IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. CATHERINE THOMPSON, Defendant and Appellant.	Case No. S033901 (Los Angeles County Superior Court No. SA004363)

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent where necessary in order to present the issues fully to the Court. Appellant does not reply to respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any specific contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

I

THE TRIAL COURT'S REFUSAL TO SEVER APPELLANT'S TRIAL FROM THE TRIAL OF CODEFENDANT SANDERS WAS A PREJUDICIAL ABUSE OF DISCRETION AND RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL, IN VIOLATION OF APPELLANT'S RIGHT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In the Opening Brief, appellant demonstrated that the courts below gave short shrift to appellant's concerns about the impact of a joint trial on her rights to fair trial, erroneously dismissing her arguments even when they were supported by the words and actions of Sanders's counsel. (AOB at pp. 40-102.) Appellant also demonstrated that at the trial that followed, appellant was denied her trial rights, a fundamentally fair proceeding, and a reliable judgment of guilt and penalty.

This was not simply a case where codefendants attempted to lay all blame on each other. The efforts of Sanders's counsel extended to their secret cooperation with the prosecution throughout the trial and included acts which, if done by the prosecution, would have violated appellant's right to counsel and her attorney-client confidentiality. Sanders's counsel confided to the trial court that they were cooperating with the prosecution about who would present certain pieces of evidence and that they had told the prosecution what they believed appellant's defense would be. (RT 26:4651-4652; RT 20:3510.) They confided to the trial court that they had obtained the prosecution's agreement to forego discovery for the explicit purpose of ensuring that appellant would have no notice of evidence Sanders would present to attempt to incriminate her "until appellant locks herself into a position" (RT 5: 762), evidence Sanders claimed to have obtained by writing directly to appellant at his lawyer's suggestion, without

notice to appellant's counsel. (RT 40: 6929-6930; RT 50: 8577-8578.)

The prosecution benefitted from Sanders's cooperation. It explicitly used Sanders evidence against appellant, evidence she had no opportunity to investigate or confront. Sanders's waiver of his objection to the testimony of his wife Carolyn permitted the prosecution to avoid severance, and to elicit further evidence against appellant. Sanders's cross-examination of appellant's son Girard about the date of Girard's contacts with Sanders regarding the purchase of a car, which was not raised on Girard's direct examination by appellant's counsel, opened the door to Girard's later impeachment by the prosecution, and the prosecutor's argument that appellant had been "crucified" by her own son's testimony. (RT 51:8672.) In closing arguments, the prosecution used Sanders's evidence and the evidence it triggered against appellant, arguing that it proved "95%" of the prosecution's case". (RT 51:8681.)

Sanders's efforts to obtain a more favorable result for their client at appellant's expense were successful. When the court finally determined that severance was necessary to afford appellant her right to a fair trial, Sanders entered into an agreement with the prosecution that avoided the need for severance in return for the prosecutor's agreement not to argue for death for Sanders at the penalty phase. Sanders's counsel later persuaded the court that the prosecution could only fulfill its end of the bargain if Sanders were granted a separate penalty trial, which never occurred. Sanders was sentenced to life without possibility of parole, while appellant was sentenced to death by a jury that was effectively told that the prosecution had determined that Sanders was so less culpable than appellant that it would not argue for his execution, thereby cementing the erroneous inference that appellant was the mastermind of her husband's murder.

Despite these unprecedented and extraordinary events, respondent insists no error occurred, contending that the evidence against appellant, independent of Sanders testimony and the evidence he presented, was more than enough to convict appellant. But whether or not the prosecution could have convicted appellant without relying on Sanders's evidence is irrelevant; it chose to embrace Sanders's evidence at trial and respondent cannot now ignore what its counsel below endorsed. In addition, respondent's characterization of the prosecution's own evidence is based on an incomplete and misleading summary. Aside from Kuretich's suspect testimony, the prosecution's case against appellant was circumstantial and far more tenuous than respondent acknowledges. See Section I.B, *infra*.

A. The Denials of Appellant's Pretrial Motions to Sever Were An Abuse of Discretion

1. The Applicable Law Required Severance

In arguing that there was no abuse of discretion in the denial of appellant's repeated pretrial motions to sever, respondent contends that appellant ignores relevant state case law --in particular, *People v. Coffman* (2004) 34 Cal.4th 1 --in favor of nonbinding federal law. (RB at p. 34.) Not so. Appellant discussed numerous state law decisions, including *People v. Hardy* (1992) 2 Cal.4th 86, on which the Court relied in *Coffman.* (AOB at pp. 65-71.) Appellant also properly relies on federal law this Court has cited with approval. (*People v. Coffman, supra*, 34 Cal.4th at p. 41; *People v. Hardy, supra*, 2 Cal. 4th at p. 168.)

It is respondent, not appellant, who ignores this Court's decisions. It is true that the Court has stated that "to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will

unjustifiably infer that this conflict alone demonstrates that both are guilty." (*People v. Hardy* (1992) 2 Cal.4th 86, 168, quoted in *People v. Coffman*, *supra*, 34 Cal.4th at p. 42; emphasis added.) However, the Court has also articulated the test for severance where defenses are irreconcilable in other ways. In *Hardy,* the Court quoted with approval federal cases holding that irreconcilable defenses mandating severance "'exist where the acceptance of one party's defense will preclude acquittal of the other.'" (*People v. Hardy*, *supra*, at p. 168, quoting *United States v. Zipperstein* (7th Cir. 1979) 601 F.2d 281, 285; *People v. Burney* (2009) 47 Cal.4th 203, 239 ["Antagonistic defenses do not warrant severance unless the acceptance of one party's defense would preclude acquittal of the other"]. Federal courts have applied the same analysis. (See, e.g., *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 899-900, quoting *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1072 [irreconcilable defenses exist when "'the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant'"]; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1086 [irreconcilable defenses "exist when acquittal of a codefendant would necessarily call for conviction of the other"]; *United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1415 [irreconcilable defenses exist "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of another"]; *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173, 178-181.)

Appellant submits that while it is certainly appropriate to mandate severance when the defenses are irreconcilable "*and* the jury will unjustifiably infer from this conflict *alone* that both are guilty" (*People v. Hardy, supra,* 2 Cal.4th at 168*),* severance on the ground of irreconcilable

defenses should not be limited to cases meeting that high standard. If the defendants have been properly held to answer based on the evidence introduced at the preliminary hearing, it is extremely unlikely that there will be such a dearth of evidence against them that a jury would unjustifiably infer from the conflict in defenses "alone" that both are guilty. If this is the only criteria for severing mutually antagonistic codefendants, severance for that reason is an illusory remedy.

In fact, this Court's decisions appear to recognize the necessity of severance in other situations. *Hardy* discusses an alternative formulation that focuses on whether the codefendants will rely on defenses that are so antagonistic that acceptance of one party's defense will preclude acquittal of the other, without requiring the further showing discussed in the previous paragraph. (*People v. Hardy, supra,* 2 Cal.4th at p.168.) This is such a case. Sanders's defense that there was no conspiracy to kill Tom and that he was an innocent bystander who witnessed appellant shoot her husband, if accepted, would preclude acquittal of appellant. Conversely, appellant's defense that Sanders shot her husband for his own purposes and in her absence, if accepted, would preclude Sanders's acquittal. Thus, the defenses in this case were not merely conflicting but were the paradigm of contradictory and mutually irreconcilable defenses mandating severance. Respondent recognizes as much when he observes that "both defendants claimed innocence and laid all the blame at each other's feet." (RB at p. 33.)

The cases cited by respondent are all distinguishable in this crucial respect. For example, in *People v. Hardy, supra,* 2 Cal.4th at p. 168, the Court explained:

[A]lthough their expected defenses were technically "conflicting" in

> that all three defendants denied culpability and speculated that one or both of the other defendants was responsible, their defenses were not particularly "antagonistic," as that term is used in the federal courts. For example, it is perfectly consistent that Reilly withdrew from a conspiracy involving others but that Hardy was not one of the coconspirators. Morgan's reliance on his alibi that he was in Carson City when the murders occurred and that Reilly and an unknown third person committed the crimes is not fatally contrary to Reilly's claim that he withdrew from the conspiracy; because Morgan claims not to have been present, he could not know if Reilly actually withdrew from the conspiracy and left before the crimes were committed. Morgan claims not to have known of Hardy's involvement; their defenses were thus not antagonistic at all.

The *Hardy* Court explicitly distinguished a case like appellant's in which "one defendant presents a defense that necessarily implicated another defendant." (*Id.*, at p. 169.)

Similarly, in *People v. Coffman*, *supra*, the defendants' defenses were "antagonistic" only in the sense that they were hostile to each other. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 40.) *Coffman* relied on a battered woman's defense to negate intent to kill, based on extensive evidence of her male codefendant's past assaults on her and his otherwise violent character. (*Id.* at pp. 20-25.) Marlowe, the male codefendant, presented evidence to rebut her defense. (*Id.* at pp. 27-30.) There was no factual basis on which only one defendant could be guilty. Hence, the case did not involve a situation wherein the defenses were irreconcilable, or alleged to be irreconcilable, in the sense that "'the acceptance of one party's defense [would] preclude acquittal of the other.' [Citation]" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 168.) Therefore, this Court examined whether joinder and antagonistic defenses alone would have led the jurors to conclude that "*both* defendants were guilty." (*People v. Coffman*, *supra*, at p. 42, italics added.) Cases decided after *Coffman* are

consistent with this analysis. (See, e.g., *People v. Letner* (2010) 50 Cal.4th 99, 150 & fn. 11 (blame shifting defenses did not require severance where one party's defense did not require establishing the guilt of his codefendant.)

The Court has also found the analysis adopted by the Supreme Court in *Zafiro v. United States* (1993) 506 U.S. 534 "helpful." (*People v. Coffman, supra,* 34 Cal.4th at p. 41.) In *Zafiro, supra,* 506 U.S. at p. 539, the High Court rejected "a bright line rule mandating severance whenever defendants have conflicting defenses" holding that the "district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, *or* prevent the jury from making a reliable judgment about guilt or innocence." (*Ibid.*; emphasis added.) In contrast to the language cited by respondent, it is clear that the *Zafiro* analysis focuses on the "*risk* of prejudice" and is cast in the disjunctive, i.e., severance is required where a joint trial will create a serious risk that a defendant's trial right will be impaired *"or"* will create a serious risk of undermining the reliability of the guilt phase judgment. "The risk of prejudice will vary with the facts in each case." (*Id.*)

Under the *Zafiro* analysis, severance was also mandated. By the time of appellant's renewed motion to sever on June 9, 1992, Judge Trammel knew that Sanders was concealing from appellant's counsel evidence that Sanders believed implicated appellant, and that the prosecutor was aware that Sanders had unspecified evidence he intended to use against appellant that would also help support the prosecution's case against appellant. At that point, it was or should have been clear to the court that there was a "serious risk that a joint trial would compromise" specific trial rights of appellant, including her statutory and constitutional right to notice of the evidence against her, her right to the effective assistance of counsel,

and her right to a meaningful opportunity to present a full defense which necessarily entail a timely opportunity to investigate the evidence that would be used against her.

Despite the extreme prejudicial effects of joinder in this case and the extraordinary degree of secret cooperation between the prosecution and Sanders, respondent insists that the denial of appellant's motions was not an abuse of discretion because, independent of Sanders testimony and any evidence he introduced, there was "overwhelming evidence" that appellant hired Sanders to kill her husband so she could recover insurance money to repurchase the house she lost in foreclosure. (RB at p. 51.) Appellant recognizes *Coffman* added this gloss to the formulation of the severance analysis relied upon by respondent, citing an Alabama case for the proposition that when "there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance." (*People v. Coffman, supra,* 34 Cal.4th at 42, citing *Ex Parte Hardy* (Ala.2000) 804 So.2d 298, 304.) In applying the language of the Alabama opinion to the abuse-of-discretion analysis, however, this Court appears to have conflated the issues of error and prejudice. The Alabama Supreme Court did not use this test to measure whether the denial of a severance motion was an abuse of discretion, but rather to determine if any error was harmless. (*Ex parte Hardy, supra,* at p. 304 ["test . . . did not entitle Hardy to a reversal"].)

Whether there is "sufficient independent evidence" of the moving defendant's guilt cannot be determined in the context of a pretrial motion to sever, when the prosecution's evidence has yet to be presented. Moreover, the Court has not defined what constitutes "sufficient" independent evidence in this context. A defendant will normally have been held to

answer before making a severance motion, which indicates there is at least enough evidence of guilt, i.e., reasonable cause to believe that he or she has committed the charged crimes. If that is all that is required, then a severance motion will always be denied, no matter how clear it is that a joint trial will create a significant risk to one of the defendant's trial rights. Requiring a joint trial under these circumstances does not contribute to judicial efficiency, but increases the likelihood that a midtrial mistrial will be necessary or that the judgment will later be reversed, and thus does not further the purposes of Penal Code section 1098.

In any event, *Coffman* had not been decided at the time the courts below ruled on appellant's motions, and the language on which respondent relies cannot be applied on this record. Neither Judge Weisberg nor Judge Trammel made any inquiry into the prosecution's evidence or made any effort to determine the strength of the evidence against appellant, independent of what Sanders intended to present.

2. Judge Weisberg's Denials of Appellant's Pretrial Motions Were an Abuse of Discretion

Respondent points to evidence introduced at the joint trial to argue that appellant was not convicted "solely because of the fact that her defense was antagonistic to codefendant Sanders" and therefore Judge Weisberg's denial of appellant's initial motion on April 14, 1992 and her renewed motion on May 11, 1992, were not an abuse of discretion. (RB at pp. 51-53.) But whether the denial of the pretrial motions was an abuse of discretion must be judged on the basis of the facts known to the court at the time of the ruling, not what develops at the later trial. Respondent fails to mention that Judge Weisberg did not rely on the prosecution's evidence against appellant when ruling on either motion. She did not ask the

prosecution for an offer of proof, or make any finding or even mention the strength of the prosecution's case in denying the motions, and nothing in the record indicates that she was aware of that information. (RT 3:534). Therefore, even if respondent's legal standard is the correct one, Judge Weisberg abused her discretion by failing to apply it. Had she done so, she would have been required to conclude that the prosecution's evidence, discussed below, was largely circumstantial and inconclusive.

Respondent also chooses not to address the significant additional evidence presented to Judge Weisberg in support of appellant's renewed motion to sever. After the denial of appellant's initial motion to sever, Sanders gave a statement to police in which he claimed total innocence and alleged he witnessed appellant kill her husband. (CT 7: 1856.) Sanders told the police he went to the victim's auto repair shop to discuss the sale of a car, that appellant shot her husband without warning, then handed him the revolver and told him to get rid of it. (CT 7:1856-1857) This was an about-face from his first statement to police in which he claimed he knew nothing about the killing (CT 7:1857).[1] When compared to the defense outlined by appellant's counsel in chambers -- that Sanders was pressuring appellant and the victim for more money as payment for his help in obtaining the fraudulent loan on the Sycamore Street property,[2] that shortly before the victim was killed Sanders threatened to take "some kind of action if he didn't get his money," and that Sanders shot the victim (RT 4:533-534 -- it

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[1] Sanders changed his story again at trial, claiming to be there to discuss a loan. (RT 39:6702.)

[2] Sanders testified at trial that it had occurred to him later that the amount of money he was paid for that transaction was not adequate for the number of felonies involved. (RT 41:7101.)

is apparent that the two defenses were not merely inconsistent, as the judge opined (RT 3:496), but mutually antagonistic and irreconcilable. (CT 7:1864.)

At the hearing on the renewed motion, Sanders's own counsel confirmed for the first time that appellant was correct in arguing that their defenses were mutually antagonistic, and joined appellant's motion to sever. (RT 3:494.) The prosecution did not dispute Sanders's representation. Judge Weisberg, however, made no in camera inquiry of Sanders or appellant to determine how this conflict would affect the proceedings. (RT 3:496.) (Compare *People v. Hardy, supra*, 2 Cal.4th at p. 167 [trial judge separately conferred ex parte with each of the defendants to ascertain what their defense would be]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 344 [trial court read entire preliminary hearing and declarations filed in camera by all three defendants]. Instead, the court simply referred back to her earlier ruling: "As I stated before, it is within the court's discretion and I considered the matter of inconsistent defenses, and I am exercising my discretion and denying the motion." (RT 3:496.) It is the court's failure to recognize the legal significance of the difference between merely inconsistent and mutually irreconcilable defenses in the context of the additional facts presented in support of the renewed motion, and the failure to make a further inquiry that constitutes an abuse of discretion. On this record, Judge Weisberg was required to grant the renewed motion for severance.

3. Judge Trammel's Denial of Appellant's Pretrial Motion for Reconsideration Was an Abuse of Discretion

Respondent acknowledges that after hearing argument on June 8, 1992, Judge Trammel "did provide some indication that he would have approached the [severance] issue differently" than Judge Weisberg. (RB at p. 56). In fact, Judge Trammel said that he "probably would have granted the motion." (RT 4:561, 562.) Nonetheless, respondent argues that Judge Trammel's denial of appellant's motion to reconsider Judge Weisberg's rulings was not an abuse of discretion because (1) Judge Trammel could have properly found that Judge Weisberg's ruling was law of the case, (2) no new facts justified reconsideration by a different judge, and (3) the motion failed on the merits for the same reason it failed before Judge Weisberg. (RB at pp. 54-57.)

Respondent is incorrect in asserting that Judge Trammel could have rested his denial on law of the case. That doctrine does not apply to rulings of a trial court. (*People v. Sons* (2008) 164 Cal.App.4th 90, 100, citing 9 Witkin, *Cal. Procedure* (4th ed. 1997) §896, p. 930.) Respondent argues that appellant's motions did not fall within the exception recognized in *In re Alberto* (2002) 102 Cal.App.4th 421, 426-427, permitting reconsideration where the original judge is not available, because she was "not unavailable in the sense that the lawyers wanted to bring the motion to her but could not." (RB at p. 56) But as respondent also admits, she was unavailable for all purposes because she was no longer the judge presiding over the case. (*Ibid.*) The case was transferred to Judge Trammel for all purposes on May 26, 1993, without any input from appellant. (CT 7: 1946-1947; RT 4: 507-509.) Under these circumstances, the reasons for the general rule limiting the power of one judge to overrule another were not

implicated. Appellant was not forum shopping but was ordered to appear before Judge Trammel for all purposes, and requesting reconsideration did therefore not interfere with a case pending before another judge.

4. Judge Trammel's Denial of Appellant's Renewed Motion to Sever, Based on a Significant Change of Circumstances, Was an Abuse of Discretion

Whether or not Judge Trammel should have granted the motion to reconsider on June 8, a subsequent change of circumstances required the court to grant appellant's renewed motion on June 24, 1992. As respondent concedes (RB at p. 56), reconsideration of a previous order is appropriate when based on new facts or circumstances. Between June 8 and June 24, Judge Trammel learned that Sanders counsel intended to conceal the existence of evidence they believed incriminated appellant until they presented their case-in-chief, and that in order to guarantee that appellant would be surprised by this evidence, they had obtained the prosecution's agreement to forego discovery. Having ruled that the reciprocal discovery provisions of Penal Code section 1054 did not apply to codefendants, the court was now on notice that the risk that a joint trial would deprive appellant of her trial rights had become a reality. (See Argument II, *infra.)*

Moreover, Sanders's counsel told the court that the evidence it was withholding was critical to whether appellant's motion to sever should be granted, but that they could not disclose it. (RT 5:764) The court did nothing, advising them he could not resolve their dilemma and shrugging off their concerns about appellant's rights: "[V]ery definitely the district attorney wants to keep this case together. . . [E]ven though the other defendant has been insisting on separate trial, I would be reluctant to

hearing such a motion . . . out of the presence of that defendant." (RT 5 :765). The court also observed that discussing the information with the prosecution in connection with the severance motion would lead to the disclosure of the information to appellant, contrary to the agreement between Sanders and appellant. Based on what the court knew, it did not need to disclose the specific evidence that Sanders intended to present; the court could and should have granted appellant's motion to sever because it was clear that the lack of reciprocal discovery between the codefendants was being used to deny appellant her rights. The jury had not been sworn and severing the trial at this point would not have implicated double jeopardy concerns.

The court had another available alternative to remedy the situation. Appellant has also argued that the denial of her alternative motion for separate juries, also made on June 24, was an abuse of discretion under these circumstances, Respondent dismisses this argument in a footnote, arguing without citation to any authority that "identical (or virtually identical)" considerations apply to both a motion to sever and a motion for two juries. (RB at p. 58, fn. 23.) Appellant disagrees. Dual juries were approved by this Court in *People v. Harris* (1989) 47 Cal.3d 1047, 1071-1076, and explicitly approved as an alternative to severance for conflicting defenses in *People v Cummings, supra.* The factors weighing against separate trials do not weigh against dual juries because the latter "facilitate[] the legislative preference" to try jointly-charged defendants together. (*People v Cummings, supra,* 4 Cal.4th at 1287). The use of dual juries conserves judicial resources, and it avoids the inconvenience and trauma to witnesses that may occur when they must repeat their testimony in multiple proceedings." In addition, there were no logistical considerations

weighing against dual juries in Judge Trammel's courtroom, where the procedure had been successfully used in the past without problems. (RT 5:665.) Judge Trammel did not consider any of these factors when he summarily denied appellant's motion.

Separate juries would have "minimized any impact the defendants' respective trial strategies" would have had on each other. (*People v. Cummings, supra,* 4 Cal.4th at p.1288.) If two juries had been impaneled, appellant's jury would not have been called upon to accept or reject Sanders's defense. Appellant's jury would not have heard Sanders's testimony and there would have been no reason for appellant to call Carolyn Sanders to impeach him. Sanders would have had no legitimate reason to refuse to disclose the letters and the identity of Jennifer Lee to the prosecution prior to trial, and if the prosecution then chose to use that evidence against appellant, it would have been required to disclose it prior to trial. At that point, appellant's counsel would have had an opportunity to investigate and discover the evidence rebutting the significance of Lee's surprise testimony, discussed in Argument II, *infra.*

Faced with the denial of her renewed motion to sever or to empanel dual juries, appellant requested the court to alter the order of proof to require Sanders to present his case before appellant. As explained in the Opening Brief (AOB at pp. 85-88), the court denied that request in reliance on the confidential information it had received in camera from Sanders and refused to disclose that information to appellant's counsel. The court abused its discretion by relying on secret information that appellant's counsel could not address, information that was unreliable for several reasons. See Argument III, *infra.* The court's refusal to alter the order of proof error is particularly egregious in light of the court's knowledge that

Sanders and the prosecution were effectively altering the burden of proof by agreeing that Sanders would withhold evidence and defer cross-examination so that prosecution could use it later in its rebuttal. (RT 26 :4651-4652.)

Appellant again moved for a severance when the court relied on undisclosed information received from Sanders's counsel in camera to deny appellant's motion to alter the burden of proof. The court's summary denial of this motion without any comment at all is illustrative of the court's repeated failure to consider in the aggregate the adverse effects of forcing appellant to go to trial with Sanders. Those effects could not be avoided and persisted throughout the trial.

