S046848

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KERRY LYN DALTON,

Defendant and Appellant.

San Diego County
Sup. Ct. No.135002

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

HONORABLE THOMAS J. WHELAN, JUDGE

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KERRY LYN DALTON, Defendant and Appellant.	San Diego County Sup. CT. No. 135002

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INTRODUCTION

Appellant's conviction and death sentence were based not on "overwhelming evidence," as respondent repeatedly asserts, but on the unreliable and conflicting testimony of prosecution witnesses, virtually all of whom were methamphetamine users, and many of whom had extensive past and pending criminal charges.[1] The victim's body was never found and no other forensic evidence was produced to establish the manner or method of the killing. Compounding the absence of credible evidence, appellant's trial was riddled with pervasive prejudicial error.

[1] In respondent's own words: "Nearly every single witness in this case was a drug addict with one or more felony convictions." (RB 88.)

Respondent makes a half-hearted attempt to preserve this conviction by ignoring pertinent facts, avoiding significant legal issues, and dismissing all error as harmless. Respondent's efforts, however, cannot alter the fact that grievous error occurred and the convictions and death judgment must be reversed.[2]

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[2] Appellant has found it unnecessary to reply to all the arguments in the response since respondent raises very little that is not fully addressed in the opening brief, and appellant has only addressed respondent's contentions that require further discussion for the proper determination of the issues raised on appeal. Appellant specifically adopts the arguments presented in her opening brief on each and every issue, whether or not discussed individually below. Appellant intends no waiver of any issue by not expressly reiterating it herein.

LEGAL ARGUMENT

GUILT PHASE ARGUMENTS

I.

THE COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE HEARSAY STATEMENTS OF MARK TOMPKINS THROUGH JAIL-HOUSE INFORMANT DONALD MCNEELY.

Informant Donald McNeely testified about alleged conversations he had while in custody with appellant's codefendant Mark Tompkins. Notably, he claimed that Tompkins described the torture of Melanie May:

> I wouldn't say [Tompkins'] boasted about [the torture], but he seemed to enjoy it. [¶] He said that he was really into violence. He was into the violent scene, and he said that he tortured the hell out her . . . . [¶] He used to say, "pain was the name of the game," and different little phrases like that . . . . [¶] He told me that the original plan was to give Miss May a hotshot, I believe he called it.

(32 RT 3074.)

> He mentioned a screwdriver and a knife at one point, a heavy kitchen skillet. He said that, "they work wonders on the knees," is the way he said it. [¶] Electrical cord, I believe, too, he mentioned. He said that he gave her a – a "shock treatment," is the way he said it. * * * He said that he gave her a hotshot, and then there was some of the other instruments used; and then apparently he wasn't satisfied that it – she was going to die quick enough. He got tired of it, and he said that he just wanted it to end; and he stabbed her with a knife. That's the way he told me.

(32 RT 3075.)

Appellant has argued that the hearsay statements of her severed codefendant Mark Tompkins to jail-house informant Donald McNeely were unreliable and inadmissible at appellant's trial, and that the erroneous introduction of those statements denied appellant her constitutional and

statutory rights to due process and a fair trial, confrontation and a reliable guilt and penalty determination. (See AOB 42-73.)

Respondent belabors undisputed matters,[3] while at the same time, avoiding the claims actually raised. Appellant proffered several separate reasons why McNeely's testimony was inadmissible for any purpose. She argued that a statement against penal interest is not a firmly rooted hearsay exception; Tompkins' hearsay admissions were not admissible to prove corpus; both Tompkins and McNeely were highly unreliable witnesses; Tompkins' statements were irrelevant and inadmissible evidence against appellant; the inapplicability of redaction to statements of a codefendant whose trial was severed under *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518, 547; and the fact that the redaction in this case rendered the introduced evidence false.

Respondent's principal argument is that Tompkins' statements are not testimonial, and, presumably, thus not subject to the Confrontation Clause. (RB 32-37.) It is true that since appellant filed her opening brief, the United States Supreme Court filed its decision in *Davis v. Washington* (2006) 547 U.S. 813, 823-824, where it held that the Confrontation Clause does not apply to nontestimonial hearsay.[4] Appellant has never asserted

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[3] Although appellant stated in the opening brief that she "does not contend that Tompkins' statements were testimonial in the manner suggested by the Court in *Crawford* [*v. Washington* (2004) 541 U.S. 36]," respondent spends several pages arguing that Tompkins' statements were not testimonial. (RB 32-37.) Although appellant has not argued in the opening brief that informant McNeely was acting as a police agent when housed with Tompkins, respondent spends still more pages arguing that *Massiah v. United States* (1964) 377 U.S. 201, does not apply in this case because McNeely was not an agent of the police. (RB 38-40.)

[4] *Davis* does not hold that a Confrontation Clause *analysis* is not required when considering the admissibility of nontestimonial hearsay.

(continued...)

that Tompkins' statements were testimonial, and, accordingly, to the extent that appellant's argument relied upon the Sixth Amendment Confrontation Clause, that reliance is no longer valid. That fact, however, does not defeat, or even significantly impact, appellant's argument.

Appellant's multi-faceted attack on the introduction of McNeely's testimony includes an overarching claim that both McNeely and Tompkins were utterly unreliable individuals. While the full scope of *Davis* is not clear, it is wholly inconsistent with due process to admit into evidence at a capital trial the unreliable hearsay statement of a declarant who lacks credibility and is not available for cross-examination, through the testimony of a skilled con artist-informant. (See *White v. Illinois* (1992) 502 U.S. 346, 363-364 (Thomas, J., with Scalia, J., concurring) ["Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them"); see also *United States v. Thomas*,

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[4] (...continued)
(*Davis v. Washington*, *supra*, 547 U.S. at pp. 823-825.) As one court has observed, it could be that *Crawford* " merely set the floor for admissibility and did not intend to permit a court to admit obviously unreliable testimony, such as testimony that did not meet the criteria laid out in [*California v. Green* (1970) 399 U.S. 149] or otherwise would have failed the *Roberts* test." (*Al-Timimi v. Jackson* (E.D. Mich. 2009) __ F.Supp. __ , 2009 WL 416482, *14.) In *United States v. Thomas* (7th Cir. 2006) 453 F.3d 838, 844, fn.2, the court observed:

> We recognize that *Crawford v. Washington*, 541 U.S. at 60, ... overruled, in part, *Ohio v. Roberts*, and that *Davis v. Washington* reaffirmed this fact. [Citation.] While at first glance, *Davis* appears to speak of *Roberts* being overruled in general, a closer reading reveals that the discussion of *Roberts* occurs strictly within the context of statements implicating the Confrontation Clause. *Id.* Where the Court addresses nontestimonial statements such language is conspicuously absent.

supra, 453 F.3d at p. 843 ["Where a hearsay statement is found to be non-testimonial, we continue to evaluate the declaration under *Ohio v. Roberts*"].)

Trial counsel objected to McNeely's hearsay testimony as unreliable and violative of due process (see 29 RT 2477), and appellant raised a due process argument in her opening brief (see AOB 45, 90). Federal courts have long applied due process to limit the use of unreliable hearsay in contexts where the Confrontation Clause is not implicated, and "*Crawford* does not suggest that confrontation is the only mechanism through which reliability of testimony can be assessed." (*United States v. Fields* (5th Cir. 2007) 483 F.3d 313, 337.) Consequently, although "the Confrontation Clause is inapplicable to the presentation of testimony relevant" to certain sentencing decisions, due process prohibits sentencing decisions based upon unreliable hearsay. (*Id.* at pp. 337-338.) Similarly, an alien contesting deportation is entitled to due process of law, and deportation decisions may not rely on untrustworthy hearsay or the unfair denial of the right to cross-examine witnesses. (*Hernandez-Guadarrama v. Ashcroft* (9th Cir. 2005) 394 F.3d 674, 681-682; *Felzcerek v. INS* (2d Cir. 1996) 75 F.3d 112, 115.) Finally, parole revocation decisions are subject to like analysis: although no Sixth Amendment confrontation right applies, reliance upon untrustworthy hearsay at a revocation hearing may violate due process. (*Singletary v. Reilly* (D.C. Cir. 2006) 452 F.3d 868, 872-873 [finding a due process violation where "[a]lmost all the evidence presented at the hearing was hearsay, much of it multilayered"].)

