure to object should be excused because, under the circumstances, objection would have been futile, or admonition would not have cured the harm. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Avila* (2009) 46 Cal. 4th 680, 710-711. The Superior Court's prior pattern of unresponsiveness to defense objections - rather than "ritual invocation" - warrant application of the futility exception to the Green/Hill contemporaneous objection-rule. (*See People v. Hill*, *supra*, 17 Cal.4th at 821 (excusing further objections as futile where prosecutorial misconduct was interspersed during proceedings and trial court failed to curb it when counsel did object.).) Alternately, as noted *infra*, the misrepresentations of fact and reasonable inference therefrom were so flagrantly improper than no admonition would have sufficed to undo the harm. Under these circumstances, further objection to each and every instance of prosecution misconduct would have been futile, and this Court should consider and address the merits of all of Appellant's claims regarding the prosecution's penalty closing argument misconduct.

3. The Prosecution Committed Prejudicial Misconduct in Penalty Phase Closing Argument

The prosecution's closing argument at penalty phase "so infected the trial with unfairness as to make the resulting conviction [and sentence] a denial of due process." *(Darden*, 477 U.S. at 181 (*quoting Donnelly v.*

201/ The rule had its genesis in *People v. Green* (1980) 27 Cal.3d 1, 28, and the exceptions were clarified in *People v. Hill* (1998) 17 Cal.4th 800. The contemporaneous objection rule, as applied to cases of prosecutorial misconduct, is commonly referred to as the *Green* or *Hill* rule or *Green/Hill* rule.

DeChristoforo (1974) 416 U.S. 637).)

a. Davenport Error

In *People v. Davenport* (1985) 41 Cal.3d 247, 290, this Court held that the prosecution cannot argue that a capital murder was aggravated by the absence of statutory sentencing factors (*see* § 190.3) which can only be mitigating. Under *Davenport*, the prosecution cannot label aggravating any facts - or absence of facts - presented under factor (k). (*Id.* at 290.)

In this case, the prosecution went considerably farther than any precedent in this jurisdiction would or should permit. It argued squarely that the factor (k) evidence of Appellant's family background and dysfunction, his brother's criminal conviction, and his sister's heroin addiction were aggravation, plain and simple: a family that "batted zero" with all three children, producing "two brothers who pose a serious danger to others" (11 RT 2346).[202]

This Court has ruled that factor (k) can serve only as a mitigator, though it has not required that the jury be so instructed (in the absence of argument of the sort made here). (*See e.g.*, *People v. Raley* (1992) 2 Cal.4th 870, 919, *cert. denied (1993),* 507 U.S. 945, 122; *People v. Montiel* (1993) 5 Cal.4th 877, *cert. denied* (1994) 512 U.S. 1253.)

At a minimum, the prosecution's argument on factor (k) artificially inflated the number of aggravating factors the jury weighed, "creating the possibility not only of randomness but also of bias in favor of death." *(Stringer v. Black* (1994) 503 U.S. 222, 236.) More likely, the jury took the prosecution at its word, applying its normative judgment and distaste to the factor (k) evidence, rather than disregarding it, if found unpersuasive.

202/ The prosecution argued inferences regarding the brother's crime which were without any basis in the record: that it was extraordinarily violent by virtue of his being tried in adult court and sentenced to a 12-year prison term. This too was improper.

The jury instructions, CALJIC Nos. 8.85 and 8.88, were not adequate corrective to this misconduct.[203] CALJIC No. 8.85 refers to "evidence offered by Appellant" but does not clarify that such evidence can only be considered mitigation, or not at all. CALJIC No. 8.88 permits the jury to assign "any value" to the evidence of each of the factors. The prosecution made no secret that Appellant offered evidence of his family-life and siblings under factor (k), then reversed its polarity as a basis for imposition of death. The jury reasonably could have understood the instructions, in light of the prosecution's argument, permitted this "negative polarity"

203/ The jury was instructed with CALJIC No. 8.85 that,

> In determining which penalty is to be imposed on appellant, . . . you shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the appellant's character or record *that the appellant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.*
>
> (6 CT 1546-1547, emphasis added.)

CALJIC No. 8.88 was also given to the jury that,

> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> ...
>
> *You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.*
>
> (6 CT 1551, emphasis added.)

interpretation of Appellant's factor (k) showing. This Court has held that the pattern instruction does not suggest that the absence of a mitigating factor should be considered in aggravation. (*Page*, 44 Cal.4th at 61; *People v. Dykes* (2009) 46 Cal. 4th 731, 815-816.) Yet, it is crucial to California's §190.3 framework that factor (k) not be converted to a catch-all aggravator.

Recently, in *People v. Gamache* (2010) 48 Cal.4th 347, the prosecution disparaged defense mental health expert opinion at penalty phase as "psycho babble," showing at most defendant's "subtle motivations," rather than a substantive impairment in his thinking at the time of the murders. This Court held that argument was within the prosecution's wide latitude to comment on the evidence. "The prosecution is permitted to question whether a defendant's mitigating evidence should carry much weight." *(Id.* at *79 (*citing People v. Salcido* (2008) 44 Cal.4th 93, 159; *see also People v. Raley*, 2 Cal.4th at 917 (upholding prosecution's argument that testimony by defense witnesses designed to elicit sympathy from the jury "lacked the mitigating force the defendant claimed for it").) Under *Gamache* and *Zamsbrano*, 41 Cal. 4th 1173-1174, the prosecution may well argue that mental health evidence offered in mitigation is insufficient to warrant an exercise of the jury's mercy or sympathy, to comment on the defendant's failure to call logical witnesses, or to express remorse, either generally or during guilt phase testimony.

Nonetheless, in this jurisdiction, there are finite limits to what the prosecution may say, and those limits were crossed in this case. In *Zambrano*, this Court recognized that the prosecution may *not* argue or imply that the jury should not decide defendant deserved sympathy unless it found *he* had expressed remorse, *or that the failure to express remorse was a factor in aggravation. Id.* The prosecution went considerably beyond what was proscribed for it in *Zambrano*, arguing that Appellant's family history was aggravation, that the death penalty was a reasoned moral response to a failure of parenting ("they batted zero with all three children")

and a troubled pair of siblings.[204] The prosecution could and did argue that Appellant's factor (k) evidence is insubstantial, but to label it "aggravation" and argue it as a basis for the death penalty tipped the §190.3 scales toward death was to strike both a foul blow.

The United States Supreme Court has held that jurors must be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio* (1978) 438 U.S. 586, 604. Yet, the High Court has never approved *unrestricted consideration* of a circumstance in aggravation. *Tulaiepa v. California, supra.*

Appellant anticipates that, if respondent acknowledges the impropriety of the prosecution's argument, he will argue to uphold the judgment on the basis that a reasonable jury would have understood the facts and its channeled discretion, to preclude giving effect to it. *See People v. Clark* (1992) 3 Cal.4th 41, 169, (*quoting People v. Gonzalez* (1990) 51 Cal.3d 1179, 1234; *see also People v. Proctor* (1992) 4 Cal.4th 499, 544-545; *People v. Brown* (1988), 46 Cal.3d 432, 454-456; *People v. Montiel* (1993) 5 Cal.4th 877, 937-938. Yet, the *Clark* line of cases are distinguishable because the jury was not likely misled in regard to the phrasing of factor (h), and the prosecution confined its argument to the lack of extenuating factors, not the *reverse-polarity* of proscriptive aggravation, as happened here. This case, if approved, would set a far more ominous precedent. The prosecution's explicit call to the jury to treat defense factor (k) evidence as an aggravator would transform California's catch-all mitigation factor into a two-way "free for all", permitting the prosecution to make subtle, or unsubtle, subjective pitches to the jury's latent human

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204/ The argument smacks of Justice Oliver Wendell Holmes' oft-quoted and rebuked comment in a long-discredited case that "three generations of imbeciles are enough." *Buck v. Bell* (1920) 274 U.S. 200. This Court should be wary of approving such argument, or finding it had no effect in the heightened arena of capital sentencing.

prejudices about Appellant or his family's class, race, religion, or political affiliation, just as readily as it made a pitch for death based upon this Appellant's family dysfunction, poverty, and neglect. Reversal is warranted on this important claim.

b. Arguing Factor (i) "Aggravation"

Penal Code §190.05(a) forbids the imposition of the death penalty on any defendant under the age of 18 at the time of the crime. The prosecution overstepped the bounds of reasonable inference by comparing Appellant's age of 21 unfavorably to co-defendant Pressley, who was 17 at the time of the crime. Since Pressley was statutorily- ineligible for the death penalty, it was unfair and improper for the prosecution to characterize Pressley's age as "mitigating maybe," and by contrast, Appellant's age as particularly aggravating. This was misconduct.

The prosecutor's argument gave rise to two errors: (1) improperly converting mitigation into aggravation; and (2) doing so on the basis of facts which the prosecutor knew to be false. In this respect, this misconduct is similar to several instances of guilt phase misconduct. The prosecutor knew that Pressley was statutorily ineligible for the death penalty in the State of California, but the jury did not know so. Thus, the prosecutor was making a comparison he knew to be false in order to induce the jury to find these facts aggravating, rather than mitigating. In addition, the prosecutor's argument (based on facts the prosecutor knew to be false) deprived Appellant of the jury's consideration of his relative youth (20 at the time of the killing), which was mitigating.

c. Arguing Conditions of Confinement

This Court has repeatedly confirmed that *evidence* concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has *no bearing* on the appellant's character, culpability, or the circumstances of the offense under either the federal Constitution or §190.3.(k). *People v. Martinez* (2010) 47 Cal. 4 th 911, 963 (citing cases). Moreover, describing future conditions of confinement for a person serving

life without possibility of parole involves "speculation as to what future officials in another branch of government will or will not do." *Id.* (*quoting People v. Thompson* (1988) 45 Cal.3d 86, 139).

Prosecution argument on the issue is even more irrelevant, speculative, and improper, since it carries with it the imprimatur of the executive branch (which is in privity with state prison administrators). The prosecution's argument in this case invoked the specter of Appellant living a life of ease and comfort in prison, accoutre with girlfriend, library of classics, friends among his fellow criminals, and pickup games of basketball until the end of his natural life. Of course there was not and, under *Thompson* and its progeny, could not be, any evidence of this *reductio ad absurdum*. Where evidence is improper, argument is even more so. The prosecution's argument was designed to counteract Appellant's relative youth and lack of prior criminality by depicting for the jury what his life in prison could be, playing to its passions and prejudices, without any tether to the evidence and against all policy proscription. The argument was meant to persuade the jury to punish Appellant by denying him the pleasures of an imagined and speculative paradise in prison. This was misconduct pertaining to an issue of importance to any rational jury.

d. Arguing Extrinsic "Facts"

Under Penal Code §190.3, except for evidence in proof of the offense or special circumstance which subjects a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice has been given to the defendant within a reasonable period of time as determined by the court, prior to trial.

In this case, the only aggravation evidence the prosecution noticed was victim impact testimony of Jeff and Susan Markowitz under §190.3(a) (5 CT 1312). According to its proffer, these witnesses (only Susan Markowitz was called at the penalty phase) would offer "brief testimony regarding the relationship of the family members to Nicholas Markowitz, the impact his death has had on them, and the facts of his life that relate to or have some bearing on the circumstances of the crime," but no testimony

regarding their "characterization or opinion of the defendant, his character, or what the appropriate sentence should be."

Nonetheless, the prosecution argued "facts" not in evidence at guilt or penalty phase, *e.g.*, its unfounded assertion that Appellant used a shovel to dig the victim's grave and duct-taped him beforehand (11 RT 2349). This was misconduct.

e. Arguing for Victim's Family Retribution

This Court has affirmed the prosecution's "isolated, brief references to retribution or community vengeance," while recognizing these are potentially inflammatory, so long as it does not form the principal basis for advocating the imposition of the death penalty. *People v. Montiel* (1993) 6 Cal. 4th 215, 262; *Davenport*, 11 Cal. 4th at 1222. The law in this jurisdiction is that the prosecution may argue for the death penalty as *a valid form of community retribution* or vengeance exacted by the state, under controlled circumstances, and on behalf of all its members, *in lieu of the right of personal retaliation.*" *People v. Zambrano* (2007) 41 Cal. 4th 1082, 1178, *overruled on other grounds in People v. Doolin* (2009) 45 Cal.4th 390, 421. Here, the prosecution overstepped that line by appealing to the jury to answer one question with its verdict: "should the Markowitz family have to wonder if Appellant is playing basketball or *whether justice was done.*" (11 RT 2354, emphasis added.) Since the prosecution had equated "playing basketball" as a pejorative form of shorthand for life in prison, the implication was clear: only the death penalty would give the Markowitz family that reassurance, and quell their fears. This was error because it exalted the Markowitz family's right of personal retaliation over community norms of justice.

In posing one final question against the backdrop of its caricature of life in prison, the prosecution further committed error first identified in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329, leading the jury to believe that ultimate responsibility for determining the appropriateness of the defendant's death rests elsewhere. *See also People v. Milner* (1988) 45 Cal. 3d 227, 257. The fact that Appellant did not make a contemporaneous

objection to the prosecution's remarks does not bar the claim of *Caldwell* error on appeal. *People v. Bittaker* (1989) 48 Cal. 3d at 1104; *People v. Jackson* (1996) 13 Cal.4th 1164, 1238. In this case, the "higher moral authority" to whom the prosecution appealed was Susan Markowitz, the bereaved mother of the teenage victim. The prosecutor cloaked himself in her mantle by closing his summation, "it has been my honor to represent the thoughts of the Markowitz family." Coupled with the thinly-veiled pitch for the death penalty to restore her sense of tranquility, this was constitutional error.

f. Arguing Punishment Imputed From Original Kidnap

Appellant incorporates by reference the discussion of this issue in Claim VIII, supra. The prosecutor's guilt phase evidence and argument imputed guilt to Appellant based on the poignant "what if's" of the original kidnap, a set of circumstances of which Appellant was unaware, and played no part. This argument violated the Eighth Amendment principle that the capital sentencing jury consider only those facts *related to* the personal moral blameworthiness of a particular defendant, not facts of which a defendant was unaware, or were irrelevant to his decision to kill. That such facts catapulted the case to national prominence as a symbol of the decadence and decline of American youth only accentuates the legal error in the prosecution's argument.

g. The Errors Were Prejudicial

At penalty phase, the prosecution converted factor (k) evidence to aggravation, misapplied factor (i), argued facts outside the record, and appealed to the victim-family's right of retaliation. These acts, separately and cumulatively, denied Appellant due process, a fair trial and a reliable determination of the facts in a capital trial in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and their state constitutional analogues. The prosecution's conduct in this case "infected the trial with such unfairness as to make the conviction a denial of due process." *Darden*, 77 U.S. at 181; *People v.*

Morales (2001) 25 Cal.4th 34, 44. Alternately, the prosecution's misconduct violated California law because it involved the repeated "use of deceptive or reprehensible methods to attempt to persuade the *People v. Farnam* (2002) 28 Cal.4th 107, 167. Appellant urges this Court to reverse his death sentence.

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

A. INTRODUCTION

Appellant challenges California's capital sentencing statutes as applied in his case, and asks this Court's reconsideration of prior decisions upholding the statutes in other factual contexts. This Court consistently has rejected a number of arguments pointing out asserted structural deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the appellant does no more than (1) identify the claim in the context of the facts, (2) note that we previously have rejected the same or a similar claim in a prior decision, and (3) ask us to reconsider that decision." *Id.* at 303-304 (*citing Vasquez v. Hillery* (1986) 474 U.S. 254, 257.) In light of *Schmeck*, Appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. These claims of error are cognizable on appeal under Penal Code §1259, even where appellant did not seek the specific instruction or raise the precise claim asserted here.

B. ARGUMENT

1. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. *People v. Edelbacher*

(1989) 47 Ca1.3d 983, 1023 (*citing Furman v. Georgia* (1972) 408 U.S. 238, 313, White, J. concurring). To meet this criteria, the state must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. *Zant v. Stephens* (1983) 462 U.S. 862, 878.

As applied to the circumstances of Appellant's case, California's capital sentencing scheme did not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code §190.2 contained no less than 21 special circumstances. Given the large number of special circumstances, California's statutory scheme failed to identify the few cases in which the death penalty might be appropriate, but instead made *all, or nearly all,* first degree murders eligible for the death penalty.

This Court has rejected prior challenges to the statute's lack of any meaningful narrowing. *People v. Stanley* (1995) 10 Ca1.4th 764, 842-843. Yet, in this case, as argued *supra*, assuming the state's trial evidence was properly admissible, no rational fact-finder could have determined that Appellant had an independent felonious purpose other than the commission of murder when he arrived at the Lemon Tree Hotel, and accompanied the victim to a pre-arranged grave-site. None of the 21 special circumstances rationally applied to distinguish this set of facts from myriad other cases of premeditated, yet non-capital, murder. This Court should reconsider *Stanley* and strike down Penal Code §190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. The Broad Application Of Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code §190.3(a) (hereafter "factor (a)") directed the jury in this case to consider in aggravation the "circumstances of the crime." *See* CALJIC No. 8.85. California prosecutors have argued that the jury could weigh in aggravation every conceivable "circumstance of the crime," even those that, from case to case, reflect starkly opposite circumstances. Of

special concern under the Eighth Amendment is the frequent use of factor (a) by prosecutors to embrace facts which cover the entire spectrum of circumstances inevitably present in every murder; facts such as the tender or senior age of the victim, the tender or senior age of the defendant, the specific or random selection of the victim, the myriad methods by which killings are accomplished, and their myriad motives, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). *People v. Blair* (2005) 36 Cal.4th 686, 749 ("circumstances of crime" *not* required to have spatial or temporal connection to crime.) Rather, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that all, or nearly all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding this murder were sufficient, *by themselves and without some narrowing principle*, to warrant the imposition of death. *See Maynard v. Cartwright* (1988) 486 U.S. 356, 363; *but see Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 (factor (a) survived facial challenge at time of decision).

Appellant concedes that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of § 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401. Nonetheless, appellant urges the Court to reconsider this holding in light of the expanded use to which factor (a) was put in this case. No fact in aggravation was presented other than the opinion testimony of Appellant's mother that the circumstances of the crime was exceptionally cruel.

3. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

a. Appellant's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. *See* CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 (penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"). In conformity with this standard, Appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. *See* CALJIC Nos. 8.85, 8.88; 6 CT 1546, 1551.

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, Appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. *See* CALJIC No. 8.88; 6 CT 1551. Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely*, and *Cunningham* require that each of these findings be made *beyond a reasonable doubt*. The Superior Court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." *People v. Sedeno* (1974) 10 Cal.3d 703, 715; *see Carter v. Kentucky* (1981) 450 U.S.

288, 302.