B. The Erroneous Denial of Appellant's Severance Motions Was Prejudicial

Under state law, the effect of an error must be evaluated under the *Watson* test, i.e., whether there is a "reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Federal law is also applicable here because the denial of severance deprived appellant of trial rights guaranteed by the Sixth and Fourteenth Amendments, including a "meaningful opportunity to present a complete defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690), and her rights to the effective assistance of counsel and due process. Under federal law, appellant's conviction must be reversed unless Respondent demonstrates that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Although it is respondent's burden under *Chapman* to show why the error did not contribute to the verdict, respondent does not address *Chapman* at all. While he pays lip service to *Watson*, he argues that any

error was harmless because the prosecution's evidence was sufficient to convict appellant "without any assistance from codefendant Sanders's defense." (RB at p. 54.) While it may be true in some cases that it is not the "conflict alone" that leads to a guilty verdict, that is not the relevant question. The real issue under state law is whether there is a "reasonable probability" that joinder of antagonistic defendants contributed to the verdict. (*People v. Watson, supra,* at p. 836.) The Supreme Court has explicitly recognized the distinction between sufficiency of the evidence and prejudicial error. In construing a federal rule which found nonconstitutional error harmless unless it affected substantial rights, the Court explained:

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

(*Kotteakos v. United States* (1946) 328 U.S. 750, 765.) It is particularly inappropriate for respondent to ignore the effect of Sanders's evidence, including the surprise testimony of Virginia Lee about the letters and the manipulation of Girard's testimony, and the evidence appellant was forced to present to rebut Sanders, which included Carolyn Sanders testimony that her husband told her appellant had hired him to kill Tom, where the prosecution embraced that evidence and used it against appellant.

Even under respondent's approach, however, the denial of severance was prejudicial. An analysis of the facts cited by respondent does not support his argument that the prosecution's evidence overwhelmingly established appellant's guilt, independent of Sanders's evidence. (RB at p. 51.) Much of the evidence presented in the prosecution's case-in-chief was

focused on proving the uncontested facts of the Sycamore Street transaction, and the uncontested circumstances surrounding appellant's effort to create a better albeit false financial picture to obtain a loan to repurchase the family home on Hillary Street.

Respondent asserts that the prosecution proved that appellant, who handled the family's personal and business finances, "let their home go into foreclosure." (RB at p. 51.) But the evidence shows that it was forces beyond the control of appellant and her husband that caused their financial problems. In the several years before the foreclosure on the Hillary Street property, the couple lost income because Tom had to close a second business run by his brother, because appellant left her job to assist her husband at work, because Tom was required to do work on the Kayser Automotive property to comply with government regulations, and, most importantly, because Tom's ex-wife Mellie defaulted on her promise to sell the Sycamore Street house in February of 1988 and pay Tom $25,000.00. After November of 1989, the couple has the added burden of monthly payments on the Sycamore Street mortgage, which had to be repaid in full within one year (subject to a six month extension), at 16% interest. (Ex. 29.) Like the prosecutors below, Respondent asserts that appellant manipulated Tom for his money. The evidence contradicts that argument. Family and friends described their relationship as a loving partnership. (RT 27:4735; 35: 6104.) Tom was not an unsophisticated man: he successfully ran a business and was viewed as a good businessman. (RT 36: 6259-6265.) In fact, Carolyn Thompson testified that her father told her he married appellant because he thought *she* had money. (RT49:8325)

Respondent contends that "without the victim's knowledge," appellant obtained a fraudulent loan on the Sycamore Street house that

Mellie refused to sell, lied about the victim's health and made false statements about her financial condition. (RB at p. 51.) Respondent refuses to acknowledge that there was independent evidence that Tom was aware of appellant's participation in that fraud: he sought advice about taking the house out of Mellie's name and putting it into appellant's name (37:6351-55), and sent a letter to Reik, the mortgage broker, regarding payment. (Ex. 32). Monthly payments on the loan were made from the Kayser account. (Ex. 40.) When Mellie discovered the unauthorized loan, she had no question about Tom's involvement and sued him, along with appellant. (RT 23: 3938-3940.) [3] There is no evidence that after being sued, Tom indicated in any way that he was not aware of what had occurred.

Respondent attempts to make much of the fact that appellant used her given name, Catherine Bazar and a different address in her efforts to buy back the Hilary Street house. But appellant made no secret of this or why she was doing it: she told Tony de Greef of BID Properties, who then owned the Hilary Street house, that she was married but was attempting to get credit in her maiden name, Catherine Bazar, because of a bad credit history, and the address she used was her son's apartment. (RT 34:4113, 4140; RT 24:4171, 4180; RT 23:4053-4054). Escrow agent Rogers confirmed that married people sometimes buy and hold property as individuals, not as a couple (RT 23:4041), and there was evidence supporting appellant's statement that Tom was absent from the negotiations because of illness: Tom's son, Tommy, testified that his father was ill in the months preceding his death. (RT 26:4475.) It was also because of that

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[3] Appellant's minimization of her contacts with Sanders to Detective Klingford was understandable in light of their involvement in that fraud.

bad credit history that it was necessary for appellant to create a false impression about her financial situation by providing the name of a fictional bank. Placing the business in her name and claiming to have a trust fund were consistent with that goal. Given her goal, it was not surprising or suspicious that appellant assigned part of the insurance proceeds to BID Properties. According to a representative of the insurance company, the timing of appellant's application for the insurance proceeds was not unusual. (RT 26:4604-4605)

The evidence summarized above shows, at most, that appellant resorted to fraud to attempt to dig the couple out of their financial hole, not that she was conspiring to kill her husband for the insurance money she might receive under policies that Tom applied for at the urging of insurance agent Leonard Williams. In contrast, the prosecution's evidence of a conspiracy to kill Tom for the insurance money was limited to the suspect testimony of Christine Kuretich and evidence that phone calls were made between the home and business of appellant and Tom, and Sanders's residence in May and June of 1990. Kuretich admitted that she was an alcoholic who also used cocaine and marijuana at the time she claimed to have overheard Sanders and his wife discussing appellant's alleged desire to have her husband killed for insurance money. (RT 29: 5098-5100.) She did not tell the police the version of facts she related at trial until they told her what they believed happened and who they believed was involved. (RT 30: 5214-5217.) At the preliminary hearing, she could not say whether the purported conversations occurred before or after she learned of Tom's death. At trial, she attempted to explain this discrepancy with the startling assertion that her memory was better at the time of trial than it had been at the earlier hearing because she was now sober. (RT 29: 5095, 5101, 5105;

RT 30: 5172-5173.)

As for the records of the telephone calls, they did not establish who made the calls or what was discussed. The record reflects that Sanders mother, Isabelle, was good friend of appellant's who spent a great deal of time at Kayser Automotive, in the two years before Tom's death. (RT 36: 6311). Appellant's son Girard was also a friend of Sanders's brother, Elmer, and Sander's nephews. (RT 36: 6511, 6318.) In addition, the telephone records show many calls between the same numbers long before the alleged conspiracy. (Exs. 58, 59, 60.)

Respondent attempts to transform innocuous facts into guilty ones, pointing out (1) that appellant was seen coming from the area of the shooting shortly after it occurred, (2) that two bags of aluminum cans were found at the scene, even though appellant told the police she left the shop at 5:45p.m. to recycle cans, (3) that she told the police a Rolex watch was stolen from the victim, when one was later found at appellant's home, (4) that appellant incorrectly told a friend that the San Francisco police arrested a person in possession of Tom's watch, and (5) that she told friends she saw a tall Black man who was not Sanders near the scene, and that she believed Greg Jones, not Sanders, murdered Tom. (RB at pp. 52-53.) But in context, none of these facts had any tendency to prove appellant's guilt. Appellant worked with her husband so it was not suspicious that she was in the area. That additional cans remained at the shop did not disprove her statement that she had taken some to be recycled, and no evidence was introduced to impeach her statement. The fact that a Rolex was found later at appellant's home shows only that, based on Tom's usual practice, she mistakenly believed he had it at the shop. Similarly, assuming the accuracy of Rene Griffin's testimony, a mistaken belief that a person had been

arrested with Tom's Rolex in San Francisco does not tend to prove a conspiracy to kill. No evidence was presented to establish that there was not another Black man in the area, and appellant's speculation that Greg Jones was the killer was not unwarranted, given the dispute that existed between the Thompsons and the Jones. [4]

Respondent's efforts to shore up a less than compelling case are apparent in his assertion that appellant "all but confessed" when she said on the way home from the hospital, after Tom had been pronounced dead, that "it wasn't supposed to happen this way" or "I didn't mean for it to happen this way." (RB at p. 53.) Rather than incriminatory, the literal meaning of her statement is that she did not intend what happened, which is inconsistent with the prosecution's theory and exculpatory. Respondent also points to Officer Kingsford's testimony that appellant told him she did not know Sanders and had only met him once. Appellant had good reason not to discuss her relationship with Sanders, given her potential liability fo the fraud she committed with him in 1989. Kingsford said she raised his name first, but other evidence showed that Sanders arrest in this case was the subject of a press release several days earlier (RT 27:4714, 4720-22). And in light of appellant's close friendship with Sanders's mother, it is likely that appellant learned about Sanders's arrest from her.

Finally, although not mentioned by respondent in this context, the mis-named "hit note" added nothing to the prosecution's case against appellant. In addition to the inconsistent testimony about where and how long after the crime it was found, it was inconsistent with the prosecutor's

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[4] Greg Jones, the husband of Philip Sanders's sister, Loviera Jones, borrowed money from appellant but did not pay her back. (RT 39: 6703.)

theory of the case: Tommy Thompson testified that Sanders had visited the shop about two weeks before the killing, and that Jones had visited about one week before the killing, making it unnecessary for anyone to furnish Sanders with a description of Tom. (RT 26:4487.) Sanders himself admitted to the police that he had previously visited the shop. (RT 43:7408.)

C. As a Result of the Denial of Severance, Appellant's Trial Was Fundamentally Unfair

Respondent 's argument that appellant's trial was not fundamentally unfair is again based on the inaccurate premise that the prosecution's case alone, without any of the evidence admitted during or as a result of Sanders case, was "overwhelming." (RB at p. 61.) Assuming that is the measure of fundamental unfairness (a proposition that respondent does not support with any legal authority and with which appellant disagrees), appellant has shown above that respondent's premise is mistaken.

Respondent also contends that appellant's arguments about the fundamental unfairness of her trial are no more than a complaint that Sanders was a "second prosecutor," which Respondent views as a "necessary consequence of having antagonistic defenses." (RB at p. 60.) Not so. Appellant's counsel was forced to move for a mistrial numerous times during the guilt phase, based on the conduct of Sanders and the prosecution. Sanders counsel did more than present evidence against appellant: they directed Sanders to communicate directly with appellant (who was represented by counsel) in an attempt to obtain evidence to use against her, colluded with the prosecutor to hide evidence in order to surprise appellant, secretly secured the prosecutor's assistance to obtain expert assistance at no cost from the Los Angeles County Sheriff's

Department and the special transportation of Jennifer Lee from Frontera directly to and court, facilitated the prosecution's investigation, and coordinated the discovery and presentation of evidence against appellant with the prosecution. They used their cross-examination of appellant's son to provide the prosecution with an opportunity to impeach him and then argue that appellant's own son had "crucified" her. (AOB at pp. 88-98.)

Significantly, Respondent does not address the ways in which the prosecution cooperated with Sanders is counsel and took full advantage of Sanders's evidence and defense tactics. As noted, the prosecutors agreed to defer their receipt of discovery from Sanders, agreed to provide Sanders with expert assistance, and coordinated the presentation of evidence against appellant.

This cooperation climaxed in the agreement struck by the prosecution during Sanders testimony for the purpose of avoiding the severance the trial court finally realized was necessary because appellant's rights would be violated by Sanders's assertion of the marital privilege to prevent his impeachment with his admission to his wife Carolyn. The prosecution agreed not to argue for death for Sanders at the penalty phase and in return, Sanders withdrew his objection. The court accepted this agreement without making any inquiry into the parties' understanding of its terms, the implications of the agreement for the penalty phase or whether it would it would in fact avoid severance. Although the prosecution's version of the agreement contemplated a joint penalty trial at which the "People will not be urging the death penalty" in argument as to Sanders (CT 2514), Sanders believed and testified that he was no longer subject to the death penalty. The court granted a motion to strike that testimony of the prosecution and Sanders's counsel to strike his testimony, and was forced to

deliver a lengthy instruction explaining the agreement that had led to the testimony the court was now striking and telling the jurors "to put out of its mind and not let . . . affect [their] determination of the issues *in this phase of the case.*" (RT 42:7270-7272; emphasis added.) As the trial judge recognized, he was asking the jurors to "play. . . mental gymnastics" because it was "very difficult"for them to ignore what happened. (*Id.*) This instruction, and its impact at the penalty phase, would not have been necessary if severance had been granted.

The prosecution entered the agreement to retain the tactical advantage of the joint trial, at which Sanders buttressed the prosecutions' case against appellant. The prosecutors then parlayed their advantage by refusing to call Carolyn Sanders to impeach her husband's testimony that he did not confess to her, knowing that appellant believed it was important to impeach Sanders on this point and would therefore call her as a defense witness. This permitted the prosecution to elicit on cross-examination testimony that incriminated appellant. (RT 45:7626, 7864.)

Nor does Respondent address the use the prosecution made of Sanders's help in closing arguments. They argued that parts of Philip's testimony proved "95 % of the prosecution's case." (RT 51:8681.) Prosecutor Goldberg argued to the court that the letters introduced by Sanders proved appellant's consciousness of guilt, and argued at length to the jury that the letters proved there was a continuing conspiracy. (RT 40:6839; RT 49:8285-8289.) Prosecutor Mader told the jury that the prosecution "could not have come up with more powerful evidence that all these people were in it together" than Sanders 's evidence, and that defense case itself –the letters, and the testimony of Sanders and his wife – was

sufficient to convict. (RT 51:8676, 8682- 8683).[5]

Respondent is silent about the ways in which the court's refusal to sever the guilt trials prejudiced appellant at the penalty phase. The controversy between Sanders and the prosecution about the meaning of their agreement continued after the jury returned its guilt phase verdicts. Prior to the penalty phase, Sanders's counsel argued that the prosecution had agreed not to seek death against him at all. When the court rejected that position, Sanders argued that his penalty trial would have to be severed because allowing the prosecution to present aggravating evidence about the circumstances of the crime to support a death sentence for appellant would be tantamount to arguing that death was the proper penalty for Sanders as well as appellant, an argument that the court accepted. Based on this unanticipated development, appellant requested the court to allow the penalty phase to proceed before the same jury with Sanders alone and impanel a new jury for her sentencing, but the court refused to do so.

At penalty appellant argued that the jury should not impose death, in

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[5] Respondent also contends that consideration of the evidence that would likely not have been presented if appellant had been tried alone is irrelevant and speculative. (RB at pp. 61-63.) While it is correct that it is not possible to determine with certainty how a separate trial would have differed, the inferences appellant has drawn illustrate the unfairness of the trial that occurred and are fully supported by the legal arguments presented in the opening brief.

part because Sanders was the actual killer and was therefore more culpable [6] but nothing prevented one or more jurors from reaching a different conclusion based on the deal. The jury was free to speculate that the prosecutor's deal with Philip not to argue for the death penalty was also motivated by its opinion that Sanders was less culpable than appellant, whether or not he was the actual killer. Further, the jury was also free to speculate from Sanders's absence that its own guilt phase findings about the facts of the case should be re-evaluated or upended. The guilt phase limiting instruction did not preclude the jury from doing so or considering the significance of the deal at penalty phase because it was limited to "this phase" of the case (RT 42:7272.) The penalty phase limiting instruction did not address the deal at all, but told the jury to disregard the court's "exercise of its discretion to grant Mr. Sanders a mistrial and a separate penalty." (RT 55:9104-9105.)

The purpose of the statutory preference for joint trials is to prevent repetition of evidence and save time and expense to the prosecution and the defense. (*People v. Scott* (1944) 24 Cal.2d 1233, 1286.) Here, the prosecution insisted on joint trials to obtain an unfair tactical advantage that prejudiced appellant throughout the proceedings. For all of the reasons stated above, the guilt and penalty phase judgments must be set aside.

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[6] The court agreed that the identity of the triggerperson would control who would receive the death penalty. (RT39:6572.) "[T]he very issue as to who may receive the death penalty . . .is the issue as to who shot Melving Thompson." (RT33:5713)

II

THE TRIAL COURT'S REFUSAL TO ORDER DISCOVERY BETWEEN APPELLANT AND HER ANTAGONISTIC CODEFENDANT, AND ITS APPROVAL OF THE CODEFENDANT'S AGREEMENT WITH THE PROSECUTION TO DELAY DISCLOSURE OF HIS EVIDENCE TO THE PROSECUTION FOR THE PURPOSE OF PREJUDICING APPELLANT, WAS PREJUDICIAL ERROR

At appellant's joint trial with Philip Sanders, the trial court approved an agreement between Sander's counsel and the prosecution that denied appellant her statutory and constitutional rights to notice of evidence used against her and an opportunity to confront and rebut that evidence. The prosecutors agreed to forego their entitlement to pretrial discovery of the names of two witnesses and real evidence that Sanders intended to and did present in his defense, delaying their receipt of this material until the night before Sanders called his witness, days after appellant had rested her case. Although the trial court was informed of the agreement by Sanders's counsel and approved it at an in camera hearing held before the trial began, the agreement was never disclosed to appellant or her counsel. Appellant did not learn of the agreement until after the jury returned a verdict of death and the court unsealed the transcripts of the ex parte in camera hearings held during the trial. Respondent does not dispute these facts.

In closing arguments at the guilt phase, the prosecution embraced the evidence presented by Sanders and used it against appellant, arguing that the prosecution "could not have come up with more powerful evidence that all these people were in it together than the production of these letters." (RT 51:8576.) At the penalty phase, the prosecution used the letters to impeach the testimony of appellant's mitigation witnesses. (RT 58:9372.)

The prosecution also relied on Jennifer Lee's testimony to argue that appellant would be a danger to others if sentenced to life without possibility of parole. (RT 58:9374-9375.)

This scenario was only possible because appellant and Sanders were tried together, over appellant's vigorous and repeated objections. (See Argument I, *supra.*) If the trial court had severed the trials of appellant and Sanders and appellant was tried before Sanders, the prosecution would not have learned of the evidence until after appellant's trial. (Pen. Code §1054.7 [30 day requirement].) If Sanders had been tried first, then the evidence would have been part of the public record of his trial and available to appellant in time to investigate and prepare a response. In addition, if the prosecution wanted to use the evidence against appellant at her subsequent trial, it would have had to provide discovery.

Appellant has argued that under the circumstances of this case, both Penal Code section 1054 and due process prohibited the conduct engaged in by the prosecution and Sanders with the approval of the court, and that the discovery statute should be construed to avoid such unfairness. Citing inapposite cases holding that Penal Code section 190.3 does not require discovery of aggravating evidence at the penalty phase, respondent argues that section 1054 does not provide for reciprocal discovery between antagonistic codefendants at guilt phase, and that no unfairness occurred here. (RB at pp.69-77.)

Respondent's arguments should be rejected for several reasons: first, under the plain language of section 1054, a defendant is entitled to compel a codefendant to disclose evidence that the codefendant intends to use to incriminate the defendant at their joint trial under the same terms that govern reciprocal discovery between the prosecution and the defense;

second, no good cause justified delaying Sanders's disclosure to the prosecution which, as respondent concedes, would have then been required to disclose immediately to appellant (RB at p. 70); third, even if not required by the statute, disclosure was mandated by due process and appellant's Sixth Amendment trial rights; and fourth, appellant was prejudiced by the improper failure to disclose .

A. Section 1054 Requires Reciprocal Guilt Phase Discovery Between Codefendants

In her Opening Brief, appellant argued that the language of section 1054, subdivision (b) requires reciprocal guilt phase discovery between codefendants, particularly when they are presenting antagonistic defenses. (AOB at pp. 109-123.) The statute mandates that section 1054 "be interpreted to give effect to" five purposes, including saving "court time by requiring that discovery be conducted informally *between and among the parties.*" (Emphasis added.) Respondent does not address the plain language of the statute or the drafters' intent, relying instead on this Court's decisions in *People v. Ervin* (2000) 22 Cal.4th 48 and *People v. Coffman* (2004) 34 Cal..4th 1. Neither case controls the outcome here.

In *Ervin, supra,* 48 Cal.3d at p.101, defendant argued that his counsel was ineffective for failing to obtain discovery of the witnesses to be called by his codefendant at their joint *penalty* trial. The Court rejected the argument without explanation, other than to note that defendant *conceded* there was no statutory basis for his request. (*Ibid.*) *Coffman* also involved notice between codefendants at penalty phase. Relying solely on Penal Code section 190.3, the Court held that the statute "contemplates that the *prosecution* will give notice of the aggravating evidence it will present but omits any mention of a codefendant's obligation to provide notice of

penalty phase evidence." (*People v. Coffman, supra,* 34 Cal.4th at 114; emphasis in original.)

Thus, neither case involves guilt phase discovery or the interpretation of section 1054.

Respondent asserts that there is "no logical reason . . . why the rule that codefendants have no right to discovery from each other should apply in the penalty phase, but not in the guilt phase." (RB at p. 75.) But there is a logical reason, based on the different purposes of the guilt and penalty phase. While the jury's function at the penalty phase is to make an individualized moral assessment of each defendant's personal culpability, its function at the guilt phase is to determine if the prosecution has proved the defendant's guilt beyond a reasonable doubt, which requires the jury to determine the facts. Discovery between codefendants at the guilt phase contributes to the accuracy and reliability of those factual findings by ensuring that all relevant evidence will be identified, presented and tested through cross-examination, thereby "promot[ing] ascertainment of the truth." (Pen. C. §1054.) Discovery between codefendants also saves court time by avoiding the necessity for the interruptions that will occur, particularly in a case where the defendants rely on mutually exclusive defenses, when one defendant must seek a mid-trial continuance to investigate evidence presented by a codefendant who has not previously disclosed it, or as here, a mistrial.

B. The Prosecution's Agreement to Forego Its Statutory Right to Timely Disclosure of Sanders's Evidence, with Knowledge of Sanders's Purpose, Violated Appellant's Rights to Due Process and a Fair Trial

Respondent concedes that once Sanders disclosed his evidence to the prosecution, the prosecution would have been required to disclose it to

appellant. (RB at p. 70.) Respondent argues, however, that the prosecution was entitled to waive, forfeit or defer his statutory right to timely disclosure of Sanders's evidence, and thus committed no error. (RB at p. 73.) But Respondent overlooks that the prosecutor's agreement to forego advance disclosure of Sanders's evidence was made with knowledge that Sanders's purpose was to ambush appellant and with the assurance that the evidence Sanders was withholding would incriminate appellant. (RT 6:762-764.) Sanders counsel represented they had informed the prosecution that the witness whose identity they were withholding was "critical" to their case (RT 6:763), and the prosecution knew from Sanders's opening statement that his defense would be that appellant alone was responsible. These facts distinguish this case from the concededly "rare case where the prosecution decline[s] discovery in the possession of a defendant." (RB at p. 73.) It is impermissible for a party to "refrain deliberately from learning the address or whereabouts of a prospective witness, and thus to furnish to [her adversary] nothing more than the name of such a witness." (*In re Littlefield* 1(1993) 5 Cal.4th 122, 131.) A fortiori, under the circumstances of this case, it was improper for the prosecution to agree to delay its discovery of Lee's identity in order to avoid disclosure to appellant.

Respondent asserts that the "evidence in question was not used by the prosecution to prove appellant's guilt." (RB at pp. 71-72.) Not so. The prosecution affirmatively used the withheld evidence against appellant at both the guilt and penalty phases. Prosecutor Mader examined Sanders extensively about the content of the letters that Lee testified she copied (RT 43:7358 *et seq*) , and told the jury in her guilt phase closing argument that the prosecution "could not have come up with more powerful evidence that all these people were in it together than the production of the letters." (RT

51:8676.) Prosecutor Goldberg also commented at length on the letters in his guilt phase closing, arguing extensively that the letters proved a continuing conspiracy among the defendants and proved that appellant was the ringleader. (RT 49:8285-8297.)