For all these reasons, appellant has presented a valid due process claim that survives *Crawford* and *Davis* – and the response filed in this case.

A. Tompkins' Statements Are Inadmissible Against Appellant Dalton.

Respondent argues that appellant "erroneously contends the prosecution relied on the testimony of appellant's cellmate [sic] to improperly establish that the crime occurred."[5] (RB 40.) Appellant's contention is not erroneous – the prosecutor articulated this as his basis for admission of the informant's testimony. The prosecutor argued that McNeely's testimony regarding Tompkins' statements was admissible to "prove the commission of the crimes." (3 CT 510 [Argument I of Prosecution's Points and Authorities in Support of Admission of Codefendant's Hearsay Statements].) The hearsay statements were proffered "to help establish the crimes charged, not to inculpate defendant Dalton." (*Ibid.*)

The trial court admitted the testimony for this same reason. In ruling on the prosecution's motion to admit Tompkins' hearsay statements, the trial court stated that if Tompkins' original statements were redacted or "corrected" to substitute "I" wherever Tompkins had actually said "we" or "they," the statements were admissible:

> So that if the other evidence would establish that Ms. Dalton was present at the scene when these events happened, this statement couldn't be used to attribute to her taking part in the conduct, but merely to do what it is offered for, *which is to show that the conduct occurred and that a corpus, the corpus of homicide is established.*

(19/24 RT 1183-1184, italics added.)

The trial court went on to observe, "[y]ou can't use these statements to establish that Ms. Dalton was part of the corpus. It's to establish that events occurred in the trailer; the events being the use of the electric shock,

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[5] The objected testimony was from the cellmate of appellant's codefendant, who related the codefendant's hearsay statements.

the hot shot, they threatened her with a knife, the kitchen knife, the kitchen skillet." (19/24 RT 1185.)

In response to defense counsel's argument that appellant was left with no opportunity to confront and cross examine Tompkins about these statements, the trial court stated, "the right to confront and cross does not extend to statements . . . *offered to establish corpus*." (19/25 RT 1190, italics added. See also 35 RT 3507 [court states that corpus is a legitimate issue in this case].)

Statements of an accomplice *cannot* be used to establish corpus, a point conceded by respondent. (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 396-397. See RB 40.) Therefore, the trial court erred in admitting McNeely's testimony for that purpose. Respondent attempts to disguise the fact the testimony was improperly admitted by asserting that corpus was already established by Fedor's testimony and the victim's disappearance. (RB 40-41.) If that is so, the articulated basis for admission of the testimony was specious at worst, and at best, cumulative.[6] Respondent's argument that the hearsay was *not* introduced to prove corpus demonstrates that the evidence was not used for the purpose for which it was – improperly – admitted, but rather to inculpate Ms. Dalton, which the trial court clearly ruled was prohibited.[7]

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[6] During a hearing on pretrial motions, defense counsel argued that the alleged ground for admission was a subterfuge.

> This case was severed from the co-defendant's case for the very purpose that there were major *Aranda* problems. What is being done now is an attempt to disguise these statements as corpus arguments and to get around the *Aranda/Hovey* problems. And I don't think that the problem goes away.

(19/24 RT 1188.)

[7] The trial court's ruling was consistent with the plurality opinion in

(continued...)

B. Both McNeely and Tompkins Were Unreliable Witnesses.

In her opening brief, appellant argued that the circumstances under which Tompkins' statements were made severely undermine their trustworthiness because *both* the declarant and the testifying witness were highly suspect. "This confluence of two unreliable information sources renders McNeely's testimony inadmissible under the Due Process Clause of the United States Constitution." (AOB 51.)

Appellant argued that Tompkins was as likely to have been bragging as to have been confessing anything to McNeely; that Tompkins was happy about the conflicting stories regarding the alleged homicide; and that Tompkins gave McNeely conflicting stories, and wrote deceptive accounts to others, knowing that law enforcement would check his mail. (AOB 51-52.) Appellant further argued that because Tompkins did not take the stand, he was not impeached and the jury did not learn of his numerous prior

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[7] (...continued)

Lilly v. Virginia (1999) 527 U.S. 116, 127-128, where the Court stated:

> [W]e have consistently either stated or assumed that *the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person.* See *Gray v. Maryland*, 523 U.S. 185, 194-195 . . . (1998) (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must comply with *Bruton*, hold separate trials, use separate juries, or abandon the use of the confession); 523 U.S., at 200 . . . (Scalia, J., dissenting) (stating that codefendant's confessions "may not be considered for the purpose of determining [the defendant's] guilt").

(Italics added.)

The plurality also recognized that,

> we have over the years "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."

(*Id.* at p. 131, citations omitted.)

convictions or have the opportunity to "*look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*" (AOB 55, citing *Mattox v. United States*, (1895) 156 U.S. 237, 242-243, emphasis added.)

Respondent makes no attempt to allay these concerns. Rather, respondent acknowledges them, but shockingly posits that Dalton asked for it: "it was appellant who chose TK as her boyfriend and as her crime partner. . . ." (RB 42-43.) If respondent is suggesting that appellant somehow forfeited her constitutional rights by failing to choose her friends wisely, respondent is mistaken. The fact that jurors would not be surprised that prisoners are not model citizen, or that the statements were redacted (RB 43), does not address appellant's argument or diminish the unreliability of the declarant whose hearsay statements were introduced against appellant.

In response to appellant's concerns about McNeely, respondent, citing pages 45-55 of appellant's opening brief, states that appellant described McNeely as a "sleazy, con-artist who nevertheless presented well." (RB 42.) Appellant at no time used the word "sleazy." She did however, quote the prosecutor who described McNeely as a con-artist – and more:

> By outward appearances and lifestyles [Donald McNeely] does not fit the stereotype of the typical burglar that comes through this court. But if the court is able to examine what really counts, the man's soul and conscience, it will discover a *confirmed thief and conman.* The only difference between this burglar and the vast majority is that this defendant is not satisfied with a "nickel and dime haul." The defendant has the looks, brains, and wherewithal to make the big score. In fact, he scored big eight separate times.

(6 CT 1078 [Dusek's statement in aggravation filed in *People v. Donald Richard McNeely*, San Diego County Superior Court Case No. 105810].)

Respondent dismisses the trial prosecutor's characterization of McNeely because it "is improperly based on evidence not before the jury" (RB 42) – which is exactly appellant's point.[8] The jurors did not see the actual declarant, Tompkins. Instead, they saw McNeely, a skilled con man, whose smooth presentation belied his motives and leant unwarranted sincerity and reliability to statements made by someone who would not have impressed the jurors as McNeely did. The fact that the jurors did not know of the prosecutor's characterization of McNeely only exacerbated the error of allowing such an unreliable witness to testify.

Respondent fails to show that either McNeely's testimony or the hearsay on which it was based, bear any indicia of reliability. The only such indicia respondent can articulate is that he was given no benefit for his testimony. (RB 35, 40). Whether or not McNeely ultimately received anything for his testimony is only one issue to consider when determining reliability because it may have been induced by "tacit agreements," by promises made but not fulfilled, or, as alleged here, made under other circumstances that rendered it unreliable.

Respondent ignores the concerns appellant expressed in the opening brief about the use, in general, of in-custody informants. By definition, "[a]ll jail house informants are incarcerated. They necessarily are charged with, or have been convicted of, a crime. These crimes include the most serious and often heinous crimes." (Report of the 1989-90 Los Angeles County Grand Jury, Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County 9 (June

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[8] The court improperly refused to permit counsel to question McNeely about the views Dusek expressed. (AOB 74-82.)

16, 1990) [hereafter Grand Jury Report].)[9] Not only are jailhouse informants by implication criminals, but a majority of them have "recidivistic tendencies." (*Id.* at p. 10.) They thus frequently find themselves in jail, faced with the prospect of increasingly longer sentences as a result of their recidivism.

The Los Angeles grand jury investigation revealed that "in the vast majority of cases it is a benefit, *real or perceived*, for the informant or some third party that motivates the cooperation." (Grand Jury Report, *supra*, at p. 12, italics added.) While serving their sentences, informants can also avail themselves of other benefits that improve their day-to-day lives, such as "added servings of food . . . extra phone call[s], visits, food or access to a movie or television." (Grand Jury Report, *supra*, at p. 12.)