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an "increased sentence" within the meaning of *Apprendi, see People v. Anderson supra*, 25 Cal. 4th at 589 n.180, and does not require any particular findings of fact. *People v. Griffin* (2004) 33 Cal. 4th 536, 595. This Court has also rejected the argument that *Apprendi, Blakely,* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. *People v. Prieto* (2003) 30 Cal.4th 226, 263. Yet, as applied to the specific facts of this case, Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi, Ring, Blakely,* and *Cunningham*. No rational juror would have voted to impose the death sentence upon Appellant under such a requirement.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. *People v. Blair* (2005) 36 Cal. 4th 686, 753. Appellant respectfully asks that the Court reconsider this holding.

b. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. *See* Evid. Code §520. Evidence Code §520 creates a legitimate and settled expectation, and a corresponding entitlement, by

parties to a state criminal action as to the manner by which a criminal prosecution will be decided, and therefore Appellant was constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. *Cf. Hicks v.Oklahoma* (1980) 447 U.S. 343, 346 (defendant constitutionally entitled to procedural protections afforded by state law). Accordingly, Appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed (if the evidence were in equipoise) that life without parole was an appropriate sentence. CALJIC Nos. 8.85 and 8.88, the instructions given here (6 CT 1546, 1551), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards and consequently violated the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is "not susceptible" to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. *People v. Lenart* (2004) 32 Ca1.4th 1107, 1136-1137. This Court also has rejected any instruction on the presumption of life. *People v. Arias* (1996) 13 Ca1.4th 92, 190. Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. *Cf. People v. Williams* (1988) 44 Cal.3d 883, 960 (upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law). Absent such an instruction, there was a strong possibility in this case that a juror would vote for the death penalty because of a mistaken allocation to appellant of a nonexistent burden of proof, or a failure to engage a presumption of life sentencing if the matter was in equipoise.

c. Appellant's Death Verdict was Not Premised on Unanimous Jury Findings

i. Aggravating Factors

Appellant contends that the California statute violates the Sixth, Eighth, and Fourteenth Amendments by permitting imposition of the death penalty in the absence of any requirement that the jury, or even a majority of the jury, find or agree upon a single set of aggravating circumstances that warrant the death penalty. *See Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305. This Court has held that unanimity with respect to aggravating factors is *not* required by statute or as a constitutional procedural safeguard, *People v. Taylor* (1990) 52 Cal. 3d 719, 749, reaffirming this holding after the United States Supreme Court's landmark decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. *See People v. Prieto*, *supra*, 30 Ca1.4th at 275.

Appellant respectfully asserts that *Prieto* was incorrectly decided in light of the High Court's post-*Ring* jurisprudence, in that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity [] is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (Kennedy, J., concurring.)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal appellant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. *See e.g.*, Pen. Code §1158(a). Since capital appellants are entitled, if anything, to more rigorous protections than those afforded noncapital appellants, *see Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994, and since providing more protection to a noncapital appellant than a capital appellant violates the

equal protection clause of the Fourteenth Amendment, *see e.g., Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421, it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the appellant should live or die," *People v. Medina* (1995) 11 Cal.4th 694, 763-764, would *by its inequity* violate the equal protection clause of the federal Constitution and *by its irrationality* violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

ii. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing statutes. In fact, the jury was instructed that unanimity was *not* required. *See* CALJIC 8.88; 6 CT 1551. Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code §190.3(b) violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering the death sentence unreliable. *See e.g., Johnson v. Mississippi* (1988) 486 U.S. 578 (overturning death penalty based in part on vacated prior conviction).) Appellant concedes that this Court has rejected this claim in other cases. *See People v. Anderson* (2001) 25 Cal. 4th 543, 584-585. Nonetheless, in this case, the prosecution presented evidence of Appellant's alleged prior criminal activity (verbal threat to extract drug debt from third party by force or fear, prior marijuana sales) under factor (b) (4 RT 748, 809, 842; 6 RT 1284) and substantially relied on this evidence in his closing argument (11 RT 2327 ("we know he was selling narcotics, which is prior felony conduct"), 2340 (sold drugs for Hollywood), 2343 ("dope dealer"), 2346 (characterizing younger brother's robbery as "so

scary and so horrible"), and 2347 ("[parents] batted zero with all three children").

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona, supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the clue process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, *all* of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Notwithstanding this Court's previous rejection of such claim, *People v. Ward* (2005) 36 Ca1.4th 186, 221-222, Appellant respectfully asks the Court to reconsider its holdings in *Anderson* and *Ward*.

iii. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon Appellant hinged on whether the jurors were "'persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole." *See* CALJIC No. 8.88; 6 CT 1551 (emphasis added). As a matter of grammar and common sense, the phrase "so substantial" is an impermissibly broad phrase that neither channels nor limits the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments in that it creates a standard that is vague and directionless. *See Maynard v. Cartwright* (1988) 486 U.S. 356, 362. This Court has found that the use of this phrase does *not* render the instruction constitutionally deficient. *People v. Breaux* (1991) 1 Ca1.4th 281, 316 n.14. Appellant asks this Court to reconsider *Breaux*.

iv. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. *Woodson v. North Carolina, supra*, 428 U.S. at 305. Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307, the punishment must fit the offense and the offender, *i.e.*, it must be appropriate. *See Zant v. Stephens, supra*, 462 U.S. at 879. On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. *See People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464. By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution. The Court has previously rejected this claim. *People v. Arias, supra,* 13 Cal. 4th at 171. Appellant urges this Court to reconsider that ruling.

v. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Penal Code § 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital Appellant's circumstances that is required under the Eighth Amendment. *See Boyde v. California* (1990) 494 U.S. 370, 377. Yet, the Superior Court instructed the jury with CALJIC No. 8.88, which only informs the jury of the circumstances that

permit the imposition of a death verdict (6 CT 1551). By failing to conform to the mandate of Penal Code § 190.3, the instruction violated Appellant's right to due process of law. *See Hicks v. Oklahoma, supra*, 447 U.S. at 346. This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. *People v. Duncan* (1991) 53 Ca1.3d 955, 978. Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. *See People v. Moore* (1954) 43 Ca1.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; *see also People v. Rice* (1976) 59 Cal. App.3d 998, 1004 (instructions required on every aspect of case). It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life without parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. *See Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.

vi. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. *See Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at 304. Constitutional error occurs when there is a likelihood that the jury applied an instruction in a way that prevented the consideration of constitutionally relevant evidence. *Boyde v. California, supra*, 494 U.S. at 380. Such error occurred in this case because the instructions given left the sentencing jury with the likely impression that Appellant bore some

particular burden in proving facts in mitigation.

A similar problem was presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit Appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors. A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. *See McKoy v. North Carolina, supra*, 494 U.S. at 442-443. Had the sentencing jury been instructed that unanimity *was* required before mitigating circumstances could be considered, there would be no question that reversal would be required. *Ibid.*; *see also Mills v. Maryland, supra*, 486 U.S. at 374. Because there is a reasonable likelihood that the jury erroneously believed that unanimity *was* required, reversal is required. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

d. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. *See Estelle v. Williams* (1976) 425 U.S. 501-503. In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the ultimate stakes are in play at the penalty phase, there is no statutory requirement in California that the jury be instructed as to the presumption of life. *See* Note, "The Presumption Of Life: A Starting Point for Due Process Analysis of Capital Sentencing" (1984) 94 Yale L.J. 351; *cf. Delo v. Lashley* (1983) 507 U.S. 272. The trial court's failure to instruct the jury that the law favors life and presumes life

imprisonment without parole to be the appropriate sentence absent persuasive evidence to the contrary, violated Appellant's right to due process of law, U.S. Const., amend. 14, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, U.S. Const., amends. 8th, 14th), and his right to the equal protection of the laws. *See* U.S. Const., Amend, 14th.

In *People v. Arias, supra*, 13 Cal.4th 92, 190, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. However, as the other sections of this claim posit, California's death penalty law is deficient in the protections needed to secure consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction was constitutionally required in this case.

e. Failing to Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law, *People v. Fauber* (1992) 2 Cal.4th 792, 859, Appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not imposed in an arbitrary or capricious manner. *See Gregg v. Georgia* (1976) 428 U.S. 153, 195. This Court has rejected similar contentions. *People v. Cook* (2006) 39 Cal.4th 566, 619. Appellant urges the court to reconsider its decisions on the necessity of written findings in light of the manifest injustice of the imposition of the death sentence in this case on an essentially silent record as to which aggravating factor was found to warrant the death verdict.

f. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Appellant's case. The trial court failed to omit those factors from the jury instructions (6 CT 1546), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of Appellant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook, supra*, 39 Cal. 4th at 618, and hold that the trial court *must* delete any inapplicable sentencing factors from the jury's instructions.

g. California's Lack of Inter-Case or Intra-Case Proportionality Review Violates Constitutional Guarantees Against Arbitrary or Disproportionate Imposition Of The Death Penalty

The California capital sentencing statutes do not require that either the Superior Court or this Court undertake a comparison between this case and other similar cases, or even against the disposition of four co-Appellants' cases regarding the relative proportionality of the sentence imposed, *i.e.*, inter-case and intra-case proportionality review. *See People v. Fierro* (1991) 1 Cal.4th 173, 253. Appellant asks this Court to take judicial notice that all four of his co-Appellants Hollywood, Pressley, Rugge, and Skidmore received non-capital sentences for their roles in the killing, which ranged from mastermind in every salient respect (Hollywood) to original kidnappers (Rugge, Skidmore, Hollywood). The failure to conduct inter-case or intra-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary and capricious manner or that violate equal protection or due process. For this reason, Appellant urges the Court to reconsider its failure to require inter-case or intra-case proportionality review in capital cases.

h. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital Appellants and non-capital felony Appellants, those differences justify greater, not lesser, procedural protections for capital Appellants. In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the Appellant's sentence. *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e). In a capital sentencing phase, there is no burden of proof at all, the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the Appellant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments, *People v. Manriquez* (2005) 37 Cal.4th 547, 590, but asks the Court to find that his case presents a suitable occasion to reconsider its ruling.

i. California's Use Of The Death Penalty as a Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." *Trop v. Dulles* (1958) 356 U.S. 86, 10-1; *People v. Cook, supra*, 39 Cal.4th at 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779. In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of

capital punishment against appellants who committed their crimes asjuveniles, *Roper v. Simmons* (2005) 543 U.S. 551, 554, Appellant urges this Court to reconsider its previous decisions, and consider the evidence of evolving consensus against this form of punishment.

Claims Affecting Both Phases

XIII. THE SUPERIOR COURT VIOLATED APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND TO COUNSEL AT TRIAL AND ON APPEAL BY DENYING HIS REQUESTS FOR HIS TRIAL ATTORNEY'S STATE BAR RECORDS MATERIAL TO DEMONSTRATING INEFFECTIVE ASSISTANCE AND CONFLICT OF INTEREST

A. INTRODUCTION

With charges pending, trial attorney Owen resigned from the State Bar of California ten weeks after the jury sentenced her client to death. In order to investigate and present his new trial motion raising, *inter alia*, claims of ineffective assistance of counsel and counsel's conflict of interest, Appellant moved to compel the State Bar to produce Owen's records; the State Bar and Owen moved to quash the subpoena. In 2002 Judge Gordon denied Appellant's request for review *in camera* or alternately that the records be preserved in the court-file for appellate review (11 RT 2510). In 2009 during proceedings to certify the record on appeal in Superior Court, Appellant renewed both requests, which Presiding Judge Brian Hill denied. An order issued to require the State Bar to maintain any extant Owen records (2 CT 2A 373).[205]

Appellant theorized that Owen had concealed a conflict of interest and breach of fiduciary duty, and furthermore that the records would

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205/ Judge Hill's April 17, 2009 Order required the State Bar to "preserve under its possession, custody or control any and all documents pertaining to attorney Cheri Owen, who was admitted to practice on June 9, 1999, with State Bar Number 201893. The documents include but are not limited to all notes, reports, complaints, and investigative notes and reports." (*Id.*) The State Bar retention policy expired after five years.

corroborate her lack of fitness to try a capital case, her improper diversion of Penal Code §987.9 funds, and a pattern of misconduct in other cases negating any strategic rationale she might offer for her performance. Such evidence - if it could be found in the State Bar file - was, *and is*, material to Appellant's motion for new trial based on ineffective assistance of counsel and conflict of interest. *(People v. Fosselman* (1983) 33 Cal.3d 572, 582-583; *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1460 (hereafter "*Fosselman*" motion).)

In both instances, the Superior Court rejected appellant's theories as too featherweight to warrant *in camera* review of the records.[206] As argued below, this was error under *Pennsylvania v. Ritchie* (1987) 480 U.S. 39. This error deprived Appellant of his right to due process under the Fifth and Fourteenth Amendments, as well as his Sixth Amendment right to effective assistance of counsel both at trial *and* on appeal.

Appellant asks this Court to take the following three steps to complete the record on appeal, and decide the merits of related Claim XIV: 1) authorize Appellant to re-issue the State Bar subpoena, and stay the appeal, 2) direct Judge Hill to review Owen's 1999-2002 records *in camera* and augment the record accordingly with any material evidence, and an index of documents withheld, and 3) permit Appellant to then supplement Claim XIV of his opening brief with any claim that material evidence had been withheld, or with any newly-produced material evidence on the *Fosselman* claim. S*ee People v. Galland* (2008) 45 Cal.4th 354, 372-373 (issuing comparable remand order in a case of first impression).

B. STATEMENT OF FACTS

1. Appellant's Motion

On July 18, 2002, Appellant issued a subpoena to the State Bar for "any and all documents relating to Cheri Owen, State Bar Number 201893,

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206/ As argued *infra*, *see* Claim XIV, Judge Gordon erred separately by denying appellant's *Fosselman* motion without a hearing, where the State Bar records could well have impeached any purported tactical reasoning Owen might have advanced for her acts and omissions.

from 1999 to 2002, including notes, records and investigative reports" (6 CT 1720, 7 CT 2069).[207] On July 30, 2002, Appellant moved for *in camera* review of the return on his Subpoena Duces Tecum for Owen's State Bar records (11 RT 2438), and on September 5, 2002, Appellant moved to compel (11 RT 2474; 7 CT 2067).

Appellant advanced four arguments in favor of his motions to compel and for *in camera* review. *First*, Owen answered a civil malpractice complaint by averring that she was too ill to file a civil complaint and missed the applicable statute of limitations which ran on August 12, 2000. One week later, Owen took a sizeable retainer from Appellant's family to defend him on these capital murder charges. Appellant asserted the State Bar records might contain evidence of Owen's lack of fitness to practice law before and during his trial.

Second, Owen was absent for portions of Appellant's trial (jury selection and guilt phase testimony) because she was meeting with Robbins in regard to her State Bar case. Appellant asserted the State Bar records might contain evidence confirming why Owen was unable to prepare for or attend portions of his trial.

Third, Owen instructed George Zeliff, her investigator, *not* to work on Appellant's case, and diverted Penal Code §987.9 funds to pay debts she owed Zeliff for work he had done on other cases. Appellant asserted the State Bar records might contain evidence confirming Owen diverted §987.9 funds to pay other-case debts.

Fourth, on the day before her resignation from the Bar, Owen obtained a writing from Appellant evidencing his grant of exclusive literary-rights to his life-story, and his waiver of attorney-client privilege. The writing confirmed an oral agreement that had existed from the

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207/ Appellant's request was framed broadly to encompass any records of Owen's role as informant to State Bar and/or Los Angeles Police Department investigations in an effort to avoid criminal charges. The State Bar referenced Owen's own case (Number 02-Q-10760), but full-compliance with the subpoena would require due diligence to produce Owen's informant-file.

inception of the relationship, which posed an inherent conflict of interest (11 RT 2547; 6 CT 1685-1686). Appellant asserted the State Bar records might contain evidence that Owen engaged in similar misconduct in other cases, or (as was her *modus operandi* in his case) failed to prepare other clients' cases, then pressured them into presenting absurd defenses or ill-advisedly taking the stand, if the cases did not settle before trial, to forestall any malpractice claim against her when they were found guilty.

The State Bar opposed the motion, and Owen through her attorney Robbins moved to quash (6 CT 1719).[208]

2. Judge Gordon's Denial

On October 8, 2002, Judge Gordon denied Appellant's motion to compel or for review *in camera* (11 RT 2509), and granted the State Bar and Owen's motion to quash the subpoena, and the following colloquy ensued:

> MR. SANGER[209]: ...I would be remiss in my duty if I didn't request that the Court order that the material be produced and at least a copy of it be preserved and sealed with this record, and so that is my request.
>
> THE COURT: I'm not going to do that. If the Court of Appeal thinks that that material should be available, I'm sure

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208/ On July 30, 2002, Rachel Grunberg, State Bar counsel, asked to "discuss some things" *in camera* with Judge Gordon (11 RT 2444). On October 8, 2002, Judge Gordon held an in chambers conference with Grunberg, which it ordered sealed and filed under separate cover with the Supreme Court (11 RT 2511-2515). The court reporter could not locate these pages. Appellant asks that this transcript be served on his counsel and added to the certified record on appeal under seal. Alternately, this unreported *ex parte* discussion itself warrants production of the records to avoid any appearance of impropriety, or of denying appellant his ability to present the claim on appeal.

209/ As discussed in the Statement of Facts, *supra*, after Owen's forced resignation from the Bar, appellant filed a Marsden motion to relieve Crouter as his remaining attorney. Judge Gordon permitted appellant to substitute in newly-retained attorney Robert Sanger, who litigated the motions for State Bar records, and §1181 motion for new trial.

the State Bar will have it available, but I'm not going to order it produced in this courtroom. All right. That's the order.

(Id. at 2509-2510.)

3. Judge Hill's Denial

In record-augmentation proceedings before the Superior Court, Appellant raised to Judge Hill two additional arguments for re-issuance of the State Bar subpoena, review *in camera*, and production of material documents, for which he found support in the trial record:

Fifth, Owen was acting as an informant for the State Bar and the Los Angeles District Attorney at the time of trial in Appellant's case, which posed a conflict of interest. The State Bar records would contain confirming evidence of this adverse relationship.

Sixth, Owen engaged in fraudulent legal practices with Nat Colley, another attorney, whom she engaged to appear on Appellant's behalf at pretrial hearings of January 30 and March 1, 2001 (3 CT 875, 4 CT 957). Colley served as Owen's counsel in a civil action she filed in Los Angeles Superior Court on March 1, 2001 against Professional Account Services, a legal advertising firm, alleging fraudulent business practices which damaged her by subjecting her to "numerous" Bar complaints and "emotional shock and distress," and rendering her unable to "attend to the daily affairs of her practice" (7 CT 1845-1846, Cheri Owen v. Brent Carruth, et al.).

Four months later, Colley served as counsel of record for plaintiffs in a legal malpractice action *against* Owen, filed on August 13, 2001 (7 CT 2077, Elpidio and Bertha Madera v. Owen, Case No. BC 256044.). The Maderas' Complaint alleged that Owen took a retainer to defend the client in a criminal matter and pursue a civil action on his behalf, but she defaulted by not timely filing an administrative claim because she felt too "ill" to work in August, 2000 (7 CT 2081). The State Bar records might contain evidence of Owen's criminal relationship with Colley.