1. The Trial Court Did Not Find and the Record Does Not Support "Good Cause" for Sanders to Delay Disclosure to the Prosecution

Respondent also argues that the court would not have abused its discretion if it had found there was good cause to delay discovery, as authorized by Penal Code section 1054.7. To support that argument, respondent repeats what is contained in the transcript of the ex parte in camera hearing with Sanders's counsel, without addressing appellant's arguments about why the representations of Sanders's counsel were insufficient to establish "good cause" under section 1054.7.

As appellant demonstrated in the opening brief, the record made at the ex parte in camera hearing suffered from the "inherent deficiencies" of an ex parte proceeding. (*Kling v. Superior Court* (2010) ___ Cal.4th ___; 2010 WL 4054491, *7.) Given their desire to keep Lee's identity a secret, Sanders had no incentive to volunteer any information that would not help their cause. They did not provide, and were not asked to provide, anything to support the hearsay allegation that Lee had received threats from appellant. Counsel did not explain the nature of the alleged threat, why Lee believed it was from appellant, or how appellant, who was in custody in Los Angeles, could have contacted Lee, who was in custody at Frontera. Nor did counsel explain why Lee would be "lost" to them as a witness if only counsel for appellant, but not appellant, was told about Lee's identity. Thus, even if the court had made a finding of good cause, the record is

insufficient to support it. (*Alvarado v. Superior Court* (2000) 23 Cal4th 1121.)

2. The Error Was Not Harmless Beyond A Reasonable Doubt

Respondent contends that appellant could not have been harmed by the late disclosure, arguing that she could not have been surprised because she wrote the letters but failed to tell her lawyer (RB at p. 74). Respondent's argument assumes that Lee's testimony and the inferences the prosecution drew from it were reliable. But if counsel had prior notice of this evidence and an opportunity to investigate, that assumption may have been rebutted through cross-examination and the introduction of additional evidence. As discussed more fully below, appellant's motion for new trial contains evidence that at the request of Carolyn Sanders, another inmate copied two letters remarkably similar to the letters introduced by Sanders, under circumstances suggesting they Sanders and his wife were attempting to set appellant up, or at the least were the motivating force behind the letters.

Moreover, respondent conflates a defendant's knowledge of the existence of a piece of evidence and notice that the evidence will be introduced against her at trial. But the difference between the two and the importance of the latter has been recognized by this Court and the Supreme Court. "'Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense *and not be taken by surprise by evidence offered at his trial.*'" (*People v Seaton* (2001) 26 Cal.4th 598, 640-641, citing *People v. Jones* (1990) 51 Cal.3d 294, 317; emphasis added.) Due process may also be violated when the prosecution deliberately misleads the defense about

the evidence to be presented. (*Grey v. Netherland* (1996) 518 U.S. 152, 164.)

More than 50 years ago, this Court held that a defendant need not allege that she could not recall her statement to the police in order to inspect the statement prior to trial. (*In re Joe Z.* (19) 3 Cal.3d 797, 802-805.)

> Such a requirement would necessarily be founded on the false premise that the only good cause for pretrial inspection of such material is to refresh defendant's memory. On the contrary, inspection is ordinarily vital for the intelligent and efficient preparation of one's defense...

(*Id.* at p. 803.) Nothing in the current statutory scheme, which requires disclosure of a defendant's statements, both written and oral and real evidence (Pen. Code § 1054.1(b)(c)), suggests any intent "to alter this longstanding disclosure policy." (*People v. Jackson* (2005) 129 Cal.App.4th 129, 169.) If a defendant's knowledge of his or her own statements to the police does not defeat the right to notice of that statement in discovery prior to trial, then a defendant's knowledge of some other piece of evidence should not defeat the entitlement to pretrial notice that the evidence will be used against him or her at trial. Respondent's argument, if accepted, would render pretrial notice a nullity in most cases.

Respondent argues further that any error was harmless "under any standard of prejudice." (RB at p. 76.) Respondent's contention should be rejected because it relies on cases that are distinguishable in critical ways and ignores facts that show how the prosecution's court-sanctioned agreement with Sanders prejudiced appellant.

Respondent cites *People v. Pinholster* (1992) 1 Cal.4th 865, 941, where defendant claimed that five witnesses were not timely-disclosed. The Court found that three of the witnesses had been timely disclosed. One of

the two untimely-disclosed witnesses did not testify. (*Id.* at 941.) The fifth witness' testimony was limited to relating a prior consistent statement to support the credibility of another prosecution witness, and the court offered defendant "as much time as you want to investigate" when the witness was disclosed, but defense counsel did not request a continuance. (*Id.* at 941.) In *People v. Bell* (1992) 61 Cal.App.4th 282, 290-291, the witness had been disclosed prior to trial but was not able to identify the defendant for the first time until mid-trial; before allowing the witness to testify to that fact before the jury, the court held a hearing at which the witness was subject to "thorough" cross-examination; in addition, defense counsel was able to informally talk to the witness, and discovered that he had a misdemeanor conviction for welfare fraud, the facts of which the defense used to impeach the witness. (*Id.* at p. 291.) The court concluded that under these circumstances, there was no violation of due process and therefore applied the state law harmless error test. (*Id.* at p. 291, fn.3.)

The facts of this case stand in sharp relief. In contrast to the witness in *Baker,* Jennifer Lee was not disclosed prior to trial, was not examined by appellant's counsel before she testified and was not subject to thorough cross-examination and impeachment at trial. In contrast to *Baker,* where the witness' change in his testimony came as a surprise, the prosecution knew in advance that Sanders would be presenting evidence helpful to the prosecution's case. In contrast to *Baker* and *Pinholster,* appellant's counsel did not have any prior notice or opportunity to investigate Lee before she testified. Finally, in contrast to *Pinholster*, where the late-disclosed witness' testimony was limited to supporting the credibility of another prosecution witness, Lee's testimony authenticating the letters permitted the introduction of the letters, which the prosecution viewed as the most

powerful evidence of guilt.

The record shows that if counsel had timely notice that Sanders and the prosecution intended to use the letters against her, he could have presented evidence to impeach Lee about who wrote the letters to Sanders and for what purpose. In a declaration dated February 5, 1993 submitted in support of appellant's motion for a new trial, Virginia Venegas stated she met appellant and Carolyn Sanders while in custody at the Los Angeles County women's jail. (CT 11:3241.) Carolyn told her that she was in jail for something her husband and son did, that her husband (Phillip) was extorting money from appellant and her husband, that she "would do anything to free herself" and she believed the prosecution would let her go home if she said appellant was behind the crime and "paid to have her husband killed." (*Ibid.*)

Carolyn asked Venegas to copy several letters that she said she wrote to help her husband. (*Ibid.*) One of the letters Venegas copied was to Phillip Sanders, saying "something about someone being taken care of," which Venegas construed as a reference to financial support. (CT 11:3242.) Venegas copied a second letter that was "like a prepared testimony for her defense." Carolyn told Venegas she had to "figure out a way to get Catherine to write these letters in her own handwriting." (CT 11:3242.) Sometime later, Carolyn told her that "everything was o.k." (*Ibid.*) Carolyn also told her that a person named Lee Mavin sent someone to see her husband and told him "they would be 'set' as long as that bitch (Cathy) went down" and that she "expected to go home and collect." (*Ibid.*)

In a second declaration dated March 18, 1993, submitted by the prosecution, Venegas confirmed that she copied letters at Carolyn's request that Carolyn did not want in her own handwriting. (CT 12:3380.) In this

declaration, she described one letter as a "script and about Carolyn and her husband being taken care of and another about Carolyn and her husband extorting money." (*Ibid.*) However, she said she learned about the crimes from copying the letters, not from talking to Carolyn, and that Carolyn did not say anything about the crime, about her husband and son being involved or that she was going to lie about appellant. Carolyn also said "the DA was going to help if she talked." (*Ibid.*) In addition, Venegas stated that Carolyn never said "whether or not" appellant was involved. (*Ibid.*)

Venegas' declarations suggest that the exchange of letters in the jail was instigated by Carolyn and Phillip Sanders, not by appellant. Venegas' descriptions of the letters are quite similar to the letters Lee said she copied for appellant. (Ex. 138.) With this information, appellant could have cross-examined Lee about whether she saw appellant write the letters she copied and simply assumed that the letter she was given to copy was written by appellant, and could have argued that the letters Lee copied were actually written by Carolyn Sanders. At a minimum, Venegas' testimony would have countered the prosecution's argument that appellant was the ringleader telling her codefendants what to say. (RT 49:8286).

In arguing that the error was harmless, respondent chooses not to address the heavy reliance the prosecution placed on the letters and Lee's testimony at both phases of the trial. Given the prosecution's reliance on that evidence, "there is no reason why [this Court] should treat the evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 862.)

Appellant's conviction and sentence of death must therefore be reversed.

III

THE EXCLUSION OF APPELLANT AND HER COUNSEL FROM SEVERAL EX PARTE HEARINGS REGARDING DISCOVERY OF CRITICAL WITNESSES AND EVIDENCE DEPRIVED APPELLANT OF HER RIGHT TO BE PERSONALLY PRESENT, HER RIGHT TO COUNSEL AT ALL CRITICAL STAGES OF THE PROCEEDINGS, AND DUE PROCESS OF LAW

Appellant has shown that the trial court denied her rights to be present as well as to be represented by counsel at a critical stage of the proceeding when both appellant and her counsel were excluded from several in camera and ex parte hearings regarding discovery of two antagonistic witnesses, Jennifer Lee and Christine Kuretich. (AOB at pp. 128-142.) Appellant has also shown that this error violated appellant's federal and state constitutional rights, as well as state law. (AOB at pp. 130-142.) Respondent contends that none of appellant's rights could have been violated because she had no right to the discovery at issue in the first place, as it concerned witnesses for the codefendant. (RB at pp. 77-78.) Respondent is mistaken for the reasons set forth below.

A. The Ex Parte Hearings Between The Judge, Prosecutor, And Codefendant Violated Appellant's Right to Due Process Because She Had A Right To The Discovery To Be Presented Against Her

The following facts are undisputed between the parties:

* Appellant and her attorneys were not only excluded from a series of proceedings held between the court and the district attorney (Kuretich) and between the court and codefendant's counsel (Lee), but were also denied notice of these proceeding (AOB at pp. 129-130; RB at p. 78);

* The primary focus of these proceedings was on how

codefendant's counsel could legally withhold evidence he believed to be incriminating from appellant and her counsel for as long as possible in order to insure that the evidence would have its maximum impact (AOB at pp. 129-130; RB at p. 79.)[7]

Although respondent does appear to dispute appellant's argument that these hearings were a critical stage of the proceedings *against her* for purposes of due process and the right to the assistance of counsel, appellant's argument is supported by this Court's recent opinion in *People v. Carasi* (2008) 44 Cal.4th 1263. In *Carasi*, the appellant complained of ten ex parte hearings held between the trial judge and the codefendant. (*Id.* at p. 1299.) This Court stated that critical stage protections are not implicated in proceedings that do not bear a "reasonable, substantial relation to the defense of the charge." (*Ibid.*) This Court reasoned that because the matters discussed in the ex parte hearings did not bear directly on the evidence at trial, the conduct of the defense or the outcome of the case, and because the transcripts did not reveal any attempt by codefendant's attorney to benefit his client at the expense of the defendant, no rights were violated. (*Id.*) The record in *Carasi* stands in marked contrast to the instant case. Not only was the evidence in issue here directly relevant to appellant's defense, codefendant's attorney blatantly stated that he wanted to keep the evidence from appellant (RT 5:759-760), bolstering his client's case at the expense of appellant.

Rather than address appellant's analysis as to why the conduct of

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[7] Initially, respondent claims that appellant never explains how her federal constitutional rights were violated. (RB at p. 78.) Contrary to respondent's assertion, appellant addresses how her federal due process rights were violated on pages 130-135 of her opening brief.

Sanders's counsel, the prosecution and the court violated her right to due process, respondent rests his opposition primarily on the argument that under *People v. Ervin* (2000) 22 Cal.4th 48 and *People v. Coffman* (2004) 34 Cal.4th 1, both of which addressed discovery between co-defendants in penalty phase proceedings. Respondent argues that the reasoning of those cases applies to the guilt phase as well, that there is therefore no discovery obligation between codefendants, and thus the exclusion of appellant and her counsel categorically could not have resulted in a constitutional violation. (RB at pp. 78-79.) Respondent's argument is overly simplistic, unsupported by the law, and should be rejected by this Court.

First, *Ervin* and *Coffman* are factually inapposite, and should not govern. Both concern a codefendant's penalty phase witnesses. The penalty phase of a capital trial is fundamentally different than guilt phase proceedings. Codefendants are generally not antagonistic during the penalty phase, as the jury is charged to determine what penalty is appropriate for a particular individual balancing individual mitigating and aggravating circumstances. However, at the guilt phase, codefendants can (and in this case Sanders definitely did) present evidence for the sole purpose of incriminating their codefendant. Respondent does not dispute that Ms. Lee was put on by codefendant Sanders for the sole purpose of incriminating appellant. Thus, as codefendant Sanders was a *de facto* "second prosecutor" in this matter and throughout the trial (*see* AOB Arg. I), the reciprocal discovery provisions should have applied to him and appellant had a federal due process right to be present and represented by counsel at each hearing concerning his witnesses.

Second, this Court's reasoning in *Ervin* and *Coffman* does not extend as far as respondent would have it, as neither addressed a codefendant's

deliberate attempts to avoid discovery of evidence which is only being offered to incriminate a codefendant. In *Ervin,* this Court merely accepted appellant's concession that there is no discovery obligation for codefendants to supply their penalty phase witness list to each other. (*People v. Ervin, supra,* 22 Cal.4th at p. 101.) In *Coffman*, this Court's holding that the codefendant was not required to provide notice of evidence presented in his case in mitigation which was potentially aggravating to the appellant was premised in part on the finding that because the jury was specifically admonished not to consider the evidence as aggravation against the appellant, the appellant was not forced to defend against aggravating evidence without proper notice. (*People v. Coffman, supra*, 34 Cal.4th at pp. 112-113.)

In relying on these cases, respondent fails to address the fundamental issues which appellant complains of here: a court should not engage in statutorily unauthorized ex parte proceedings simply to assist one party in taking another by surprise; and is improper and fundamentally unfair for the prosecution to manipulate the rules of discovery to facilitate an ambush of one codefendant. Other jurisdictions have found the conduct of which appellant complains reversible error. In *United States v. Minsky* (6th Cir. 1992) 963 F.2d 870), the court held that the trial court committed reversible error by conducting a bench conference concerning discovery of a prosecution witness without the presence of defense counsel, refusing to "condone conduct that undermines confidence in the impartiality of the court." (*Id.* at p. 874, citation omitted). The *Minsky* court relied in part on *Haller v. Robbins* (1st Cir. 1969) 40 F.2d 857, 859, where the court reasoned that "it is improper for the prosecutor to convey information or to discuss any matter relating to the merits of the case or sentence with the

judge in the absence of counsel." (*Ibid.*)

Moreover, respondent's argument is contrary to California law interpreting the degree of notice and opportunity to be heard which must be afforded third parties who may be adversely impacted by discovery, regardless of the absence of any statutory authority requiring the adverse party's presence. In *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, the court explicitly held that notice must be given to an adverse party when there is a possibility that a discovery order may adversely affect the party's rights. *Department of Corrections* concerned an ex parte hearing regarding third party discovery from which the defendant excluded the prosecutor. The court reasoned that although the prosecution had no statutory right to be present as their interests were not directly implicated, the prosecution's due process rights were violated by the ex parte proceedings and the protective order foreclosing discovery by the prosecution. (*Id.* at 1093.) In the instant case, not only were appellant's rights directly affected by the trial court's nondisclosure orders, the only purpose of the parties in seeking the orders was to keep the evidence from appellant.

Under *Department of Corrections*, appellant had at a minimum an undeniable right to notice that Sanders had requested an in camera hearing under Section 1054.7. This would have permitted appellant's counsel to present legal argument and authority to the court concerning the requirements for a finding of good cause, and request an opportunity to present alternatives to nondisclosure that would protect the rights of all parties. As this Court recently emphasized ex parte in camera discovery proceedings are "extraordinary:"

They should be limited to that which is necessary to safeguard

> the rights of the defendant or of a third party, inasmuch as ex parte proceedings are generally disfavored because of their inherent deficiencies. "'The first is a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving parties own presentation is often abbreviated because no challenge from the [opposing party] is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision. . . '" (*People v. Ayala* (2000) 24 Cal.4th 243, 262...)

(*Kling v. Superior Court* (2010) ___ Cal.4th ___, 2010 WL 4054491, *12.) Quoting from *Department of Corrections, supra,* this Court also observed in *Kling* : "[m]oreover, 'with only the moving party present to assist in drafting the courts order, there is a danger the order may sweep 'more broadly than necessary.'" (*Ibid.*) That danger was realized here. Because appellant's counsel had no notice of the hearing, he was unable to agree not to disclose Lee's identity as a witness to appellant.

Respondent next states that appellant suffered no prejudice by being excluded from the hearings because she obviously knew of the Jennifer Lee letters, given that appellant wrote them. Respondent mischaracterizes appellant's argument. First of all, the major claim of prejudice put forth by appellant lies in the undue influence her codefendant was allowed to exert on the trial judge. Failing to provide due process during a critical stage creates two foundations for error: the trial court has a shortage of factual and legal contentions on which to base its decision because adverse counsel is not present, and the resulting order is likely to be overbroad when only the moving party assists in drafting it. (*See Department of Corrections, supra,* 199 Cal.App.3d 1087). Appellant was harmed by not having any representation at the discovery hearings because the trial judge made

decisions that directly affected her and only her without any input from her counsel to balance the assertions of her opposing parties. The order itself was as broad as possible, keeping all information and evidence which the codefendant wanted to be kept from the appellant confidential until it was introduced at trial. Had defense counsel been permitted to participate, he certainly would have objected to the nondisclosure orders, asserted his right to interview Jennifer Lee and to investigate her claim, and assured the court that he would not disclose the identity of the witness to appellant. Surely such input from appellant's counsel would have opened the proceedings as necessary to ensure due process while protecting the confidentiality concerns of Sanders. (*See id.* at 1094.)

Further, respondent's assertion that appellant's knowledge of the existence of potential evidence is fatal to her prejudice claim is unfounded. The harm to appellant lies in the way that she and her counsel were taken by surprise when Jennifer Lee testified against appellant. Because of these surprises, appellant's counsel did not have any opportunity to investigate the witness background or claims, and had no time to prepare to defend against the testimony. The essence of the Sixth Amendment right to counsel is the opportunity to investigate and prepare a defense for trial. (*Powell v. Alabama* (1932) 287 U.S. 45, 58, 71.) Arguably, a criminal defendant is going to have personal knowledge of most (if not all) potential witnesses and evidence surrounding the events in issue at trial. The most important issue, and the source of prejudice, is that the defendant has a right to know what is coming at trial so that she and her attorney can be prepared to counter it. It is neither reasonable nor fair to require appellant to be prepared to defend against every imaginable person or evidence without notice.

B. Even If The Ex Parte Hearings Were Proper, Federal And California Law Require That Appellant Be Provided Notice And An Opportunity To Be Heard

Respondent fails to counter appellant' argument that the complete denial of notice and an opportunity to be heard was a denial of appellant's due process rights. Respondent's argument relies on a cramped reading of California case law, and should be rejected by this Court.

First, Respondent misleadingly relies on *Keenan v. Superior Court* (1982) 31 Cal.3d 424, and *Department of Corrections*, *supra*, 199 Cal.App.3d 1087, for his proposition that California courts have specifically recognized that some proceedings may be held ex parte without violating due process. (RB at p. 81.) First, *Keenan* is simply not relevant to the present analysis. *Keenan* concerned a section 987.9 hearing, which allows publicly appointed defense attorneys to petition the court for extra funds. That statute specifically provides that the application be confidential because it necessarily reveals the defense attorney's trial strategy. (*Keenan*, *supra*, 31 Cal.3d at pp. 426, 430.) The clear difference in statutory language, purpose and scope of Section 987.9 and Section 1054 et. seq. defeat respondent's attempt to analogize between the two. Additionally, in contradistinction to this case, the Court in *Keenan* was not confronted with a question of counsel's exclusion from a critical stage of the proceeding.

Respondent correctly notes that the court in *Department of Corrections* did note that ex parte proceedings could be necessary at times. (RB at p. 81.) But that court made clear that even in such a situation, at the

very least notice must be given to the opposing party.[8] (*Id.* at 1092.) This Court's decision in *Kling* clarifies that when faced with an ex parte discovery request, the trial court must attempt to balance the due process rights of all the affected parties and to that end provide notice and solicit input before proceeding ex parte and in camera. (*Kling v. Superior Court, supra,* at pp. 11-12.)

Respondent also correctly notes that the legislature did contemplate the potential need for confidentiality when drafting Section 1054.7, as it authorized the use of "in camera" proceedings. (RB at p. 81.) However, contrary to respondent's argument, there is nothing in the legislative history to suggest that the legislature intended to sanction the complete denial of notice and an opportunity to be heard. The concerns identified in the legislation allowing "in camera" proceedings are adequately addressed in the three-step method set forth by the court in *City of Alhambra, supra,* 205 Cal.App.3d 1118 and cited with approval by this Court in *Kling, supra,* *11.][9]

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[8] "The fundamental requisite of due process of law is the opportunity to be heard . . . a right that has little reality or worth unless one is informed that the matter is pending . . .." (*Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092 (citations omitted).)

[9] The court in *City of Alhambra* set forth the following procedures to protect the moving party's right to confidentiality as well as their opponent's right to discovery:

(i) the movant shall provide proper and timely notice of their motion with supporting evidence and an explanation for requesting *in camera* review;

(ii) the court shall make a finding on the record that it received the movant's papers and state for what reason *in camera* review is justified; and

(iii) the court must determine which portions must be sealed or

As noted in *City of Alhambra,* these steps are necessary to protect the due process rights of the adverse party because while confidentiality is sometimes needed,

> "it does not follow that the [opposing party] must be precluded from effective participation in an important pretrial matter merely because the [movant] asserts that the factual or legal showing made in support of a particular motion should remain confidential. If that were the rule, all . . . discovery motions would soon be made and conducted in camera, to the detriment of our system of criminal justice in that those proceedings would not then be tested by the stringent and wholesome requirements of adversary litigation."

(*City of Alhambra, supra,* 205 Cal.App.3d at p. 1130.)

Respondent also fails to explain how his interpretation of the statute as implicitly allowing complete confidentiality can be harmonized with Section 1054.7's explicit contemplation of review by writ or appeal. Writ review is not a meaningful remedy unless the opposing party knows of the hearing from which the movant seeks to exclude her. In issuing the nondisclosure orders, the trial court compounded its violation of due process by preventing the appellant from being heard "even after the fact." (*See Department of Corrections, supra,* 199 Cal.App.3d at 1093.)

Respondent next urges this Court to dismiss the holding in *Miller v. Superior Court* (1999) 21 Cal.4th 883, that ex parte hearings must comport with general principles of due process, because *Miller* was not explicitly about discovery and concerned the scope of the prosecution's due process rights. (RB pp. 81-83.) Respondent's argument should be rejected by this Court, as it fails to address the basic holding of *Miller* that ex parte hearings

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disclosed.