Informants fully expect to receive some benefit for any cooperation they give. This was borne out by the Los Angeles County grand jury investigation, which interviewed or heard testimony from twenty-five jail house informants. Although the investigation's staffers explicitly told the informants that they had no ability to secure reduced sentences, some informants nonetheless continued to "request[] further contacts" with those very staffers in the hope of garnering some benefit for their testimony. (Grand Jury Report, *supra*, at p. 22, fn.12.)

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[9] From 1989 to 1990, in the wake of an admission by one career informant, Leslie White, that he had repeatedly fabricated testimony in prosecutions of other individuals, a grand jury in Los Angeles County conducted an extensive investigation into the use of jailhouse informants. (Robert M. Bloom, Ratting: *The Use and Abuse of Informants in the American Justice System* 65 (2002).) The grand jury issued a report that summarized the results of its investigation and "recommend[ed] policies and procedures ... [to] prevent or curtail the emergence of" problems relating to the use of informant testimony in the future. (Grand Jury Report, *supra*, at p.5.)

As the courts have long recognized, the benefits provided to jail house informants create strong incentives to lie. Indeed, in 1996, a Canadian commission formed to investigate the use of jailhouse informants concluded that "[i]n-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth of their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove." (Hon. Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin* [hereinafter The Morin Commission] 599 (Ont. Ministry of the Att'y Gen. 1998).

Ironically, prosecutors have the strongest incentives to rely on informants in cases in which they are least able to ensure veracity. "[I]n most situations a cooperator's value increases in inverse proportion to the [other] information in possession of the prosecutor." (Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor* (2002) 23 Cardozo L. Rev. 817, 822.) Thus informant testimony is most valuable when the prosecutor otherwise has a weak case, both because the prosecutor needs evidence and because the lack of other sources of information makes it more difficult for a defendant to rebut informant testimony. Informant testimony is often used, for example, where as here, there is little to no physical evidence and no eyewitness testimony. Especially in cases involving serious crimes, and therefore high stakes, prosecutors will be tempted to supplement thin evidence with informant testimony. It therefore is not surprising that reliance on incentivized testimony is the "leading cause of wrongful convictions" in capital cases. (See *Northwestern Center on Wrongful Convictions, The Snitch System* (2004-2005) 3.)

In cases involving thin evidence, "[the] very lack of evidence tends to make it much more difficult to evaluate the veracity of the would-be cooperator." (Cohen, *supra*, at p. 822.) Even when an informant provides details regarding the crime, that may be no indication of veracity as informants have a variety of ways to "obtain the necessary information about another prisoner's pending charges in order to convincingly fabricate a confession." (Christopher Sherrin, *Jailhouse Informants, Part I: Problems With Their Use*, 1998) 40 Crim. L.Q. 106, 113.) Some defense counsel, unlike Tompkins' counsel in this case, refuse to leave case materials with clients who are being held pending trial because of the possibility that a jailhouse informant will rely on such materials to conjure up a false confession. (*Id.* at pp. 119-120.)

Defense counsel frequently find it just as difficult to establish what benefits an informant has received in exchange for testimony, particularly when agreements have not been reduced to writing, but are only implicit. (Grand Jury Report, *supra*, at p. 39.)[10]

This confluence of factors increases the "difficulty of the defen[s]e to disprove [an informant's] claims to a confession" and makes the use of such testimony "a 'ready recipe for disaster.'" (Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants* (2002) 23 Cardozo L. Rev. 759, 762 [quoting The Morin Commission, *supra*, Executive

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[10] For example, in one case, a jailhouse informant who testified that the defendant had confessed to him also "testified that he had asked for nothing and that the District Attorney would not even discuss favorable treatment with him." (Grand Jury Report, *supra*, at pp. 76-77.) "Within a day of this testimony," however, the informant gave the prosecutor "a sample form for a letter he wished written to the Department of Corrections requesting an early release." (*Id.* at p. 77.) Because the letter was sent only after the defendant was convicted, "[t]he jury was never apprised of this request." To the contrary, it "was advised that benefits are not awarded for testimony." (*Ibid.*)

Summary, at p. 14].)

In addition, it has been recognized that "some inmates . . . react to their vulnerability by volunteering false stories of past criminal behaviour to other inmates. They may feel that such fabrications are necessary in order to boost their standing within the prison community and reduce the threats to their personal safety." (Sherrin, *supra*, at p. 116, citing Elizabeth Ganong, *Involuntary Confessions and the Jailhouse Informant: An Examination of Arizona v. Fulminante* (1992) 19 Hastings Const. L.Q. 911, 928.)

In this case, many, if not all, of these considerations were present. McNeely was a recidivist facing a long prison sentence. Appellant's case involved a serious crime, but the prosecution had weak evidence and needed McNeely's testimony. McNeely was a cellmate of Tompkins and had access to his case material. On top of all that, McNeely was an attractive con-artist. McNeely's unreliability is manifest. Despite this, respondent has no response other than to say he apparently received nothing for his testimony.

C. Redaction Did Not Cure the Constitutional Error in this Case.

Contradicting its assertions that the statements were not improperly admitted to establish corpus, respondent posits that the redacted statements were admitted to "establish what happened in the trailer." (RB 42. See also RB 41, fn. 34 [the statements could only "establish the crime itself"].)[11] At the same time, respondent argues, this is not evidence of appellant's guilt because the statements were redacted pursuant to *Bruton* and *Aranda*. (RB 41, fn. 34; 43.) Respondent, like the trial court, has conflated two concepts.

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[11] Of course, this explanation does not account for admission of McNeely's testimony that Tompkins "seemed to enjoy" torture, and Tompkins' alleged statements that he was "really into violence . . . and the violent scene," and "pain was the name of the game."

Redaction is meant to protect a defendant, such as Dalton, from statements admissible *only* against her codefendant at a *joint trial.* (*Bruton v. United States*, *supra*, 391 U.S. at pp. 123-124 [framing the question presented as "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence"]; *Gray v. Maryland* (1998) 523 U.S. 185, 194-195 [a prosecutor desiring to use an accomplice's confession must comply with *Bruton*, hold separate trial, or use separate juries]; *United States v. Hawk Wing* (8th Cir. 1972) 459 F.2d 428, 429 ["*Bruton* . . . requires a separate trial where out-of-court statements of a codefendant implicating the defendant will be deliberately spread before the jury in the event of a joint trial"].)

Here, the statements were not introduced against Dalton's jointly tried codefendant, but against her. If they were admissible against her, then there was no need to redact the statements. If they were inadmissible, redaction cannot not cure the error of their improper admission.

Moreover, given the evidence presented and the prosecution's theory of the case, it is folly to suggest, as respondent does, that the redaction in this case fully protected appellant. Respondent finds "meritless" appellant's argument that the statements virtually established appellant's guilt and that the redaction distorted the statements, but fails to address the cases cited in appellant's opening brief, *People v. Fulks* (1980) 110 Cal.App.3d 609, 616-617 ["*Aranda* makes it clear that the problem remains when the statements are 'not only direct and indirect identifications of co-defendants but any statements that could be employed against nondeclarant co-defendants once their identity is otherwise established'"] and *People v. Anderson* (1987) 43 Cal.3d 1104, 1123 ["what is material for *Bruton-Aranda* analysis is not how the statement under review should be classified in the abstract . . . but rather

whether on the facts of the individual case it operates to inculpate the other defendant]. (See AOB 58-59.)

Tompkins' statements, channeled through McNeely, were patently inculpatory, inflammatory and prejudicial. Description of torture and Dalton's codefendant's enjoyment of inflicting it were introduced at Dalton's severed trial without any articulated limitation. Tompkins and Dalton were charged with conspiracy,[12] and the court instructed the jurors that principals are equally guilty of the crimes. (39 RT 3879.) The prosecutor told the jurors during his closing argument that they would have to decide whether or not Dalton was criminally responsible for the crime. (39 RT 3773.) He explained that, while Tompkins was the one who actually committed the murder, the jurors would be given an instruction defining the people responsible for the crimes, and under this instruction Dalton was equally guilty as an aider and abettor. "It makes no difference." "Either one applies. The ones who actually do the crime or aid and abet." "Under either theory, the defendant is criminally responsible, a principal of murder." (39 RT 3774.) Thus, if Tompkins allegedly confessed to killing and torturing the victim, appellant was equally guilty. Contrary to respondent's assertion, appellant's argument that redaction did not cure any error has great merit.