On February 19, 2009, Judge Hill denied Appellant's request to re-

issue the subpoena and for review *in camera* and production, or to preserve the records in the court-file for appellate review (1 RT A 192, 194.) On April 13, 2009, Judge Hill ordered the State Bar to preserve Owen's records subject to production only upon further Order of that Court (1 RT A 232, 239; 2 CT 2A 373).[210]

C. ARGUMENT

1. Judge Gordon's Decision to Quash the Subpoena Violated Appellant's Right to Due Process

In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, the United States Supreme Court held that, under the Due Process Clause of the Fifth and Fourteenth Amendments, a defendant is entitled to disclosure of statutorily-privileged information if it is material to the defense and would warrant a new trial. The remedy on appeal in *Ritchie* was remand to the trial court to review the records *in camera*.

Ritchie was accused of sexual crimes against his daughter. He served a subpoena on the Pennsylvania Children and Youth Services agency ("CYS agency") for records concerning his daughter, the file related to the immediate charges, her medical report, as well as records compiled on an earlier report of child-abuse. He claimed the file "*might contain*" the names of favorable witnesses. *(Id.* at 44, emphasis added.) The records were privileged under state law, subject to production by court order. The trial court did not read the entire file before denying Ritchie's motion.

The Supreme Court observed that the state statute did not grant the CYS agency absolute authority to shield its files from all eyes. Id. at 57-58. Indeed, the statute contemplated *some use* of CYS records in judicial proceedings. Therefore, Ritchie was entitled to have the CYS agency file reviewed *in camera* to determine whether it contains information that probably would have changed the outcome of his trial. *Id.* at 58. *In camera*

210/ Under the State Bar Act, in disciplinary proceedings in which no discipline has been imposed, the records thereof may be destroyed after five years (Cal. Bus'n. & Prof. Code §6080).

review by the trial court would serve Ritchie's interest without destroying the state's need to protect the confidentiality of those involved in child-abuse investigations.

Appellant asks this Court to follow *Ritchie* at this juncture, by remanding the case to the Superior Court to review Owen's State Bar records *in camera,* and to certify material evidence (responsive to the lines of inquiry suggested above) and an index of all documents reviewed, to the parties and to this Court. An opportunity to submit further briefing on the merits of the *Fosselman* claim should also be granted.

In the context of appellant's *Fosselman* motion, materiality was not the highest burden known to man. It meant simply that the State Bar records had *some tendency* to prove deficient performance by attorney Owen, or could rebut any tactical reason she advanced for her acts or omissions at the hearing which should have been, but was not held. *See People v. Fosselman* (1983) 33 Cal. 3d 572, 582-583 (reversing conviction and remanding the proceeding for new hearing on motion for new trial based on counsel's deficient performance).

To establish ineffectiveness, Appellant's burden was to show that Owen's representation fell below an objective standard of reasonableness. To establish prejudice, a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability was a probability sufficient to undermine confidence in the outcome. *Williams v. Taylor* (2000) 529 U.S. 362, 390-391 (*citing Strickland v. Washington*, 466 U.S. at 694.

Contrary to what Judges Gordon and Hill assumed to be the law, evidence of Owen's prior misconduct in other case *was* material to the *Fosselman* motion. *See e.g., In re Vargas* (2000) 83 Cal.App.4th 1125, 1134-36 (taking judicial notice of prior cases to demonstrate attorney's pattern of ineptitude and negating attorney's credibility). In *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1460, the Ninth Circuit considered counsel's pattern of misconduct in other cases and *State Bar disciplinary record* to be *"compelling"* evidence that his actions at trial were the product

of incompetence and indifference, rather than strategy, as the State supposed.

If the State Bar records did no more than confirm Owen's truancy and distraction or course of conduct, Appellant was entitled to use them to impeach whatever she might say was tactical.[211] Yet, the records could also contain dynamite, by confirming Owen's inherent conflict as an informant to law enforcement at the very same time she stood between Appellant and the prosecution in this capital case, a *per se* Sixth Amendment violation. Certainly, Appellant was entitled to show with best evidence that Owen breached her fiduciary duties by concealing she was the target of investigation of her standing to practice law. *People v. Hinkley* (1987) 193 Cal.App.3d 383, 388 (reversing trial court's denial of motion for new trial where trial counsel had been suspended from practice, was presumptively incompetent, and failed to disclose to appellant his lack of standing).

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, the California Supreme Court recognized defendant's due process right to impeachment evidence in a police officer's confidential personnel file. To balance competing interests, *Pitchess* requires the "intervention of a neutral trial judge, who examines the personnel records *in camera*, away from the prying eyes of either party, and orders disclosed to the defendant only those records that are both relevant and otherwise in compliance with statutory limitations." *People v. Mooc* (2001) 26 Cal.4th 1216, 1226. Judge Hill rejected this approach on the view that the *"highly-developed" Pitchess* body of case-law is meant only to apply to police personnel-files. But, as the adage goes, "if the shoe fits, wear it." In this case, remand for *Pitchess*-type review strikes the balance between the State Bar and Owen's conditional privileges and defendant's due process right to material

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211/ As in *Vargas* and *Sanders*, Owen's misconduct in other cases would be admissible under Evid. Code §§ 351, 1105 to show 1) she lacked the ability to try a capital case; 2) took money from appellants, did nothing, and without advising of meritorious defenses based on adequate investigation, either cajoled them to plea bargain or lost their cases at trial; and 3) lied about the representation provided. *Id.* at 1136.

evidence on his *Fosselman* motion, and to a meaningful appeal based on "all relevant and reasonably accessible information." *1990* 38 Cal.4th 932, 960.

2. *In Camera* Review Was Warranted Under Any Balancing of Interests

The statutes governing State Bar disciplinary investigations (like the state agency records at issue in *Ritchie*) create only a conditional, *not* an absolute, privilege. Cal. Bus. & Prof. Code §§ 6044.5 and 6086.1(b)(1)-(2) provide several exceptions to the rule of confidentiality, including waiver by the Chief Trial Counsel or President of the State Bar "when an investigation [] concerns alleged misconduct which may subject a member to criminal prosecution for [] any lesser crime committed during the course of the practice of law, or in any manner that the client of the member was a victim."

In addition, Cal. State Bar Rule 2302(d) permits the Chief Trial Counsel or President of the State Bar to waive confidentiality "when the necessity for disclosing information outweighs the necessity for preserving confidentiality" under circumstances including harm to a client, the public, or the administration of justice. The Bar is charged with considering, *inter alia*, the gravity and number of allegations against the Member, which in the case against Owen was exceedingly large. In addition, the State Bar *may* inform other complainants, including appellant, of the status of its investigation. Significantly, the State Bar *may* disclose "documents and information concerning disciplinary inquiries, complaints and investigations [] to other governmental agencies responsible for the enforcement of civil or criminal laws" or *"to any other person* or entity to the extent that such disclosure is authorized by [] any other law." (State Bar Rule 2302(4)(e)(4), (9).)

Thus, the State Bar had considerable discretion to waive confidentiality under the circumstances, and apparently already did so in this case. Attorney Robbins told Judge Gordon *she* was not aware of any of defendant's records in Owen's State Bar file, implying that the case file was

made available to her in the course of State Bar proceedings against her client Owen (11 RT 2504). By disclosing the case-file to Owen and Robbins, the State Bar waived any privilege to withhold those same documents from Appellant (who was by then a complainant) in connection with his *Fosselman* motion in 2002, and his pending capital appeal. Under Evid. Code §1040(b)(2), this Court should find that the necessity for limited disclosure outweighs any need for confidentiality. A protective order sealing the State Bar records, and limiting use of material records and the index of documents reviewed to Appellant and the Supreme Court will fully protect the State Bar's statutory interest and Owen's privacy.

Significantly, Appellant alleged that Owen concealed her misconduct and the State Bar investigation from him, at the same time she took his retainer and literary rights agreement, and failed to present a competent defense at trial. Contrary to what State Bar said in its Opposition, these allegations implicate the interest of all Californians in the fairness and reliability of their death penalty, *not* mere "private needs" of a civil litigant. (6 CT 1721, 1725, 8 CT 2146).

As argued more fully in Claim XIV *infra*, Owen's client was sentenced to death on a record which strongly suggested an extreme case of ineffective assistance of counsel, but he needed, and needs, the State bar records to prove that assertion. In his new trial motion, Appellant presented at least *prima facie*, if not more evidence of Owen's prior misconduct, akin to the threshold *Pitchess* showing of prior excessive force complaints. In that analogous context, the trial court must review the officer's personnel records for itself *in camera*, and preserve both the records and the *in camera* transcript for appellate review. *People v. Prince* (2007) 40 Cal. 4th 1179, 1300 (affirming trial court's *in camera* review and limited disclosure of *Pitchess* records, and order sealing transcript); *Mooc*, 26 Cal. 4th at 1229 (observing that trial court should make a record of what documents it examined before ruling on the *Pitchess* motion for future appellate review). Deference to the custodian of record's own view of materiality is inappropriate under the circumstances. *Mooc*, 26 Cal. 4th at 1229 ("the

locus of decision-making is to be the trial court, not the prosecution or the custodian of records").

Both Superior Court Judges Gordon and Hill erred by failing to create a meaningful record for appeal on this issue, either by reviewing the State Bar records for materiality, or obtaining and preserving the records within the court-file for purpose of appeal. Appellant asks this Court to correct this significant error by 1) remanding the issue to Judge Hill with leave to re-issue the subpoena for Owen's State Bar records (*see* 1 CT A 176, true and correct copy of appellant's proposed subpoena); 2) ordering the Superior Court to review *in camera* the records, disclose any evidence material to the *Fosselman* motion and an index of all items withheld; and 3) transmit these certified materials to this Court to determine the merits of the *Fosselman* claim.

3. Judge Hill Erred in Denying Record-Augmentation with the Return on a Reissued Subpoena

A capital appellant has the right to a complete and accurate record on appeal under the Fourteenth Amendment of the U.S. Constitution and federal and state law. (*See Parker v. Dugger* (1991) 498 U.S. 308, 321 (noting that "meaningful appellate review requires that the appellate court consider the appellant's actual record"); *Gardner v. Florida (*1977) 430 U.S. 349, 361-362 (holding that petitioner was denied due process when death sentence was imposed based on information unavailable to defense counsel); *People v. Hawthorne* (1992) 4 Cal.4th 43, 63 (discussing the "critical role of a proper and complete record in facilitating meaningful appellate review").)

Judge Gordon's factual predicate for denying Sanger's request for preservation - that the State Bar would surely make the materials available upon request of the Supreme Court - was clearly mistaken in light of the expiry of the five-year preservation mandate of Bus'n. and Prof. Code

§6080 *at the end of 2007.*[212]

Judge Hill cited the admonition of *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585, that record correction not be used "to create proceedings, make records, or litigate issues which they neglected to pursue earlier," to deny reconsideration Judge Gordon's decision to quash the subpoena. Yet, this situation was far closer to *People v. Galland* (2008) 45 Cal.4th 354 in which remand was ordered to clarify and augment the record than it was to *Tuilaepa*, in which there was nothing in the first instance to reconstruct.[213]

In *Galland*, this Court observed that the magistrate erred in permitting the police department to retain custody of the original sealed search warrant affidavit. Appellate review of the warrant was not irrevocably compromised only because a duplicate affidavit had surfaced. This remanded the matter "to enable the superior court to conduct a full hearing to reconstruct or settle the record as to the missing original sealed search warrant affidavit and augment the record accordingly." *Galland*, 45 Cal. 4th at 372-373.

Had Judges Gordon or Hill reviewed the records and denied disclosure, this would have been an easy case under *People v. Mooc* (2001) 26 Cal. 4th 1216 for augmentation and certification of the records to this Court. *See id.* at 1228 ("without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent"); *People v. Barnard* (1982) 138 Cal. App.3d 400 (where trial court reviewed a Drug Enforcement Agency file *in camera* but did not preserve it, appropriate remedy on appeal was for trial court to certify the DEA-file as accurate and transmit it to the court of appeal).

212/ Judge Hill's Order requiring the State Bar to preserve any extant records does not equate to augmentation of the record for this Court's review.

213/ "The function of the augmentation procedure is to supplement an incomplete but existing record, and the rule is to be construed liberally." *People v. Brooks* (1980) 26 Cal.3d 471, 484, citations omitted.

Yet, without the availability of the records, this Court cannot assess the merits of Appellant's claim that the Superior Court erred in denying his motion to compel, or the prejudice of any error. Under these unusual circumstances, augmentation with the records under seal balances appellant's right to a meaningful appeal and the State Bar's privilege. *Mooc,* 26 Cal. 4th at 1231; *see also Ritchie,* 480 U.S. 39 ("Ritchie is entitled to know whether the CYS file contains information that may have changed the outcome of the trial had it been disclosed."). The appropriate remedy in this case under *Barnard, Mooc, Galland* and *Ritchie* is a remand to Judge Hill with leave granted for Appellant to re-issue the subpoena to the State Bar for records of Cheri Ann Owen, State Bar No. 201893, and with direction to Judge Hill to review the records *in camera*, to augment and transmit to this Court the certified record with material records and an index of any documents withheld, and leave for the parties to submit further briefing, if warranted by such augmentation, on the merits of the underlying *Fosselman* claim, to which such records relate.

XIV. THE SUPERIOR COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND EIGHTH AMENDMENT RIGHTS OF DUE PROCESS, COUNSEL, AND RELIABLE SENTENCING BY DENYING HIS MOTION FOR A NEW TRIAL

A. INTRODUCTION

The Superior Court violated Appellant's Fifth Amendment right to due process and Sixth Amendment right to counsel, as well as California statutory law (Cal. Penal Code §1181), by denying his motion for new trial without a hearing on well-pleaded and documented facts that told the unusual, astonishing and bizarre tale of mis-representation at trial by Cheri Owen, who was by that time no longer a member of the California Bar.

Appellant's claim on appeal raises important questions of first impression about the role of §1181 as a due process bulwark when fundamental trial errors are unearthed, if only partially, *before* entry of judgment. The requirement of the *prima facie* case before counsel can be

discharged, *People v. Marsden*, which is no less after than before or during trial, ensures that §1181 motions raising constitutional rather than non-statutory grounds does not become a pre-habeas habeas, or that ineffective assistance claims can, or will be raised at the pre-judgment phase of every case. Yet, when such error surfaces, and in surfacing, appears to be only the tip of the iceberg, the trial court has a solemn duty to inquire, and to act, rather than pass the buck to the appellate court, or beyond, to some future habeas proceeding, many years and thousands of dollars and procedural safeguards away. This case stands for the important proposition that, in the context of a §1181 *Fosselman* motion which makes a *prima facie* case of ineffective assistance of counsel, the Superior Court must hold an adversary hearing, at which the defense is entitled to question former counsel under oath; the Superior Court must find facts and give reasons for granting or denying the motion that comport with the current state of the law on the duties of effective counsel in capital cases.

In *People v. Knoller* (2007) 41 Cal.4th 139, this Court found an abuse of discretion and remanded to the trial court for reconsideration of appellant's new trial motion on the correct standard of law and without consideration of an impermissible factor. This case invokes the same principles at stake in *Knoller*. Reversal and remand for a hearing and reconsideration is appropriate under the correct standards of law and without consideration of an impermissible factor.

B. STATEMENT OF FACTS

1. Background

The February 27, 2002 date set for formal sentencing presented the Superior Court with an unusual twist: Cheri Owen, appellant's lead attorney, had resigned from the State Bar with disciplinary charges pending (6 CT 1590-1591). Then, on May 15, 2002, after continuance of sentencing, appellant brought a *Marsden* motion against Richard Crouter, originally his *Keenan,* but by this point his sole remaining counsel, for failures to communicate about the case, a motion the Superior Court granted

provisionally, subject to appellant's retaining a new lawyer.[214] On June 6, 2002, the Superior Court relieved Crouter and Bob Sanger appeared as counsel of record (6 CT 1667).

On September 5, 2002, Sanger filed what he styled a "supplemental memorandum" along with 14 expert and witness declarations and/or exhibits in support of appellant's motion for new trial (hereafter "new trial motion"), raising the new claim of predecessor counsels' conflicts of interest and ineffective assistance (7 CT 1855-1964).[215] On December 16, 2002, Sanger filed a "second supplemental memorandum" in support of the new trial motion, with 15 more expert and witness declarations, including a sworn statement by Crouter in regard to the trial representation (8 CT 2222-2334). On January 31, 2003, appellant filed his reply in support of new trial motion, with a hearsay statement by Owen that she did not interview witnesses because she felt the police investigation was thorough (9 CT 2436-2453, Bobette Tryon Dec.). Owen herself was not a declarant for either party.

Appellant moved for a hearing at which he could present Owen and Crouter as adverse witnesses on the conflict and deficient performance issues, and call his experts on newly-discovered mental state evidence.[216]

214/ The Superior Court thereby avoided having to make findings on Owen and Crouter's conduct as would warrant at that juncture the appointment of new counsel.

215/ Crouter had raised the *Danis* and several other issues in a motion for new trial filed before his discharge. Sanger moved to compel the State Bar to release Owen's case file, which the Superior Court denied, an issue raised as error on appeal *infra*. Sanger also moved to modify appellant's sentence under §190.4(e), and to strike the death penalty as disproportionate or as unconstitutional under international law. The Superior Court denied these motions.

216/ Appellant argued in the alternative that his *prima facie* evidence cast doubt on the verdicts sufficient to warrant a new trial, without resolving conflicts with the prosecution experts (9 CT 2437, 2446). Appellant never agreed that the Superior Court could dispense with the need for a hearing altogether, make adverse credibility determinations and assumptions, or indulge presumptions of competency in the face of

Appellant issued a subpoena to compel Owen's testimony at the hearing (8 CT 2115, 2125), obtained §987.9 funds (from Judge Anderson, not Gordon) to secure his experts for testimony at the hearing (8A CT 2201, 2209), and requested leave to call witnesses. On September 10, 2002, Sanger issued subpoenas duces tecum to Owen and Danny Davis, her investigator, for their testimony on the new trial motion, and for compliance with the pending records requests (11 RT 2476). The Court did not maintain copies of these subpoenas, which could not be located for inclusion in the certified record on appeal.

Appellant's supplemental papers and evidence raised the following issues of contested fact which required a hearing to resolve, if the Court were not persuaded to grant relief on the basis of the submitted evidence.

2. Conflicts of Interest

a. Life-Story Rights

By agreements dated February 12, 2002, attorney Owen obtained an "exclusive grant" of *any and all* of appellant's rights to his entire personal background and his criminal case, and *any and all* rights regarding any literary or media individuals or entities (6 CT 1685) (hereafter "life-story rights"). Owen also obtained Appellant's express waiver of attorney-client privilege so she "may speak and write about his personal background and criminal case in Santa Barbara" (6 CT 1686). Both agreements were in flagrant violation of American Bar Association canons of professional ethics, and rules of professional conduct.[217]

In his new trial motion, Appellant submitted Owen's life-story rights agreement and the waiver of attorney-client privilege (6 CT 1685), Crouter's declaration that had he known of the life-story rights agreement, he would have advised Owen to withdraw from the case (8 CT 2309), and a

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compelling evidence to the contrary, and deny a new trial.

217/ The agreements created a conflict of interest for multiple reasons. Noticeably absent, any mutuality of consideration; any advice of independent counsel or waiver.