(*City of Alhambra, supra,* 205 Cal.App.3d at pp. 1131-1132.)

must comport with the general principles of due process. (*Miller v. Superior Court*, 21 Cal.4th 883; *City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at pp. 1130-1131; *Department of Corrections*, *supra*, 199 Cal.App.3d at p. 1092.) Moreover, *Miller* actually centered on a discovery hearing in which the media shield law was implicated, and the court's analysis of the case focused on a party's due process right to be heard and to oppose an adversary's claim of right to be heard ex parte; in other words, the same issue as that raised in appellant's brief.

Moreover, that the complaining party in *Miller* was the prosecution and not a criminal defendant does nothing to aid respondent's argument. First, the court in *Miller* states that the rights of a defendant and a prosecutor are not equivalent in a way that makes it clear that the defendant is owed a *greater* right of due process.[10] But appellant is entitled to at least all the same due process rights a prosecutor deserves. Second, the court in *Department of Corrections* specifically states that due process rights implicated by ex parte hearings are owed to both sides. (*Department of Corrections*, *supra*, 199 Cal.App.3d at 1092.) It also does not follow that the right of the defendant to due process under the federal constitution would be somehow lesser than that of the due process rights of the prosecutor under Article I, section 29 of the California Constitution.

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[10] "The Court of Appeal's holding appears to have been based on the assumption that the people's right to due process of law must be the exact equivalent to a criminal defendant's right to due process . . .. Nothing in the language or legislative history of article I, section 29 supports this view. Nor does anything in our case law. In some cases, the use of the term 'due process of law' in connection with the prosecution was simply another way of formulating the truism that the state has a strong interest in prosecuting criminals, which must be weighed against the criminal defendant's assertion of due process rights." (*Miller*, *supra*, 21 Cal.4th at 896.)

This court should also reject respondent's argument that *Department of Corrections*, *supra*, 199 Cal.App.3d 1087, implicitly acknowledges that complete exclusion of the opposing party from ex parte proceedings may be appropriate in certain circumstances. (RB p. 82.) Respondent misreads *Department of Corrections*. While it is true that the issue statement of that case could be read as acknowledging that complete exclusion could be permissible, respondent offers no reason why complete exclusion should mean that the excluded party would not receive notice, or why appellant's case presents a situation in which exclusion was appropriate. Each of the cases cited in appellant's brief for their discussion of due process, including *Department of Corrections* itself, hold that notice is required as the bare minimum protection for the rights of excluded parties. (*See Id.* at 1092.) Moreover, even if this Court were to accept that *Department of Corrections* allows for the possibility of no notice in some extreme situations. respondent offers no explanation for why the instant case meets this criteria.

Finally, respondent contends that the only notice required was owed to the prosecutor as sole opposing party, and that *City of Alhambra, supra,* 205 Cal.App.3d 1118 is the only California case (and merely appellate at that) to include interested third parties in the notice requirement. (RB p. 83.) Respondent overlooks that a third party's receipt of a subpoena itself provides notice, and the statutory procedure provides an opportunity to object before the documents are disclosed. (*Kling v. Superior Court, supra,* at p.7.) As well, the victim in a criminal case is entitled to notice of a third party subpoena. (*Id.* P. 13.)

More importantly, respondent again mischaracterizes appellant's point. Appellant does not argue that she was entitled to notice of the ex parte hearing as an interested third party. The reliance of respondent on the

singularity of the holding of *City of Alhambra* is flawed. In *City of Alhambra*, the interested third party was a witness. (*Id.* at p. 1124.) Both the third party and the prosecution claimed that they were denied due process when they were excluded from ex parte hearings, and the appellate court agreed. (*Id.*) Appellant was not a mere third party to this case. She was a primary participant in the litigation whose rights were directly and purposefully affected by the ex parte proceedings, and it is for that reason that she was owed notice.

C. The Trial Judge Violated The Judicial Code of Ethics In Conducting The Ex Parte Hearings

Respondent cavalierly disposes of this point in a footnote by stating that he is unaware of any authority supporting the notion that a judge's violation of the ethical code is sufficient to overturn a conviction on appeal. (RB at p. 84.) The Code of Judicial Ethics applies to judges both on and off the bench. When a violation of the judicial code of ethics impacts the trial of a criminal defendant, it is judicial misconduct and a form of error which can result in reversal. (*See, e.g., Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1002-1003 [trial judge's improper ex parte viewing of a video with defense counsel was reversible error]; *People v. Bradford* (2007) 154 Cal.App.4th 1390 [trial judge's misconduct in engaging in ex parte communications with the jury constituted reversible error].) Further, appellant's brief does not rest on the idea that this single point of error is sufficient, but also argues that the cumulative effect of many errors should result in reversal.

D. The Ex Parte Hearings And The Resulting Nondisclosure Orders Violated Appellant's Right To Effective Assistance Of Counsel

Respondent again dismisses this issue by footnote, stating that appellant's point merely repeats the discovery claim discussed above in section B and thus the ineffective assistance of counsel claim is worthless because "counsel cannot be ineffective if they had no right to appear at the hearing." (RB at p. 84.) Respondent is wrong. While this claim and the discovery claim are rooted in the same issue, namely that appellant and her attorney were wrongfully excluded from the hearings, they represent a violation of two distinct rights. The Sixth Amendment guarantees each criminal defendant the right to counsel. If defendant is denied access to evidence prior to trial, as happened in this case, her attorney's "ability to present an intelligent defense and to make informed tactical decision[s]" has been thwarted. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960.) These are the basic requirements of the right to effective assistance of counsel.

E. The Exclusion Of Appellant And Her Attorney From These Ex Parte Hearings Was Prejudicial Per Se

Appellant has argued that because appellant and her counsel were excluded form a critical stage of the proceedings, the error was prejudicial per se and requires reversal.(AOB at pp. 137-141.) Respondent fails to adequately address this argument. Respondent claims that even had notice been required, there was still no remedial error because section 1054.7 approves of confidential proceedings where they are necessary to maintain the safety of a witness or preserve evidence, and Jennifer Lee's safety and her value as a witness may have been compromised by disclosure to appellant. (RB at p. 83.) This argument is based on respondent's vague

assertion that Jennifer Lee's safety " and her value as a witness could have been potentially compromised" had her identity been disclosed to the appellant. Respondent does not explain how allowing *counsel* an opportunity to investigate Lee could have compromised her safety or value as a witness and appellant submits there is no legitimate explanation.

Appellant does not dispute that section 1054.7 allows confidential proceedings when necessary to maintain the safety of the witness. However, it is well settled that conclusory claims by the party attempting to keep information confidential are insufficient to meet the stringent standards of section 1054.7. (*See Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1337.) In *Reid*, the trial court prohibited defense counsel from any access to the alleged victims because the victims were frightened of defendant, though none of them had reported receiving any specific threats to the court. (*Id.* at p. 1330.) On review of a writ of mandamus, the appellate court ordered the trial court to vacate the prohibition. (*Id.* at p. 1338.) In so holding, the court stated that a criminal defendant has a fundamental due process right to the identity, contact information, and opportunity to interview the witnesses, and that exceptions can be justified only under the "clearest and most compelling circumstances". (*Id.* at pp. 1332-1333, quoting *United States v. Cook* (9th Cir. 1979) 608 F.2d 1175.) If the court denies a defendant this right, it "significantly impairs defense efforts to prepare for trial." (*Id.* at p. 1335.) Because of the importance of defendant's right to pretrial discovery, a prosecutor seeking confidentiality must show good cause with evidence of actual harassment, threats, or danger to the safety of victims. (*Id.* at 1339.) Ungrounded apprehension is simply insufficient.

In this case, the parties who had notice of the in camera hearings

did not present any evidence whatsoever to show good cause for keeping Jennifer Lee's identity and testimony confidential. During the ex parte hearing on June 9, 1992, in which the judge granted codefendant's request to keep the witness secret, the attorney for codefendant Sanders stated that Jennifer Lee was "scared to death" of appearing to other inmates as a snitch, and stated unspecifically that the witness had received threats from appellant. (RT 5:760-761.) This hardly qualifies as the "most compelling" situation described by *Reid, supra*, 55 Cal.App.4th 1326. Moreover, if this type of naked claim is sufficient to keep witnesses confidential, than every jailhouse witness would have good cause to keep their identity from the defense. Alternatively, even if the court was correct in deciding that the codefendant had presented good cause to shield Jennifer Lee from appellant, had appellant's counsel been present he would have been able to assure the trial court that the information would not be shared with appellant or otherwise tailor the order, thus balancing appellant's right to defend herself with the codefendant's concerns as required by *City of Alhambra, supra*, 205 Cal.App.3d at pp. 1131-1132.

Appellant has also shown that no matter how this Court assesses or characterizes the trial court's error, appellant is entitled to a new trial. (AOB at pp.141-142.) Respondent fails to refute the clear showing of prejudice that resulted from appellant being denied notice and an opportunity to be heard. (See Argument II, *supra*.) As appellant has shown above, that appellant may have known about the evidence does little to address the fact that counsel was not given an opportunity to investigate and prepare a defense. Although it is difficult to ascertain on this record precisely what evidence counsel would have been able to adduce, it is inconceivable that the complete denial of appellant's counsel's opportunity

to investigate the veracity and credibility of a witness who was serving a prison term for kidnaping (RT 40: 6811), can be shown to be harmless beyond a reasonable doubt.

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IV

THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTOR TO WITHHOLD NUMEROUS STATEMENTS MADE BY ITS WITNESSES

Appellant asserts that the trial court committed reversible error when it admitted into evidence statements of four witnesses that had not been disclosed to the defense, in violation of Penal Code section 1054.1. Respondent contends that even "assuming" that oral statements are discoverable, the "trial court's ruling that the prosecution did not violate any discovery rules did not constitute an abuse of discretion," and in any event any error was harmless. (RB at pp. 87, 85.) Respondent misapprehends the court's rulings and the state of the law.

A. Discovery of Oral Statements Is Required under the Law

In *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, the court held that section 1054.1 requires both the prosecution and the defense to disclose unrecorded oral statements made by third parties who will be called as witnesses, whether those oral statements are made directly to counsel or to a third party. (*Id.* at pp. 161, 165.) Without making any attempt to show that *Roland* was wrongly decided, respondent argues that section 1054.1 does not mandate the disclosure of unrecorded oral statements, observing only that this Court has not yet examined *Roland*. (RB at pp. 85-86).

While this is true, this Court has not decided any cases that hold differently regarding the disclosure of oral statements. Further, at least one other published California case, *People v. Lamb* (2006) 136 Cal.App.4th 575, follows the holding of *Roland*. In *Lamb*, defense counsel failed to provide any discovery regarding the statements of their expert, arguing that

there were no written reports or statements to be provided. The *Lamb* court stated that defense counsel was reading the statute's requirements too narrowly, and held that counsel was required to disclose all of the statements that the expert witness had conveyed to him orally. (*Id.* at p. 580.) The holdings of *Roland* and *Lamb* are consistent with prior case law from this Court regarding the scope of section 1054.1.

In *In re Littlefield* (1993) 5 Cal.4th 122, this Court held that the prosecution may not avoid the disclosure required by section 1054.1 by refraining to obtain readily available information. (*Id.* at pp. 134-135.) *Littlefield* further supports that a broad reading of the discovery statute is required in order to avoid gamesmanship by the parties and remain consistent with the spirit of the statute. As well, a broad reading of the discovery statute is necessary in order to comport with due process. As the *Roland* court stated, exclusion of oral statements from the disclosure requirement "would undermine the [statute's] intent because it would permit defense attorneys and prosecutors to avoid disclosing relevant information by simply conducting their own interviews of critical witnesses, . . . and by not writing down or recording any of those witnesses' statements." (*People v. Roland, supra*, 124 Cal.App.4th at p. 167.) Thus, *Roland* holds each side to the affirmative obligation to write down all the oral statements made by their witnesses.

In the instant case, the pattern of questioning used by the prosecutor strongly suggests that she knew how the witnesses would testify, and therefore successfully insulated these statements from disclosure to defense counsel by merely not writing them down. (RT 24:4113; 40: 6818-6820; 43: 7497-7499.)

Each of the statements at issue here should have been provided to the

defense under section 1054.1 and *Roland*. Appellant's alleged statements to Mr. DeGreef and Ms. Lee should have been disclosed under section 1054.1, subdivision (b), "statements of all defendants." The testimony of Ms. Jones and Mr. Thompson should have been disclosed as "reports of statements of witnesses whom the prosecutor intends to call at trial" under section 1054.1 subdivision (f).

B. The Failure to Disclose the Statements Was Prejudicial

Respondent next asserts that even if *Roland* correctly states the law, it is not reasonably probable that a result more favorable to appellant would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818.) (RB at p. 86-87.) Respondent's reliance on *Watson* is misplaced.

According to *People v. Bounds* (1985) 171 Cal.App.3d 802, 809, the appropriate standard for determining prejudice when the error is one of "federal constitutional dimensions" is the harmless-beyond-a-reasonable-doubt test stated in *Chapman v. California* (1967) 386 US 18, and the *Watson* reasonable-probability standard is inappropriate for analyzing such an error.[11] The failure of the prosecution to disclose the oral statements of these four witnesses violated appellant's rights under the Sixth, Eighth, and

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[11] Two of the three cases cited by respondent to support his use of *Watson* involved state law claims of error only, thus rendering *Watson* the correct standard in those instances. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 210; *People v. Bell* (1998) 61 Cal.App.4th 282, 291 fn. 3.) In the third case cited by respondent, *People v. Pinholster* (1992) 1 Cal.4th 865, the errors alleged were partially federal, but this Court applied *Watson* without any discussion. (*Id.* at 932.) This Court noted the holding of *People v. Bounds*, supra, 171 Cal.App.3d 802 with approval in *People v. Lee* (1987) 43 Cal.3d 666, 672-673, and consistently applies *Chapman* to federal constitutional errors. (*See People v. Huggins* (2006) 38 Cal.4th 175, 204.)

Fourteenth Amendments, and therefore must be analyzed under the *Chapman* standard.

C. Carolyn Thompson Jones

Respondent advances several reasons the trial court did not err in compelling disclosure of statements made by prosecution witness Carolyn Thompson Jones. First, respondent states that the argument made by appellant regarding Ms. Jones is waived because a claim on appeal must be specifically raised below, and trial counsel objected to Ms. Jones's testimony as an expert. (RB at p. 88.)

Respondent relies on *People v. Carter* (2005) 36 Cal.4th 1215 to support his position that appellant failed to object on the proper grounds at trial. In *Carter*, trial counsel had objected to the testimony as to relevance only, and when appellate counsel argued instead that it had been a discovery violation, the court deemed the argument waived ("[d]efendant did not object to Haisha's testimony on the ground that the prosecution had violated discovery rules . . . ." *Id.* at p. 1264). In this case, trial counsel objected to the witness' testimony on the ground that discovery of the statement by Ms. Jones had not been produced. (RT 43:7494.) The prosecutor then argued the witness' testimony should be admitted as expert testimony and trial counsel again objected that he had not received notice of the witness' status as an expert or discovery of the witness' statement. (RT 43:7499.) *Carter* is not applicable to this case where the objection on discovery grounds was made at trial.

The discovery requirement of section 1054.1 is for all witnesses, including experts. Since defense counsel objected at trial based on the failure of the prosecutor to disclose witness statements, it is irrelevant that defense counsel referred to the witness as an expert. Therefore, the

objection made at trial was sufficient to preserve the issue of the undisclosed statements of Ms. Jones for appeal.

Respondent next contends that even if appellant's argument was not waived, *People v. Carpenter* (1997) 15 Cal.4th 312, requires proof that a continuance would not have cured the harm. (RB at p. 88.) The rule in *Carpenter* originated in *People v. Pinholster* (1992) 1 Cal.4th 865 in which the prosecutor did not disclose a witness because he thought the testimony was not relevant; when the prosecutor decided to use the witness and defense objected on the basis of lack of notice, the trial court offered the defense a continuance so that it could prepare to respond. (*Id.* at p. 941.) The court on appeal declined to find error because the defense had turned down their opportunity for more time to prepare. (*Ibid.*)

In the instant case, the court did not offer trial counsel any time to investigate and prepare to meet the surprise witness statements offered by the prosecutor. Therefore, appellant should not now be required to prove that a continuance would not have cured the harm, as one was not available to her.

Respondent further contends that appellant has not argued that the testimony of Ms. Jones was prejudicial to her case. (RB at p. 89.) In fact, appellant has alleged, "Evidence of appellant's allegedly feigned grief at the death of Tom . . . improperly bolstered the prosecutor's penalty phase argument that appellant was a cold and callous person . . . ." was prejudicial. (AOB at p. 149.) This clearly refers to Ms. Jones's testimony.

Finally, respondent asserts that any error in admitting this testimony was harmless because Ms. Jones's ability to recollect events accurately was impeached, and the failure of the prosecution to turn over her statements prior to trial was not "the reason" appellant was convicted. (RB at p. 89.)

This Court, in *People v. Gonzalez* (2006) 38 Cal.4th 932, discussed how to determine whether belated revelation of witness testimony harmed the defense. It held that if there is no suggestion that the defense would have been different had the discovery been provided on time, then there is no harm; however, where there is "a strong suggestion" that the defense would have been altered, harmlessness cannot be presumed. (*Id.* at p. 962.) Had appellant known in advance what Ms. Jones was going to testify to, she would have had time to investigate the "special training" the witness claimed to have received, and prepare to meet it or move to exclude it. Ms. Jones's allusion to the alleged training improperly enhanced her opinion, even if she was never qualified as an expert witness. Further, the impeachment of Ms. Jones on the different question of who else was present at the hospital when Ms. Jones made her observations does not substantially call into question her opinion testimony that appellant did not appear distraught at the hospital based on her undisclosed "special training."

D. Tony DeGreef

Respondent asserts that even if *Roland* applies to the statements made by Tony DeGreef, proof that a continuance would not have cured the harm is required citing *People v. Carpenter, supra,* 15 Cal.4th 312. (RB at p. 90.) The analysis of *Carpenter* for the testimony of Ms. Jones set forth above is equally applicable to Mr. DeGreef's statements. Since trial counsel was not afforded an opportunity to prepare for Mr. DeGreef's surprise testimony, appellant should not now be required to prove that a continuance would not have cured the harm.

Respondent also contends that any error regarding Mr. DeGreef's testimony was harmless because there was a plethora of other evidence

regarding appellant's financial fraud. (RB at p. 90.) However, where there is a strong suggestion that the defense would have been altered, harmlessness cannot be presumed. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 962.) Since Mr. DeGreef's testimony undercut appellant's defense that her husband was aware of the situation regarding the Hillary Street house foreclosure, it stands to reason that knowing what Mr. DeGreef was going to testify to would have had an effect on appellant's ability to investigate the testimony further and prepare to meet it. Further, evidence of other unrelated financial fraud had no bearing on the victim's knowledge of trouble surrounding the Hillary Street house.

E. Tommy Thompson

As to Tommy Thompson's testimony, respondent states that the prosecutor did inform the defense of this witness' statements before he testified and within an hour of learning of it. Thus, even if *Roland* applies, respondent contends that the prosecutor satisfied the statute. (RB at p. 91.) However, once the final discovery deadline has passed, any newly discovered evidence or witnesses must be disclosed immediately. (Pen. Code, sec. 1054.7.) The court in *People v. Walton* (1996) 42 Cal.App.4th 1004 (disapproved of on other grounds by *People v. Cromer* (2001) 24 Cal.4th 889, 901) addressed how a prosecutor should deal with late discovery of a witness or testimony. In *Walton*, the prosecutor found the witness on the night before trial and immediately provided the defense with the witness's statement along with the opportunity to interview the witness before he took the stand. (*Id.* at p. 1017.)

More recently, in *People v. DePriest* (2007) 42 Cal.4th 1, this Court held that evidence discovered immediately before trial and disclosed to the defense without delay did not require continuance or other sanctions

because "[n]either the prosecutor nor the court sought to deny defendant an opportunity to investigate the shoe print evidence or to defend against it. The record supports the court's determination that defendant had ample time and resources to do so after trial began." (*Id.* at p. 39.)

While the prosecutor in this case may have quickly disclosed Mr. Thompson's statement, informing the defense of a witness' statement immediately before the testimony in no way affords defense counsel enough time to discuss the matter with his client and prepare cross-examination. Unlike the defendants in *Walton* and *DePriest*, appellant was given absolutely no time to prepare for Mr. Thompson's testimony regarding her cat, having only been notified minutes before the testimony was introduced.

Respondent also contends that any error regarding Mr. Thompson's testimony was harmless. (RB at p. 91.) However, where there is a strong suggestion that the defense would have been altered, harmlessness cannot be presumed. (*People v. Gonzalez, supra,* 38 Cal.4th 932.) This testimony bolstered the prosecutor's penalty phase argument that appellant was so callous that she should not be allowed to live. Had appellant known in advance what Mr. Thompson was going to testify to, she would have had time to investigate the testimony and to move to exclude it as highly prejudicial.

F. Jennifer Lee

Respondent finally asserts that appellant was not entitled to any discovery regarding Jennifer Lee because she was a witness for appellant's co-defendant, and there is no right of discovery between co-defendants. (RB at p. 92.) Respondent relies on *People v. Ervin* (2000) 22 Cal.4th 48 and *People v. Coffman* (2004) 34 Cal.4th 1 to support this contention. This reliance is misplaced for two reasons.

First, the statements were not made to Sanders's counsel but to agents of the prosecution. (RT 40:6842-6843.) Likewise, the statements were elicited at trial by the prosecution, not the codefendant. (RT 40:6818-6822.) Thus, even if there is no discovery between codefendents, the prosecution had a duty to disclose Lee's statements.

Second, both *Ervin* and *Coffman* concern a codefendant's penalty phase witnesses. The guilt phase and the penalty phase of a criminal trial are fundamentally different. It is logical that a defendant would not be entitled to discovery from her codefendant at penalty phase. Codefendants are not necessarily antagonistic during that phase, with each side merely presenting mitigating factors for their own defense. However, at the guilt phase, codefendants can be (and in this case, definitely were) presenting cases against each other. Ms. Lee was a guilt phase witness put on by co-defendant Sanders. The only purpose of her testimony was to incriminate appellant. Thus, as co-defendant Sanders was a *de facto* "second prosecutor," the reciprocal discovery provisions should have applied to him. (See Argument II, *supra.*)

Because respondent cannot prove that the foregoing errors were harmless beyond a reasonable doubt, the judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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V

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT PERMITTED THE PROSECUTION TO REFUSE TO DISCLOSE CRUCIAL INFORMATION AFFECTING THE CREDIBILITY OF PROSECUTION WITNESS KURETICH

In the Opening Brief, Appellant argued that the trial court erred in allowing the prosecution to refuse to disclose the current address of Christine Kuretich, the witness who claimed she overheard the Sanders discussing a plan to kill Tom so that appellant could collect his life insurance. Respondent concedes that Penal Code section 1054.1, subdivision (a) requires the prosecution to disclose the names and addresses of prosecution witnesses to defense counsel, but argues that (1) there was "good cause" as defined in Penal Code section 1054.7 to refuse to disclose Kuretich's address, and (2) the address was "inconsequential" to appellant's right to a fair trial. (RB at pp. 92-95.)

The record refutes respondent's argument that there was good cause to withhold Kuretich's current address. Judge Trammel explicitly rejected the arguments of respondent's counsel below, finding that the prosecution had not presented "anything" to cause him to believe "there's any threat to her safety" (RT 5:694.) Respondent attempts to rely on Kuretich's *trial* testimony to support a finding of good cause never made by the court. But that testimony was not presented to the court at the time it ruled, and should not now be considered to justify the court's pretrial ruling.