Respondent barely acknowledges appellant's argument that the redaction rendered the statement false and inconsistent with the prosecution's evidence. The alteration to Tompkins' statements distorted the accuracy of the evidence the jury used to assess guilt and convict appellant. The closest respondent comes to addressing this problem is a suggestion that redaction itself remedied the misleading redaction.

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[12] Justice Holmes defined conspiracy as "a partnership in criminal purposes." (*United States v. Kissel* (1910) 218 U.S. 601, 608.)

Respondent contends that because "the evidence could only apply to establish the crime itself," appellant's argument that the redaction misstated the evidence "is meritless." (RB 41, fn. 34.) Respondent is mistaken. In the first place, the jurors had no idea that the statements were admissible "only to establish the crime" and not to inculpate appellant. Contrary to respondent's contention, the statements did, in fact, inculpate appellant. Under the prosecution's theory, appellant was alone with the victim until Tompkins and Baker returned to find the victim covered with a sheet and bound to a chair. According to Baker, she and then appellant tried unsuccessfully to inject the victim with a syringe, then Baker hit her with a pan, and finally, Tompkins, who had been outside, came in and stabbed the victim to put her out of her misery. The redacted statement that "I," that is, Tompkins, tortured the hell out of the victim, could only have been interpreted by the jurors as referring to acts of appellant Dalton.

Beyond that, no cases condone the kind of wholesale re-writing of events that occurred in this case. As appellant stated in the opening brief, Justice Scalia noted in his dissenting opinion in *Gray v. Maryland*, that in *Richardson v. Marsh* (1987) 481 U.S. 200, the parties had agreed to the method of redaction, so that the Court had no occasion to address the propriety of the "freelance editing" of a confession without showing the true nature of the editing. (*Gray v. Maryland*, *supra*, 523 U.S. at pp. 203-204 & fn. 1 (dis. opn. of Scalia, J.).) In *Gray*, the majority had suggested that the jointly tried codefendant's statement could have been redacted to omit any reference to a second party's involvement. Justice Scalia responded, "[t]he answer, it seems obvious to me, is because that is not what [the declarant] said." (*Id.* at p. 203.) Justice Scalia expressed concern that introducing a confession edited in the manner suggested in the majority

opinion posed a threat to our system and might mislead the jury.[13]

Recently, in *People v. Stallworth* (2008) 164 Cal.App.4th 1079, the court ruled that the trial court's redactions and deletions of a murder defendant's statements in order to omit mention of his jointly tried codefendant was prejudicial error requiring reversal. There, Stallworth's statements to law enforcement were redacted to omit mention of his codefendant Davis. Stallworth complained that the redaction stripped him of credibility because the account of events was necessarily incomplete. Specifically, he complained that redacted references to the number of passengers in the car were insufficient because the jury knew there was a driver and passenger in the front seat and two other passengers in the back seat.

> Stallworth concludes that his redacted statements appear false, inconsistent, and evasive, and that the jury must have decided that Stallworth was in the front passenger seat, rejecting his assertion that he was lying down in the back of the Tahoe. We have reviewed the redactions of which Stallworth complains and conclude that the redactions effectively rendered his exculpatory account of the freeway shooting implausible.

(*Id.* at p. 1092.)

The court concluded that "we cannot say that the error is harmless." (*Id.* at p. 1101.)

In this case, as in *Stallworth*, the trial court, by fundamentally altering Tompkins' statements, rendered the evidence introduced against appellant unreliable, confusing and misleading.

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[13] As another court observed when considering evidence "redacted to a point that the jury must have come away with a misleading impression of what happened," "[a] trial is a search for the truth. To the extent possible, jurors must be *told* the truth if they are to *find* the truth." (*People v. Harris* (1998) 60 Cal.App.4th 727, 733, italics in original.)

D. The Trial Court Erred in Failing to Adequately Instruct the Jury Regarding the Limited Admissibility of the Hearsay Statements.

Appellant argued in her opening brief that even if Tompkins' hearsay statements were admissible to establish "only" that the crime occurred, the trial court was required to inform the jurors of this limited admissibility. Nothing of that kind was done in this case, and, as a result, the prosecutor was free to, and did, improperly rely on the statements to establish appellant Dalton's guilt. (AOB 45.) Respondent dismisses this contention in a footnote, stating, without explanation or elaboration, that no instruction was necessary because "the redaction made sure TK did not identify appellant – even indirectly." (RB 41, fn. 34.) The fact remains that, even if the statements were not proffered or admitted to inculpate appellant (3 CT 510; 19/24 RT 1183-1184), they clearly *did* inculpate her, based on the prosecution's theory of the case and the instructions given.

Without an instruction, the jurors had no reason *not* to believe the statements were evidence of appellant's guilt. Indeed, a cautionary instruction is required when a codefendant's redacted confession is admitted in a joint trial. (See *Richardson v. Marsh*, *supra*, 481 U.S. at pp. 208-209 [admission of a non-testifying defendant's confession that did not facially incriminate a co-defendant did not violate the Confrontation Clause if the confession was redacted to eliminate the co-defendant's name and any reference to his or her existence, *and if the jury was given a proper limiting instruction*]. Surely, then, such an instruction is required at a severed trial where the jurors' use of the hearsay statement is admissible for only a very limited purpose. Respondent acknowledged as much when, citing *Richardson v. Marsh*, *supra*, at p. 211, it maintains: "The confrontation clause is **not** violated by the admission of a non-testifying codefendant's confession with a *proper limiting instruction* when the confession is

[properly] redacted. . . ." (RB 43, bold in original, italics added.)

For all these reasons, the hearsay statements introduced through McNeely did not contain particularized guarantees of trustworthiness necessary to satisfy the concerns of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

E. The Error of Admitting Tompkins' Statements Was Prejudicial and Requires Reversal of the Verdict and Penalty Determination.

Respondent's fallback argument is that any possible error was harmless beyond a reasonable doubt "because Sheryl Baker testified as an eyewitness to the murder and the torture" and Fedor testified to what she heard and about the blood she found, in addition to the blood evidence and May's disappearance. (RB 46.)[14] Respondent ignores the fact that Baker *consistently* maintained that no one intended to cause May pain. (See, e.g., 8 CT 1565 ["I don't think they were trying to torture her, no"]; *ibid.* ["they were just trying to end it and they really didn't know how to do it"]; 8 CT 1565-1566 ["I don't believed that they were trying to . . . make it painful for her"].)[15]

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[14] Respondent's argument belies its later assertion that even if introduction of the blood was error, it was not prejudicial given the other "overwhelming evidence" of appellant's guilt. (RB 60.) Like the prosecutor below, respondent attempts to bolster and corroborate one piece of unreliable evidence with another even more unreliable piece of evidence. But no number of unreliable witnesses and no amount of unreliable evidence can prove the case against appellant beyond a reasonable doubt.

[15] The prosecutor effectively blunted this testimony in his closing argument by referring to Tompkins' alleged enjoyment of inflicting pain. The prosecutor told the jurors that an element of the torture special circumstance was that pain be inflicted for the purpose of revenge, extortion, persuasion or sadistic purpose, for instance, "I love causing pain." (39 RT 3762.) This unsubtle reference to Tompkins' mental state, which never should have been admitted during Dalton's trial, undoubtedly

(continued...)

The blood evidence respondent relies on was anything but compelling. The blood Fedor allegedly saw all over her trailer was not seen by a sheriff who searched the house that very night. (Testimony of Deputy Dave Wilson, 31 RT 2752, 2766-2769.) Kathy Eckstein claimed to have seen nickel and dime sized spots of what looked like dried blood in the trailer, and her son Fred allegedly saw spots of what could have been blood in the trailer living room, but neither of them was even in the trailer at the time blood was supposedly there. (31 RT 2859, 2871-2872.) Law enforcement officers thoroughly searched Fedor's trailer twice looking specifically for traces of blood. They found none. (Three hour search of September 15, 1988, see 34 RT 3332-3334; 35 RT 3439-3440, 3442. "Intensive" and "exhaustive" search of November 16, 1988, see 35 RT 3441-3442; 36 RT 3523-3526.) After more than three years and four different occupants to the trailer, blood smears, which could have been from any mammal, were found.