Strickland expert, Steve Balash's declaration that Owen's agreement violated *per se* norms of conflict-free counsel and tainted the representation *ab initio* (8 CT 2285).

People v. Corona (1978) 80 Cal.App.3d 684 established that life-story rights agreements were inherently prejudicial, and *per se* unethical, because it vests the attorney with a financial stake in the loudest, rather than the best outcome for her client. Balash opined that Owen had a strong economic motive to bring the case to trial because it would increase the visibility of appellant's life-story (which she "owned"), rather than resolve it by plea bargain (8 CT 2286). He added that Owen would not have qualified for appointment in a capital case and was facing charges with the State Bar, yet took the case anyway. Why? Most plausibly, it was a money-grab to publicize and profit from appellant's life-story. Owen announced ready for trial on October 4, one week *before* Crouter was appointed *Keenan* counsel. Had he known about the life-story rights agreement, Crouter would have told Owen to withdraw from the case. Based on Balash's review of her case file, Owen had not done anything to prepare for penalty phase before October 4.

The prosecution conceded that Owen's life-story rights agreement was inappropriate, yet maintained it was benign (8 CT 2344).
Unlike *Corona*, the prosecution argued, the appellant had not presented evidence that Owen contacted a literary agent, wrote a book, or waived a psychiatric defense because of the book deal (8 CT 2344).

The Superior Court took no evidence on any of these issues: What was the effective date of the agreement? Did the February 12, 2002 signing memorialize an understanding of the parties *ab initio*, or was it the final act of an attorney on her way out of the case, and the profession? What steps did Owen take to capitalize on the value of the life-story rights agreement during the representation? What influence did the life-story rights deal have on the significant decisions, and omissions, of her defense: failing to continue trial, object to cameras in the courtroom, or move venue from Santa Barbara, the epicenter of publicity about the case; calling appellant to

testify, thereby waiving attorney-client privilege as to the version of events he gave; failing to prepare or present a psychiatric defense to the confession, to Hollywood's domination of appellant's every move, and to his degree of liability for the crimes? Was the conflict structural, or if a showing of prejudice were required, did appellant meet the test? At the time, did Crouter align himself with Owen, such that the conflict should be imputed to both attorneys?

b. Informant

Appellant sought Owen's state bar file to prove she was an informant to the Office of the Los Angeles District Attorney at the time of his trial, in flagrant violation of her duty of loyalty. Appellant's *prima facie* case was that Owen had negotiated a voluntary resignation from the State Bar with charges pending, at the same time the Los Angeles District Attorney was investigating Owen's former employer for fraud.

Owen moved to quash the subpoena on grounds which only buttressed appellant's *prima facie* case that an informant relationship existed. She averred that the return on the subpoena would prejudice ongoing investigations by the State Bar *and the Los Angeles County District Attorney, whom she was "assisting in ongoing criminal investigations," and that she might be placed in physical danger if her cooperation became known* (8 CT 2172).[218] The Superior Court did not take testimony on these issues: what was the timing, nature and extent of Owen's activities as an informant for the Los Angeles District Attorney?; did Owen pull her punches as appellant's advocate to stave off disbarment or criminal fraud charges; was appellant's case prejudiced as a result? Was the conflict structural, or if a showing of prejudice were required, did appellant meet the test? At the time, did Crouter align himself with Owen, such that the conflict should be imputed to both attorneys?

218/ The State Bar opposed the motion on the ground that its interest in the "integrity of disciplinary process and confidentiality of informants" trumped the appellant's right of access as a mere "private litigant" (6 CT 1725).

3. Deficient Performance

The defense presented evidence that Owen and Crouter performed deficiently at guilt and penalty phase, which resulted in the withdrawal of meritorious defenses, in all the following respects:

a. Inexperience

By way of background, Owen was admitted to the California Bar in June 1999, barely one year before she was hired by appellant's grandmother to be lead attorney in this case; she had *no* murder (much less capital murder) case experience of any sort (8 CT 1824, 1875). At that time, California Rule of Court 4.117 required that appointed lead counsel in a capital case have at least ten years experience in criminal litigation, prior experience in at least ten felony cases, two murder cases, and 15 hours of capital case training. A complete neophyte, Owen fell far short of that criteria.

Co-counsel Crouter was appointed to the case just five days before trial, yet he had no capital experience either, though no continuance of the trial date was sought, or waiver of the minimum qualifications requirement by appellant obtained (8 CT 2308).[219]

b. Diversion of Section 987.9 Funds

The defense presented *prima facie* evidence that Owen fraudulently misappropriated Santa Barbara County funds, which was offered as one of several explanations for her lack of preparation for trial. On October 11, 2001, three weeks before trial, the Superior Court granted Owen's request for $85,000 in ancillary funds for Crouter ($40,000), Dr. Kania ($25,000), and an investigator Danny Davis ($20,000) (15 CT A 4216-4218; 6 CT 1799). The only third-party bill submitted to the County was $14,759 by Dr. Kania (6 CT 1788). Owen obtained the rest of the money, including a

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219/ The Superior Court did not make any inquiry of Owen's qualifications or take a waiver from appellant. Appellant makes the point not because Rule 4.117 applied *per se* to retained counsel, but simply because Owen and Crouter were novices, unworthy of the presumption of reasonableness that attends qualified counsel's performance.

final disbursement of funds sought two days *after* her resignation from the Bar, which was an *ultra vires* act since she was no longer authorized to file papers as appellant's attorney of record (6A CT 1588).

Owen directed her investigators Davis and Zeliff to divert §987.9 funds to pay debts on other cases they had with her, which they did, in violation of the funding statute (8 CT 1824, 1875). Owen did not account for $65,000 of §987.9 funds disbursed to the case, or contradict Davis and Zeliff's sworn statements that money was diverted for purposes unrelated to the defense of this action.

c. Lack of Preparation

Owen told Davis there was little guilt phase work to be done because of the confession (7 CT 1818). She said they didn't need to prepare for penalty because "there wouldn't be a penalty phase", and instructed Davis and Zeliff not to speak with appellant or any witnesses (6 CT 1788; 7 CT 1813, 1816, 1819). According to appellant's aunt Anne Stendel, Owen said not to worry about penalty phase because appellant would "be home by Christmas," and "you don't have the money for a penalty phase anyway" (8 CT 1875). After trial, Owen contended that no investigative work was done because of the "thoroughness of the police investigation," an absurd *non sequitur* from the mouth of any criminal defense attorney charged with the responsibility of putting the prosecution case to the "crucible of adversarial testing." Crouter conceded that "if it was not presented at penalty phase, he did not know about it" (8 CT 2313). In mid-October, 2001, just two-weeks shy of trial, Owen expressed surprise the prosecution had decided to seek the death penalty. Her surprise was not well-founded; the case was death-eligible upon Indictment (11 RT 2529). The special circumstance allegation required competent counsel to prepare a viable mitigation case, from the outset. See e.g., *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003 (holding that a murder case in which special circumstances are alleged is a "capital case" within the meaning of §987.9, unless and until the prosecution expressly indicated the death penalty would not be sought). The evidence Sanger presented made at least a *prima facie*

showing that this they did not do.

Owen and Crouter's case file was described as minimal and meager, and did not contain any trial notes, legal research, witness files, lists of jurors, appellant's police interview, or police interviews (6 CT 1788), all of which would have been the stock-in-trade of a competent defense work-up.[220] Davis and Zeliff's case files were also truly minuscule, consisting of only five witness interviews between them (6 CT 1788). According to jail logs, Davis visited appellant in custody twice, on August 2, 2001, for 24 minutes, and on August 29, 2001, for 17 minutes (8 CT 1926). Thus, the record compiled in connection with the new trial motion demonstrated that minimal guilt and penalty phase preparation in fact was done.

d. Newly-Discovered Brain Damage

The defense presented at least a *prima facie* case that Owen and Crouter failed to make reasonable investigations into the availability of a meritorious *mens rea* defense and mitigation or to make a reasonable decision that made such investigations unnecessary. Alternatively, the evidence was presented as newly-discovered evidence material to appellant under Penal Code §1181(8).

i. Dr. Kania

In early October, 2001, on the eve of trial, Owen retained a psychologist Dr. Kania, but only to answer a narrow referral question, to assess the possible falsity of Appellant's confession. Dr. Kania testified that he was *not* asked to consider or render any opinion on Appellant's mental state or mental health. No medical history or records were provided.[221] No consideration was given to Appellant's *prima facie*

220/ The case file was produced under subpoena and only after repeated orders to show cause and a body attachment on Owen, and no question was raised as to whether portions were withheld (7 CT 1708-18, 1728-31).

221/ As argued *infra*, the Superior Court assumed, without any factual support, that Dr. Kania did not ask Owen to provide him with any medical records. The Superior Court ignored governing law that imposes

showing that the referral itself was so narrow as to breach professional norms in the defense of a capital crime. Notably, at the October 16, 2001 hearing on the prosecution's *Danis* motion, just days after his appointment, Crouter told the Superior Court there was *no evidence* of any mental illness or low IQ (1 RT 2A A-53). This was both unfounded and untrue.[222]

ii. Medical records

In fact, newly-discovered evidence not presented to the jury established that Appellant had suffered a series of physical traumas in early childhood, which were documented in hospital records and witness accounts. Vicky Hoyt went into premature labor with appellant, after being kicked in the stomach by her husband Jim. At three months age, Appellant was dropped on his head. At six months, Appellant was hospitalized at Tarzana Medical Center for six days, with high fever, convulsions, and breathing difficulty. At two and a half years, appellant was again hospitalized for viral fever (7 CT 1962). He was hospitalized after accidents at Tarzana, West Hills and Kaiser Permanente Hospitals (7 CT 1827).

iii. EEG-Test Results

Appellant's EEG-test (administered post-trial in connection with Sanger's new trial motion) was interpreted by a non-party expert, Dr. Phillip Delio, a Santa Barbara neurologist, as abnormal in ways that typically affect cognitive judgment, memory, perception, and affect (8 CT 2274). The finding was consistent with an organic brain disorder called encephalopathy. Owen did not retain a psychiatrist, a critical failing. Nor did she recognize or make use of the exculpatory value of

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an affirmative duty on counsel to discover such evidence for penalty phase defense.

222/ In a similar vein, Owen argued to the jury that appellant did *not* suffer brain damage. Moreover, Dr. Glaser, the prosecution's expert, disparaged Dr. Kania's testimony as implausible precisely because of the absence of any evidence of brain damage. Thus, the issue was joined at trial, but in a manner that belied the truth and severely prejudiced appellant.

neuropsychological findings of Dr. Dana Chidekel, the prosecution expert.

iv. Neuropsychological Testing

Unbeknownst to the jury, Dr. Chidekel had assessed that Appellant suffered specific right hemisphere and frontal lobe brain impairments which significantly increased his impulsiveness, poor judgment, and extreme dependency. Appellant had a full-scale IQ of 73, which placed him in the bottom 4th percentile; performance IQ of 68 (2nd percentile), his reasoning, ability to comprehend, and memory were limited; his attention span was within the bottom 7th percentile; when stressed, he had poor impulse control and limited frustration tolerance (8 CT 2393). He had difficulty organizing information, and was reliant on others for direction *because of* his impairments; he had specific deficits in right brain hemisphere and frontal function. This evidence was highly significant in itself (after all, its source, a prosecution expert, was impeccable). Dr. Chidekel explained Appellant's submissiveness to Hollywood as, in a basic sense, involuntary, a mode of adaptation by someone with substantial deficits, rather than his sovereign choice or a reflection of premeditation and deliberation. Dr. Chidekel explained that Appellant had difficulty understanding the ramifications of his actions, and his deficits could make him more susceptible to accept Hollywood's assignment to kill. Even if Dr. Chidekel was also correct that Appellant understood the essential nature of the act of killing another human being (8 CT 2388), this would not in itself make a case for first, as opposed to second degree murder or manslaughter. In other words, Dr. Chidekel was a pivotal witness whose testimony would have tended to show Appellant's reduced culpability and mitigation factors of substantial domination and mental deficit. Owen and Crouter simply missed it.

v. Dr. Globus

Owen did not retain a psychiatrist, a crucial failing. By contrast, in the new trial motion, the defense submitted a declaration of Dr. Albert Globus, a psychiatrist, who had the benefit of medical records, witness accounts, EEG- and neuropsychological test results. Dr. Globus opined that

Appellant's abnormal EEG-test result was proof of longstanding organic brain syndrome, consistent with hospital records *and* with Dr. Chidekel's findings (8 CT 2276). Dr. Globus theorized that any one of five events in Appellant's social history could have caused his brain disorder, none of which were conveyed to the jury. Appellant's brain injury contributed to his profound dependency and compliance with Hollywood, whom he perceived to be an authority figure (8 CT 2282).

Dr. Globus regarded these events as significant in Appellant's social history, which were confirmed in hospital records and family witness declarations: skull fracture he suffered as an infant, Vicky Hoyt believed he also suffered a clavicle fracture from Jim Hoyt's physical abuse; on another occasion, he suffered febrile seizures and turned blue, and was hospitalized for dehydration following viral infection; his gastroenteritis was of unusually long duration. "These multiple events are remarkable in a young boy's life and give rise to the suspicion of abuse and neglect." In addition, appellant's family history abounds with psychiatric disorders predisposing him to depression, anxiety and drug abuse, and unusual dependency (8 CT 2222, 2243-2267, 2269, 2318-2320).

vi. Social History

The defense argued in its new trial motion that Owen's failure to prepare a social history or present its significance through a qualified expert to explain appellant's behavior was *per se* deficient performance at penalty phase (8 CT 1865). *See e.g., Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1225-1227. Dr. Wendy Saxon, a mitigation specialist, observed that under prevailing professional standards, neuropsychological testing *must be done* whenever the appellant is young, and brain damage if present *must always be presented* to the jury (7 CT 1934). Dr. Saxon opined that Owen violated *per se* norms of the legal profession in regard to the penalty mitigation case.

e. Withdrawal of Best Defense and Mitigation

The gist of the new trial motion was that Owen was deficient for failing to uncover and present this medical evidence as *the* best defense to

premeditation and deliberation, and *the* most compelling showing of mitigation under §§190.3(a) (circumstance of the offense), (d) (extreme mental disturbance), (g) (substantial domination of another), and (h) (impaired capacity to conform conduct to requirements of law due to mental disease or defect) (9 CT 2403, Dr. Globus's opinion and explanation how Appellant was substantially impaired in his capacity to reason and weigh consequences of actions).[223] The defense argued that Owen overlooked the significance of Appellant's history of head injury and febrile seizures, and brain damage, as an explanation of his criminal conduct (8 CT 2322). Dr. Kania's guilt phase testimony did not begin to fill that yawning gap, because he spoke only to the possible falsity of the confession, without consideration of Appellant's elaborately documented brain injury and cognitive impairments. In short, at no time did the jury hear any expert analysis of Appellant's medical history, brain injury, and its probable consequences for the behavior at issue. Appellant's *prima facie* evidence (Drs. Chidekel, Delio, and Globus, neuropsychological and EEG-test results, hospital records, family member declarations) demonstrated a substantial likelihood of proof within the *Strickland* framework.[224]

By comparison, Owen presented an ineffectual mitigation case consisting of family witnesses, who while offering tidbits of Appellant's

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223/ The defense argued that this presentation of appellant's organic brain disorder, as it related to Hollywood's absolute dominion over him, could have resulted in a second degree murder or manslaughter verdict, and a compelling case in mitigation of penalty.

224/ Sanger argued that Dr. Kania was hired one week before trial and had no opportunity to do a "proper work-up", and that Dr. Chidikel supports Dr. Globus's opinions:

> Bottom-line is that new stuff came out, including organic brain damage, and to say that Mr. Hoyt had a fair trial where his counsel had *no clue about any of this and proceeded with a defense, whatever it was,* doesn't answer the question of whether or not he was prejudiced. He was prejudiced under the meaning of law.
>
> (11 RT 2541-2542.)

chaotic home-life, could not and did not link his background to his conduct. Nor could they offer perspective such as a qualified medical expert provides, to explain Appellant's brain disorders which impaired his judgment and perceptions, even as to those linch-pin elements of premeditation, driving to Santa Barbara and carrying out Hollywood's fatal plan.

Alternatively, if Owen were not at fault for missing this evidence, then by definition it was newly-discovered evidence which could not, with reasonable diligence, have been discovered and produced at trial. *See* §1181(8).

f. Failure to Challenge Voluntariness

Dr. Richard Ofshe, a defense psychologist, opined that appellant's cognitive defects made him particularly vulnerable to interrogation tactics, a line of attack Owen did not pursue (8 CT 2331). Drs. Globus and Chidekel agreed that "Appellant is *prone to* brief reactive psychosis when social demands become inescapable." Individuals with personality disorders *may occasionally* become psychotic. Thus, a dis-associative episode *may have* contributed to Appellant's behavior in claiming responsibility to the police. The new trial motion challenged Owen's failure to put these facts before the Superior Court in its determination that Appellant's confession was voluntary (11 RT 2533). In addition, Steve Balash opined that Owen acted unreasonably in calling Appellant to testify in light of the Superior Court's rulings admitting the confession as direct evidence (Side "A") and impeachment (Side "B") (8 CT 1931). No competent counsel would have chosen a defense based on this tenuous reed.[225]

The prosecution countered that Owen's choice of an actual innocence defense at guilt and his presentation at penalty were adequate, and inconsistent with his newly-discovered evidence of brain disorder (8

225/ The new trial motion alleged that Owen made this decision to further her proprietary interests in Appellant's life-story, and effect a waiver of his privilege against self-incrimination, so she could safely comment upon it.

CT 2359).[226] The prosecution did not attempt to justify Owen's lack of preparation, or failure to uncover the evidence, except by disparaging its validity. Dr. Richard Lowenthal, a prosecution neurologist, was unimpressed by the EEG-test result, controverting Drs. Globus and Delio (8 CT 2356, 2385). Dancing lightly around the bombshell that was its own expert Dr. Chidekel, the prosecution cited her findings to make the limited point that Appellant's newly-discovered brain injury did not prove his claim of amnesia.[227]

Dr. Glaser, the state's trial psychiatrist, declared that Appellant's "genetic and environmental factors, if true, *would not preclude him from being aware of the significance of his actions, either in killing or confessing* (9 CT 2401, emphasis added). Yet, Dr. Glaser's standard itself did not preclude, indeed was consistent with, a lesser-included defense to the premeditation and deliberation element of first degree murder, and with the existence of circumstances in mitigation of a capital crime under Penal Code §190.3. What's more, the phrase "did not preclude" nearly concedes the point, that a reasonable doubt of such awareness was demonstrated by the evidence of appellant's brain trauma and lesion. Moreover, Dr. Globus focused exclusively on the nebulous term "awareness" rather than on the combination of senses - judgment, impulsiveness, memory, perception - that Drs. Globus, Delio and (most significantly) Chidekel - found were substantially impaired as appellant performed those actions which were the linchpin of the prosecution's case, driving to Santa Barbara with the TEC-9 gun, accompanying Rugge and Pressley to Lizard's Mouth, and shooting the

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226/ The prosecution found the mitigation case, based upon "heartfelt testimony of [Appellant's] dysfunctional family and non-violence" (8 CT 2355), adequate to satisfy constitutional norms, though it offered no explanation or link between Appellant's disorder and biologically-based subservience to Hollywood, and the murder itself.