Moreover, even if properly considered, Kuretich's trial testimony would not have supported a finding of good cause. Although she said she was "afraid something would happen" if she testified against the defendants at trial (RT 29:5103), she did not provide any information to show that her

fear was reasonable, nor was there any independent evidence that she had been threatened in connection with this case. Respondent's argument that she was reasonably afraid because she had "direct knowledge" about the "planning of and commission of a cold blooded murder" (RB at p. 94) not only assumes the truth of Kuretich's testimony, but more importantly, if accepted, would also lead to a finding of "good cause" to deny disclosing the address of any prosecution witness who has "direct knowledge" of the commission of a violent crime. Such an exception would swallow the rule requiring disclosure.

Although the court properly rejected the prosecution's reliance on section 1054.7, it then refused to order disclosure because her "current whereabout's . . . really is not her residence." (RT 5:694.) This was clearly an abuse of discretion. Penal Code section 1054.1, subdivision (a), requires disclosure of the "addresses" of witnesses without any further qualifications. The court did not explain its reasoning and none can be discerned from the record. While it appears that appellant had been provided Kuretich's prior address in Kansas, where she resided between the time of the preliminary hearing and her return to California in early February, 1992, appellant properly sought to investigate her credibility by interviewing witnesses with current knowledge of her reputation for truth and veracity. Any speculation that Kuretich might return to Kansas after the trial and that her address in California was therefore "not really her residence" has no bearing on appellant's right to investigate her credibility at the time she testified at trial.

> The fundamental right of cross-examination includes eliciting the address of a witness in order that 'the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his

> own neighborhood' and that 'facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.' (*Alford v. United States*, 282 U.S. 687, 691-692 [75 L.Ed. 624, 627, 51 S.Ct. 218].) .

People v. Miller (1979) 99 Cal.App.3d. 381, 385.)

Under Section 1054.1, a defendant need not make a showing of relevance to obtain the address of a prosecution witness. But here, the need to investigate the truthfulness of her claim that she was no longer drinking alcohol or using drugs was clearly relevant. (RT 5:693.) Appellant did not seek this information for the purposes of attacking her credibility in general. Rather, information from friends and neighbors about her current drinking and drug use was highly relevant to a material issue in the case: to impeach her trial testimony that her memory about the sequence of events was better two years after the events, than at the preliminary hearing where she testified that she may not have heard about any of the events until after the murder. (RT 29:5095, 5101, 5105-5107; RT30: 5172-5173, 5241.)

The court's refusal to order disclosure of Kuretich's address undermined appellant's Sixth and Fourteenth Amendment rights to cross-examine the witnesses against her and a "meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485.) Respondent's arguments that any error was harmless fall far short of satisfying its burden of demonstrating beyond a reasonable doubt that the error "did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) The fact that appellant was aware of Kuretich's prior inconsistent statements to the police and at the preliminary hearing and used those to attempt to impeach her trial testimony supports rather than renders harmless her lack of access to Kuretich's address. Counsel could reasonably expect

her to attempt to disclaim or explain away those statements, and the credibility of any explanation would be key to the significance the jury would place on her prior inconsistent statements. Evidence that she had resumed drinking or using drugs would seriously undercut, if not totally destroy, the credibility of her explanation. Moreover, if her explanation was not credible, her testimony would have been excluded. (See Argument VI, *infra.*)

Respondent does not dispute that Kuretich was a critical witness. Her trial testimony was the glue of the prosecution's case; without her testimony, the prosecution could not connect appellant's efforts to secure a loan to save her home and Sanders's murder of her husband, a connection that was necessary to prove its case. Under these circumstances, the error cannot be dismissed as "inconsequential."

The court's refusal to order the prosecution to disclose Kuretich's address, alone and in conjunction with the effect of the numerous other errors at appellant's trial, requires reversal of the judgment.

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VI

THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OVERHEARD BY CHRISTINE KURETICH BECAUSE THE EVIDENCE DID NOT SATISFY THE REQUIREMENTS OF EVIDENCE CODE SECTION 1223

In her Opening Brief, appellant argued that the trial court erred in admitting the testimony of Christine Kuretich regarding hearsay statements allegedly made by codefendants Phillip and Carolyn Sanders discussing a plan to murder appellant's husband in return for insurance money. Appellant argued that this testimony was inadmissible because the prosecution failed to present prima facie evidence, independent of the substance of the hearsay statements, establishing that a conspiracy involving appellant was in existence at the time the statements were made, as required by Evidence Code section 1223.[12] (AOB at pp. 158-165.)

Respondent argues that appellant failed to properly preserve this issue for appeal and in any event it lacks merit. (RB at pp. 96- 107.)

A. The Issue Is Not Forfeited

While acknowledging that appellant objected to the admission of Kuretich's testimony prior to trial, respondent contends that counsel's

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[12] Evidence Code section 1223, "Admission of co-conspirator," reads as follows:

> "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in the conspiracy; and [¶] © The evidence is offered either after admission of evidence sufficiency to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

failure to object again when Kuretich actually testified forfeits this issue. (RB at pp. 101-102.) Respondent's argument should be rejected because appellant did all that was necessary under the circumstances to preserve this issue for review.

As respondent notes,

> [t]he general rule is that 'when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal' [Citation], although a sufficiently definite and express ruling on a motion in limine may also serve to preserve a claim. [Citation.]

(*People v. Brown* (2003) 31 Cal.4th 518, 547.) Thus, when a court fails to make a definitive ruling in limine, the proponent of the objection is obligated to press for a ruling and to object to the evidence until he obtains one. *(People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

In this case, the court made an express and definitive pretrial ruling before Kuretich testified at trial, and no further objection was required. Before trial, appellant filed a written motion arguing that the hearsay statements were not admissible under Section 1223 for a variety of reasons. (CT 3:891-935.) Appellant sought a hearing to examine Kuretich about whether the alleged statements were made during and in furtherance of the conspiracy. Appellant argued that because Kuretich's testimony at the preliminary hearing was inconsistent with the prosecution's offer of proof, the court should not accept the prosecution's offer of proof that Kuretich would now testify that the statements were made before the murder, not after, without first examining her.

After reviewing the transcript of Kuretich's testimony at the preliminary hearing, and finding it "pretty unclear as to when those statements were made," the court agreed it would be necessary for the

parties to examine Kuretich before it could determine the preliminary facts required for admissibility. (RT 28:4867, 4875.) During appellant's cross-examination of Kuretich at the hearing, however, the court reversed itself, indicating it would not consider her testimony for purposes of ruling on appellant's objections but would rely solely on the prosecutor's offer of proof and argument. (RT 28: 4910, 4932.)

After further argument, the court denied appellant's motion without reservation or qualification. (RT 29:5007.) The court did not state that the evidence would be admitted subject to a motion to strike, and neither the court nor the parties made any reference to Section 1223(c), which permits the court to conditionally admit the coconspirators' statements, subject to the later introduction of evidence to satisfy subdivisions 1223(a) and (b). Nor did counsel expressly reserve further argument on the issue. (Compare *People v. Ramos, supra,* 15 Cal.4th at p. 1171.) Under these circumstances, it was not necessary for appellant to renew her Section 1223 objection when Kuretich testified before the jury.

Respondent's argument is misplaced in this case for an additional reason. Judge Trammel's refusal to consider Kuretich's testimony in ruling on appellant's objection shows that the substance of her testimony was not, in the court's view, relevant to its ruling on admissibility, and a renewed objection to would have been futile.

B. No Prima Facie Case of Conspiracy Was Made

In support of his argument that there was no error, respondent characterizes the prosecution's burden of proof on the foundational facts necessary to justify admission under Section 1223 as "minimal." (RB at p. 102 .) Appellant disagrees with that characterization. The proponent's burden under Section 1223 is to show that it is more likely than not that the

foundational facts exist, i.e., by a preponderance of the evidence. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 62.) This is the burden of proof that governs resolution of civil disputes and cannot be fairly described as "minimal." When viewed in light of the requirement that the prosecution prove the foundational facts more likely true than not, it is clear that the court's ruling was error.

Respondent relies on three categories of evidence to support its argument: (1) evidence connecting Phillip Sanders and Robert Jones to the killing; (2) evidence that appellant had financial problems; and (3) evidence that appellant knew Phillip and Carolyn Sanders. Appellant does not dispute that the evidence introduced by the prosecution showed that Phillip Sanders killed the victim with Robert Jones' help. (See RB at pp. 102-103.) Nor does appellant dispute that she and her husband had financial problems. Both were being sued by Mellie Thompson as a result of the fraudulent loan of the Sycamore property in 1989, and were attempting to buy back their home on Hilary Street in appellant's own name to overcome a bad credit history. Respondent does not explain how this evidence tends to show that appellant was involved in a conspiracy with the Sanders to kill her husband in June of 1990.

Respondent also relies on evidence of contacts between appellant and the Sanders, including their joint participation in the Sycamore fraud in 1989. (RB at pp. 104-105.) Respondent's extensive discussion of that undisputed transaction omits any reference to the trial court's finding that the 1989 transaction was not part of any conspiracy to kill (RT 29:5006), and therefore fails to explain why it is proper to rely on that evidence on appeal. In any event, appellant's willingness to resort to financial fraud to solve the couple's financial problem caused by Mellie Thompson's refusal

to abide by her agreement to sell the Sycamore Street property is not evidence of her involvement in a conspiracy to kill. (See Argument I, *supra.*)

Respondent points to the records showing numerous telephone calls between the home of appellant and her family and the family business, and the home and workplace of the Sanders, but these records do not establish that appellant rather than a family member or friend made the calls. Nor do they establish to whom the calls were made or what was discussed. The record reflects that Phillip's mother, Isabelle Sanders, was a good friend of appellant's, and that appellant's son Girard was a friend of the Sanders's family. (RT 36:6311, 6313, 6318.) In addition, the telephone records show many calls made long before the alleged June conspiracy. (Exs. 58, 60.) These facts undermine any inference that the telephone records are proof of a conspiracy.

Respondent attempts to overcome this problem by pointing to Phillip Sanders's testimony that the calls concerned appellant's prospective purchase of a car for her son, testimony which was later impeached, and a $1500 loan from appellant. (RB at p.103.) But Phillip's testimony was not before the court when it ruled on the admissibility of Kuretich's testimony, and therefore should not be considered in assessing admissibility. Moreover, Phillip's testimony was in response to Kuretich's testimony that appellant called the Sanders's home several times in early June. In the absence of Kuretich's inadmissible testimony, Phillip would have had no need to respond. It is unfair to use evidence presented by the defense to rebut prosecution evidence to support the admissibility of the prosecution's evidence. And of course, Phillip's testimony in his own defense would not have been presented at appellant's trial at all if the court had granted her

motion to sever. (See Argument I, *supra*.)

Respondent places significance on the fact that appellant lied to the police about the extent of her contacts with Phillip. Given their joint involvement in obtaining a fraudulent loan on the Sycamore Street property in 1989, appellant's lack of candor says little about her involvement in a conspiracy in June of 1990. Phillip Sanders's arrest was the subject of a press release issued several days before appellant talked to Officer Kingsford (RT 27:4714, 4720-4722), and appellant would likely have learned about his arrest from her friend Isabelle Sanders. (RT 36:6316-6317.)

Respondent also relies on what the prosecutor admitted was a "somewhat ambiguous" note (RT 27:4985) in appellant's handwriting found under a blotter at the auto shop months after the victim's death describing a black male with salt and pepper hair who could be found at the shop between 6 and 7 pm to support an inference that the note was intended for the killer. Respondent's inference is not a reasonable one. No evidence was introduced showing when the note was written or why, and neither the contents of the note nor the circumstances in which it was found shed any light on its purpose. Evidence that both Sanders and Robert Jones had visited Kayser Automotive, the scene of the killing, shortly before June 14 (RT 26:4487) makes the need to prepare a description of Tom inconsistent with the prosecution's theory of the case.[13]

Finally, respondent notes that appellant was "never delinquent on the life insurance payments for Melvin" and upon his death, assigned the proceeds to Bid Properties so she could repurchase their foreclosed

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[13] Sanders also testified that he visited Kayser Automotive before June 14, 1990. (RT 43:7408.)

property. (RB at p. 105.) The fact that appellant and her husband insured each other's life, and the fact that appellant applied for the proceeds after husband's death so that she could repurchase the Hillary Street house does not distinguish her from many surviving spouses who wish to use life insurance proceeds to solve a financial problem.

C. Respondent Fails to Address Appellant's Argument That the Evidence Was Insufficient to Establish That Appellant Was Part of the Conspiracy When the Statements Were Made

Respondent asserts that appellant has argued only that there was no prima facie evidence of conspiracy and has therefore conceded the other foundational prerequisites to admissibility under Section 1223, including the requirement of prima facie evidence that at the time that at the time the statements were made, the party against whom the evidence is offered was participating in or later joined the conspiracy. (RB at p. 106, fn. 38.)

Respondent is wrong. Appellant clearly argued:

> Here, there was no evidence independent of the statements themselves that established by a preponderance of the evidence a conspiracy *and appellant's connection to it . . . The court must have relied on the statements themselves to establish that appellant was part of the conspiracy because without such reference there was insufficient evidence to establish that appellant was part of the conspiracy at the time the statements were made.*

(AOB at pp. 163-164; emphasis added.) It is therefore respondent, not appellant, who has conceded the issue by his failure to address the argument.

D. The Erroneous Admission of the Evidence Was Prejudicial

As appellant has discussed at greater length in Arguments I and V, Kuretich's testimony was the linchpin of the prosecution's case. Without that testimony, the prosecution's case was circumstantial and weak. Moreover, without prima facie proof of a conspiracy, Kuretich's hearsay testimony evidence about statements she attributed to Phillip and Carolyn Sanders would not have been admissible as statements of a coconspirator, and therefore totally inadmissible as to appellant. As to Sanders, however, the evidence would have been admissible as admissions. This would have provided an additional basis on which to grant appellant a separate trial.

For these reasons, the erroneous admission of Kuretich's testimony requires reversal of the judgment.

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VII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT POLYGRAPH QUESTIONS BY BOTH APPELLANT AND THE PROSECUTOR WERE IMPROPER AND SHOULD BE DISREGARDED

The trial court delivered a warning instruction to the jury admonishing them to disregard questions by appellant's trial counsel and the prosecutor to Christine Kuretich regarding a polygraph examination. Appellant has argued the instruction was confusing, legally inaccurate, and did not cure the prejudice caused by the prosecutor's misconduct. (AOB at pp. 166-174.) Respondent contends the court's admonition was timely and correct, rendered any error non-prejudicial and that the error is waived for lack of objection below. (RB at pp. 108-115.) However, the claim is not waived as defense counsel did object to the court's instruction, and the instruction did not cure the error of the prosecutor attempting to elicit inadmissible polygraph testimony designed to unfairly bolster the credibility of the key witness.

A. Appellant's Claim of Error Regarding the Trial Court's Admonishment Is Not Forfeited on Appeal

Respondent contends appellant has waived her right to complain on appeal about the court's cautionary instruction regarding polygraphs because appellant "never objected to the wording, content or adequacy of the instruction." (RB at p. 112.) However, appellant's trial counsel did object to the court's stated intent to instruct the jury and his objection was met with a threat by the court to reverse its decision to exclude the question by the prosecutor whether the witness would be willing to take a polygraph test to prove the truth of her testimony. Counsel clearly stated, "I am going to ask you not to comment [to the jury]." (RT 3:5586), to which the court

responded, "Then I am going to let her ask the question." (*Ibid.*)[14] In other words, the court would reverse its ruling sustaining appellant's objection to the prosecutor's last question to Ms. Kuretich of whether she "would be willing to take a polygraph today" if he persisted in his objection. (RT 32:5581.)

As trial counsel pointed out, the court's threat to admit clearly irrelevant evidence in the face of an objection to the instruction put defense counsel on the horn's of a dilemma: he could further object to the court's admonition and the court would admit the previously excluded evidence or he could not object to the court's admonition and preserve the court's ruling excluding the evidence.

The forfeiture doctrine is designed to prevent both the unfairness and inefficiency that results when a claim of error is not brought to the court's attention. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) However, under these facts, counsel made his objection clear, but was estopped from making any further objection. Clearly, the objection by counsel was sufficient to preserve the issue and did not create either an unfairness or

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[14] "[Defense counsel]: I'm going to ask you not to comment.
"The Court: Then I'm going to let [the prosecutor] ask the question.
"[Defense counsel]: Puts me on the horns of a dilemma.
"The Court: You've ask [sic] a question. She's got a right to come back . . . "
(RT 32:5586.) The trial court's reasoning here was faulty. A party cannot open the door to "immaterial and irrelevant testimony." (*People v. Parella* (1958) 158 Cal.App.2d 140, 147 [defense's improper direct examination question regarding a polygraph could not open the door to inadmissible testimony on cross-examination].) The same prohibition against opening the door applies to incompetent testimony "elicited under the guise of redirect." (*People v. Arends* (1957) 155 Cal.App.2d 496, 509 [citation omitted].)

insufficiency, and is not waived.

Further, a claim of error is automatically preserved if an admonition by the trial court would not have cured the prejudice or if an objection would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) Both of the circumstances described in *Boyette* apply to the present case. An admonition could not have cured the prejudice because the risk of reliance by the jury on the inadmissible polygraph testimony was simply too high. (See *People v. Wochnick* (1950) 98 Cal.App.2d 124, 128.) It is very probable that the jury found Ms. Kuretich to be credible because of her willingness to take a polygraph. Additionally, an objection in the instant case would clearly have been futile: when trial counsel objected to the court giving an instruction, he was told that he had a choice between the judge's admonition or simply allowing the prosecutor's impermissible question to stand. (RT 32:5586.) California courts have consistently held that incompetent evidence (whether irrelevant, immaterial, or unduly prejudicial) to which no objection is made does not open the door to further testimony. Here the trial court here correctly ruled that the prosecutor's question was misconduct. (See, e.g., *People v. Matlock* (1970) 11 Cal.App.3d 452, 461; *People v. Arends* (1957) 155 Cal.App.2d 496, 509; *People v. McDaniel* (1943) 59 Cal.App.2d 672, 677.) However, the court's improper response to the defense's initial objection shows that any further objection would have been equally futile.

As well, Penal Code section 1259 allows the court on appeal to review any instruction which affects the defendant's substantial rights or is an incorrect statement of law, with or without a trial objection. (*People v. Cleveland* (2004) 32 Cal.4th 704, 749.) In this case, the instruction affected appellant's substantial rights under the Sixth and Fourteenth Amendments

because it undermined appellant's cross-examination of Ms. Kuretich and placed information before the jury that appellant had no opportunity to confront or rebut. In addition, the instruction incorrectly stated the law (discussed further in section B, *infra*). After instructing the jury that polygraphs were unreliable, the trial judge confusingly bolstered polygraphs by stating that the threat of one is "a good investigative tool" which can have a "salutary effect" on the person being questioned. (RT 32:5588-5589.) This impermissibly told the jurors that the prosecutor's interpretation of the incident was correct and that appellant's theory (that Ms. Kuretich changed her truthful story to what the police wanted to hear) was wrong. Adding insult to injury, appellant was not given any opportunity to respond to the judge's extraneous comments.

Under both the rule elucidated in *Boyette,* and Penal Code section 1259, appellant's claim of error is preserved for appeal despite any lack of a further objection by trial counsel. The prosecutor's misconduct is properly before this Court.

B. The Trial Court's Admonition Was Confusing and Misled the Jury, and Further Failed to Cure the Prosecutor's Misconduct in Attempting to Elicit Inadmissible Testimony

Respondent asserts that the admonition by the trial court cured any prejudice which resulted from the prosecutor's improper question. (RB 112.) However, respondent is wrong. Only a timely and correct admonition will cure such error. (*People v. Cox* (2003) 30 Cal.4th 916, 953.) Here, the alleged cure was worse than the harm. In contrast, in *People v. Cox*, supra, the court admonished the jury, "Ladies and gentlemen of the jury, a question was put to you shortly before the recess that was to the effect as to whether or not the witness recalled

talking to a polygraph operator. That question is struck. You are cautioned to disregard it. You are to treat it as though you never heard it." (*Id.* at p. 951.) That admonition is far different from the rambling and confused instruction the court gave in the present case in which the court told the jurors polygraphs are "inherently unreliable," but "a good investigative tool," the threat of which can have a "salutary effect." (RT 32:5588-5589.) Such an "admonition" did little to cure the harm of the prosecutor's vouching for the witness' credibility by showing she would be willing to take a polygraph exam. In fact, the admonition did the opposite. It told the jurors polygraphs are not good and unreliable except when vouching for a witness' credibility - precisely why polygraph evidence is not admissible. (Evidence Code, §351.)

Respondent contends that the court's admonition was correct in telling the jury that questions concerning a polygraph are improper and correct in telling the jury that one portion of defense counsel's questions were proper. However, despite the fact that the court's admonition was both rambling and confusing, the court at one point clearly told the jurors, "Both those questions are improper." (RT 32:5588.) Given this statement, it is unreasonable to believe that the jurors could have understood from the other parts of the court's scrambled admonition that defense counsel's questions were proper and the prosecutor's were not.

Not only did the instruction fail to clearly delineate which portions of the testimony were admissible and which were not, the trial judge bolstered the witness's credibility in exactly the way prohibited by Evidence Code section 351 by stating that the threat of a polygraph was a useful

interrogation tool which has a "salutary effect."[15] (RT 32:5588-5589.) It was solely the juror's responsibility to determine whether to believe Ms. Kuretich. However, the only inference that can reasonably be drawn from the latter portion of the court's instruction was that she was telling the truth about appellant's guilt. Instead of curing the prejudice caused by the prosecutor's improper question, the trial court exacerbated it.

C. The Error was Prejudicial

Where a witness' testimony is critical to the prosecution, her credibility becomes even more crucial and prejudice is likely to result from inadmissible evidence relating to it. The admonition by the trial court concerning the inadmissible testimony only served to highlight the information in the minds of the jurors. The most critical consideration when determining whether prejudice resulted from inadmissible testimony relating to a witness's credibility should be how vital her credibility is to the case.

According to the United States Supreme Court, "[a] fundamental premise of our criminal trial system is that the *jury* is the lie detector." (*United States v. Scheffer* (1998) 523 U.S. 303, 313 [emphasis in original] [citation omitted].) In holding that a jurisdiction's *per se* rule excluding polygraph evidence was constitutional, the Court stated,

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[15] While polygraphs do have some recognized usefulness in interrogations, the United States Supreme Court has stated that "limited, out of court uses of polygraph techniques differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in a criminal trial. They do not establish the reliability of polygraphs as evidence in criminal trials." (*United States v. Scheffer* (1998) 523 U.S. 303, 310, fn.6.) Even if polygraphs can have a useful purpose outside of trial, it was extremely improper for the trial court to have said as much to the jurors at the trial.

> By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. . . . Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge . . . a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth.

(*Id.*) In the instant case, Ms. Kuretich was the primary witness for the prosecution and presented the only direct evidence tying appellant to the crime. Because of the crucial nature of her testimony, her credibility was absolutely essential and the jurors province as the sole determiners of fact should have been inviolate. The essence of the prejudice in the present case was the way the improper question by the prosecutor and the trial court's instruction lightened the duty of the jurors to determine the credibility of the witness.