The fact is, this was a very weak case with no body, no weapons, no physical evidence and no witnesses to what occurred while Tompkins and Baker were away from the trailer. Indeed, even after the prosecution had presented its case-in-chief, the trial court observed that "there is a legitimate issue before the jury as to whether or not . . . a corpus of a homicide has been established." (35 RT 3507.)[16]

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[15] (...continued)
had an enormous impact on the jurors' view of the killing.

[16] The trial court made these observations before ruling that the prosecution could introduce Tompkins' guilty plea as evidence of corpus – to show May was a victim of homicide "as versus having died of natural causes or self-inflicted wounds or alive but outside the country or alive but hiding within the country." (36 RT 3507.) As explained in Argument II of the AOB, this was an improper ruling. (AOB Arg. II, pp. 94-103.) The (continued...)

In *Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927, a panel of the Ninth Circuit held that the "cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. [Citation.]" Here, the cumulative errors in admitting the McNeely's testimony require reversal. The trial court committed errors that rendered the trial so arbitrary and fundamentally unfair that it violated federal due process. (*Reiger v. Christensen* (9th Cir.1986) 789 F.2d 1425, 1430.)

The standard of review, as set forth in *Chapman*, "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) "To say that an error did not contribute to the ensuing verdict is . . . *to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.*" (*Yates v. Evatt* (1991) 500 U.S. 391, 403, italics added.) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics in original. Accord, *People v. Neal* (2003) 31 Cal.4th 63, 86.)

Under this standard, the erroneous admission of McNeely's testimony cannot be characterized as "harmless beyond a reasonable doubt." There is every reason to believe that the jury relied heavily on McNeely's testimony to reach its verdict. He testified that Tompkins suggested a conspiracy – a "plan" – and confessed to torture and premeditated murder, and the court and prosecutor instructed the jury that Dalton was guilty for

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[16] (...continued)
prosecution decided not to introduce Tompkins' plea.

the crimes of Tompkins. This Court must reverse the convictions and death judgment.

Even if this Court finds that the error was not of constitutional magnitude, it must determine whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) McNeely's testimony was essential to the prosecution's case and highly prejudicial. His recounting of Tompkins' enjoyment of torture and his statements that "he tortured the hell" out of the victim and that "pain was the name of the game," had to have had a chilling and indelible effect on the jurors and their verdict.

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II.

THE PROSECUTOR IMPROPERLY RELIED ON COCONSPIRATOR BAKER'S GUILTY PLEA TO ESTABLISH THE VICTIM'S MURDER AND MS. DALTON'S GUILT.

Appellant has argued that the prosecutor improperly used codefendant Baker's guilty plea as substantive evidence of Dalton's guilt, substantive evidence that a crime occurred, corroboration of Baker's trial testimony, and confirmation of Dalton's refusal to accept responsibility for her acts as Baker had. (See AOB 94-103.)

Respondent first allows that "[g]enerally, the guilty plea and sentence of a codefendant are irrelevant and inadmissible."[17] (RB 53.) In

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[17] Respondent cites *People v. Brown* (2003) 31 Cal.4th 518, 562-563, and *People v. Young* (1978) 85 Cal.App.3d 594, 602, for this position. *Brown* is a capital case in which this Court affirmed that evidence of an accomplice's sentence, sought to be introduced by the defendant, "is irrelevant at the penalty phase because it does not shed any light on the circumstances of the offense or the defendants character, background, history or mental condition." (Internal quotes and citations omitted.) Here, the issue is admissibility of a accomplice's plea as substantive evidence at the guilt phase, *not* an accomplice's sentence at the penalty phase. In *Young*, the reviewing court held that the trial court erred when, in explaining why a codefendant was no longer being tried with the defendant, it instructed the jury that the codefendant had pled guilty. Again, this case involves a different issue.

Respondent then inexplicably cites *Bruton v. United States* and discusses the admission of confessions at a joint trial and the limitation of *Bruton* only to statements that expressly implicate the defendant or are powerfully incriminating. (RB 53.) If respondent is attempting to distinguish this case from the general rule that a codefendant's plea is irrelevant and inadmissible, reliance on *Bruton* is misplaced. In fact, the court in *Young* cited *People v. Aranda* (1965) 63 Cal.2d 518, 529, to explain why the trial court's admonition to disregard the guilty plea "could hardly negate the prejudice caused by the court's assistance to the prosecution. Error could hardly be negated by the form in which the inadmissible matter reached the jury or cured by an admonition to disregard

(continued...)

the next breath, respondent states that "[t]elling the jury about the plea was not error." (RB 54, fn. 40.) This inconsistency may be explained by respondent's apparent misapprehension of appellant's argument: appellant has not argued that it was error to introduce Baker's guilty plea, but that the prosecutor used the plea for impermissible purposes, and the court failed to minimize that error by informing the jurors of the limited purpose for which the plea could be used.

Respondent repeatedly contends that appellant failed to object to inquiries about Baker's guilty plea (RB 53, 54, 55), and, presumably, the issue is thus waived. As noted, however, appellant does not object to introduction of the guilty plea, but to the prosecutor's use of the plea as substantive evidence of appellant's guilt. Any objection on this ground would have been futile. The prosecutor also sought to introduce codefendant Tompkins' plea at appellant's trial, and, over vigorous objection, the court ruled that it was a declaration against interest and admissible to establish corpus. (35 RT 3507.) The fact that the prosecutor ultimately decided not to use Tompkins' plea does not alter the fact that the court believed codefendant Tompkins' plea was admissible at appellant's trial to prove corpus. There is no reason to believe the trial court would have ruled differently as to the admissibility of codefendant Baker's plea. Accordingly, any defense objection to the use of the plea for purposes other than evaluating Baker's credibility would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

After ostensibly introducing Baker's plea for the legitimate purpose of establishing credibility, the prosecutor then impermissibly and repeatedly

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[17] (...continued)
evidence prejudicial to the defense case." (*People v. Young, supra*, 85 Cal.App.3d at p. 602.)

urged the jurors to use the plea to prove the corpus of the crime and appellant's substantive guilt. This was error. While the credibility of the prosecution's witnesses may be central in a criminal case, the requirement that a defendant receive a fair trial is nevertheless supreme, and the improper use of a coconspirator's guilty plea as substantive evidence of the defendant's guilt may deprive a defendant of a fair trial. Evidence of a codefendant's guilty plea is inadmissible to prove the guilt of one charged because a defendant has "a right to have his guilt or innocence determined by the evidence presented against him [or her], not by what has happened with regard to a criminal prosecution against someone else." (*United States v. Toner* (3d Cir.1949) 173 F.2d 140, 142.) In *Bisaccia v. Attorney Gen. of N.J.* (3d Cir.1980) 623 F.2d 307, 313, cert. denied (1980) 449 U.S. 1042, the court held that the admission of a coconspirator's guilty plea without limiting instructions from the trial judge combined with the prosecutor's emphasis on the guilty plea as evidence of the conspiracy, "so exceeded the tolerable level of ordinary trial error as to amount to a denial of constitutional due process."[18]

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[18] A number of federal courts prohibit evidence of the guilty plea or conviction of a co-defendant as "substantive evidence of guilt of those on trial," reasoning that there is a real danger that the jurors will give undue emphasis to a crime-partner's guilty plea, impinging on a defendant's right to be tried solely on the evidence and raising the specter of guilt by association. (*United States v. Halbert* (1981) 640 F.2d 1000, 1004. See *United States v. Singer* (9th Cir. 1972) 469 F.2d 275, 276; *Baker v. United States* (9th Cir. 1968) 393 F.2d 604, 614, cert. den., 393 U.S. 836; *Babb v. United States* (5th Cir. 1936) 218 F.2d 538, 542; *Leroy v. Government of Canal Zone* (5th Cir. 1936) 81 F.2d 914; *Payton v. United States* (1955) 96 U.S. App. D.C. 1, 222 F.2d 794; *United States v. Toner, supra*, 173 F.2d 140; *United States v. Restiano* (3rd Cir. 1966) 369 F.2d 544, 545; *Hudson v. North Carolina* (1960) 363 U.S. 697 ["The potential prejudice of such an occurrence is obvious . . ."].)