227/ The defense did not contend otherwise.

victim in a single burst at Pressley's pre-selected grave-site.[228]

g. Material Questions of Fact and Law Raised by Appellant's Motion

Appellant's new trial motion raised at least these 18 determinative questions of fact and law:

A) Was Owen's October 4, 2001 referral to Dr. Kania to assess the possible falsity of appellant's confession without making any mental health diagnosis too narrow in focus, and too close to trial, to meet professional standards of reasonableness?

B) Whether Owen's narrow referral basis to Dr. Kania precluded him from having any reason to request that Owen provide him with medical records of Appellant, recommend neuropsychological or EEG-testing, or consultation with a psychiatrist?

C) Notwithstanding his limited referral, did Dr. Kania actually request that Owen provide him with medical records of Appellant, to recommend neuropsychological or EEG-testing, or consultation with a psychiatrist, none of which tasks Owen performed?

D) Whether Owen's choice of defense was sufficiently well-informed to meet professional standards of reasonableness, in light of the newly-presented evidence of Appellant's organic brain impairments?

E) Whether Owen acted unreasonably in raising the legal ground, but failing to present readily-available and persuasive medical evidence in support of the motion to suppress Appellant's confession as involuntary, due to psychological coercion?

228/ At Pressley's retrial, the prosecution presented Dr. Chidekel's finding of appellant's defects in spatial-visual memory as evidence that he (appellant) could not make his way up and back the Lizard's Mouth trail at night without Pressley literally guiding him at every step of the way, a version of events fully in line with appellant's new trial motion, and fully at odds with the prosecution's presentation at appellant's trial. By separate motion, Appellant asks this Court to take judicial notice of the Evid. Code §402 hearing transcript of Dr. Chidekel's testimony held in *People v. Pressley*, on November 7, 2002, and to apply principles of jucidial estoppel to consider it for the truth of the matters asserted herein.

F) Whether Dr. Globus and Chidekel's findings that Appellant suffered organic brain impairment which affected his thinking, judgment, memory, impulsiveness, and vulnerability to authority, would have defeated the prosecution's burden to show voluntariness.

G) Whether a *mens rea* defense based on Appellant's organic brain impairments, dependent personality disorder, and extreme vulnerability to Hollywood, was a more viable and meritorious defense to first degree murder, and a more viable and meritorious theory of mitigation than Owen's choice of defense, assuming the two defenses were in fact mutually inconsistent?

H) Whether Owen's performance at guilt or penalty phase was deficient *per se* for failing to elicit strong exculpatory evidence from a neuropsychologist along the lines of prosecution expert Dr. Chidekel's findings that Appellant suffered from substantial cognitive impairment?

I) Whether Owen met the standard of reasonableness in her counseling and preparation, if any, of Appellant's testimony at guilt phase, and decision not to testify at penalty phase?

J) Whether Appellant's decision to testify was knowing and informed, and based upon advice of counsel, or contrary to it?

K) Whether Owen met her legal duties to investigate and present available mitigation, including Appellant's organic brain impairments, dependent personality disorder, and extreme vulnerability to Hollywood, and its significance in terms of how his impaired thinking and judgment, impulsiveness, mis-perceptions, and reaction to stress affected his behavior and conduct?

L) Assuming Owen's decision not to investigate Appellant's medical history was reasonable, whether Appellant's evidence of organic brain impairments qualified as "newly-discovered" within the meaning of §1181(8)?

M) Whether Appellant's newly-presented evidence of organic brain impairment, and the expert testimony of Drs. Globus and Chidekel in particular, satisfy the *Strickland* standard for establishing prejudice?

N) What acts or omissions of the defense were affected by Owen's acquisition of the exclusive right to exploit Appellant's life-story for commercial purposes?

O) When and how did Owen serve as an informant for the Los Angeles District Attorney, and what acts or omissions of the defense were affected?

P) Did the prosecution gain any evidence or confidential information regarding defense plans through Owen's relationship with a coordinate prosecuting agency?

Q) When did Owen tender her letter of involuntary resignation to the State Bar, and did the terms of her resignation include immediate cessation of the practice of law, and notification of the Court and parties?

R) Whether Owen's conflict of interest should be imputed to co-counsel Crouter, who took no action to inform the Court or Appellant until the date set for sentencing?

To be sure, these were unusual questions to be put to the Superior Court, yet there they were, squarely presented on the singular facts of this case. As described below, the Superior Court disposed of the new trial motion without taking evidence on any of these 18 critical questions, despite the strength of appellant's *prima facie* case. As explained *infra*, the gist of appellant's claim on appeal is that a remand to the Superior Court to take evidence and resolve this controverted questions of material fact is necessary to a just resolution of the motion for new trial, and to provide guidance in future cases which may arise from time to time in which similar issues of attorney malfeasance are raised at the comparatively early trial stage.

4. Superior Court Rulings

a. January 16th Prejudgment

On January 16, 2003, the date set for hearing on the new trial motion, the Superior Court granted a three-week continuance to February 7, so the defense could respond to the three prosecution expert declarations

(Drs. Chidekel, Glaser, and Lowenthal) filed three days earlier. Judge Gordon, who had by then retired from the bench but was sitting *ex officio* on this, his last case, reset the hearing and sentencing date for February 7, with the following observations, which reflected a predetermination of the outcome of Appellant's new trial motion:

> THE COURT: *Well, I'm sure that everyone concerned with this case would like to see it move on. I would. I came back on assignment to deal with this.*
>
> But the material which was submitted, I don't know how necessary it is to respond in detail to it since *I'm not sure that we'd ever get to the kind of – the necessity of having to resolve any conflict that is information in a motion for new trial.* But it is extensive, it does raise issues which are responsive to some of Mr. Sanger's assertions here. *And I think it's important in a case like this to have the record complete so that whoever wishes, the defense wishes on appeal, which it will appeal, automatic appeal, everything that's necessary for the Appellate Court to deal with the issues there.*
>
> So, I'm going to go ahead and continue this until February 7th. I suspect, Mr. Zonen, that it won't be necessary for you to file any responses to what he's filing.
>
> (11 RT 2522-2523, emphasis added.)

b. February 7th Summary Denial

At the outset of the February 7, 2003 hearing, Judge Gordon said he would only permit the parties to "make a summary of what your point is," without addressing the need to resolve disputed, or simply unanswered, issues of fact, or Appellant's right to call Owen as an adverse witness or his own declarants to bolster his *prima facie* case for granting a new trial (11 RT 2527).[229]

Judge Gordon apparently conceded that Owen's life-story rights

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229/ This was not invited error, but an instance of swallowing the bitter pill among limited options. *See e.g.* 11 RT 2527 (Mr. Sanger: "Thank you, your Honor. I think that of the choices your Honor gave us there I think a summary is probably most apt.")

agreement posed a conflict of interest under the ABA canons and California Rules of Professional Conduct. Yet, he dismissed the issue as inconsequential, because he couldn't find a "cause" and "effect" relationship, and *"none has been shown to me."* Of course, Owen was not an available witness except by compulsory process, which did not occur, due to the Superior Court's perfunctory interpretation of the hearing requirement in this context.

Judge Gordon similarly dismissed the defense assertion of Owen's fraudulent diversion of funds:

> *I guess I have to assume for the sake of the argument that she may have overreached in her retainer arrangements, . . .* it might be grounds to discipline Miss Owen, but I don't -- *I can't see anything in that that tells me that that translates into incompetent representation,* unless we're going to try to establish some presumption, and I don't think the cases say there's a presumption of incompetence flowing simply because of allegations of misconduct of that kind.[230]
>
> (11 RT 2548-49)

In essence, Judge Gordon concluded that appellant had failed to show prejudice because Owen had not voluntarily conceded it which he wrongly construed as a "presumption" of conflict-free representation (11 RT 2548).

Judge Gordon proceeded to deny appellant's new trial motion essentially because trial evidence of premeditation and deliberation was not dislodged to his satisfaction by any newly-discovered evidence that Appellant was under the influence of drugs or alcohol during the planning,

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230/ The defense challenged Owen's deficient performance in a variety of ways not amenable to resolution on this record, but require the process of compulsory attendance of witnesses at a proper hearing on the new trial motion, *e.g.,* allegations of fraudulent diversion of funds, fraud upon the court in regard to a fraudulent waiver of the venue motion, default on the application for a writ of prohibition on the *Danis* issue, ill-conceived and ill-prepared testimony of Appellant, and prejudice from failure to present a panoply of mental state and mental health evidence available at the time.

driving or commission of the crime, or under an "immediate" mental or emotional disturbance that influenced his decision to kill (9 CT 2464, 11 RT 2542, 2557).[231] Judge Gordon speculated that Owen's choice of defense (false confession and Hollywood was the actual killer) was a more plausible fit for the confession than a *mens rea* defense based upon organic brain damage, and was therefore the better of the two.[232]

Separately, Judge Gordon pointed to the absence of a showing that Dr. Kania requested "this sort of information" which Owen failed to provide, which fatuously shifted to the defense the burden of proving its case by voluntary admission of Owen, an adverse witness, or by a third-party witness Dr. Kania, whom was under no obligation to speak with Sanger.[233] Also, Judge Gordon's off-the-cuff remark gloomed together three distinct, and significant, issues: One, an unresolved question of fact relevant to guilt phase performance, though not to penalty, being what information did Dr. Kania request, and did Owen provide it? Two, a mixed

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231/ In that sense, the Court adopted the prosecution's lampoon of the newly-discovered evidence: Dr. Kania's diagnosis (identical to the diagnosis of Drs. Chidekel and Glaser) was that Appellant suffers from only an avoidant dependent personality disorder. "What does that mean? He's the guy who goes to a party and wonders if anybody is going to like him" (11 RT 2537).

232/ Judge Gordon ignored Sanger's argument that Owen's choice of defense was uninformed, resting instead on the premise that the defense had not shown it was contrary to Appellant's wishes (11 RT 2554). He also ignored the defense argument that Owen's closing argument - whether or not it conceded that Appellant had no brain damage (an essential component of a false confession, according to Dr. Glaser) - was deficient *per se*, in light of the newly-discovered evidence in EEG and neuropsychological test results, and opinions of Drs. Globus, Delio and Chidekel. *See* 11 RT 2555 (construing Owen's argument as attacking Dr. Glaser's criteria without conceding the point).

233/ Judge Gordon stated, "there's no evidence from Dr. Kania, who was the Appellant's expert and *I assume has been available to the defense,* that he had requested or required this kind of information, or that he requested any information from the defense that was not provided to him" (11 RT 2555).

question of fact and law relevant to guilt phase performance but not penalty, whether the scope of Dr. Kania's referral (and qualified expertise) was so narrow as to preclude any consideration of organic brain impairments? Three, a mixed question of fact and law in regard to guilt and penalty, whether Owen met her duties to conduct a reasonably thorough investigation of avenues of defense and mitigation, or make reasonable decisions which rendered such investigation unnecessary, and with regard to penalty, whether she conducted a reasonably thorough investigation of potential mitigation evidence?

Judge Gordon added erroneously his two cents that Appellant *had* to testify to lay a foundation for any false confession defense, *see supra*, and that evidence of Appellant's subjective vulnerability to coercion was irrelevant to the legal issues governing admissibility of his confession: "*I don't think you need a psychiatrist or a psychologist to help with that. In fact, I think that probably would be irrelevant at that stage. So, I can't find any error in that regard*" (11 RT 2557).

Judge Gordon gave similar short-shrift to the issues relating to motion for new penalty trial, denying the claim on the ground that the newly-discovered brain damage evidence would not have been significant because its effect on Appellant's behavior was inherently speculative (11 RT 2575). In particular, he found no evidence Hollywood had a "Svengali-like component" which would override Appellant's ability to make rational decisions, since Appellant was not in Hollywood's physical presence for many hours before the crime (11 RT 2588). While purporting to give Appellant the benefit of the assumption the newly-discovered evidence was true, Judge Gordon essentially dismissed its relevance or insight into appellant's character and behavior:

> *How does that translate into . . . a mitigating circumstance to simply have somebody say this person has this kind of a mental deficiency, whatever it may be, recognizing that there apparently would be a dispute about that. But I understand that I'm not here to evaluate, to resolve disputes between potential expert witnesses that haven't even testified.*

> But I agree with the prosecutor that there's nothing in the information that's been presented here that tells me that there was some error that counsel failed to develop information that would have been significant in terms of extenuating circumstances. There's nothing about that. It's simply -- it comes the fact he had this brain damage and maybe that might have influenced him, *but there's nothing that pins that down, so we're speculating. And I'm not prepared to speculate that this -- that there was evidence that could have been presented that would have borne significantly on the issue of mitigation that should have been presented based upon what I've seen, because I don't see it.*
>
> (11 RT 2575.)

With that, Judge Gordon had done with Appellant's new trial motion and remanded him to death row.[234]

C. ARGUMENT

1. Legal Standards

Penal Code §1181(8) provides that when a defendant seeks a new trial based on newly-discovered material evidence, he "must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given." In addition to the eight statutory grounds set forth in §1181, this Court has added that a new trial may be granted on grounds of ineffective assistance of counsel, when necessary to protect defendant's constitutional right to a fair trial. *People v. Fosselman* (1983) 33 Cal.3d 572, 582-583. Simply put, justice is expedited when the issue of counsel's effectiveness can be resolved promptly at the trial level. "[I]n those cases in which counsel was ineffective, this is best determined early." *People v. Smith* (1993) 6 Cal.4th 684, 695.[235] Though no published decision

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234/ Judge Gordon also denied Appellant's §190.4(e) motion at the same time.

235/ Justice Baxter's position that the trial court should not consider *Fosselman* claims based on matters outside the personal observation of the trial judge, has never commanded a majority of this Court. *Cf. Smith*, 6 Cal. 4th at 697-705 (Baxter, J., concurring). In conducting a trial that accorded with due process, the constitutional

has so held, the due process rationale of *Fosselman*, and the Sixth Amendment right at stake, suggest that a new trial may also be granted where trial counsel had a conflict of interest.

The Superior Court's decision on the motion is reviewed for abuse of discretion. *People v. Cox* (1991) 53 Cal.3d 618, 694. An abuse of discretion arises if the trial court based its decision on 1) *impermissible factors, see People v. Carmody* (2004) 33 Cal. 4th 367, 378, or on 2) *an incorrect legal standard. Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436. *People v. Knoller* (2007) 41 Cal.4th 139, 156, the well-known San Francisco dog-mauling case, is an example of both; this Court reversed the trial court's granting of a new trial on second degree murder which was based on an inaccurate definition of implied malice and on an inappropriate consideration, the failure to charge the co-defendant with murder. This Court remanded the case for reconsideration of the new trial motion under the appropriate legal standards. *Id.* at 158-159.

The decision not to hear evidence before ruling on a new trial motion is also reviewed for abuse of discretion. An evidentiary hearing "'should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is *necessary to resolve material, disputed issues of fact.*'" *People v. Williams* (1997) 16 Cal.4th 635, 686 (emphasis added). A hearing in this context, akin to civil summary judgment, makes sense when defendant meets his burden of stating a claim upon which relief could be granted, along with affidavits which raise controverted issues of material fact. Appellant met this burden; the trial record did not resolve contested issues related to his representation. Appellant's right to be heard on the motion logically encompassed the right to challenge the credibility of his former attorneys and the prosecution rebuttal expert Dr. Glaser under oath.

In this case, Judge Gordon of the Santa Barbara Superior Court used improper criteria (his own retirement from the bench and the availability of

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principle underlying *Fosselman*, Judge Gordon had an obligation to hear "all" evidence in support of defendant's motion. *Id.* at 704.

appellate review) and multiple incorrect legal assumptions to deny the new trial motion, for which a remand for reconsideration, after a hearing, is the appropriate remedy.

2. The Superior Court Applied Incorrect Legal Standards to Deny Appellant's Motion for New Guilt Phase Trial

a. *Strickland* Analysis

Under the two-tier test set forth in *Strickland v. Washington* (1984) 466 U.S. 668, in order to prevail on his claim that Owen and Crouter rendered ineffective assistance at the guilt and penalty phases of his trial, Appellant must demonstrate 1) that counsels' performance was deficient; and 2) that the deficient performance prejudiced his defense. Regarding trial counsels' performance, the ultimate question is whether counsels' "representation fell below an objective standard of reasonableness." *Seidel v. Merkle* (9th Cir. 1998) 146 F.3d 750, 755, *cert. denied*, 119 S. Ct. 850 (1999).

Deficient performance may be shown by either 1) unreasonable acts or omissions which result in the withdrawal of a *potentially meritorious defense* (the *"Pope"* standard; or 2) failure to perform with reasonable competence (even if it does not amount to withdrawal of a defense). *People v. Pope* (1979) 23 Cal.3d 412, 425, *overruled on other grounds in People v. Berryman* (1993) 6 Cal.4th 1048, 1081 n.10, *overruled on other grounds in People v. Hill* (1998) 17 Cal.4th 800, 823, n.1; *Stewart*, 171 Cal.App.3d at 395. "It is sufficient . . . that the defense was potentially meritorious, and that appellant was denied an adjudication on the matter because of his counsel's inadequate factual and legal preparation." *People v. Shaw* (1984) 35 Cal.3d 535, 541 (*quoting In re Hall* (1981) 30 Cal.3d 408, 434). A crucial defense is not necessarily one that would result inexorably in appellant's acquittal. *Id.* at 541. Generally, counsel has a duty to make "reasonable investigations or to make a *reasonable decision* that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691 (emphasis added). "Reasonable" in this context means a rational and

informed decision founded on adequate preparation. *In re Jones* (1996) 13 Cal.4th 552, 565; *In re Fields* (1990) 51 Cal.3d 1063, 1069.

In particular, counsel had the duty to investigate carefully all defenses of fact and of law that may have been available. *In re Williams* (1969) 1 Cal.3d 168, 175. "To render reasonably competent assistance, an attorney bears certain basic responsibilities, including the investigation of available defenses and, in an appropriate case, the obtaining of a psychiatric examination." *Frierson*, 25 Cal.3d at 160–161. "In assessing the reasonableness of an attorney's investigation, ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith* (2003) 539 U.S. 510, 527.

By 2000-2001, there was a presumption by practice that the competent presentation of any *mens rea* defense all but required affirmative expert testimony to bolster that defense. *See e.g. Bloom*, 132 F.3d at 1270, 1278 (competent counsel at 1983 trial would have recognized that heat of passion defense needed a psychiatric expert witness). So, for example, in *People v. Frierson* (1979) 25 Cal.3d 142, 160, decided well before appellant's trial, this Court reversed a capital murder conviction on direct appeal where trial counsel had failed to present any expert testimony regarding defendant's mental condition or the effects of his drug use. The court observed that the resulting presentation to the jury was an "incomplete, undeveloped [] defense." *Id.* at 164. Similarly, in the landmark case of *Ake v. Oklahoma* (1985) 470 U.S. 68, decided long before appellant's trial, the United States Supreme Court recognized that a psychiatrist may well play a "crucial" role in presenting mental state defenses by explaining to the jury both the facts they have gathered themselves "through professional examination, interviews, and elsewhere" as well as their expert analyses of such facts. Indeed, medical experts are uniquely situated to offer "plausible conclusions about the defendant's mental condition and about the effects of any disorder on behavior," and to "translate a medical diagnosis into language that will assist the trier of fact

... in a form that has meaning for the task at hand." *Id.* at 1095.