Respondent contends that any error was harmless regardless of which standard of prejudice is applied because Ms. Kuretich was not responsible for the long list of additional evidence against appellant. (RB 113-115.) However, the evidence respondent claims is overwhelming evidence of appellant's guilt of the crime consists primarily of evidence relating to the Thompson's financial problems and appellant's efforts to resolve them such as fraudulent efforts to repurchase the Hillary Street house and the prior fraud on the Sycamore Street house. Some of the evidence respondent relies on does not relate to appellant at all such as the eyewitness testimony placing Sanders and Robert Jones at the crime scene. The remainder of the supposedly overwhelming evidence of appellant's guilt consists of alleged lies told after the murder. Upon learning of her husband's death, appellant's statement "It wasn't supposed to happen this way," is merely the natural reaction of a spouse who learns of the untimely death of her partner. Respondent's nefarious spin on the statement is not

even logical – if, in fact, the conspiracy "wasn't supposed to happen this way," then the prosecutor's theory of appellant's participation in a conspiracy to murder her husband must have been wrong. Appellant's statement to the police that she did not know Phil is not remarkable since it is undisputed that appellant and Sanders were involved in the fraudulent Sycamore Street loan conspiracy and appellant had that to hide. Appellant's statement that she was recycling cans when he husband was shot is not proved as a lie just because additional cans were found at the garage or because appellant returned the cans to the garage. Finally, a single hearsay statement to one witness that the victim's watch was found by the police which may or may not have been accurately repeated is also inconsistent with the prosecution's case, nor is it helpful to appellant's case since appellant knew Sanders had been arrested for the crime when she allegedly made the statement. None of the additional evidence cited by respondent beyond the testimony of Ms. Kuretich amounts to overwhelming evidence of guilt.

The testimony of Ms. Kuretich is the only evidence directly linking appellant to the prosecution's theory of the crime that appellant paid Phillip Sanders to kill the victim. The question of Ms. Kuretich's credibility was therefore far more crucial to the prosecution's case than the other evidence to which respondent refers. (See *People v. Basuta*, *supra*, 94 Cal.App.4th 370.) Because the determination of Ms. Kuretich's credibility was so crucial, this error could not be harmless under the test of either *People v. Watson* (1956) 46 Cal.2d 818 or *Chapman v. California* (1967) 386 U.S. 18, and appellant's convictions and sentence must be reversed.

VIII

THE ERRONEOUS ADMISSION OF EVIDENCE OF NUMEROUS UNCHARGED BAD ACTS WAS PREJUDICIAL

A. Introduction

Appellant argued that it was error for the trial court to admit prosecution evidence of appellant's prior fraudulent conduct, gambling, and a lack of sufficient grief over her husband's death to prove appellant's involvement in a conspiracy to murder her husband. The trial court ruled the evidence admissible to show motive or scheme and design. (RT 14:1543-1545.) Respondent, apparently conceding that the evidence was not admissible under a theory of scheme or design, contends the evidence was admissible to prove motive. (RB at p. 117.) However, respondent's theory of motive, when closely inspected, collapses like a house of cards.

B. The Fraud Evidence was Neither Relevant nor Admissible to Prove Motive

Respondent argues that it would be an "understatement to suggest that [appellant's] motive for killing her husband was simply to recover the insurance money." (RB at p. 118.) Rather, respondent contends, appellant's motive was to reacquire the house she had lost without the victim ever learning of the foreclosure and, therefore, the jurors "needed to understand how the foreclosure came about in the first place" which made the prior acts admissible. (*Ibid.*)

The problem with respondent's reasoning is two-fold. First, it is nonsensical to argue that appellant was motivated to kill the victim so that the victim would not learn of the foreclosure in order to buy back the house

which was in foreclosure.[16] If appellant had conspired to kill someone other than the person from whom she was trying to keep the foreclosure a secret this argument might be defensible. In other words, if appellant had killed another person for the insurance proceeds in order to buy back the Hillary Street house without the victim ever knowing about the foreclosure then evidence of the foreclosure, keeping it a secret and other financial frauds and problems might be an intermediate fact of appellant's intent to commit the crime. But the argument is ludicrous where the object of the conspiracy to murder is the person from whom the information must be kept secret so that he will not later learn about the foreclosure. Obviously, the victim's murder would have effectively prevented him from learning of the foreclosure. That appellant might have wanted to keep her husband from learning of the foreclosure while he was alive is a separate question and not relevant to the conspiracy to murder him for the insurance proceeds.

Second, respondents' claims that the foreclosure stemmed from appellant's failure to pay the Edith Ann debt is not based on the record and does not create a theory of admissibility for this evidence or any of the other prior bad acts evidence the court admitted.

Respondent claims that "the genesis of appellant's fraud in relation to the eventual murder was patently relevant"and that appellant's failure to repay this debt "sent the property into foreclosure." However, there is no evidence to support this claim. (RB at p.119.) Respondent cites only the testimony of Mike Regan, appellant's former employer at Edith Ann's

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[16] The prosecutor argued that Tom knew nothing about the rent back (RT 8:1070) or the fraudulent loan on the Sycamore Street property (RT 46:7910, 7943), however these points were contested by the defense. (See, e.g., RT 8:1106; 24:4184; 35:6033, 46:7915.)

Answering Service, for the proposition that appellant paid $7,500 of the debt she owed him and then stopped paying. (RB at p.19.) However, Regan's testimony does not show that failure to pay this debt sent the property into foreclosure as respondent claims. His testimony is limited to the fact that $7,500 of the total indebtedness was actually paid by the Thompsons, and that Regan sold the trust deed in 1988 for $23,000. (RT 25:4335-4336.) No testimony was presented to show whether the remainder of the debt was repaid to the new owner, and no testimony established that this lien sent the property into foreclosure.

In addition, there is no evidence to support respondent's proposition that the other evidence of financial fraud flowed from the Edith Ann's debt. Respondent attempts to create such a nexus by placing the events in chronological order, however, as discussed more fully below, there is no nexus between the prior events and the murder which, as respondent contends, is the only means to understand the murder. (RB at p. 119.)

C. The Trial Court Erred in Admitting Evidence of the 1989 Fraudulent Transaction on the Sycamore Property

Proving that the Hillary Street house was in foreclosure and that appellant arguably entered into a conspiracy to get insurance proceeds from the killing to stop the foreclosure does not require, as respondent contends, that the jurors "understand how the foreclosure came about in the first place." (RB at p. 118.) Evidence Code section 1101 specifically prohibits propensity evidence such as the prior frauds in this case because evidence of other crimes is highly inflammatory. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) And, "[b]ecause evidence of other crimes may be highly inflammatory, its admissibility should be scrutinized with great care." (*Ibid.*) Such heightened scrutiny did not occur in this case.

The court ruled evidence of the uncharged fraudulent misconduct was admissible to show motive and "scheme and design possibly." (RT 14:1543-1545.) According to the prosecution, appellant's motive in entering the conspiracy to murder Tom was to acquire the proceeds from Tom's life insurance policy for which appellant was the beneficiary in order to stop the foreclosure proceedings on the Hillary Street house. Thus the prosecution was permitted to offer evidence that appellant and Phillip Sanders obtained driver's licenses in the names of Mellie and Tom in order to obtain a mortgage on the Sycamore Street home owned by Tom and his ex-wife Mellie.

Motive evidence is an intermediate fact which may be established by prior dissimilar crimes. Thus, in a prosecution for conspiracy to murder for financial gain it can be shown that the defendant needed money. However, the fact that appellant committed the prior frauds because she needed money does not make those crimes admissible in the murder for financial gain case simply because the motive in that crime was similar. The fact that two crimes have similar motives does not make one admissible as motive evidence of the other. There is no nexus between the prior crime and the present crime. (See, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 857 [direct relationship between prior robbery where defendant rendered paraplegic by police and murder of officers in retribution]; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 245-246 [prior robberies evidence admissible to show motive to murder witnesses].)

Nor does the similarity of motive make the prior acts admissible under the theory of common design, plan or scheme. "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to

support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Here although there was similar motive – the need for money – between the prior frauds and the present conspiracy to murder, the crimes are not sufficiently similar to support admission of the evidence.

D. The Court Erred in Admitting Evidence of the 1986 Forged Deed of Trust to Edith Ann's Answering Service

Nor, as respondent contends, was the evidence of appellant's forgery on the deed of trust to Edith Ann's Answering service and her promise to Tom not to repeat the forgery necessary to the jurors' understanding of motive.

Respondent argues that it was appellant's failure to repay the debt to Edith Ann's which sent the property into foreclosure and "triggered all subsequent criminal efforts to obtain money" thus making the prior bad acts relevant. (RB at p.119.) Not so. The only arguably relevant evidence of the motive for the killing was to gain the insurance proceeds because appellant needed money. That appellant needed money to pay off a lien and to avoid foreclosure is arguably relevant, however, these are the only facts relevant to the alleged motive to kill for financial gain. Contrary to respondent's argument, it is not necessary to understand the uncharged crimes of fraud or forgery in order to understand the reason for the charged crime. (RB at p.119.) The need for money due to foreclosure on one's house and to pay an outstanding debt is understandable without the admission of the inflammatory details of forgery or lying.

Using the same tautological reasoning used to defend the admission of the evidence of the fraudulent Sycamore Street property loan, respondent argues that appellant's letter to her husband in which she confesses to

forging his signature is relevant to the murder for financial gain because if he learned that she had engaged in fraudulent conduct a second time there would be "disastrous consequences for her marriage." (RB at p. 119.) However, the motive attributed to appellant for conspiracy to murder her husband is not fear of loss of her marriage, but murder for financial gain. Appellant's apology letter does not contribute to an understanding of the reason for the murder when the theory is that Tom was killed for insurance money.

None of the prior frauds explains why appellant "murdered her husband" as respondent contends. (RB at p.120.) Respondent's argument boils down to this: the prior acts are relevant to the murder because they show that appellant had to keep her fraudulent actions a secret from her husband either because she had promised never to engage in fraud again or because such knowledge would be devastating to her marriage. Yet, what would be the value of keeping a secret from a dead person? Wouldn't Tom's murder be even more devastating to their marriage than the revelation of appellant's fraud? When viewed in logical fashion, respondent's claim of the relevancy of the prior bad acts of forgery and the fraudulent Sycamore Street property loan are clearly unsupportable.

Respondent contends the murder "*only* makes sense in light of the [prior bad acts] evidence." (RB at p. 121.) However, murder for financial gain is not an uncommon crime. It's motive is to gain money, not to keep secrets or prevent persons from gaining knowledge of one's fraudulent conduct. Yet, respondent maintains that appellant's "motive [] was not just about obtaining money. It was about obtaining money without her husband ever knowing why or how." (RB at p.120.) However, motive is defined as a "[c]ause or reason that moves the will or induces the action." (Black's

Law Dict. (Rev. 4th ed. 1968) p. 1164, col.2.) The prosecutor did not argue that Tom was killed to keep the foreclosure of the Hillary Street house or the Sycamore Street loan fraud from him. Rather, the prosecutor argued that appellant committed the Sycamore Street property loan fraud eight months earlier in order to gain money to try and buy back the Hillary Street house without Tom's knowledge. The conspiracy to murder Tom came later and was motivated by the need for more money to buy back the Hillary Street house.

In *People v. Sheer* (1998) 68 Cal.App.4th 1009, 1019, which respondent cites, the court held a "nexus or direct link between the commission of the prior misconduct and the charged crime" is needed to admit prior crimes evidence for motive. In that case, the court found "the prior flight evidence was not admissible to establish a motive. [] No relationship exists between appellant's 1993 flight from police following his failure to obey a red light and his flight from civilian eyewitnesses after a collision between his vehicle and another. The individuals involved in each accident are wholly unconnected to each other. The events themselves do not have any apparent overlapping characteristics." (*Sheer*, 68 Cal.App.4th at 1020-1021.) Thus, there was no nexus or direct link between the commission of the prior misconduct and the charged crime.

As the *Sheer* court explained further, "The presence of the same motive in both instances may be a contributing factor in finding a common plan or design. (See, e.g., *People v. Lisenba* (1939) 14 Cal.2d 403 [94 P.2d 569] [murder of two wives, each of whom apparently drowned accidentally, motivated by desire to collect on double-indemnity insurance policy for each wife].) However, in contrast, the converse is not true." (*Sheer, supra*, 68 Cal.App.4th at pp. 1020-1021.) "The manner in which the prior

misconduct was committed, which is the focus of the common plan or design inquiry, does not give rise to a motive, i.e., incentive or impetus, for commission of the charged crime. A contrary conclusion would be a non sequitur." (*Id.* at p. 1021.)

In the present case, as in *Sheer,* the prior crime was not admissible to prove a common plan or design. "'Evidence of a common design or plan is admissible to establish that the defendant committed the act alleged.' (Citation.) Thus, a common design or plan, like motive, is simply an intermediate fact. Unlike motive, however, a common plan or scheme depends on the existence of striking similarities between the prior misconduct and the charged crime, and a nexus between the commission of the two is unnecessary. In other words, a common scheme or plan focuses on the manner in which the prior misconduct and the current crimes were committed, i.e., whether the defendant committed similar distinctive acts of misconduct against similar victims under similar circumstances." (*Sheer, supra*, at p. 1021.)

In the present case, evidence that appellant committed the prior and present crimes in order to get money, and even the fact that she allegedly wanted to keep the fact of the prior frauds from Tom as well as allegedly keep secret from him the conspiracy to have him killed does not establish either evidence of motive or common plan or scheme.

E. Efforts to Buy Back the Hillary House

Respondent contends that the foreclosure on the Hillary Street property "triggered all subsequent criminal efforts to obtain money" including posing with Sanders as Melvin and Mellie Thompson to obtain a loan on the Sycamore Street property and creating a false identity and fictional bank to secure a loan and, thus, "the only way to adequately

understand the reason for appellant's charged crimes was to understand the uncharged ones." (RB at p. 119.) However, the prosecution is not required to prove as an element of the crime the "reason" or motive for the charged crimes although motive evidence may be an intermediate fact which is probative of an ultimate issue such as intent. (See, e.g. *People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23.)

As discussed above, however, the motive for the crime of conspiracy to commit murder for financial gain is the need for money. That appellant's house was in foreclosure and she needed money is sufficient evidence of motive to alert the jurors to the intermediate fact of motive without introducing the highly prejudicial evidence of other frauds. Moreover, even though the motive for the other frauds may have been similar to the motive for the murder – to get money– such similarity does not establish a theory of relevance of the prior crimes. (*People v. Thompson, supra,* 27 Cal.3d at p. 319, fn. 23.)

Evidence of appellant's fraudulent efforts to buy back the Hilary Street house was admitted solely to show that appellant was a bad and dishonest person. Such prosecution by bad character evidence has not been ever been allowed under our system of jurisprudence. (*Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

F. The Court Abused its Discretion When it Admitted Evidence That Appellant Pawned Her Husband's Jewelry and Used the Proceeds to Gamble

Respondent contends that the evidence that appellant pawned the jewelry worn by her husband in his coffin and used the money to gamble was admissible to rebut appellant's evidence that she and her husband enjoyed a good relationship. (RB at p. 123.) At trial, the prosecutor repeatedly sought to have the evidence admitted on several different

theories. (RT 24:4239; 254323; 26:4623.) However, the court found only that the evidence would be admissible to refute the defense theory that appellant and Tom enjoyed a loving relationship. (RT 24:4243, 4244.) The defense presented the testimony of Rene Griffin to say that appellant and Tom "got along well" however, the court found this to be evidence that appellant and Tom had a loving relationship and therefore admitted the evidence which the court concluded tended to refute the evidence of a loving relationship. (RT 35:6125-6126.)

Respondent contends that the prosecution was entitled to present evidence that rebutted an impression created by the defense that "appellant would not have murdered a man whom she loved." (RB at p. 123.) However, the prosecutor's closing argument clearly shows that the evidence was introduced for the purpose of showing the bad character of appellant. The prosecutor argued that it would be understandable to take the jewelry off one's husband's body if you were desperate to pay the rent, but to take the money and gamble "is just really cold . . . ." (RT 51:8670.) Thus it was not the fact that appellant did not allow the jewelry to be buried with Tom, but that her use of the proceeds of the jewelry was not what the prosecutor considered to be in good character. Such evidence was clearly inadmissible character evidence offered for the purpose of smearing appellant's character before the jurors.

G. The Court Erred in Admitting Testimony about the Death of Appellant's Cat

Respondent contends it was permissible for the prosecutor to counter defense evidence that appellant was upset upon learning her husband had been shot with evidence that she was not upset later that evening, and had been more upset following the death of her cat on a prior occasion.

Respondent likens this case to *People v. Jones* (1998) 17 Cal.4th 279, in which the prosecutor was allowed to present evidence that the defendant was not upset when confessing his crimes to the police in contrast to his tearful testimony at trial to rebut his claim that he was remorseful during the confession. (*Id.* at pp. 306-307.) Clearly, that case is not similar to the present case.

In *Jones,* the prosecutor was seeking to counter evidence the defendant himself had manufactured in court. Here, the defense presented evidence by third parties that appellant was distraught upon learning of the shooting of her husband. Arguably the prosecutor should have been permitted to show that appellant was not upset later that evening, however, the purported evidence that she was more upset about the death of a cat was clearly beyond the bounds of permissible rebuttal.

Not only was the prosecution evidence from a lay witness not experienced in comparing appellant's behavior to other similarly situated persons, but the evidence of appellant's grief following the death of her cat was both irrelevant and unnecessary to his opinion. (*United States v. Meling* (9th Cir. 1995) 97 F.3d 1546, 1556-1557.) The evidence was used by the prosecutor in an attempt to further besmirch appellant's character – that she cared more for her cat than her husband – and should not have been permitted.

H. Admission of the Bad Character Evidence Was Prejudicial

The character evidence admitted by the court was not harmless. Respondent contends the evidence of the prior uncharged crimes was "no more inflammatory than the offense for which appellant was being tried, which was murder" (RB at p. 121), citing *People v. Kipp, supra,* 18 Cal.4th

at. p. 372 for this proposition. However, as the Court stated in *Kipp*, "The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 404-405.)" (*Kipp, supra*, 18 Cal.4th at p. 371.)

In addition to reviewing the uncharged evidence for its inflammatory nature, the court must also determine whether the evidence will cause undue prejudice. Here, the evidence that appellant had engaged in conspiracy to murder her husband was not substantial, but the danger that the jurors would convict appellant not on the strength of the evidence but because she was a person of bad character likely to have committed another crime or deserving of punishment for those prior bad acts was strong.

Moreover, the prior and charged crimes in *Kipp* "displayed the same highly distinctive features, so that evidence of the [prior] crimes had substantial probative value on the issues of identity, common plan or design, and intent in the [present] crimes." (*People v. Kipp, supra*, 18 Cal.4th at p. 372.) No such similarity between the crimes was present in appellant's case. Rather, the prosecutor sought to use the emotionally charged evidence of appellant's character as a bad wife who was conniving and lying to her husband, and who had a deeper emotional attachment to her pet than her husband. Such evidence should never have been admitted.

Respondent contends the evidence of appellant's involvement in the conspiracy was "utterly compelling" and "indisputably demonstrated." (RB at pp. 121-122.) However, these bald assertions are not substantiated by the evidence. For example, as evidence of appellant's involvement in the crime respondent cites "the multitude of documented phone calls from appellant

to codefendant Sanders." (RB at p. 121.) However, the record does not show actual phone calls between appellant to Sanders, but merely show phone calls between phone numbers where appellant and Sanders and numerous others resided and worked. The calls may have been between appellant's son and his friend, Phillip Sanders's son or between appellant and her friend Isabelle Sanders or any other number of people who lived and worked at the phone locations.

The fact that appellant was at the "crime scene" is also suspicious, respondent contends, but, it was appellant's place of work. Appellant's statement to the effect of "it wasn't supposed to happen this way," at the hospital when she learned of her husband's death was not a confession to her participation in the conspiracy and murder as respondent contends. Rather, it was a common reaction upon learning of the untimely death of her spouse with whom she had anticipated growing old. Moreover, if, in fact, the conspiracy "wasn't supposed to happen this way," then the prosecutor's theory of appellant's participation in a conspiracy to murder her husband must have been wrong. Finally, appellant's statement to the police that she did not know Phil is not remarkable since it is undisputed that appellant and Sanders were involved in the fraudulent Sycamore Street loan conspiracy and appellant had that to hide.

As appellant has shown, the only independent evidence upon which the prosecutor relied was the unreliable hearsay testimony of Christine Kuretich. Kuretich's testimony was the only evidence that did not come from the codefendants which tied appellant to the conspiracy to murder. Thus, appellant suffered significant prejudice from the admission of the bad character evidence. The admission of this evidence created a reasonable likelihood that appellant was convicted not on the strength of the evidence

against her, but because the jury found her to be a person of bad character, one either likely to have committed another crime, or deserving of punishment for those prior bad acts. Accordingly appellant's convictions, the special circumstances finding and the death penalty must be reversed.

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IX

THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S RIGHTS BY DIRECTLY COMMENTING ON HER DECISION NOT TO TESTIFY

Appellant has shown that the trial court committed reversible error by improperly commenting on appellant's decision not to testify at the guilt phase of her trial. As explained in the Opening Brief, the record clearly establishes that the trial court's comments served to direct the jury's attention to appellant's choice not to testify. (AOB at pp. 207-212.) Respondent fails to counter appellant's argument, but instead baldly asserts that the Court's comments were made to protect appellant's constitutional rights. (RB at p. 127.) This argument is contradicted by the record, and unsupported by the law. The trial court's misconduct violated appellant's right not to testify, to a fair jury trial, to due process, and to reliable determinations of guilt and death eligibility under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., V, VI, VIII, XIV Amends.)

A. Relevant Proceedings in the Trial Court

Prior to the close of the defense case, the Court excused the jury specifically to allow the appellant's counsel adequate time to meet with their client for the sole purpose of reaching a decision on whether or not she would testify. (RT 37:6411-6412.) When the Court reconvened, appellant, through counsel and outside the presence of the jury, announced that she would not be testifying. (RT 37:6424-6425.) Subsequent to that announcement, the District Attorney stated that "we would like to encourage the defendant to testify," and sought to enter into negotiations with appellant as to certain subject matters that would be excluded from

cross-examination in exchange for her agreement to testify. (RT 37:6425-6428.)

There followed another break in proceedings, during which time defense counsel and the district attorney discussed the terms under which appellant might testify. Appellant ultimately rejected the District Attorney's various offers, and again announced through counsel that she would not testify. (RT 37:6429.) At that time the Court announced, "[j]ust so that it's clear, this is irrevocable." (RT 37:6429.)

Immediately following this repeated assertion of her Fifth Amendment rights, the trial court considered a series of evidentiary motions, all of which were premised on appellant's decision not to testify (RT 37:6431-6444 [appellant moves for jury to be instructed and deliberate on the issue of her guilt prior to presentation of co-defendant's case]; RT 37:6448 [district attorney argues that she is entitled to put on good character evidence in rebuttal because she structured her case anticipating that appellant would testify]; RT 37:6449 [court comments that there is no evidence of victim's reputation for dishonesty because appellant elected not to testify];RT 37:6449 [district attorney argues against admission of tax return for purposes of proving victim's income, "the person who knows what the income was is Catherine Thompson and she's not testifying."].)

Finally, at the close of these discussions, the court directly discussed the consequences of not testifying and verified, both with defense counsel and appellant herself, that appellant understood those consequences and still wished to waive her right to testify. (RT 37:6461.) The trial court pronounced itself satisfied with the waiver, stating "I don't know how much clearer it can be." (RT 37:6461.)

Immediately following this waiver, the defense presented its last

brief witness to the jury. This witness' testimony lasted for four transcript pages. Afterward, in the presence of the jury, defense counsel announced that the defense rested its case. Immediately the court rejoined, "You are resting without calling your client?" (RT 37:6469.) Defense counsel moved for a mistrial on the basis of *Griffin* error. (*Griffin v. California* (1965) 380 U.S. 609 [A trial judge or prosecutor's comments on an accused's failure to testify in a California criminal case violates the self-incrimination clause of the Fifth Amendment].)