California courts have recognized that the introduction of a co-defendant's guilty plea is highly prejudicial. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1322; *People v. Leonard* (1983) 34 Cal.3d 183, 188-189 ["That some time after the robbery defendant was stopped and arrested with another man who then pleaded guilty to the commission of a robbery earlier that evening invites an inference of guilt by association. . . ."]; *People v. Andrews* (1983) 149 Cal.App.3d 358, 364, 366 [juror misconduct from reading a newspaper article reporting co-defendant's guilty plea: "[a] conviction cannot stand if even a single juror has been influenced improperly"]; *People v. Thomas* (1975) 47 Cal.App.3d 178, 181-182 [same: "the likelihood of prejudicial effect upon the minds of the few jurors who saw the article was obviously substantial. . ."]; *People v. Young* (1978) 85 Cal.App.3d 594, 602 [the jury was admonished to disregard evidence of co-defendant's guilty plea; the admonishment "could hardly negate the prejudice caused by the court's assistance to the prosecution"].)

Nevertheless, respondent argues that the prosecutor's use of the plea to prove appellant's guilt was "fair comment on the evidence and its implications." (RB 55.) This is comparable to reasoning that it would be fair comment on the evidence for a prosecutor to argue that a defendant's prior offense, admissible only to show plan or scheme, was in fact evidence of criminal propensity. If evidence is admissible for one purpose and not another, the prosecutor may not urge the jury to consider the improper purpose under the guise of fair comment on the evidence.

Respondent then argues that once corpus was "proved" through Fedor's testimony and the victim's disappearance, Baker's "testimony" could be used on all issues. (RB 56.) Respondent cites *Matthews v. Superior Court* (1988) 201 Cal.App.3d 385, for this proposition; its

relevance, however, is elusive. There, the court observed that the corpus delicti of rape may be proved by other acts evidence. (*Id.* at pp. 393-395.) It did not hold, as respondent would have it in this case, that once corpus delicti is established, other acts evidence is admissible as substantive evidence of a defendant's guilt of the charged offense. Moreover, respondent has once again lost focus of appellant's complaint – the prosecutor's improper use of Baker's plea, not her testimony.

Appellant has argued that the trial court, at the very least, should have mitigated the prejudice caused by the prosecutor's argument by instructing the jury on the limited purpose for which the plea could be used. (AOB 99-102.) Appellant cited *United States v. Halbert supra*, 640 F.2d at p.1006, where a panel of the Ninth Circuit observed that evidence of a guilty plea is "amenable to misuse," and, without instruction, the jury could use a plea as evidence of a defendant's guilt. "This danger may be averted only by adequate cautionary instructions that make it clear to lay people that evidence of a witness' own guilty plea can be used only to assess credibility." (*Ibid.*) There, the panel reversed the conviction even though the trial court had given a cautionary instruction, concluding that the instruction given did not sufficiently apprise the jury that it could use the pleas only as evidence of the witnesses' credibility.

Respondent rejoins that the Ninth Circuit opinion is not binding on this Court. (RB 56.) Regardless of whether it is or is not binding, *Halbert*, and the numerous cases it cites, address a danger that this and other California courts have acknowledged: the potential misuse of a codefendant's guilty plea. *Halbert* proffers the only way to ensure that jurors understand the limited use to be made of guilty pleas. In analyzing *Halbert*, respondent again appears to misperceive appellant's argument, stating that the panel in *Halbert* "held it was 'clearly relevant' for the

prosecutor to 'elicit the fact that guilty pleas were entered' *without* 'editorial comment or unnecessary elaboration. . . .'" (RB 56, emphasis added, quoting *Halbert*, *supra*, 640 F.2d at p. 1006.) Respondent apparently attempts to distinguish *Halbert* on the ground that reversal was granted "purely" because the jury was not told the limited purpose for which the pleas could be used. (RB 56.) That, in fact, is the precise argument appellant makes. Respondent then concludes, without in fact distinguishing *Halbert* in any way, that the prosecutor's "passing remark" in this case and the failure to give a limiting instruction did not constitute reversible error. It did, for all the reasons stated in *Halbert* and the above-cited cases in which numerous courts have observed the danger of introducing a codefendant's guilty plea.

Respondent then argues that the court was not obligated to instruct *sua sponte* on the limited value of Baker's guilty plea. (RB 56-57.) Appellant submits that it an instruction was necessary, at the very least, after the prosecutor improperly argued that the plea could be used for more than assessing Baker's credibility. Moreover, as noted above, the trial court obviously misunderstood the law regarding use of an accomplice's plea, believing that Tompkins' plea was admissible to prove corpus, and would not have given a limiting instruction had it been requested.

Finally, respondent argues that even if the court erred in failing to give a limiting instruction, it was harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836.) Respondent, however, has truncated the argument. The error was the prosecutor's improper use of Baker's plea. A plea by a coconspirator presents a unique situation that require trial courts to scrutinize more closely the purported remedial effects of instructions to the jury. Appellant Dalton was charged with conspiracy. (5 CT 999.) Given this charge, a jury's inclination to conclude that Baker's guilty plea

to murder establishes Dalton's guilt is compelling. Where the likely effect of Baker's guilty plea was to suggest improperly to the jury that appellant was also guilty, due process and appellant's Eighth Amendment right to a reliable guilt and penalty determination required the trial court to disabuse the jurors of their natural inclination, and ensure that appellant's guilt or innocence was "determined by the evidence presented against [her], not by what has happened with regard to a criminal prosecution against someone else." (*United States v. Toner*, *supra*, 173 F.2d at p. 142.)

Given the many weaknesses of this case – no body, no physical evidence, no weapons and no witnesses to what occurred between the victim and Dalton – there was a "real danger that jurors [gave] undue emphasis to a crime-partner's guilty plea," impinging of the "defendant's right to be tried solely on the evidence." (*United States v. Binger* (9th Cir. 1972) 469 F.2d 275, 276.) Respondent cannot prove beyond a reasonable doubt that the improper use of Baker's plea did not contribute to the verdict obtained. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The convictions, special circumstance findings and penalty judgment must be reversed.

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III.

THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF IRRELEVANT AND UNRELIABLE BLOOD EVIDENCE VIOLATED KERRY DALTON'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE JUDGMENT OF DEATH.

On August 12, 1991, more than three years after the alleged murder in June 1988 (32 RT 2933), and following two "intensive, exhaustive" (35 RT 3441-3442) and unsuccessful searches for blood in Joanne Fedor's trailer in September and November of 1988,[19] and one unsuccessful search of the trailer on the day of the alleged murder (31 RT 2741, 2766-2769), Fedor's trailer was once again searched for evidence of blood. (32 RT 2933.) By this time, Fedor had moved out and four different families had occupied the trailer. (35 RT 3481-3483.) During this 1991 search, a number of samples that tested presumptively positive for blood were collected. (32 RT 2938-2945.)

The criminalist who attempted to DNA-type the samples was able to obtain only a presumptive reading for blood (32 RT 2980), and the serologist who performed ABO testing on six samples concluded there was type O and type A blood, but he was unable to conclude whether the blood was even human. (32 RT 2986, 2994, 2998, 3006.) Appellant has argued that the blood evidence was immaterial, irrelevant and highly prejudicial. (AOB 104-118.)

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[19] See 32 RT 2931 *et seq*, 2938-2940 [testimony of San Diego Police Department Crime Lab evidence technician Dorsett regarding August 12, 1991, search of trailer for blood]; 34 RT 3300 *et seq* [testimony of supervising criminalist for the San Diego Sheriff's Crime Laboratory Randy Robinson regarding September 15, 1988, search of trailer for blood]; 36 RT 3519 *et seq* [testimony of San Diego Sheriff's Department criminalist Walter Fung regarding November 16, 1988, search of trailer for blood].)