Under Ninth Circuit law, at the guilt phase of a capital trial in which counsel has chosen to pursue *mens rea* defenses, counsel has the corollary duties 1) to provide "significant" or otherwise requested "readily-available" information to retained medical experts, *Bloom*, 132 F.3d at 1277-78, and 2) to obtain and, if favorable, to present those experts' opinions supporting the *mens rea* defenses. *See Smith v. Stewart* (9th Cir. 1999) 189 F.3d 1004, 1012 (recognizing duty to provide expert witnesses "essential information going to the heart of the defendant's case for mitigation"); *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1117 & n.5 (same).

On the issue of prejudice, *Strickland* requires a new trial if there is a "reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different but for counsels' errors." *Smith*, 189 F.3d at 1008 (*citing Strickland*, 104 S. Ct. at 2068). Prejudice may be shown "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, at 694; *Hoffman v. Arave* (9th Cir. 2006) 236 F.3d 523. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, at 686; *see also In re Visciotti* (1996) 14 Cal.4th 325, 352.

b. Mental Disorder Evidence

Penal Code Section 189 defines the mental state necessary for a first degree murder conviction as "willful, deliberate, and premeditated." In order to give effect to the Legislature's classification of murder by degree, California case law defined these terms as requiring a "preexisting reflection [] resulting from actual deliberation or forethought [as] a result of careful thought and weighing of considerations." *People v. Thomas* (1945) 25 Cal. 2d 880, 900-901. By contrast, this Court described the paradigm of second degree murder in phrases such as an "explosion of violence" or a "rash impulse hastily executed." *People v. Anderson* (1968) 70 Cal. 2d 15, 24-28; *People v. Smith* (1973) 33 Cal. App. 3d 51, 64.

A state of mind defense requires only evidence that would preclude a finding beyond a reasonable doubt that the appellant had the requisite intent (or other mental state) for the charged crime, in that appellant "did not act in the exercise of his free will." *People v. Petznick* (2003) 114 Cal.App.4th 663, 676. In addition, mental state evidence was admissible to show that appellant aided and abetted the underlying kidnap while under duress or the control and domination of Hollywood. *See e.g.*, *People v. Anderson* (2002) 28 Cal. 4th 767, 784 (recognizing duress as a viable defense to kidnap and kidnap-murder); *People v. Callahan* (2004) 124 Cal.App.4th 198, 207 n.3 (same).

By 2000-2001, expert testimony was admissible to show Appellant was vulnerable to forms of behavior which had the effect of subjecting him to the control and domination of Jesse Hollywood by threatened harm or loss of status or relationships, and through acts of shame, humiliation or degradation, and that such acts of abuse were likely to achieve Hollywood's aim of control and domination. Such evidence could consist of Appellant's developmental history and impairments which placed him at greatly heightened risk of entanglement, and that he lacked the necessary skills to recognize and counteract Hollywood's controlling acts. In short, expert opinion was admissible to show that Appellant could experience a restriction of behavioral options (even a seemingly illogical and irrational restriction that the average person would neither experience nor understand) as a result of his impairments, as a result of Hollywood's undue influence, intimidation, and control, even if such restriction of another person.

It was well-settled law in California in 2000-2001 that expert testimony and documentary evidence were admissible to show that "because of mental abnormality not amounting to legal insanity the appellant did not possess [the required] mental state at the time he committed the act." *People v. McDowell* (1968) 69 Cal.2d 737, 747. Penal Code Section 28 expressly permitted admission of "[e]vidence of mental disease, mental defect, or mental disorder ... on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored

malice aforethought, when a specific intent crime is charged."

By 2000-2001, California courts had interpreted Penal Code Section 29 as permitting extensive psychiatric testimony relating a appellant's mental condition to commission of the *actus reus*, including full description of diagnoses, symptoms, impairments, and the effects of drugs on a defendant's mental state and processes. So, for example, in *People v. McGowan* (1986) 182 Cal.App.3d 1, 8, 14, the Court of Appeal approved psychiatric testimony that the defendant's mental disorder 1) "had a significant impact on his mental process the night of the shooting"; 2) caused him "great difficulty in thinking clearly and making judgments"; and 3) rendered him "essentially out of control." *See also People v. Jackson* (1984) 152 Cal.App. 961, 964, 970 (Section 29 did not preclude psychiatric testimony that killing was "direct product of ... mental disease").

Thus, the expert testimony and documentary evidence available to Owen and Crouter in 2001 -- and submitted as evidence in support of the new trial motion -- would have been admissible to negate the *mens rea* element of first degree murder. Judge Gordon erred in his conduct of *Strickland* analysis by indulging in several erroneous legal assumptions to cast a blind eye toward counsel's misconduct.

c. Erroneous Assumption that Counsel's Choice of Defense Was Founded Upon Reasonable Investigation

The Superior Court assumed that any *mens rea* defense was inconsistent with, and inferior to the trial defense of false confession and that Hollywood was the actual killer. Yet, with his very next breath, Judge Gordon said "there's been no argument made by the defense that the selection of the false confession defense was itself incompetent" (11 RT 2254).[236] This reflects a serious misreading of the evidence presented, and

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236/ The argument was raised below. *See e.g.*, 11 RT 2542 ("Bottom-line is that new stuff came out, including organic brain damage, and to say that Mr. Hoyt had a fair trial where his counsel had no clue about any of this and proceeded with a defense, whatever it was, doesn't answer the question of whether or not he was prejudiced. He was prejudiced under

of the trial court's duty to examine counsel's decision-making process under *Strickland*.

i. Counsels' Lack of Qualification

The uncontradicted evidence on Appellant's motion showed that, by standards governing eligibility for appointment, Owen was unqualified to defend a capital case in that she had held her license to practice law for barely one year, and had never tried a murder, much less a capital, case before.[237] Crouter was appointed *Keenan* counsel though he too had never tried a capital case. His appointment on October 11, 2001 was five days before the start of jury selection, of which no continuance was sought (15 CT A 4217, confidential).

ii. Counsel's Disqualification

On March 18, 2002, this Court accepted Owen's resignation from the State Bar.[238] (7 CT 1809, *In the Matter of the Resignation of Cheri Owen*, Case Number S104910.) The State Bar website refers to Owen's February 12, 2002 tender of resignation, which was the date upon which she was barred from practice. Owen did not inform the Superior Court or Appellant of disciplinary charges pending against her during his trial, until the date set for formal sentencing (February 28, 2002).[239] Recognizing that the

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the meaning of law."

237/ The issue was raised as context for evaluating counsel's performance; the most plausible explanation for her negligence was that she was unprepared and unscrupulous.

238/ Appellant requests that this Court take judicial notice of Cheri Owen's State Bar records, which are set forth at the California State Bar Web site, and indicate she was voluntarily inactive with the tender of her resignation with charges pending on February 12, 2002. *See* http://members.calbar.ca.gov/search/member_detail.aspx?x=201893. (Evid. Code, §§ 459, 452(h).)

239/ Without explanation of its basis, the Superior Court expressed that Owen's resignation was for "reasons unrelated" to appellant's case, and denied appellant's motion for leave to subpoena her State Bar file to discover the contents of the investigation, and her role as an informant in

pendency of charges, and even their concealment, may not constitute a breach of fiduciary duty, Appellant argued these facts to set the context for evaluating Owen's lack of preparation. *See e.g., In re Johnson* (1992) 1 Cal.4th 689, 701-702 (representation by a person who has resigned from the State Bar denies appellant his right to counsel under article I, Section 15 of the California Constitution); *People v. Vigil* (2008) 169 Cal.App.4th 8, 16 (same); *People v. Hinkley* (1987) 193 Cal. App. 3d 383, 388 (reversing trial court's denial of motion for new trial where trial counsel had been suspended from practice, was presumptively incompetent, and failed to disclose to client his lack of standing).

iii. Counsel's Lack of Investigation

On October 16, 2001, the first day of jury selection and his fifth day on the case, Crouter told the Superior Court in opposing the prosecution's *Danis* motion, there was *no evidence* of any mental illness or low IQ (1 RT 2A A-53). This was both unfounded and untrue. In regard to the new trial motion, Crouter conceded that "if it was not presented at penalty phase, he did not know about it" (8 CT 2313).

Investigators Davis and Zeliff spent *only 20 minutes* with Appellant, interviewed *only five witnesses*,, were instructed by Owen not to investigate the case (the reasons given were the existence of the confession and the "thoroughness" of the police reports), and to divert funds to cover Owen's debts for work they had performed in other matters. Judge Gordon ignored these uncontested facts which made a strong showing that Owen's choice of defense was not founded upon reasonable investigation, or upon a reasonably informed decision which obviated the need to investigate at all. *See e.g., Kenly v. Armontrout* (8th Cir. 1991) 937 F.2d 1298, 1304 ("Failure to interview witnesses ... relates to trial preparation and not trial strategy.").

iv. Counsel's Eleventh-Hour Referral to Dr. Kania

On October 11, 2001, one week before jury selection, Owen

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resolving the charges.

obtained §987.9 funds to retain Dr. Kania, a psychologist. The scope of the referral was limited to Dr. Kania's opinion on the falsity of Appellant's confession. Clearly, Owen had already settled on that choice of defense *before* consulting a mental health expert. Dr. Kania testified he was *not* asked to consider or render any opinion on Appellant's mental state or mental health. No medical records were provided.

Judge Gordon ignored these uncontested facts in assuming that this last-minute, and narrow referral to Dr. Kania met the *Strickland* standard of reasonable investigation of the availability of mental state defenses. This assumption was contrary to governing law. *See e.g.*, *Turner v. Duncan* (9th Cir. 1998) 158 F.3d 449 (finding *Strickland* error where counsel failed to review or follow up on helpful psychiatric report or interview corroborating lay witnesses); *Seidel v. Merkle* (9th Cir. 1998) 146 F.3d 750, *cert. denied*, 525 U.S. 109 (1999) (finding *Strickland* error where counsel failed to make informed decision about expert testimony to negate *mens rea* of second degree murder); *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1277-78, *cert. denied*, 523 U.S. 1145 (1998) (finding *Strickland* error where counsel delayed hiring a psychiatrist until several weeks before trial, did not provide him with "necessary and available data which [he] requested," which resulted in the expert's "hurried and inaccurate report").

Trial counsel did not retain Dr. Kania until one week before opening statements at trial, did not prepare him at all, did not provide him with any of the medical records which suggested the possibility of mental impairments, and obtained through him only an opinion regarding the possibility of false confession. This was precisely the sort of "tentative, snap judgment ... based on less than a full analysis of complete data" which counsel may *not* rely upon to foreclose mental defense investigation. *Hendricks*, 70 F.3d at 1037, 1039.

In his new trial motion, Appellant referred to findings of Dr. Chidekel, the prosecution expert, which were produced mid-trial, but never presented to the jury. The prosecution did not elicit from Dr. Chidekel these findings which tended to negate the existence of premeditation and

deliberation, and supported mitigation factors. Owen either did not read Dr. Chidekel's report, or failed to recognize its significance. Also, Dr. Chidekel testified *in limine* before Judge Gordon in co-appellant Pressley's 2002 retrial on second degree murder (before the hearing on Appellant's new trial motion), and elaborated upon her findings that Appellant was far too impaired to having navigated the Lizard's Mouth trail without Pressley's guidance. Judge Gordon erred in assuming this evidence (by comparison to Dr. Kania's presentation) did not meet the applicable standard for granting a new trial.

Trial counsel did not meet the applicable standard of care by 1) waiting until the eve of trial before retaining Dr. Kania; 2) failing to provide Dr. Kania with necessary information or a more general referral which would have prompted Dr. Kania to recommend a full battery of testing akin to Dr. Chidekel's testing on behalf of the prosecution. Counsel's mishandling of this expert, and concomitant failure to uncover evidence of Appellant's cognitive impairments, represents a serious breach of 2000-2001 professional standards. *See e.g., Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 637 (failure to investigate defendant's mental condition when there is evidence of impairment constitutes deficient performance, and is prejudicial when it hampers later presentation of evidence of mental impairment); *Kenley v. Armontrout* (8th Cir. 1991) 937 F.2d 1298, 1304, *cert. denied*, 112 S. Ct. 431 ("strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel"); *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357, 1368 (counsel had duty to "follow through" conflicting evidence and determine cause of petitioner's abnormal behavior at time of killings).

v. Counsel's Failure to Gather Essential Records Regarding Mental Disorders

Owen failed to gather important records which supported the defense of mental disorder, including Appellant's hospital records which showed skull fracture and febrile seizures, and gastroenteritis as a child. *See Bloom*, 132 F.3d at 1274 (citing failure to gather pretrial jail records which

contained evidence of mental illness); *Seidel*, 146 F.3d at 755-56 (same). Judge Gordon erred in *assuming* counsel's choice of defense was reasonable, when it was made in ignorance of this vital information. A critical decision of this magnitude should not be based on an unfounded assumption which flies in the face of the evidence presented.

Moreover, these records would have been admissible at trial under well-recognized exceptions to the hearsay rule. *See* California Evid. Code §1271 (business records); *People v. O'Tremba* (1970) 4 Cal.App.3d 524, 528-29 (admitting hospital records under business record exception). Alternatively, these records could have been used as part of the basis for the opinions of the psychiatric experts who should have been called to testify. *See* Evid. Code Section 801(b). Counsel's failure to gather or present this significant information at trial breached the 2001 standard of practice in capital defense.

d. Erroneous Assumption that Brain Impairment Defense Was Not Potentially Meritorious

Judge Gordon assumed that a mental disorder defense was both inferior to, and wholly incompatible with the chosen defenses of third party culpability and false confession. This assumption was contrary to well-settled law.

Appellant's new trial evidence consisted of medical records and fact and expert witness declarations (in particular Richard Crouter, Steven Balash, Wendy Saxon, Drs. Delio, Globus and Ofshe), offered in conjunction with the prosecution expert Dr. Chidekel's exculpatory letter and November 2002 Evid. Code §402 testimony in co-appellant Pressley's retrial. The gist of this evidence was that Appellant:

1) was hospitalized for skull fracture and febrile seizures as an infant;

2) was assessed mid-trial by Dr. Chidekel, a prosecution expert, as suffering from organic brain impairment, which significantly increased his impulsiveness, poor judgment, and extreme dependency;

3) specifically, was heavily reliant upon others for direction, and his deficits could make him more susceptible to accept Hollywood's assignment to kill, as a direct result of his impairments, and when stressed he had poor impulse control;

4) was assessed post-verdict as having an abnormal EEG, consistent with encephalopathy, which typically affects cognitive judgment; and

5) was assessed post-verdict by Dr. Globus, a psychiatrist, who opined, based upon his social history, medical records, EEG and neuropsychological testing, he suffered from organic brain syndrome, which contributed to his "profound dependency and compliance with Hollywood."[240]

This evidence was admissible to establish a state of mind defense to the kidnap, murder and kidnap-murder charges. *See e.g.*, *People v. Coddington* (2000) 23 Cal.4th 529, 582-583 (interpreting Evidence Code §29 to permit expert testimony suggesting that defendant lacked requisite mental state due to mental disease or defect as well as evidence about such disease or defect); *People v. McGowan* (1986) 182 Cal.App.3d 1, 13-14 (interpreting Evidence Code §29 to permit expert testimony suggesting that defendant's mental condition prevented him from forming the requisite mental state when he committed killing).

Judge Gordon erred in assuming that this state of mind defense (organic brain impairment, psychological duress) was inferior to the third party culpability theory of defense pursued at trial. By comparison, the chosen theory was based on a slender reed, at best: Ramon Arias and Ernest Seymour's heavily-impeached identifications of a man who resembled Jesse Hollywood at the Lemon Tree Hotel on the night of the murder. By comparison, the state of mind defense was well-grounded and substantial.

240/ No objection was nor could be raised to the competency of this evidence. *See People v. Duvall* (1995) 9 Cal.4th 464, 474 (requiring submission of reasonably available evidence in support of claim); *People v. Dennis* (1986) 177 Cal.App.3d 863, 873 (accepting evidence in affidavit form); *People v. Jackson* (1986) 187 Cal. App.3d 499, 507; *People v. Bess* (1984) 153 Cal. App.3d 1053, 1057, 1061-1062 (same).

In particular, this evidence was responsive to both of Judge Gordon's concerns: First, Dr. Chidekel's results tended to show that, as a result of his impairments, Appellant had less impulse control and frustration tolerance under stress. His decision making and judgment were compromised under such circumstances. Judge Gordon's assumption that Appellant's new trial evidence did not show "an immediate disturbance made worse under stress" was simply mistaken. Second, all of the symptoms and effects of Appellant's serious mental disorders -- and the exacerbating effects of cocaine, Soma, and alcohol -- were impediments to his having been lucid at the time of the killing or having reflected on the consequences of his actions.

Second, the jury never heard any testimony regarding the characteristics of organic brain disorder, including confusion and disorganization in the thinking process, and a restriction of behavioral options (even a seemingly illogical and irrational restriction that the average person would neither experience nor understand) as a result of such impairments, under Hollywood's undue influence, intimidation, and control. Judge Gordon's assumption that Appellant's impairments did not relate to Hollywood's "Svengali-like" control was simply mistaken.

Third, Appellant's new trial evidence was supportive of the chosen theory of defense, in that Dr. Glaser (the prosecution psychiatrist) testified that brain damage was a *sine qua non* of false confession. It is beyond cavil that the evidence summarized above was probative on the issue of whether Appellant was at risk for giving a false confession.

e. Erroneous Assumption that Appellant's Brain Impairment was Legally Irrelevant to Voluntariness and/or False Confession

Judge Gordon assumed that the expert opinions summarized above were inadmissible on the predicate question of the voluntariness of Appellant's confession. This assumption was contrary to law.

Appellant bears the burden to show on a fully developed record that, had Owen presented expert testimony and medical records of his organic

brain impairment, there is "a reasonable probability" that the motion to suppress would have been granted on the ground of involuntariness, and "the outcome of the trial would have been different." *See Lowry v. Lewis* (9th Cir. 1994) 21 F.3d 344, 346-47 (failure to file suppression motion) (*citing Kimmelman v. Morrison*, 106 S.Ct. at 2582-83). Thus, this Court must decide the merits of such a motion, as raised separately in this appeal, once the evidentiary record necessary for such a determination is complete in the Superior Court. Judge Gordon's assumption that expert testimony on Appellant's subjective vulnerability to coercion was contrary to well-established law.

f. Erroneous Assumption that New Evidence Must Pass Muster under an Outcome-Determinative Prejudice Test

The appropriate inquiry is whether trial counsel's performance "undermine[s] confidence" in appellant's kidnap, first degree murder and special circumstance kidnap-murder convictions. *Turner*, 158 F.3d at 458 (*citing Strickland*, 104 S. Ct. at 2068). Judge Gordon erred in applying an outcome-determinative test which was not the law, and failing to consider the cumulative impact of counsel's errors and omissions in assessing prejudice. *See Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-39.