B. After Appellant Informed the Trial Court that She Had Decided Not to Testify, the Trial Court, in the Presence of the Jury, Directly Commented on Appellant's Silence And Refusal To Testify, in Violation of Appellant's Constitutional Rights

Respondent fails to address the crucial sequence of events: mere minutes after the trial court confirmed, outside the presence of the jury, that appellant had decided not to testify,[17] the trial court directly commented on appellant's decision not to testify. (RT 37:6469). In light of the discussion that took place outside the presence of the jury, it is unlikely that the court's inquiry was intended merely to safeguard appellant's constitutional rights or provide the defense with an opportunity to consider having appellant take the stand. Moreover, respondent cites no authority for the argument that the intent of the speaker is determinative of whether or not the comment on a defendant's decision not to testify is *Griffin* error. (RB at p. 127.) Indeed, each of the cases cited by respondent squarely holds that a direct comment on the failure of defendant to testify is *Griffin* error. (*People v. Hovey* (1988) 44 Cal.3d 543, 572 [direct or indirect comment by prosecutor upon

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[17]Russell Furie's testimony was concluded in less than four full pages of the trial transcript. (See RT 37:6466-6469.)

failure of defendant to testify, in contrast to comment upon state of the evidence, is *Griffin* error); *People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (a comment that would reasonably be understood by the jury as referencing defendant's failure to testify is *Griffin* error); *People v. Hardy* (1992) 2 Cal.4th 86, 154 (a direct comment on the defendant's failure to testify is Griffin error).]

In *Davis v. United States* (5th Cir. 1966) 357 F.2d 438, the Fifth Circuit reviewed a case with facts similar to those of the case at bar. In *Davis*, defense counsel was cross-examining a prosecution witness regarding statements the witness made to the defendant. The prosecutor objected, arguing that the defense counsel was referencing facts not in evidence. The trial court sustained the objection and told defense counsel that "counsel could not impeach the witness, but could put 'your people' on the stand." (*Id.* at p. 440.) The Fifth Circuit found that the trial court's "your people" comment was a direct comment on the two defendants' decision not to testify, and, following *Griffin*, it was "improper for the trial judge to call attention to a defendant's silence." (*Id.* at p. 441.) "[W]e can think of no effect of the trial judge's comments other than to invite the jury's attention to the fact that [defendants] had not taken and did not take the witness stand. Here, no one but [defendants] could have contradicted the government's witness as to the events about which he had testified and upon which he was being cross-examined at the time of the trial judge's remarks." (*Id.*) The Fifth Circuit reversed the defendants' convictions.

Here, the trial court's comment was even more direct, and, considering the court's prior acknowledgment of appellant's decision not to testify, could have had no other effect other than to focus the jury's attention to the fact appellant had not taken the witness stand.

C. An Overt Violation Of The *Griffin* Rule By a Trial Court Should Not Be Subject to Harmless Error Analysis

When the trial court, in the presence of the jury, makes a direct, overt comment on a defendant's decision to remain silent in conscious disregard of a defendant's right not to be a witness against herself, the error should be reversible per se. As a federal matter, *Griffin* error, unlike some other constitutional errors, has not been found to be reversible per se, but reversible unless found harmless beyond a reasonable doubt. (*People v. Hardy* (1992) 2 Cal.4th 86, 154 [*Griffin* error harmless beyond a reasonable doubt in light of overwhelming evidence of defendant's guilt]. "Nothing in [*Chapman v. California* (1967) 386 US 18], however, appears to preclude the courts of any state from deciding, as a matter of state law, that an improper comment upon an accused's failure to testify is prejudicial per se and a ground for automatic reversal." (Annot., Violation of Federal Constitutional Rule (*Griffin v. California*) Prohibiting Adverse Comment by Prosecutor or Court upon Accused's Failure to Testify, as Constituting Reversible or Harmless Error (2009) 24 A.L.R.3d 1093, § 5.)

As noted in appellant's opening brief, many jurisdictions, including the Ninth Circuit, have held that a direct comment on a defendant's invocation of the Fifth Amendment requires reversal. (*United States v. Patterson* (9th Cir. 1987) 819 F.2d 1495, 1506 [suggesting that reversal is appropriate where statements directly refer to the defendant's failure to testify]; *see also Davis v. United States, supra*, 357 F.2d 438 [trial court's direct references to defendants' failure to testify required reversal]; *Ex parte Wilson* (Ala. 1990) 571 So.2d 1251 [direct comment on defendant's failure to testify warrants reversal, where court did not give curative instruction immediately after harmful statement, but instead waited until after closing

arguments concluded nearly 25 minutes later]; *People v. Crabtree* (Ill. App. 1987) 515 N.E.2d 1323 [trial court's solitary statement that defendant could take stand and testify required reversal]; *State v. Hale* (Tenn. 1984) 672 S.W.2d 201 [direct comment required automatic reversal of murder conviction]; *Gonzales v. State* (N.M. 1980) 612 P.2d 1306 [direct comment, as contrasted with indirect comment, on defendant's failure to testify constituted reversible error]; *Koller v. State* (Tex. Crim. App. 1975) 518 S.W.2d 373 [direct references to defendant's failure to testify required reversal]; *State v Smith* (1966) 101 Ariz. 407 [Arizona committed to rule that it was prejudicial error for court to comment on failure of defendant to take witness stand.]; see also *State v Wright* (1967) 251 La. 511 [Lousiana]; *Cape Girardeau v Jones* (1987 Mo. App.) 725 S.W.2d 904 [Missouri]; *People v Concepcion* (1987 2d Dept) 128 App.Div.2d 887, 513 N.Y.S.2d 811 [New York]; *State v Cockerham* (1988) 294 S.C. 380, 365 S.E.2d 22 [South Carolina].)

Chief Justice Traynor, in his dissenting opinion in *People v Ross* (1967) 67 Cal.2d 64, 85-86, revd. per curiam *sub nom. Ross v. California* (1967) 391 US 470, indicated that overwhelming evidence of guilt does not negate significant error involving comments on an accused's failure to testify that may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached. (*See People v. Glass* (1975) 44 Cal.App.3d 772, 780, [comment on accused's silence served to fill evidentiary gap]; *People v. Medina* (1974) 41 Cal.App.3d 438, 463 ["gap" that comment helped fill was credibility of accomplice witnesses; fact that jury took five days to reach verdict was significant].) Justice Traynor argued that when a constitutional error appears substantial, and the jury may have reached its verdict because of the constitutional error, reversal is

required, and neither the court's own view of the defendant's guilt nor its conviction that the jury would have reached the same result in the absence of error due to other evidence can then save the judgment. (*People v Ross, supra*, 67 Cal.2d at pp. 85-86 (dis. opn. of Traynor, C.J.), revd. per curiam *sub nom Ross v. California* (1967) 391 US 470.)

Applying harmless error analysis seems especially inappropriate to situations such as the one here, where a trial court directly comments on a criminal defendant's refusal to testify, with foreknowledge that the defendant was invoking her right not to testify. Such unvarnished gibes are precisely the "remnant of the 'inquisitorial system of criminal justice,'" which *Griffin* was designed to prevent. (*Griffin v. California, supra,* 380 U.S. at p. 614 [quoting *Murphy v. Waterfront Comm.* (1964) 378 U.S. 52.) Thus, the *Chapman* harmless error standard should not apply, and defendant's conviction should be reversed.

D. Even Under The *Chapman* Test, The Court's *Griffin* Violation Was Not Harmless Beyond A Reasonable Doubt

In order to establish that *Griffin* error was harmless, a violation of the *Griffin* rule must be proven beyond a reasonable doubt not to have contributed to the verdict obtained, or it must be shown that there was no reasonable possibility that such a violation might have contributed to a defendant's conviction. (See *Chapman v California, supra,* 386 U.S. 18.) Whether a trial court's comment on an accused's failure to testify can be considered harmless error is determined by a comparison of the "strength of the competent evidence against the accused with the seriousness of the error committed." (*People v Garrison* (1967) 252 Cal.App.2d 511, 515-516.)

Here, the error committed was extremely serious. Respondent briefly argues that the trial court's remarks were not severe enough to

prejudice defendant, citing *People v. Hovey* (1988) 44 Cal.3d 543, 572. In *Hovey*, the Supreme Court held that a *prosecutor* committed *Griffin* error during closing argument when she made two allusions to the defendant's failure to testify, "[the defendant has] never said anything to you about why, why he did these things." (*Id.*) The Supreme Court ultimately found the prosecutor's error to be harmless beyond a reasonable doubt, however, because her statements were "indirect, brief, and mild." (*Id.*) Here, however, the *trial court* made a direct and pointed remark on appellant's decision not to testify. (*Griffin v. California*, *supra*, 380 U.S. at p. 614-615 ["What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."].) Although the court's remark was brief, when viewed in context of the recently completed discussion outside the presence of the jurors, the trial court's question - "You are resting without calling your client?" – carried a connotation that the court considered the defense case incomplete without appellant's testimony; an inference that was surely not lost on the jury. Thus, such a remark can hardly be considered "mild;" it constitutes a "suggestion that an inference of guilt be drawn" from appellant's decision not to testify. (*Id.*) Appellant's co-defendant Phillip Sanders, testified extensively. The jury, primed by the trial court's remark highlighting appellant's decision not to testify, would thus have focused on appellant's "missing" testimony.

In contrast to the seriousness of the error, the competent evidence against defendant was weak. As noted in Arguments I, II, VI and VII, *supra*, the case against appellant consisted entirely of circumstantial evidence and the self-serving statements of coconspirators.

The prosecution cannot carry its burden of establishing that the

judge's improper comment, and the absence of any action by the trial court to correct its error, was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S at p. 24.) There is, therefore, no basis for concluding that the jury's verdicts were surely unattributable to the court's misconduct. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman, supra*, 386 U.S. at p. 24; *People v. Brown* (1998) 46 Cal.3d 432, 447-48.) Reversal of the judgment is required.

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XI

THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JURORS PETER B., NANCY N., MARIA ELENA GARY-A., BRENDA M., KUSUM P., BETTY F. AND YOLANDA N. WHO WERE EQUIVOCAL ABOUT WHETHER THEIR ATTITUDES ABOUT THE DEATH PENALTY WOULD AFFECT THEIR PENALTY PHASE DELIBERATIONS; REVERSAL OF THE DEATH SENTENCE IS REQUIRED

The trial court granted the prosecutor's challenges for cause and excluded seven prospective jurors, Peter B., Nancy N., Maria Elana Gary-A, Brenda M., Kusum P, Betty F and Yolanda N, each of whom unequivocally stated that they could impose the death penalty. Appellant has shown that there is insufficient evidence in the record to support the trial court's finding of bias (AOB at pp. 226-252.) Respondent has failed to propound any reasonable argument to the contrary.

The State's contention that the excusal of each of these jurors was justified is based on an unreasonable and flawed application of the precedent of both this Court and the United States Supreme Court, and a flawed reading of the record. To be sure, each of these jurors expressed some reluctance to impose the death penalty; however a careful review of the record of these jurors' voir dire shows that each stated they were capable of imposing the death penalty in an appropriate case. Given the record of their individual voir dire, it is clear that none were substantially impaired. (*Adams v. Texas* (1980) 448 U.S. 38, 49 [that a jurors' views on capital punishment may effect their deliberation does not render them substantially impaired, it is only when those views render the juror unable to follow the law that they may properly be excused].)

Contrary to the State's assertion, appellant does not ignore the

applicable standard of review. (Compare AOB at pp. 228-229 with RB at pp. 132-133.) The parties agree that the governing standard is whether there is substantial evidence to support the trial court's finding that the juror's views about capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and the juror's oath (see AOB at pp. 228-229; RB at p. 132); that the reviewing court must defer to a trial court's ruling as to a juror's true state of mind if the juror's statements are ambiguous or conflicting (see AOB at p. 229; RB at p. 133); and that a trial court's finding of substantial impairment must be fairly supported by the record considered as a whole. (See AOB at p. 229; RB at p. 133.)

Respondent however erroneously equates deference to the trial court's determinations as to the state of mind of a prospective juror who has given conflicting or ambiguous statements with affirmance of the trial court's exclusion. That is not the law. Rather, as the State itself acknowledges repeatedly, the trial court's determination as to a prospective juror's true state of mind is binding on the appellate court *only if it is supported by substantial evidence* in the record. (RB at pp. 141, 148, 154, 158, 163, 168, citing *People v. Stewart* (2004) 33 Cal.4th 425, 441, emphasis added.)

Nothing in *People v. Schmeck* (2005) 37 Cal.4th 205, which addresses the deference to be paid to a trial court's ruling when a juror's statements are ambiguous or conflicting, can reasonably be understood to alter this requirement. Nor does such a rule relieve the reviewing court of its obligation to review the record to determine if the legal conclusion

implicit in the trial court's finding is supported by the record.[18] Whether a prospective juror's voir dire is conflicting or consistent, ambiguous or emphatic, a trial court's exclusion can be affirmed only if it is supported by substantial evidence. In the case of each of these jurors, it is not.

Moreover, impartiality to serve on a capital jury does not require a declaration that a juror *would* impose death in the case at trial but only an assurance that the jury would follow the law and *could* in an appropriate case impose the ultimate punishment. (*People v. Kaurish* (1990) 52 Cal.3d 648, 698-699 [juror may not be excluded for death penalty views unless they would "preclude" him from returning a death verdict such as juror's statement that he could not return a death sentence under any circumstances].) Although each of the seven identified jurors expressed a preference for life over death, none of their answers reflect an unwillingness to engage in the deliberative process, and follow the law as instructed by the court. Each juror identified factors that would change, or alter, their preference for life to a vote for death. Respondent's claim that six of these jurors had "an unalterable preference against the death penalty" is simply unsupported by the record. (RB at pp. 141, 148, 153, 157, 162, 174.)

Despite Respondent's repeated assertions to the contrary, neither this Court's holding in *People v. Jenkins* (2000) 22 Cal.4th 900, nor any other case, have ever held that a mere unwillingness to impose the death penalty, without more, is sufficient to show that a juror is substantially impaired and

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[18]To the extent that this Court's ruling in *People v. Schmeck* (2005) 37 Cal.4th 240 suggests the contrary, it should be rejected as it is contrary to the rule established by the High Court in *Gray v. Mississippi* (1987) 481 U.S. 648 and *Adams v. Texas* (1980) 448 U.S. 38. (*Uttecht v. Brown* (2007) 551 U.S. 1.)

may be excused for cause. As discussed at length in the opening brief, this Court and others have made abundantly clear that:

> In light of the gravity of [the death penalty], for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" *ever* to vote to impose the death penalty. . . . [That] is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412. . . .

(*People v. Stewart*, *supra*, 33 Cal.4th 425, 446; accord, *People v. Avila* (2006) 38 Cal.4th 491, 530 ["mere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties. The prospective juror might nonetheless be able to put aside his or her personal views and deliberate fairly under the death penalty law"].)

As to each of these jurors, the trial court's ruling of bias is not supported by substantial evidence in the record, and is thus not binding on this court. (*People v. Stewart*, *supra,* 33 Cal.4th at p. 441; RB at p. 154.) The improper excusal of any and each of these jurors requires reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. 122; *People v. Heard* (2003) 31 Cal.4th 946, 965-966.)

A. Peter B.

Appellant has shown that Mr. B. was willing to impose the death penalty in an appropriate case, and although he had reservations about imposing a death sentence in a one-on-one killing for financial gain, he did not assert a categorical unwillingness to do so. (AOB at pp. 242-243.) In response, the state simply asserts that Mr. B demonstrated "an unalterable preference against the death penalty." (RB at p. 153.) Respondent's argument relies on an unreasonable interpretation of the record, glossing over the entirety of Mr. B's questionnaire and voir dire, and focusing

instead on a single moment when Mr. B, clearly in a moment of confusion over the course of the court's questioning, responded in the affirmative when asked "would it be your frame of mind that you would always automatically vote to impose life imprisonment." (RT 18:3000-3001.) Although Respondent concedes that in the next set of questions, Mr. B. clarified his response, saying that he "wouldn't use the word never. The potential is there" (RB at p.150; RT 18:3001), he nonetheless mischaracterizes Mr. B as one who "would always automatically vote to impose life imprisonment rather than death in a case of murder for financial gain." (RB at p. 153.)

Read in its entirety, Mr. B's oral and written responses reflect a position harmonious with the Supreme Court's jurisprudence – that the death penalty must be reserved for those cases in which it "fit[s] the crime." (ACT 18:4057, RT 18:2996.; see, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 [death penalty may only be imposed if aggravating circumstances "substantially outweigh" mitigating circumstances]; Pen. Code, § 190.3 [listing aggravating and mitigating circumstances relating to offense and offender jurors must consider in determining appropriate penalty]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [jurors must consider all relevant circumstances relating to the offense and the offender in selecting appropriate penalty]; *People v. Zapien* (1993) 4 Cal.4th 929, 990.)

Contrary to respondent's assertion, Mr. B. never asserted an "unalterable preference" against the death penalty, nor did he maintain that would always automatically vote against the death penalty in case of murder for financial gain. (RB 153.) Mr. B carefully and consistently explained that although he favored a sentence of life without the possibility of parole, he could impose a death sentence in an appropriate case, and that a single

murder for financial gain could be an appropriate case. (RT 18:3000 ["I would favor imprisonment for life"]; RT 18:3001 ["It would be awfully difficult (to vote to impose the death penalty) . . . I wouldn't say never; I wouldn't use the word never. The potential is there"]; RT 18:3002 ["I would place myself in the center (of the scale 1 to 10 of people who could never vote for the death penalty)"]; RT 18:3004 ["Don't know if I would put a person to death for killing one on one . . . would take more than that for me to vote for death."]; RT 18:3005 ["the chances are that I would favor a sentence of imprisonment for life, and it would not be a sentence for death"]; RT 18:3006 [would place self in the bottom 10 of people who would never give the death penalty on a one-on-one murder].) Mr. B's answers display his honest grappling with the difficult questions the death penalty raises for any juror, especially one, who like Mr. B. has been in a war zone and witnessed death and killing. (RT 18:3000, 3003.) To be sure, his answers reflect a juror more likely to vote for life than death – but they do not reflect a juror unwilling to vote for death.

Significantly, both the prosecutor's argument in support of excusal of Mr. B and the trial court's ruling excluding him support appellant's position. The prosecutor herself argued that Mr. B. should be excused *not* because he had an unalterable preference for life, but because he "would most likely vote for life in prison." (RT 18:3008.) As this Court has noted, a preference for life alone does not render a juror biased. (*People v. Kaurish, supra,* 52 Cal.3d at pp. 698-699.) Additionally, that portion of the record cited by the trial court as reflective of its finding of bias – Mr. B's response that he would place himself in the bottom 10 on a scale of 1 to 100 of those willing to impose the death penalty in a one-on-one murder for financial gain – reflects only a reluctance to impose the death penalty, not

an unwillingness to do so. (RT 18:3008-3009.)

B. Nancy N.

Appellant has shown that Ms. N. was willing to impose a death sentence in an appropriate case, and affirmed that she could personally vote for death. (AOB at pp. 232-233, 244.) Respondent's assertion that Nancy N's voir dire reflected an "unalterable preference" against the death penalty (RB at p. 157) is simply not supported by the record. Contrary to respondent's representation of the record, Ms. N. did not unequivocally state that she did not believe the death penalty was ever appropriate, or that she could never impose the death penalty. (RB at p. 157.) Ms. N. stated in voir dire not only that the death penalty "could be appropriate" in a particular case, but also that she could personally impose the death penalty "in an appropriate case." (RT 15:2234.) Moreover, Ms. N. agreed that she would consider mitigating and aggravating factors in deciding between life and death. (RT 15:2242.) The record of Ms. N.'s voir dire reflects that she was a life-leaning juror, but that she was willing to consider and weigh those factors that might support a death judgment. Given the entirety of the voir dire, the trial court's finding of substantial impairment is not supported by the record. (RT 15:2245.) As trial counsel noted, Nancy N. was more inclined toward life, but she was not unwilling to consider death. (RT 15:2245.)

C. Maria Elena Gary-A.

Appellant has shown that Ms. Gary-A was willing to impose a death sentence in an appropriate case, and that the death penalty could be an appropriate punishment for murder for financial gain. (AOB at pp. 233-234, 244.) Although acknowledging, as he must, that Ms. G-A agreed that there was a chance she would impose the death penalty in a financial gain

case (RB at p. 168), respondent none the less asserts that she " would be substantially impaired from considering the death penalty as a sentencing alternative in a case of murder for financial gain." (RB at p. 167.) Respondent's conclusory statements fail to address the critical issue – like Mr. B, Ms. Gary-A's statements reflect, at most, that she was unlikely to impose the death penalty, not that she could not impose the death penalty. Such a juror is not substantially impaired. (*People v. Kaurish*, *supra,* 52 Cal.3d at pp. 698-699.)

Contrary to respondent's assertions, Ms. Gary-A. consistently stated that she could vote for the death penalty in a murder for financial gain. (RT 19:3396-97 [would be a difficult decision, but possible would vote for death in a murder for financial gain]; RT 19:3398 [rate self as a 2 ½ on scale of 1 to 10 for imposition of life without possibility of parole in murder for financial gain]; RT 19:3399-3400 [in deciding what penalty to impose, would be interested in history of victim, prior acts, relationship between parties]; RT 19:3400 [there is a possibility would vote for death in murder for financial gain, but it is unlikely].) Given this record, in which the juror consistently states that she could impose the death penalty, the finding of bias is not supported by the record.

Respondent's attempted justification for the excusal of Mrs. Gary-A is not aided by cases cited in its brief. Unlike juror Q in *People v. Harrison* (2005) 35 Cal.4th 208, 227-228, nothing in Ms. Gary-A's voir dire reflects that any of her concerns about the death penalty "would substantially impair her ability to follow the court's instructions." (*Ibid.*) Nor did the trial court's ruling reflect any such belief. In the other cases cited by respondent, this Court explicitly found that the excused jurors stated they could not impose the death penalty. (*People v. Haley, supra,* 34 Cal.4th at p. 307

[Excused juror Delores T. repeatedly stated that she could not impose the death penalty]; *People v. Griffin* (2004) 33 Cal.4th 536, 585-561 [each of the excused jurors stated that they could not impose the death penalty]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [excused jurors responded they did not know if they could impose the death penalty]. Ms. Gary-A repeatedly stated she could vote for death, and the trial court made no finding to the contrary. Finally, given the trial court's explicit finding that Ms. Gary-A's voir dire was "as straight forward as she is attractive." (RT 19:3402), there can be no reasonable argument that this court is bound by the trial court's determination of substantial impairment, as her voir dire was neither conflicting nor ambiguous. (*People v. Haley, supra,* 34 Cal.4th at p. 307.)

D. Brenda M.

Appellant has shown that although Brenda M. was personally opposed to the death penalty, she believed herself to be willing and able to follow the Court's instructions on the law, and could be convinced to impose the death penalty in an appropriate case. (AOB at pp. 235-236, 245.) Respondent's arguments to the contrary are not compelling. Ms. M was not conflicted or ambiguous in her answers – she consistently stated that she would be very reluctant to vote for the death penalty (RT 13:2040, 2041, 2042, 2046, 2047, 2051), but that she could follow the court's instructions and would impose the death penalty in an appropriate case (RT 13:2041, 2044, 2045, 2047, 2048, 2052.) These views simply do not render Ms. M biased, nor can they reasonably be construed as representing "an inability to vote for death" (RB at p. 148), particularly as she repeatedly stated she could vote for death in an appropriate case. (RT 13:2041 [although it would be hard to vote for death penalty, can't say wouldn't do

it]; RT 13:2044 [no doubt that as a juror could set aside my own personal opinions and follow the law]; RT 13:2045 [could follow the Judge's instructions and consider both death penalty and life without parole in a case]; RT 13:2052 [Would deliberate with the jury, and if given good enough reason could vote for death, although it would be difficult to do so].)