Respondent proffers that "it is inconceivable that blood evidence would ever be irrelevant in a murder trial" (RB 59), and suggests that because four witnesses testified they saw blood in the trailer in June 1988, and one of those witnesses replaced the trailer's living room carpet because it smelled like dead animal and observed that a recliner was missing, "the jury could reasonably conclude [from these facts alone] that the living room rug was so soaked with Melanie's blood, it stank as the blood spoiled, and the recliner was too blood soaked for appellant to clean so she threw it away, yet small blood stains remained in the trailer." (RB 58-59.)

Respondent's vivid description of a blood-saturated crime scene underscores the danger of admitting unreliable, but highly inflammatory, evidence that only serves to encourage unfounded and contradictory speculation. *Not a single witness* described a blood-soaked trailer. Each of the witnesses respondent describes suffered from serious credibility problems, but, even if accepted at face value, their accounts do not support respondent's view.[20] Kathy Eckstein testified that she saw nickel and dime-sized spots that looked like blood in Fedor's bedroom. (31 RT 2859.) Her son, Fred Eckstein, testified that he saw spots on the living room carpet that

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[20] Respondent has misstated the record regarding certain aspects of the blood evidence. Respondent states that Fred Eckstein testified that in June 1988, he saw blood spots in Fedor's trailer. Fred, however, was not certain his visit was in June. (31 RT 2877.) Respondent goes on to say that "[s]ome of the stains were five inches wide and the edges were turning color." (RB 16, citing 31 RT 2870 (194-196).) There is no mention of blood on page 2870 of the transcript, and appellant does not know the significance of the numbers in parentheses. Fred does later state that Fedor showed him spots of what looked like blood on the walls and carpet. (31 RT 2871-2872.) On cross-examination, defense counsel asked about the size of the spots on the carpet. Fred replied, "I don't recall the size." (31 RT 2881.) Defense counsel asked, "[w]ere they about, oh, maybe five inches wide?" and Fred again replied, "I don't recall." (*Ibid.*) No one ever mentioned anything about the edges turning color.

"looked like blood, if possible." (31 RT 2871.)[21] Alisha Fedor claimed to have seen blood on the floor of her mother's bedroom and what looked like blood on the floor and wall of the pop-out area. (30 RT 2671, 2673.) Fedor claimed that when she first returned to the trailer, she found a bloody pillow outside in the trash can and blood on a bar of soap in her bathroom. (30 RT 2600, 2642.) She claimed later to see blood on a pocketknife and screwdriver (30 RT 2604), blood spatters on a heater (30 RT 2607) and what may have been blood spatters on paneling in the kitchen (30 RT 2607 ["[s]omething was spattered on my paneling. I didn't know if it was blood or not for sure"].) Any blood she saw was restricted to "the wall and the heater mostly." (30 RT 2608.)

These questionable witnesses were contradicted by Sheriff's Deputy David Wilson, who searched the interior of the Fedor's trailer on June 26, 1988, the very day of the alleged murder. If the living room rug was soaked with blood, he surely would have spotted some evidence of blood in the trailer. Wilson found not a trace. (31 RT 2741, 2766-2769.)[22]

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[21] Fred Eckstein testified that he replaced the living room carpet and padding in June 1988, shortly after the event. (31 RT 2874.) But, as even the prosecutor conceded, neither Kathy nor Fred Eckstein were at the trailer on June 26, 1988. (39 RT 3769.) Indeed, Kathy Eckstein testified that she was not certain of the month or year she made her alleged observations – only that it was on a Sunday. (31 RT 2862, 2865.) Fred also could not recall the date, but he did *not* think that it was in June. (31 RT 2877.) Neither Fred nor Kathy could have been at the trailer during the afternoon and early evening of Sunday, June 26, 1988. Fedor said she herself did not return until 5:00 or 5:30 p.m. that day (30 RT 2639), and Deputy Wilson was there at 9:00 p.m. (31 RT 2746.) Moreover, Fedor testified that she did not stay at her trailer "for, like, a month, a month and a half after things happened." (30 RT 2654.) It thus was quite likely that the Ecksteins did not go to the trailer, if at all, until at least after August 1988.

[22] Respondent states that Fedor put a screwdriver, knife and bloody (continued...)

Moreover, respondent's theory of relevance is undermined by prosecution witness Fred Eckstein. If, as respondent states, the living room carpet of the trailer was so soaked with blood that Fred Eckstein replaced it in June 1988, any presumptive blood found on the carpet in November 1988, could not have been related to a homicide preceding the new carpet. Blood deposited on the carpet *months after* the homicide is exactly what respondent suggests is inconceivable – irrelevant blood evidence. Possibly human blood found three-plus years and multiple occupants after an alleged murder simply does not tend logically, naturally and by reasonable inference to establish any material fact. (*People v. Heard* (2003) 31 Cal.4th 946.)

Appellant has also argued that if the blood evidence was marginally relevant to some material fact, the prejudicial effect of its admission far outweighed its probative value and thus the blood stain evidence should have been excluded under Evidence Code section 352. (AOB 113-116.) As the trial court recognized, the blood "could have been anything" – even polar bear blood. (19/24 RT 1160.) Such evidence is hardly probative of a material fact.

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[22] (...continued)
pillow in her truck, "but Deputy Wilson would not allow her to go outside to show them to him." (RB 13.) In fact, Fedor did not mention anything to Wilson about a knife or screwdriver in the back of the truck. (31 RT 2769-2770.) She told Wilson only about a bloody pillowcase that she claimed had been on her bed. Wilson looked on the bed with his flashlight, but found not a trace of blood. (31 RT 2752, 2768.) Fedor then said she put it in a box under the trailer. Wilson looked underneath the trailer in five different places but found nothing. (31 RT 2752, 2769.) Fedor then told him it might be in her trunk and he should look in the trash in the truck. (*Ibid.*) Wilson did not look through the trash, but did shine his flashlight on the interior. It did not appear that the trash had been disturbed, and he did not see a pillowcase, a knife or a screwdriver. (31 RT 2752-2753, 2769.)

In response to appellant's argument, respondent contends that the trial judge logically concluded that the blood evidence did not "uniquely do anything to evoke an emotional bias against the defendant." (RB 60, citing 24 RT 1124-1125.) Respondent, however, does not address appellant's argument in response to the court's ruling. Appellant agrees that "undue prejudice" refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis. (AOB 113-114, citing *People v. Karis* (1988) 46 Cal.3d 612, 638.) Appellant contends, however, that the evidence presented tended to cause the jurors to decide the case on an improper basis. The fact that the evidence presented did not itself evoke an emotional bias did not prevent it from being used in such a manner. The prosecutor presented three expert witnesses who testified over 75 pages as to the collection and scientific testing performed on the samples taken from the trailer. While the ultimate evidence of blood was strikingly insubstantial, its very elusiveness permitted the prosecutor to make the unfounded arguments he did. Unconstrained by facts or verification, the prosecutor used, as he did throughout this case, the absence of hard evidence to urge the jurors to imagine the worst. He argued that the belated and equivocal findings were "evidence of this torture, of this blood-letting," that was discovered once a team "took the time" and had the "equipment." (39 RT 3772-3773.) The prosecutor also urged the jurors to use the evidence to support unreliable witnesses who required corroboration. (See, e.g., 39 RT 3780 [blood specks found in the trailer corroborated Baker's "first version" of the events].) Possible "polar bear blood" does not support the prosecutor's arguments, but it gave the jurors permission to accept those arguments. The prejudice thus does not naturally flow from relevant, highly probative evidence, but from, at best, marginally relevant evidence inflated

through expert testimony and allusion to scientific testing.

The blood evidence should never have been introduced at trial. Its introduction was highly prejudicial and requires that the guilt verdict and death sentence be reversed.

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IV.

THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE OF CONSPIRACY AND FIRST DEGREE MURDER.