In *Bloom*, the Ninth Circuit held that counsel's failure to present psychiatric evidence to bolster a heat of passion defense was prejudicial despite "strong evidence suggesting premeditation." *See Turner*, 158 F.3d at 458 (*citing Bloom*, 132 F.3d at 1275, 1277-78).

There is a "reasonable probability" that the state of mind evidence which Owen failed to investigate or present would have succeeded at trial in rebutting the inferences of premeditation and deliberation relied upon by the Superior Court, *e.g.*, Appellant's act of driving to Santa Barbara, accompanying the victim from the Lemon Tree Hotel to the pre-arranged grave site in the company of two co-conspirators of Hollywood, and pulling the trigger of the semi-automatic TEC-9 gun. *Strickland*, 104 S. Ct. at 2068. This expert and documentary evidence was crucial because appellant's

mental state was the pivotal issue at trial. *See Turner*, 158 F.3d at 457 (entire defense rested on contesting intent element); *Seidel*, 146 F.3d at 756-757 (reasonable probability that evidence demonstrating petitioner's mental illness would have negated malice requirement for second degree murder).

Judge Gordon erred in adopting an incorrect outcome-determinative standard for assessing prejudice. It was this standard enunciated by Dr. Glaser, the prosecution expert, in his rebuttal declaration. The proper test was not whether evidence of organic brain impairments "precluded" - to quote Dr. Glaser - the possibility of premeditation and deliberation in Appellant's actions of driving to Santa Barbara, accompanying the victim to the pre-arranged grave site with two co-appellants, and firing the semi-automatic trigger, killing him in a single burst.

In *People v. Martinez* (1984) 36 Cal. 3d 816, defendant was convicted of burglary based on the presence of his palm print on a drill press involved in the burglary. There were numerous prior occasions when the defendant might have placed his hand on the drill press, but a prosecution witness testified that he repainted the drill press on the afternoon before the burglary. Defendant moved for a new trial based on newly-presented testimony of a plant foreman that the drill press was not painted on that afternoon, but sometime earlier. After an evidentiary hearing at which the plant foreman testified, the trial court denied the new trial motion on the grounds that the defense did not use due diligence to locate the foreman as a witness, and that the evidence did not render a different result more probable at retrial.

This Court reversed the trial court's decision for abuse of discretion because lack of diligence was not a sufficient basis for denial of the motion. *Significantly, although the new evidence did not foreclose the possibility that defendant put his palm print on the drill press during the burglary, it offered a credible alternative explanation for the print, and with it, reasonable doubt as to defendant's guilt. "If the jurors even found a reasonable possibility that [the foreman's] testimony was true, it is unlikely they would find Appellant's guilt proved beyond a reasonable doubt." Id.* at

823 (emphasis added). Hence, defendant met his burden of proof of a sufficient likelihood of a different outcome to warrant a new trial.

The newly-presented mental state evidence in this case was no less material than the timing of repainting of the drill press palm print at issue in *Martinez.* Judge Gordon applied a legally incorrect standard under which Appellant's evidence had to foreclose any scenario of guilt, rather than offer a credible alternative explanation which would have resulted in a different verdict, either of second degree murder or manslaughter. *Appellant's newly-discovered evidence of organic brain impairment raised a reasonable probability of a different result, as casting doubt on reasonable doubt of his guilt of specific intent to kidnap, or of premeditation and deliberation to murder. See Strickland*, 104 S. Ct. at 2067-68.

g. Incorrect Legal Standards Regarding Penalty Phase

i. Erroneous Assumption that Counsel Had No Duty to Investigate Appellant's Background Absent a Specific Request from Dr. Kania

There was overwhelming evidence that Owen breached her penalty phase duty. Judge Gordon did not find otherwise, but mistakenly assumed that Owen had no such duty absent a specific request from Dr. Kania. This assumption was contrary to law.

Appellant challenged his attorneys' performance with regard to their failures to "present and explain the significance of all the available [mitigating] evidence." *Williams v. Taylor* (2000) 529 U.S. 362, 393; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1043-44. Owens had a duty to conduct a penalty phase investigation which would allow a determination of what sort of experts to consult. In particular, counsel had an "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor* (2000) 529 U.S. 362, 393. "Investigations into mitigating evidence should comprise efforts to discover all reasonably available

mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith* (2003) 539 U.S. 510, 524. This duty includes an obligation to "conduct a thorough investigation of the defendant's background." *Williams*, *supra,* 529 U.S. at 396.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 11.4.1 (1989) provided that: 1) counsel should begin conducting an investigation relating to the penalty phase of a capital trial immediately upon taking the case; and 2) penalty-phase investigation should comprise efforts to discover all reasonably available mitigating evidence, by drawing upon sources including an interview with the accused, interviews with potential witnesses familiar with appellant's life history, and expert assistance. ABA Guidelines at 11.4.1(C),(D). http://www.abanet.org/deathpenalty/resources /doc/1989Guidelines.pdf.

Any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses. Failure to consult a mental health expert fell below professional standards. "An attorney should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation." ABA Guidelines at 11.4.1(D)(7)(D). Counsel should consider enlisting experts "to provide medical, psychological, sociological or other explanations for the offense for which the client is being sentenced." Id. at 11.8.3(F)(2). Significantly, Dr. Kania (nor anyone else) was not retained for this purpose. In addition, counsel should consider presenting expert testimony concerning the defendant's medical, family and social history "and the resulting impact on the client, relating to the offense." *Id.* at 11.8.6(B)(8). *See also Jones v. Ryan* (9th Cir. 2009) 583 F.3d 626, 637-38, 640 (finding counsel ineffective for failing to enlist a mental health expert to help present a mitigation case); *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247 (counsel has affirmative duty to provide background information to mental health experts).

In *Wiggins*, 539 U.S. at 526, the United States Supreme Court found

that counsel's presentation of a "half-hearted mitigation case" demonstrated that the failure to put on a stronger mitigation case was not a strategic choice. The same must be said of Owen. The information available to her (including Dr. Chidekel's findings) would have led any reasonably competent attorney to pursue further investigation.

The new trial motion evidence showed that Owen did not obtain *any* of Appellant's hospital records, EEG or neuropsychological testing, retain *any* mental health professional for mitigation purposes, or prepare *any* social history, or prepare those family members whom she called to testify for the limited purpose of establishing Appellant's chaotic home life, rather than to document his history of head injury and symptoms. Co-counsel Crouter conceded that, "if we didn't present it at penalty phase, I didn't know about it."

Applying the *Strickland* analysis, the Superior Court was charged with weighing the mitigating evidence (both that which was introduced and that which was omitted or understated) against the aggravating evidence, *Williams*, 529 U.S. at 397 n.15, and determining whether there was "a reasonable probability that, absent the errors, the sentencing jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *Mayfield*, 270 F.3d at 928.[241] Owen's failures to present available mitigation evidence including Dr. Chidekel's uncontradicted findings, was prejudicial under the *Strickland* standard. Judge Gordon erred in assuming that no such preparation was necessary in the absence of a specific request from Dr. Kania.

241/ The effect of the prosecution's new rebuttal evidence was a fact question for the jury to resolve at a new trial, not a basis for summary denial of the appellant's factual showing (9 CT 2446). Alternately, as argued *infra*, an evidentiary hearing was warranted to determine the truth.

ii. Erroneous Assumption that Evidence was Too "Inherently Speculative" to Bear Upon Appellant's Behavior or Mitigation of Crime

As explained above, Appellant's hospital records documented a childhood history of skull fracture, febrile seizure, and gastroenteritis. His contemporary assessments (EEG and neuropsychological tests) documented that he suffered substantial brain impairment, which Dr. Globus and Chidekel independently assessed as linked to a variety of behavioral abnormality, in particular *impaired judgment, impulsiveness, reaction to stress, and extreme obedience to authority.* This evidence would have filled the critical gap in Appellant's mitigation case, offering a plausible and coherent explanation of Appellant's behavior at the time of the killing, in terms of his inability to perceive or exercise free will, and limited response set to Hollywood's dominion. Judge Gordon erred in assuming that this body of evidence was "too speculative" to have any relevance to the sentencing jury's calculation of moral culpability. *Cf. People v. Beeler* (1995) 9 Cal.4th 953 (rejecting counsel's "extremely vague and equivocal" declaration that defendant "may" have organic brain damage as too speculative to meet §1181 materiality standard). By contrast to *Beeler*, Appellant submitted specific and credible evidence of his organic brain impairment in the form of hospital records, EEG and neuropsychological results, and lay and multiple expert witness declarations. One of these experts, Dr. Chidekel, was unimpeachable as the prosecution's own. *Cf. People v. Musselwhite* (1998) 17 Cal.4th 1216, 1250 (rejecting defendant's §1181 expert declaration as cumulative where issues of alleged organic brain disorder, credibility of experts, and reliability of BEAM test were fully aired at trial). Unlike *Musselwhite,* supra, this issue was not aired at all at trial, where it should have been the centerpiece of the defense. Judge Gordon erred in assuming that all parts of Appellant's hydra-headed showing, or their totality, was too speculative to possibly have swayed the jury.

iii. Erroneous Assumption that Victim Impact Was So "Overwhelming" as to Render Any Mitigation Futile

Under *Strickland*, counsel's performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" of prejudice exists "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"; indeed, a "reasonable probability" need only be "a probability sufficient to undermine confidence in the outcome." *Id.* In other words, appellant suffered prejudice if "there is a reasonable probability that, absent the errors, the sentencing jury . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; *see also Detrich v. Ryan* (9th Cir. 2010) 2010 U.S. App. LEXIS 17397, *44 (finding reasonable probability the sentencing judge would have imposed a sentence less than death had counsel presented an expert evaluation of appellant's neuropsychological functioning); *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1090 (counsel's failure to present expert testimony explaining the possible causal link between defendant's childhood and his crime was prejudicial). Expert evidence such as Drs. Globus and Chidekel provided of Appellant's impulsiveness, lack of judgment, and extreme obedience as a result of organic brain impairments would reduce his moral culpability, and help the jury understand the causal connection between brain dysfunction and criminal acts.

Judge Gordon was charged with weighing on one side of the scale the mitigating evidence adduced at trial *and* at a proper §1181 hearing (including the records and declarations) against the §190.3(a) victim impact aggravation evidence presented at trial, in order to determine whether the former tips the scale so far that no reasonable juror could have voted against the death penalty.[242] *See Silva v. Woodford* (9th Cir. 2002) 279 F.3d at 849.

242/ Appellant had no prior criminal convictions, no uncharged violent activity, no custodial infractions, and was young - 21 years old - at

Judge Gordon assumed that the testimony of Susan Markowitz (standing alone) was "overwhelming," and so far outweighed the newly-presented mitigation as to render the death penalty inevitable. *See e.g.*, *Hendricks*, 70 F.3d at 1044 (rejecting argument that substantial amount of aggravation renders presentation of mitigation futile). This assumption was contrary to law in that single victim impact evidence standing alone can never be considered so "overwhelming" as to render any and all mitigation futile. Victim impact testimony is offered for a limited purpose only, to show the direct impact of appellant's acts on the victim's family, as a circumstance of the offense under §190.3(a). *Payne v. Tennessee* (1991) 501 U.S. 808, 825-827. The overarching purpose of penalty phase is not to honor the victim or his mother's wishes for vengeance, but to decide whether, in light of his uniquely human characteristics and moral culpability, the appellant is deserving of a death sentence. *See People v. Kelly* (2008) 42 Cal.4th 763, 805 (Moreno, J., conc. & dis. opn.). Mrs. Markowitz's evocative testimony could only be considered "overwhelming" of any mitigation by consideration of its inflammatory aspect and emotional appeal, contrary to law. Appellant's new evidence of organic brain impairment was relevant as a mitigating aspect of his character and culpability under §§190.3(a) (circumstance of offense), (d) (extreme mental disturbance), (g) (substantial domination of another), and (h) (impaired capacity to conform conduct to requirements of law due to mental disease or defect). Judge Gordon erred by assuming that victim impact testimony in a single victim case - however moving in its depiction of suffering and loss - would substantially outweigh Appellant's new evidence of mitigation, which went to the heart of the jury's primary concern at sentencing, the link between his mental disorder and behavior, as it lessened Appellant's moral culpability for the crime.

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the time of the crime.

3. This Court Should Remand the Case to the Superior Court For Reconsideration and Hearing on Appellant's Allegations of Conflict and Ineffective Assistance

a. Conflict of Interest Law

The Sixth Amendment and article I, §15 of the California Constitution guarantee representation by counsel free from conflicts of interest. *Glasser v. United States* (1942) 315 U.S. 60, 69-70; *People v. Douglas* (1964) 61 Cal.2d 430, 436-439. To prevail on a non-multiple representation conflict of interest claim, appellant must show: 1) counsel's deficient performance, and 2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different.[243] *Mickens v. Taylor* (2002) 535 U.S. 162; *People v. Rundle* (2008) 43 Cal.4th 76, 169. "In order to establish a violation of the Sixth Amendment [based on conflict of interest] a appellant who raised no objection at trial must demonstrate that an *actual conflict of interest adversely affected his lawyer's performance*." *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348; *see also Mickens*, 535 U.S. 162, 172 n.5 ("'actual conflict' for Sixth Amendment purposes is a conflict of interest that adversely affects counsel's performance".) Prejudice may be shown by what counsel did, and did not do, for "what the advocate finds [herself] compelled to refrain from doing, not only at trial but also during pretrial proceedings and preparation" may demonstrate the proof of her divided loyalties. *Holloway v. Arkansas* (1978) 435 U.S. 475, 490.

243/ *People v. Doolin* (2009) 45 Cal.4th 390 limited the presumption of prejudice under state law to multiple-representation conflict claims. Whether Owen's life-story rights agreement, informant activity for a coordinate state prosecuting agency, or pending State Bar discipline warrant such a presumption because her "lips are sealed" by conflicting privileges, and the determination of which "punches she pulled" is a Gordian knot impossible to untangle, remains an open question of federal law. *See Mickens*, 535 U.S. at 168. The Superior Court should take up the question, only if necessary, after hearing the evidence.

b. *Wood v. Georgia* Error

Under *Cuyler v. Sullivan, supra at* 347, the Superior Court has a duty to inquire into the propriety of a representation when it "knows or reasonably should know that a particular conflict exists."[244] *See also People v. Jones* (1991) 53 Cal.3d 1115, 1136 (recognizing court's duty of inquiry into circumstances whenever it is, or should be aware of a possible conflict).

In the landmark case of *Wood v. Georgia* (1981) 450 U.S. 261, 265 n.5, 272, though it was not raised on appeal or included as a question in the petition for certiorari, the United States Supreme Court found the "clear possibility" that counsel was actively representing the conflicting interests of employer and defendants "was sufficiently apparent . . . to impose upon the court a duty to inquire further."[245] The Court remanded the case to the trial court for further findings "to determine whether the conflict of interest that the record strongly suggests actually existed," *i.e.,* one that *actually affected* counsel's performance. *Id.* at 273. "*On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him.* If this was the case, the due process rights of petitioners were not respected . . . at earlier stages of the proceedings below." *Wood*, 450 U.S. at 272 (emphasis added). The potential availability of relief in future habeas corpus proceedings did not alter or eliminate the trial court's duty to inquire into the conflict of which it was apprized before the entry of judgment. *Id.* at 274 & n.21. The denial of a hearing under such circumstances denies the appellant his right to due process. *Id.* at 271-273.

244/ The Sixth Amendment entitles appellant, as one who retained his own lawyer, to the same protection as appellants for whom the State appoints counsel. *See Mickens*, 535 U.S. at 169 n.2

245/ The risk of conflict arose from appellants' employer declining to pay fines which put them at jeopardy of probation revocation, while their counsel continued to be paid by employer, apparently to create a "test case" that the fines were unconstitutional. *Wood*, 450 U.S. at 267.

The comparable remedy in this case is a remand to Santa Barbara Superior Court for inquiry into the conflicts alleged with particularity in Appellant's new trial motion and evidence, and a new hearing on the §1181 motion. Owen obtained Appellant's life-story rights and waiver of attorney-client privilege for her own pursuit of profit. Separately, she acted as an informant for the Los Angeles district attorney during the representation, in an effort to stave off disbarment. After the death verdict but before entry of judgment, and without notice to the Superior Court, she resigned from the State Bar, with disciplinary charges pending. *See* 7 CT 2069 (Sanger August 29, 2002 Decl.); 20 CT 75.

The Superior Court was on notice of these conflicts by February 25, 2002, if not earlier (11 RT 2403).[246] The Court learned of Owen's life-story rights agreement by June, 2002, if not earlier, when Sanger sought an order to show cause regarding Owen's failure to produce her case file. The Court was given reason to conclude that the agreement was part of Owen's original retainer. *See e.g.* 8 CT 2309 (Crouter Dec., had he known of life-rights deal, he would have advised Owen it was unethical and to withdraw from the case.)[247] The Court did not inquire, either in February or June, 2002, or again in February 2003 in ruling on the new trial motion, into the

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246/ Judge Gordon stated tersely "I understand that Miss Owen is indisposed and that Mr. Crouter is going to continue your representation[.]" Two days later, he added, "[a]pparently Miss Owen, for purposes which are *not* relevant, is not actively practicing, or is in the process of not practicing" (11 RT 2405, emphasis added). These observations, cloaked in secrecy, cannot support any finding on appeal that a meaningful inquiry into Owen's conflicts was had.

247/ Judge Gordon made no finding on the issue whether Crouter's sense of loyalty to Owen created an actual division of loyalties on his part, when viewed in light of their unreasonable failure to prepare or try the case. *See People v. Rundle* (2007) 43 Cal.4th 171. This Court should not rely upon the artifice of second counsel, whom appointed less than one week before trial, did not bring any of the conflicts to the Court. On remand, the trial court may determine what Crouter knew, when he knew it, and why he didn't bring it to the attention of the court.

nature of Owen's conflicts to determine whether any adverse effect had tainted her representation. Rather, Judge Gordon assumed impropriety, yet denied the claim for lack of a showing of "cause" and "effect." This was an abuse of discretion.

i. Life-Story Rights Agreement

In *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, Justice Newman observed in a case involving a life-story rights agreement between an attorney and his client:

> Contracts of this kind are widely criticized. It is said they tempt lawyers, consciously or subconsciously and adversely to their client's interests, to tilt the defense for commercial reasons. (Citations omitted.) They do present a threat that counsel might provide deficient representation.

Maxwell, 616.

ABA Code of Prof. Responsibility, EC (Ethical Consideration) 5-4 provides, "such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended." DR (Disciplinary Rule) 5-103(A) provides: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client."