Moreover, Ms. M made clear that although her values would rightly inform her decision on penalty, she could also be swayed by the evidence presented by either side at trial. (RT 13:2040 [hard to say how would vote as know so little about the case]; RT 13:2041 [would be hard to vote for death in financial gain murder, but can't say for sure without knowing more].) The consistent statements from Ms. M that she was disinclined to vote for the death penalty, but would follow instructions from the Court, consider the evidence, deliberate with the other jurors and could be convinced to impose the death penalty clearly distinguish Ms. M. from the challenged jurors in each of the cases cited by respondent. (*People v. Harrison*, *supra,* 35 Cal.4th at p. 228 [Because juror was excused based on finding by trial court that position on death penalty would prevent juror from following court's instruction, excusal was proper]; *People v. Haley, supra,* 34 Cal.4th at p. 308 [excusal of jurors upheld by trial court upheld were juror's answers were equivocal, and each of the challenged jurors repeatedly stated could not impose the death penalty]; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561 [excused jurors never stated they could be convinced by the evidence to impose the death penalty].)

E. Kusum P.

Appellant has shown that although Kusum P. was personally opposed to the death penalty, Ms. P. was willing to consider the facts of the

case and consider death as an appropriate punishment. (AOB at pp. 236-238, 246-248.) The law is clear that such a position does not render a juror biased. (*People v. Kaurish, supra,* 52 Cal.3d at p. 698-699.) Despite this, Respondent argues that Ms. P.'s voir dire shows an "unalterable preference against the death penalty." (RB at p. 141.) Respondent's argument is unpersuasive, relying on a skewed recital of the facts and the relevant law.

Significantly, respondent makes a great deal of Ms. P's response to the prosecutor's question that she could not "look at this individual, and say it's my decision that you should die . . . could not be the person to impose the death penalty." (RT 18:3114.) These answers, posed in the stark language of the juror as executioner, can not reasonably be construed as exhibiting bias in the instant case, particularly with a prospective juror with an acknowledged language barrier (RT 18:3118 [DA Mader describes Ms. P as having "English problems"]), and who has repeatedly stated that she could vote to impose the death penalty. (RT 18:3109 [could vote to impose the death penalty]; RT 18:3112 [would not always vote to impose life without parole]; RT 18:3114 [whether or not voted for death would depend on the evidence].) The full record of Juror P.'s voir dire and questionnaire reflects a juror who was reluctant, but not unwilling or unable to impose the death penalty.

F. Betty F.

Appellant has shown that Betty F. was willing to consider imposing the death penalty in an appropriate case (AOB at pp. 238-240, 248-250.) Ms. F.'s views, like those of Mr. B., *ante*, mirror those of this Court and the United States Supreme Court that the death penalty must fit the crime, and the particular facts of the crime and the defendant must be considered by the finder of fact. (*People v. Prieto, supra,* 30 Cal.4th at p. 263 [death

penalty may only be imposed if aggravating circumstances "substantially outweigh" mitigating circumstances]; Pen. Code, § 190.3 [listing aggravating and mitigating circumstances relating to offense and offender jurors must consider in determining appropriate penalty]; *Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5 [jurors must consider all relevant circumstances relating to the offense and the offender in selecting appropriate penalty]; *People v. Zapien, supra,* 4 Cal.4th at p. 990.) Ms. F. Told the Court three times in quick succession that although she preferred life over death, depending on the facts and circumstances of a financial gain case, she could impose the death penalty. (RT 19:3353.) Despite this clear record, respondent insists that Ms. F's excusal was proper, because she demonstrated "an unalterable preference against the death penalty." (RB at p. 162.) This argument is simply not supported by the record, and should be rejected by this Court.

G. Yolanda N.

Appellant has shown that Yolanda N. was willing to deliberate, recognized the import of considering all the evidence in determining the appropriate punishment, and could impose the death penalty in an appropriate case. (AOB at pp. 240-241, 250-251.) Respondent's argument that the record of voir dire reflects an unalterable preference for life is unpersuasive and not supported by substantial evidence in the record. (RB at pp.173-174.)

Although Ms. N was forthright that her religious beliefs led her to prefer life over death (RT 16:2705, 2709), she consistently responded to questions from the Court, defense counsel and the prosecutor that in considering the appropriate punishment she would primarily be focused on considering all the evidence. (RT 16:2697 [would vote for death if enough

evidence]; RT16:2702 [would want to know the facts before decide which penalty]; RT16:2703 [appropriateness of death penalty depends on facts of case]; RT16:2706 [would want as much evidence as could have before deciding penalty]. Disregarding these repeated statements reflecting Ms. N's willingness to engage in the deliberative process, respondent instead encourages this Court to focus in on a single answer, given at the very end of a long voir dire as the very last juror of the day, stating that in 99.9 percent of the cases she would not impose the death penalty. This single statement, in light of all her other statements focusing on the import of hearing the evidence prior to reaching a decisions, can not reasonably be interpreted as sufficient evidence of an "unalterable preference" for death.

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XII

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES AND BAD CHARACTER EVIDENCE THROUGH CROSS-EXAMINATION OF A DEFENSE MITIGATION WITNESS AND IN REBUTTAL AT THE PENALTY PHASE

Respondent contends that appellant's "recollection of the witness's testimony is incorrect, in that the witness testified that appellant was trustworthy." (RB at p. 175.) However, as the transcript clearly shows, the witness did not testify, either explicitly or implicitly, about appellant's trustworthiness in the sense of her character for telling the truth. Rather, chaplain Miotzek's testimony was limited to appellant's willingness to follow through in the context of her religious practice at the jail. Respondent uses his mischaracterization of the testimony as a means by which to avoid addressing the substance of appellant's argument in any manner. In addition, respondent contends appellant has waived her claim of federal constitutional error and argues that any error was harmless. Respondent is wrong on all counts.

A. Trial Counsel Adequately Objected to the Introduction of the Character Evidence and the Issue Is Not Waived

Respondent concedes appellant has preserved for appeal her claims of state law error, but failed to object to the admission of the evidence on federal constitutional grounds. (RB at p. 178.) However, an objection on a state law grounds is sufficient to preserve a parallel federal constitutional claim governed by the same standard:

> [N]o useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal

> standard similar to that which would also determine the claim raised on appeal."

(*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [*Wheeler* motion sufficient to preserve *Batson* claim as well].) Moreover, an "asserted error in admitting evidence over an Evidence Code section 352 objection had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) In *Partida,* this Court held appellate review of the federal constitutional implications of a ruling on a state law objection is permitted where the federal claim does not alter the analysis of whether the trial court erred, but only concerns the reviewing court's analysis of the effect – the "legal consequence" – of that error. (*People v. Lewis* (2006) 39 Cal.4th 970, 990 fn. 5 [allowing review of federal arguments that "merely assert that the trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional legal consequence of violating the Constitution.]")

Here, the state law objection on relevancy, foundational grounds and Evidence Code section 352 is sufficient to preserve a parallel federal constitutional claim which is governed by the same standards. The trial court had to consider the same facts and to apply a legal standard similar to that which this Court must determine on appeal. Thus, this Court may and should find that by permitting evidence and testimony on the character trait for dishonesty, the trial court failed to set reasonable limits on the admission of aggravating evidence and allowed the prosecutor to argue impermissible factors in aggravation resulting in an unreliable death penalty in violation of appellant's constitutional rights. (U.S. Const., 5th, 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586; Cal. Const., art. I, §§ 7, 15, 27.) The trial court's error also violated appellant's rights to due process and a fair

trial (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [federal constitutional error to deprive defendant of interest in having state adhere to specific methods prescribed for deciding whether to impose death penalty]; *Estelle v. McQuire* (1991) 502 U.S. 62; Cal. Const., art. I, §§ 7, 15]), and violated her right to a reliable penalty determination. (U.S. Const., 8th and 14th Amends.; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gardner v. Florida* (1977) 430 U.S. 349; Cal. Const., art. I, §§ 7, 27.) Reversal of the death judgment is thus required both under California law and the federal and state constitutions.

B. The Evidence Was Not Proper Rebuttal to Appellant's Evidence in Mitigation

Protestant chaplain Leslie Miotzek testified she knew appellant from church and Bible study where appellant attended every week while she was housed at the Sybil Brand Institute for Women. (RT 57:9144.) Based on what Miotzek observed, she testified that, in her opinion, appellant has the character of someone who was "consistent in Bible study," "dependabl[e] to administer to other inmates," with "a willingness to help reach out and help others," and a "faithfulness" and a "hunger within her to know the Lord of God and to let God's word administer to her heart and her life." (RT 57:9145.) "With her coming to Bible study and to church and seeing her, I have been able to form an opinion by seeing her consistency and her ability to make some changes in her life and to prioritize her life." (RT 57:9145.) In addition, Moitzek testified she had never seen appellant exhibit any violence or ill temper in the time she had known her. (RT 57:9145.) Miotzek never saw appellant give the sheriff's deputies any trouble or commit an infraction of the rules. It appeared to Miotzek that appellant

abided by the rules in jail and submitted to the jail authorities. (RT 57:9146.) Overall, Miotzek found appellant to be a positive influence and encouraging to Miotzek and others. (RT 57:9147.)

Respondent contends that Miotzek's testimony concerning appellant's Bible study opened the door to the character trait for trustworthiness because Miotzek testified, "Cathy is a person I could trust to be consistent in Bible study, in church, in any type of activity I might assign to her." (RT 57:9145.) Capitalizing on the use of the word "trust," in this testimony, respondent argues that appellant is "mistaken [in her] assertion that the defense witness never testified about appellant's character trait for trustworthiness." (RB at p. 179.) However, as outlined in appellant's opening brief, the use of the word trust in the context of consistency in Bible study conveys the meaning of dependability or reliability. It does not imply the second meaning of trust which is confidence in "truthfulness, honesty and good judgment." (*World Book Dictionary*, Thorndike, Barnhart, 1988 ed, Vol L-Z, p. 1765.) Respondent is simply incorrect in opining that the witness testified to the character trait of honesty.

It is axiomatic that, as this Court has held, "[t]he scope of [penalty phase] rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24; *People v. Jones* (1998) 17 Cal.4th 279, 307; *People v. Carpenter* (1997) 15 Cal.4th 312, 408-409.)

In determining whether evidence falls within the "proper scope of rebuttal," the relevant question is "whether two statements 'cannot at the same time be true. . . thus, it is not a mere difference of statement that suffices; . . . an inconsistency [] is required.'" (*James v. Illinois* (1990) 493

U.S. 307, 325, fn.1 (dis. opn. of Kennedy, J.), quoting 3 Wigmore, Evidence (Chadbourne ed. 1970) § 1040.) Thus, in discussing whether previously-excluded evidence should be admitted to rebut a defendant's false testimony, Justice Kennedy said trial courts should have no difficulty "[d]efining the proper scope of rebuttal," because the rule requires a "direct conflict" between the two versions of the facts. (*James, supra*, at p. 325, fn. 1.) In this case, it is entirely possible that appellant could be a person who is reliable in her religious studies, and also be a dishonest person. Similarly, she could be unreliable in her studies and be a completely honest person. Clearly, the admission of the evidence on honesty and veracity does not relate directly to the character trait for dependability which appellant introduced. (*People v. Mitcham, supra,* 1 Cal.4th at p. 1072; *People v. Rodriquez, supra,* 42 Cal.3d at pp. 791-792; see also *In re Jackson* (1992) 3 Cal.4th 578, 613 [penalty phase rebuttal cannot "go beyond the aspects of the defendant's background on which the defendant has introduced evidence"].)

C. The Error Was Not Harmless

Respondent contends any error was patently harmless under any standard of prejudice because the jury had learned in the guilt phase of "appellant's proclivity for fraud and dishonesty." (RB at p. 180.) However, the trial court's error exposed the jury to additional bad character evidence and other crimes evidence that was inadmissible in the prosecutor's case-in-chief. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Through the prosecutors's cross-examination and evidence presented in rebuttal, the jury learned that appellant had enlisted another inmate in an attempt to solicit perjured testimony from another inmate (RT 57:9150, 9187), and that she had applied for credit while in custody. (RT 57:9151.) The jury learned

about a 1972 embezzlement from Aetna Sheet Metal Company (RT 57:9174), a 1973 embezzlement from Franklin Sheet Sales (RT 57:9175), and a 1986 embezzlement of $33,000.00 from Edith Ann's Answering Service[19] (RT 57:9175), the conversion of a Rolls Royce (RT 57:9176), and learned appellant had sent a letter to the court in 1974 asking for leniency by falsely claiming she had a kidney removed and was on dialysis. (RT 57:9159-9160.)

This highly damaging evidence came at a particularly sensitive point in the trial – shortly before the jury retired to begin its deliberations. Even evidence that could properly have been introduced during the prosecutor's case-in-chief can be unfairly prejudicial if it is introduced during rebuttal, where its impact is unduly magnified by its dramatic introduction late in the trial. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211; *People v. Golden* (1961) 55 Cal.2d 358, 371-372; *People v. Carter* (1957) 48 Cal.2d 737, 753.) Here, the evidence could not have been properly introduced in the prosecution's case-in-chief because it was totally irrelevant to any of the factors listed in Penal Code section 190.3.

In addition, the introduction of that testimony obscured the absence of true rebuttal and created the false impression that the prosecutor had evidence to counter the defense case. Although Miotzek testified that her knowledge of these fraudulent incidents would not change her opinion of appellant (RT 57:9177), the mere recitation of the evidence implied that the impression the witness' testimony was somehow "rebutted." Thus,

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[19] Previously, the jury had only heard that appellant had forged the signature of her husband on a deed of trust payable to Edith Ann's Answering Service, but did not learn the money was owed because it had been embezzled. (RT 48:8229-8230.)

introduction of this evidence suggested that the defense case had weaknesses which did not in fact exist.

The prejudicial potential of the erroneous rebuttal was fully exploited by the prosecutor during her closing argument. She argued:

> You have heard about the two prior forgeries that Catherine Thompson has, 17 and 18 years ago; and the importance of these is really for us all to understand that she did not embark upon this life of crime recently. This didn't just start when Melvin Thompson somehow came into her life. That she has been amoral, dishonest for at least 17 or 18 years. . . . [Not] [o]nly the intensity and the severity of her actions had increased; but the duplicity, the dishonesty has been there for a considerable period of time.

(RT 58:9352.)

The prosecutor used the letters to Tom and the court and the insurance application to argue appellant was a lying manipulator who was able to hoodwink the jail chaplains. She stated:

> And by showing you this history, by showing you the fact that what she did in 1974, in 1986, the point is to show you that these witnesses as to the character of Catherine Thompson as they are perceiving her now in custody in 1990 are worthless because they don't know Catherine Thompson. It's a charade. She is repenting before these witnesses also and she's going to church on Sunday and on Monday she's having Jennifer Lee on the jail write these letters for her urging false testimony by her co-conspirators.

(RT 58:9371-9372.)

Through this argument, the prejudicial impact of the improper rebuttal reached fruition. Admission of this evidence allowed the prosecutor to go far beyond the limits of rebuttal evidence and aggravating evidence and argue appellant should be killed because she is the "mistress of deception." (RT 58:9377.) The fact that the rebuttal evidence exceeded

proper parameters created precisely the kind of prejudicial juror confusion that the rules on rebuttal were designed to prevent. (See *People v. Katz* (1962) 207 Cal.App.2d 739, 749-751.)

Reversal of the death judgment is thus required both under California law and the federal and state constitutions.

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XIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON ALTERNATIVE METHODS OF EXECUTION THEREBY DIMINISHING THE JURORS' RESPONSIBILITY FOR THE SENTENCING

Caldwell v. Mississippi (1985) 472 U.S. 320, held that it is constitutionally impermissible to rest a death sentence on a decision made by jurors who have been mislead in such a way as to diminish their sense of responsibility for their penalty determination. Respondent, citing *Jones v. United States* (1999) 527 U.S. 373, *Dugger v. Adams* (1989) 489 U.S. 410, and *Romano v. Oklahoma* (1994) 512 U.S. 1, asserts that the holding in *Caldwell* has been limited by the Court such that appellant's claim must fail.[20] As demonstrated below, respondent's argument is mistaken and the cases on which it relies are inapposite.

In *Jones v. United States, supra,* 527 U.S. 373, petitioner argued that the trial court's refusal to give a jury instruction addressing the consequences of a jury deadlock in the penalty phase of the capital case amounted to an Eighth Amendment violation. The Court reasoned that the failure to give the requested instruction did not mislead the jurors as to their role in the sentencing process, but rather merely addressed the consequences of the juror's inability to fulfill their role, i.e., to come to an agreement on the appropriate punishment. Failure to instruct a jury as to

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[20] Notably, respondent does not persist in the charge made by the prosecutor that argument by defense counsel invited the erroneous instruction. The short, isolated, and unemphatic remarks by defense counsel were merely an attempt to deflate the extreme hyperbole by the prosecutor who likened appellant to the Nazis who murdered millions of people in the gas chamber. Defense counsel's remarks did not introduce to the jurors any of the improper aspects of the method of execution which is not permitted in California.

the consequences of a breakdown in the deliberative process, does not, the Court held, violate the Eighth Amendment. (*Id.* at p. 382.)

The *Jones* Court did not address a situation where, as here, the trial court gave a special instruction to the jurors at the behest of the prosecutor telling the jurors that the final decision on appellant's execution rested with appellant – someone other than themselves – thus diminishing their sense of responsibility for their penalty determination. Thus, the facts of *Jones* in which the asserted error did not concern the juror's role, are readily distinguishable from the instant case and do not support respondent's contention.

Similarly, respondent's reliance on *Dugger v. Adams, supra,* 489 U.S. 410, is misplaced. The only issue in *Dugger* was whether the petitioner had lost his right to bring a *Caldwell* claim by failing to object to the challenged instruction at trial. (*Id.* at p. 408.) Indeed, in *Dugger*, petitioner did not raise the *Caldwell* issue until his second federal habeas petition. (*Id.* at p. 405.) The Court found that in order to preserve the *Caldwell* claim, petitioner must have first objected to the instruction as a violation of state law. (*Id.* at p. 410.) Here, defense counsel clearly and unequivocally objected to the instruction at trial and moved for a mistrial arguing that instruction made the death penalty more palpable to the jury. (RT 59:9453.) Thus, appellant has preserved her *Caldwell* claim and the holding in *Dugger* is irrelevant to appellant's claim that the court erred in instructing the jurors on alternative methods of execution thereby diminishing the jurors' responsibility for the sentencing.

Respondent also inappropriately relies on *Romano v. Oklahoma, supra*, 512 U.S. 1. In *Romano*, the Court narrowed the holding in *Caldwell* by limiting *Caldwell's* application to comments which "mislead the jury as

to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." (*Id.* at p. 9, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 184.) Respondent contends that the instruction at issue here "comes nowhere close to satisfying that standard" because it "[a]ccurately informed the jury that, pursuant to a law that was about to take effect, condemned inmates would have a choice between execution by lethal gas or by lethal injection." (RB at p. 184.) Respondent's argument is flawed – the mere fact that the judge's instruction did not misstate the law on method of execution does not in itself make the instruction constitutional under *Romano*. Although the *Romano* Court found relevant the fact that the evidence at issue was not "false at the time it was admitted" in determining that *Caldwell* did not apply, the Court did not limit *Caldwell* only to situations where false information was provided to the jury. Indeed, the challenged instruction need only "mislead the jury...in a way that allows it to feel less responsible...." (*Id.* at p. 9.) That is precisely the case here. Telling the jurors that appellant herself would be the ultimate decision maker on the method of execution undermined the juror's sense of responsibility for their penalty determination.

Respondent argues that "[no] rational interpretation" of the instruction at issue here "could lead to a conclusion that the jury felt less responsible in rendering its decision on penalty." (RB at p. 184.) This contention is without merit. Any rational juror who was contemplating a death sentence in this case would naturally feel less burdened knowing that the appellant had the power to choose an arguably less heinous option with regards to her ultimate fate. This is especially true where, as in this case, a new method of execution was being introduced in the state, a method that

was widely regarded as a more gentle and humane option than lethal gas.[21]

In fact, this is precisely why the trial court in this case gave the erroneous instruction: it sought to ensure that the jurors did not feel too responsible for appellant's death by instructing the jurors that part of the ultimate decision rested elsewhere, in the hands of appellant herself. Thus, implicit in the court's instruction was the notion that if the jurors were considering the potential suffering that appellant would be subjected to if she were to be executed, it should not bother because appellant could choose a less painful alternative. This instruction, therefore, had the same effect as the instruction in *Caldwell* and clearly diminished the juror's sense of responsibility in its sentencing determination.

Next, respondent contends that the jurors were never told that the ultimate penalty decision rested with "some other authority" and it is "only that [] type of representation that raises a *Caldwell* issue." (RB at p. 184.) Yet, respondent cites no authority for this assertion. While the instruction at issue in *Caldwell* addressed a situation where the prosecution erroneously suggested the penalty decision rested with "some other authority," the holding in that case was not limited to its facts. Contrary to respondent's

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[21] At the time the jurors in appellant's case were considering her sentence, death by lethal gas was being questioned as cruel and unusual and death by lethal injection was being considered as a less heinous form of execution. (See, e.g., Jacobs, *Execution by Lethal Injection OKd Capital Punishment: Governor signs the bill. Wilson says it will eliminate last-minute pleas that the gas chamber is cruel and unusual punishment*, L. A. Times, (Aug. 29, 1992) p. 6.) In the discussion on whether to permit the introduction of evidence of the method of execution by lethal gas, the trial court opined that if it permitted such evidence the prosecution then "should be able to put on the humane aspect" of death by lethal injection. (RT 54:8940-26.)

position, the reasoning in *Caldwell* is much broader than respondent suggests – the Court's goal was to ensure that the processes by which jurors in capital cases make sentencing decisions do not mislead jurors into making irresponsible determinations based on factors outside the mitigating and aggravating evidence presented during the penalty phase. (*Caldwell*, *supra*, 472 U.S. at p. 329.)

By allowing the jurors to consider that the method of execution rested in appellant's hands, some of the "awesome responsibility" belonging solely to the jurors in a capital case was undoubtedly passed on to appellant herself. Therefore, even though the instruction at issue here did not suggest that the death sentence itself rested elsewhere, the effect on the jurors was the same: it lessened the juror's responsibility in violation of the Eighth Amendment and appellant's death sentence must therefore be reversed.

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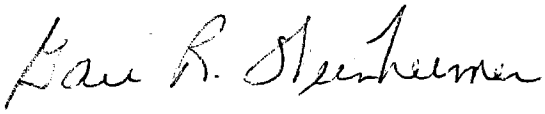
CONCLUSION

For the reasons stated above and in the Opening Brief, appellant's convictions, the special circumstance finding and the judgment of death must be reversed.

DATED: November 1, 2010

Respectfully submitted.

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(1)(C))

I, Gail R. Weinheimer, am the Senior Deputy State Public Defender assigned to represent appellant Catherine Thompson in this automatic appeal. I instructed a member of our staff to conduct a word count on this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 37,900 words in length.

Dated: November 1, 2010

Gail R. Weinheimer

GAIL R. WEINHEIMER
Attorney for Appellant

PROOF OF SERVICE BY MAIL

Re: PEOPLE v. CATHERINE THOMPSON No.S033901

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S REPLY BRIEF

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

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Each said envelope was then, on November 2, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on November 2, 2010, at San Francisco, California

Glenice Fuller
DECLARANT