Appellant alleged that Owen may have avoided mental defenses because, if successful, they might suggest Appellant's incapacity to make the life-story rights agreement and might render it void or voidable by him, and that she may have avoided such defenses to see him convicted and even sentenced to death for publicity value. *See Maxwell*, 30 Cal.3d at 611. Also, plausibly, Owen may have avoided a continuance so public interest would not cool and competing authors would not get the jump on her; failed to seek a change of venue because publicity would be maximized by a trial in Santa Barbara, and put Appellant on the witness stand, so his story would go on the record, and she would not be constrained by confidentiality rules, if for example his waiver was void or voidable by him. *Hearst*, 638 F.2d at 1193. While Appellant's interest would have dictated the invocation of a mental state defense, even if it obviated the trial, counsel's financial stake

in his life-story rights agreement created a contrary incentive for a sensational trial, at any cost.

Judge Gordon dismissed these theories as unproven, without giving Appellant a hearing to prove them, by questioning Owen under oath. Owen had previously resisted defense subpoenas of her case file, to the point that the Superior Court issued two orders to show cause and a hold order if she failed to appear. To insist on a voluntary confession of prejudicial error by Owen under these circumstances is contrary to the facts of the case, and governing *Marsden* law, which entitled Appellant to new counsel to pursue these claims in the first place.

In *People v. Corona* (1978) 80 Cal.App.3d 684, 719, appellant Juan Corona was convicted on "overwhelming" evidence of guilt of killing 25 migrant farm workers. The Court of Appeal ordered a reference hearing on an alleged conflict of interest arising from the attorney Hawke's pretrial acquisition of literary rights to defendant's life-story. *Id.* at 705 & n.10. After a three-day hearing, effectively consolidating the appeal and habeas corpus proceeding, the trial court found counsel's pretrial life-story rights agreement to be "*so inherently conducive to divided loyalties as to amount to an outrageous abrogation of standards of the legal profession,*" and the resulting trial to be a farce and a mockery. The Court of Appeal reversed Corona's 25-count murder conviction. Owen's agreement appears modeled on Hawke's, Corona's unscrupulous attorney: both having obtained conveyances of exclusive life-story rights and waiver of attorney-client privilege. *Id.* at 703. The reference hearing established that Corona's lawyer hired a writer, signed a publishing contract, which resulted in a published book (afterword by Hawkes himself) appearing a few months after trial. In this case, although the prosecution argued, and Judge Gordon agreed that Owen had not taken any sort of affirmative steps to capitalize upon the rights agreement, but how could they know?[248]

248/ In another bizarre twist, like carrion on a kill, the prosecutor gave "his" confidential case file to a Hollywood film producer shortly after the §1181 motion was denied, and the popular box office movie *"Alpha*

The basis of the *Corona* reversal was that counsel withdrew the best defense of mental incapacity in favor of a "feeble" alibi defense. The same must be said of Owen. Hawke's resistance to developing crucial facts pertaining to Corona's mental competency reached its climax at a §1368 hearing in which the trial court and prosecution pressed for further psychiatric examination of appellant, while counsel, who should have pursued the matter himself, vigorously opposed it. *Id.* at 721. Here, the prosecution employed Dr. Chidekel who assessed that Appellant suffered a substantial cognitive impairment. Yet, Owen shielded the jury from that fact, a legally-untenable position.

A remand for reconsideration and hearing is required to permit appellant to prove the claim that the conflict *adversely affected* counsel's performance. *Cf. People v. Bonin* (1989) 47 Cal.3d 808, 836-837 (denying literary-rights based claim where appellant made an informed waiver of conflict); *Maxwell*, 30 Cal. 3d at 618 (granting writ of mandate reinstating appellant's fully-informed choice of counsel).[249] In *Bonin*, this Court recognized the availability of vacation and remand as an appropriate remedy for *Wood* error, *if* the record in a capital case would not permit meaningful appellate review on the issue of adverse effect. *Id.* at 843 n.2.

In this case, the Superior Court was asked to examine the conflict not in the "murky pre-trial context when relationships between parties are seen through a glass, darkly," *Wheat v. United States* (1988) 486 U.S. 153, but in the relative clarity and proximate hindsight of post-trial motion after Owen's involuntary withdrawal from the case. Though proceedings in *this case* have since grown protracted by four years awaiting appointment of counsel and three years of record completion and filing of the opening brief, as a matter of public policy and basic fairness, justice will be served in *this*

Dog" was the result.

249/ By contrast, Owen's life-story rights agreement did *not* advise appellant of the risks, or to obtain independent legal advice, or ask him to waive conflict. Waiver of potential conflict may not be inferred from a silent record. *Carnley v. Cochran* (1962) 369 U.S. 506, 516-517.

and future cases by application of *Wood v. Georgia* to require an inquiry to be held upon *prima facie* evidence, and in appropriate cases, granting a retrial with conflict-free counsel, the outcome of which is not subject to reversal on appeal for this sort of miscarriage of justice.

Conceding the existence of a conflict, Judge Gordon failed to conduct any inquiry, creating a record inadequate for any meaningful determination whether the conflict had an adverse effect upon Owen's representation. Yet, the evidence in the record suggested no explanation other than conflict and incompetence. At a minimum, a hearing to compel, and as necessary, debunk Owen's explanation was mandated in order to inform any ruling on the claim. The edict of *Wood v. Georgia* is that vacation of judgment and remand to the Superior Court for hearing on this issue is the mandated remedy under the circumstances. *See e.g., Mickens*, 525 U.S. at 177 (Kennedy, J., concurring) (deferring to district court's findings and credibility judgments made *after hearing* testimony of petitioner's counsel and other witnesses); *see also United States v. Hearst* (9th Cir. 1980) 638 F.2d 1190 (remanding for evidentiary hearing to determine whether F. Lee Bailey's literary rights agreement with Patty Hearst had prejudicial effect upon his trial representation); *cf. Maxwell*, 30 Cal. 3d at 618 (finding competent waiver where Superior Court advised appellant of risks, reviewed psychiatric evaluation of defendant's capacity to waive conflict, and obtained his written waiver; *see id.* at 628 (Richardson, J., dissenting) (contract should be invalidated as a judicially-declared rule of criminal procedure). Here, there is nothing to defer to, due to the trial judge's failure to find any facts on actual effect, *e.g.*, whether Owen "pulled her punches" in failing to develop or present *mens rea* defenses due to divided loyalty. On reconsideration and remand for hearing, the Superior Court is the forum best suited to the development of a record adequate to make that determination.[250]

250/ Owen's inexperience in criminal matters, and pending Bar discipline, in addition to her conflicts of interest, should be aired at such a hearing, before the Court may again presume she made a strategic decision.

People v. Doolin (2009) 45 Cal. 4th 390, 428 did not erect any state law bar to remand under these circumstances.[251] The conflict claim was raised on direct appeal, rather than by §1181 motion prior to entry of judgment. This Court took judicial notice of the Fresno County Superior Court's flat fee agreement to determine whether, by lumping together counsel's fee and ancillary services, counsel labored under an inherent or actual conflict in regard to a financial disincentive to prepare his defense. *Id.* at 412 n.14. This Court had no evidence before it of counsel's acts or omissions, or reasoning, and no recourse to develop such a record below as part of trial proceedings.

By contrast, here, Appellant raised the conflict of interest claims by way of new trial motion, presented *prima facie* evidence of the conflicts, and to the extent he could, of their effects, and sought subpoena power to call Owen as an adverse witness, which the Superior Court thwarted by its conduct of the "hearing." Simply put, the trial court in *Doolin* was not asked, or given reason, to inquire. Judge Gordon was. Under this different procedural setting, a remand rather than denial pending future habeas corpus proceedings, is the appropriate remedy on appeal.

On the merits, this Appellant has made a far more detailed and concrete showing of adverse effect. In *Doolin*, this Court held that the flat fee agreement for defendant's appointed counsel did not create an inherent conflict, and defendant had failed to show on the existing trial record that it had any adverse effect at guilt or penalty phase. Based on §987.9 records, the Court discerned defendant's claim on appeal failed to account for 90 hours of time spent by the investigator for prior counsel in the case. *Id.* at

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251/ Under state law in February 2003, appellant had the burden to show an "informed speculation" that a "potential" conflict adversely affected counsel's performance. *See e.g., People v. Frye* (1998) 18 Cal.4th 894, 998. Judge Gordon's summary denial of the claim under this standard, though it no longer governs the claim, is further evidence of prejudgment due to his retirement from the bench, an attitude ill-fitted to the stakes at hand.

422. In this case, Owen did not provide a §987.9(d) accounting to the Superior Court of funds expended. Notably, she obtained a final disbursement of funds *after* her license to practice law had terminated, which was a contempt. Unlike *Doolin*, nothing contradicts Davis and Zeliff's declarations of paltry effort and diversion of funds.

Moreover, there can be no discernible tactical explanation for Owen's failure to investigate the case, and Judge Gordon hazarded none. Appellant submitted declarations from Crouter, Davis, and Anne Stendel (his maternal aunt) that Owen was "surprised" when the prosecution pursued the death penalty, even though Appellant was always capital-eligible under the indictment. Owen told the Stendel family there would *not* be a penalty phase, or in any event, they could *not* afford a penalty phase defense. Judge Gordon erred in assuming that adverse effect had not been shown, in the absence of a *mea culpa* from Owen herself.

Unlike *Doolin*, the record demonstrates that Owen failed to find, and the sentencing jury never heard, powerful evidence casting doubt on actual premeditation and deliberation, due to Appellant's organic brain impairment which directly affected his thinking, judgment, impulsiveness, and extreme vulnerability to the ringleader Hollywood, at whose direction he acted; this evidence also rebutted the prosecution's penalty case under four statutory factors in mitigation. (§§190.3(a), (d), (g), and (h).) *Cf. Doolin*, 45 Cal. 4th at 429 (record contained *no* evidence of mitigation which appellant might have presented, but for counsel's neglect).[252]

ii. Informant Activity

The Superior Court denied Appellant's request for Owen's State Bar case file and to cross-examine Owen under oath, *inter alia*, about the dates, nature and effect of her activities as an informant for the Los Angeles district attorney, as this pertained to acts and omissions of her defense. *See*

252/ As this Court noted in *Doolin*, and pertains to any *Fosselman* claim which falls short on direct appeal, such denial is without prejudice to appellant's right to expand upon the record in his pursuit of a writ of habeas corpus. *Doolin*, 45 Cal. 4 th at 429; *Rundle*, 43 Cal. 4th at 174 n.48.

Claim XIII, *supra*. The trial court did not address the issue further in regard to its denial of the multifaceted motion for new trial. This was an abuse of discretion in the misapplication of a legal standard (the necessity of inquiry under *Wood v. Georgia*, *supra*), and reliance upon an extrinsic factor (the availability of appellate review) (11 RT 2509-2510).

"Governmental interference with a appellant's relationship with his attorney may render counsel's assistance so ineffective as to violate . . . his Fifth Amendment right to due process of law." *United States v. Irwin* (9th Cir. 1980) 612 F.2d 1182, 1185. Switching of sides is fundamentally unfair and inherently prejudicial, and compromises a appellant's right to a fair trial, secured by the due process clauses of the Fifth and Fourteenth Amendments, and the Sixth Amendment right to effective assistance of counsel.

In *United States v. Marshank* (N.D. Cal. 1991) 777 F.Supp. 1507, 1519-1520, the defendant's attorney acted as an informant for the government, regularly disclosing confidential client information. After a hearing which was *"necessary in order to rule on the motion,"* the district court dismissed the indictment on Fifth and Sixth Amendment due process and right to counsel grounds. The remedy in *Marshank,* like the remand for hearing and reconsideration of the new trial motion in this case, stands as a bulwark against the specter of the criminal defense attorney who plies her trade, utterly "oblivious to the professional norms of ethical behavior." *Id.* at 1512. Because defendant's attorney was in league with the government, defendant was "for all intents and purposes," unrepresented during his post-arrest meetings with the government. *Id.* at 1521. The same must be said of this appellant who was, at every critical stage of the trial prosecution, essentially *un*-represented, *e.g.*, when no investigation was done or experts retained to conduct a competent evaluation, when the choice of defense was made in ignorance of the facts, when the motion to suppress was not supported with expert testimony, when Appellant was put on the witness stand unnecessarily, and without benefit of prosecution expert reports, when the defense failed to challenge the variance in the prosecution's proof from

its indictment or renew its challenge to far flung conspiracy evidence, until the prosecutor changed his focus in rebuttal argument.

As an informant facing potential criminal charges, Owen had an interest in maintaining a cooperative relationship with the prosecution with a view toward a favorable disposition in her own jeopardy, to avoid it ripening into a criminal case. The "inherent psychological barriers" arising out of Owen's conflicting obligations would have made effective representation impossible. *See e.g.*, *United States v. De Falco* (3d Cir. 1980) 644 F.2d 132, 137 (holding that counsel who was being prosecuted by the same United States Attorney's office that was prosecuting his client could not represent his client's interests effectively).[253]

Appellant alleged that Owen had concealed this conflict of interest and breach of fiduciary duty, and sought her State Bar case file for corrobation of her activities as an informant for a coordinate prosecuting agency.[254] Such evidence was material to Appellant's §1181 motion. Appellant's theories were cognizable on a §1181 new trial motion, raising constitutional grounds. The record was inadequate to justify summary denial, and Appellant was entitled to compulsory process to meet his burden of proof. Remand for a full inquiry by the Superior Court is the appropriate remedy.

c. The Necessity of Hearing to Resolve Disputed Issues

Under *People v. Dennis* (1986) 177 Cal.App.3d 863, 873, where the

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253/ Appellant was entitled to a hearing to determine whether each of the prosecuting agencies (Santa Barbara and Los Angeles district attorneys, and State Bar counsel) were aware of Owen's cooperation, plea, or activities in the other, or whether Owen was in a position of choosing whether to help herself or her client because of a conflicting personal interest.

254/ The State Bar case file might also contain evidence probative of Owen's lack of fitness to try a capital case, improper diversion of §987.9 funds, and pattern of misconduct in other cases negating any strategic rationale she might offer for her performance.

affidavits establish a hearing is necessary to resolve material disputed issues of fact, the trial court should conduct an evidentiary hearing on the matter. "In the presentation, hearing, and disposal of [a new trial] motion the parties and the court are engaged in a trial." *People v. Sarazzawski* (1945) 27 Cal.2d 7, 17. Such logic reflects the preference of this Court for evidentiary hearing where the matter may be fully explored.

In *Dennis,* the California Court of Appeal reversed the summary granting of a new trial motion and remanded for the holding of an adversary hearing, applying standards for conducting a habeas corpus reference hearing where comparable issues were raised before entry of judgment. Where appellant meets his *prima facie* burden on the motion of raising a colorable claim, *"the inquiry must be directed to whether there is an explanation which shows that counsel did in fact act in the manner of a diligent and conscientious advocate." Dennis*, 177 Cal. App. 3d at 872 (*citing Pope*, 23 Cal. 3d at 425; *Fosselman*, 33 Cal. 3d at 581-582). An explanation of counsel's tactics may not be presumed by the trial court without an "evidentiary hearing where the matter may be fully explored." *Id.*

Similarly, in *People v. Stewart* (1985) 171 Cal. App. 3d 388, 394-397, *disapproved on other grounds in People v. Smith* (1993) 6 Cal. 4th 684, 691-696, *and People v. Winbush* (1988) 205 Cal. App.3d 987, reversible error was demonstrated when the trial court failed to conduct a "careful inquiry" into the defendant's reasons for claiming incompetence of counsel in a new trial motion. Specifically, the trial court failed to question the defendant about the substance of the expected testimony of two witnesses he claimed counsel should have called at trial, and did not answer whether it was material, or even crucial. *Id.* at 398. "A denial of defendant's motion for new trial based on ineffective representation without careful inquiry into appellant's reasons for claiming incompetence is lacking in all the attributes of a judicial determination." *Ibid.*

Judge Gordon erred in this precisely the manner disapproved in *Dennis* and *Stewart*, by presuming a satisfactory explanation of counsel's

tactics. The prosecution contested the significance of Appellant's EEG-test result, but not its own neuropsychologist's findings, or the authenticity or significance of Appellant's hospital records and social history. The prosecution did not contest the evidence of Owen and Crouter's lack of investigation, or proffer a rationale which obviated the need for investigation. The prosecution pooh-poohed the diagnosis of dependency disorder, but ultimately staked its opposition to an erroneously high outcome-determinative standard of prejudice.[255]

Under these circumstances, a remand for hearing and reconsideration of the motion is necessary to rectify the Superior Court's speculative resolution based on the undeveloped record. Judge Gordon's ruling lacked the attributes of a judicial determination in that it came without hearing from Owen, Crouter, Drs. Chidekel, Globus, Kania, or any other fact and expert declarants, by which Appellant could meet his burden on the eighteen contested material questions of fact.

d. Judge Gordon's Return from Retirement Was an Impermissible Ground For Denying Appellant's Motion

Judge Gordon expressed his wish to see the case "move on", alluding in the same breath to his own retirement and return on assignment solely to "deal with" this motion. Judge Gordon refused to resolve any conflict in the evidence, permitting Appellant to respond to the prosecution's expert declarations, solely as an exercise in record-keeping. "I think it's important in a case like this to have the record complete so that whoever wishes, the defense wishes on appeal, which it will appeal, automatic appeal, everything that's necessary for the Appellate Court to deal with the issues there" (11 RT 2522-2523).

It does not require clairvoyance to understand Judge Gordon's choice of words to mean that he would not grant a new trial which would have the effect of requiring him to extend his return on assignment, or transfer the

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255/ See, e.g., 11 RT 2537 ("He's the guy who goes to a party and wonders if anybody is going to like him".)

retrial to an active judge of the Santa Barbara Superior Court, but rather that he was committed - whatever the new evidence might show - to enter a death judgment against Appellant. No other interpretation makes sense, particularly in light of Judge Gordon's application of multiple erroneous legal assumptions to avoid a result more favorable to Appellant.

The Superior Court abused its discretion by considering an impermissible factor, personal inconvenience or likely reassignment of a retrial to an active judge, in deciding the new trial so as to "move the case along."

D. CONCLUSION

For all the reasons stated above, under the reasoning of *Knoller, supra*, this Court should remand Appellant's §1181 motion to the Superior Court for a hearing and reconsideration of counsel's allegedly deficient performance and prejudicial conflicts of interest under the applicable legal standards of *Strickland*.

DATED: January 10, 2011

Respectfully submitted,

By: _____
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DEFENDANT-APPELLANT

CERTIFICATION OF WORD COUNT

I, Roger Teich, certify that the Appellant's Opening Brief is approximately 128,584 words in length and uses a 13-point Times New Roman font. This Court previously granted leave for Appellant to file an overlength brief exceeding the size limits allowed by the rules.

Dated: January 10, 2010

Roger Teich

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RYAN HOYT

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 290 Nevada Street, San Francisco, California 94110.

On January 11, 2010, I served a true and correct copy of the document described as APPELLANT RYAN HOYT'S OPENING BRIEF ON APPEAL on the following interested parties or counsel for interested parties in this action.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 11, 2011, at San Francisco, California.

Roger Ian Teich

Roger Ian Teich