Respondent contends that appellant's argument that there was insufficient evidence of conspiracy (AOB 135-144) is based on "the erroneous premise of a lack of corroboration," noting that "[c]orpus delicti of a felony-based special circumstance need not be proved independent of a defendant's extra-judicial statement." (RB 61 & fn. 43.) It appears that it is respondent who labors under not one, but a number of erroneous premises. Appellant was not charged with a felony-based special circumstance;[23] appellant is not arguing lack of corpus delicti of a special circumstance; and appellant is not addressing the special circumstances alleged, but rather Count 1, which charged her with the crime of conspiracy. It is the law that an accomplice's testimony must be corroborated by "such other evidence as shall tend to connect the defendant with the commission of the offense." (Penal Code, § 1111.) The corroboration "is not sufficient if it merely shows the commission of the offense or the circumstances thereof . . . ." (*Ibid.*) Further, an accomplice cannot corroborate him or herself (*People v. Andrews* (1989) 49 Cal.3d 200, 214, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237), nor can the testimony of one accomplice corroborate that of another accomplice (CALJIC Nos. 3.11 & 3.13; *People v. Clapp* (1944) 24 Cal.2d 835, 837; *People v. Dailey* (1960) 179 Cal.App.2d 482, 486).[24] The properly corroborated evidence in this case

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[23] This erroneous assumption also appears in heading IV. B, where respondent argues that the evidence at trial supports felony murder. (RB 68.) Despite the heading, felony murder is not mentioned in the argument nor was it mentioned at the trial.

[24] As appellant has argued, the trial court erred in failing to properly (continued...)

does not support either the conspiracy or first degree murder conviction.

Respondent argues that the evidence established that appellant engaged in a conspiracy to murder May but simply lists the ten charged overt acts and claims these acts are supported by the testimony of Fedor and accomplice Baker. (RT 63-64.) Respondent contends that appellant's claim that Baker's testimony was insufficiently corroborated is "not appropriate" because "the jury decided the facts" and "resolved inconsistencies in favor of the judgment." (RB 64.) Initially, it must be remembered that the trial court failed to properly instruct the jurors that one accomplice cannot corroborate another, so the jurors were not properly guided by the law. (See AOB Argument XII., A & B.) Further, as respondent acknowledges, corroboration is not binding on the reviewing court if the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (RB 62, citing *People v. McDermott* (2002) 28 Cal.4th 949, 985.) Appellant has argued both points. Baker's guilty plea, McNeely's statements regarding Tompkins' alleged admissions and the blood evidence were all inadmissible and should not be considered in determining corroboration. (See AOB Arguments I., II., & III.)

The remaining "corroboration" does not sufficiently connect appellant with the crimes of conspiracy and the first degree murder charge. In her opening brief, appellant discussed in detail the evidence the prosecutor argued was corroborative of Baker's testimony (AOB 127-134) and concluded that, at most, admissible corroborating evidence tied appellant to a crime – but not to a conspiracy or deliberate and premeditated first degree murder. Respondent fails to address the concerns appellant

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[24] (...continued)
instruct the jurors in this regard. (See AOB Argument XII., A & B.)

raises about the lack of corroboration and instead simply cites Baker's insufficiently corroborated testimony to support the charges. (See RB 65-68.) In addition, respondent misstates the record, arguing that Baker was corroborated by Fedor's testimony that appellant was "covered in blood" when Fedor returned to the trailer in the late afternoon. (RB 69.) Fedor gave no such testimony. Respondent also inaccurately describes an apparently private 15 minute conversation between appellant and Tompkins before they told Baker that they were going to kill May. (RB 10.) Respondent states that after Tompkins and Baker returned to the trailer, "Appellant and TK talked for about 15 minutes, then appellant told Baker" they were going to kill May. (RB 10.) Respondent suggests that Tompkins and appellant were working out some secret plan, but Baker actually testified that she, Tompkins and appellant all talked together for 15 minutes. (33 RT 3127.) Respondent also inaccurately stated that appellant "demanded Baker actually say out loud that she would help with the killing." (RB 11, citing 33 RT 3128.) There was no such testimony.

Respondent also fails to address the details of Baker's testimony that belie any suggestion of a conspiracy. Baker testified that no one planned anything. (See 33 RT 3113.) It was pure chance that May was with Baker and pure chance that they all ran into Fedor by the side of the road. (20 CT 4169-4170 [7/5/94 interview].) She testified that after she and Tompkins left the trailer and dropped off Fedor at the honor camp, they went to Lakeside where she got drugs and Tompkins went to call Dalton. He returned "in a panic" (33 RT 3123) and had Baker get into the car because "something happened" (33 RT 3124.) No plan or agreement can be inferred from such testimony. Even if a conspiracy to murder and the premeditated murder of May could somehow be gleaned from Baker's testimony, her testimony was not sufficiently corroborated by admissible evidence and

cannot support the convictions.

Respondent argues that Baker's testimony was sufficiently corroborated, but relies on blatant misstatements and conflicting testimony to support this contention. (See RB 69-70.) Respondent states that Fedor testified that everyone left appellant and May alone in the trailer on Sunday (RB 6), while ignoring Baker's testimony that she, Tompkins and Fedor left appellant ***and*** George with May, and respondent's own concession that George was outside the trailer when Tompkins and Baker returned (RB 10).[25] Respondent argues that corroboration can be found in Fedor's testimony that appellant was "covered in blood" late Sunday afternoon. (RB 69.) Respondent provides no cite for this statement – and none can be found as Fedor never made such a statement. Respondent also cites as corroboration Fedor's testimony that when Fedor tried to re-enter the trailer, Tompkins "stopped her saying he would not recommend it." (*Ibid.*) In fact, an objection to this testimony was sustained. (39 RT 2592-2593.)

Respondent relies on other misstatements as evidence of premeditated first degree murder. There was absolutely no evidence introduced that appellant "kept tabs" on May the day she was moving; that appellant "had [Tompkins] lie" to the paramedics who had been called to the trailer; or that she "used an unnecessarily intricate plan to kill."[26] (RB

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[25] Baker was certain and specific that only she, Tompkins, Fedor and her two children drove to the honor camp. (33 RT 3120.) She described where they sat in the truck (33 RT 3122), she described being dropped off by Tompkins and returning with Tompkins' to the trailer (33 RT 3122-3124), and she described seeing George in the yard when they returned to the trailer (33 RT 3125).

[26] Respondent takes its absurd theory of the case and attempts to use it as evidence of appellant's guilt. It is respondent's theory that appellant

(continued...)

70.)

The admissible, properly corroborated evidence introduced at trial simply was insufficient to show conspiracy or first degree murder. The conviction must be reversed.

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[26] (...continued)
somehow plotted as early as Saturday morning to stalk May, meet up with her later at a convenience store, somehow get her into George's vehicle, and then accidently run into Fedor by the side of the road, so that she could end up at Fedor's trailer. Appellant also supposedly plotted in advance that Fedor would plan to leave the trailer, leaving appellant with May, and plotted to have something unexpected occur that required Baker and Tompkins to return to the trailer and kill May. Respondent then cites this as "an unnecessarily intricate" plan to kill, which in turn is evidence of appellant's guilt of conspiracy and first degree murder. Respondent's theory describes not an unnecessarily intricate plan, but rather a totally unfeasible, unrealistic and unsupported view of the evidence. The fact that the prosecution theory does not add up cannot be used as evidence against appellant.

V.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OF LYING IN WAIT AND TORTURE-MURDER.

Appellant has argued that her state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations were violated because there was legally insufficient evidence of the special circumstances to find them true. (AOB 145-188. U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. Art. I, Sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) In a vain attempt to support the findings, respondent engages in the very "speculation and suspicion" (AOB 145) appellant has criticized in the opening brief and this Court has ruled cannot support a special circumstance finding.

A. The Evidence Was Legally Insufficient to Support the Jurors' Finding of the Lying-In-Wait Special Circumstance.[27]

To find lying in wait, the evidence must show "an intentional murder, committed under circumstances which include (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Morales* (1989) 48 Cal.3d 527, 557.) Appellant argued in her opening brief that there was insufficient evidence of all three of these requirements.

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[27] Respondent, for no discernable purpose, fails to respond to the arguments in the order raised and addresses the torture special circumstance first under heading V. A. (RB 72.) Appellant replies in the order set forth in the opening brief, and addresses the lying-in-wait argument first.

Respondent's contention that evidence of lying in wait was "substantial." is nothing more than speculation.[28] Respondent reasons that the jury could reasonably conclude from the evidence that appellant used a surprise attack when the two women were alone. (RB 78.) There is disputed testimony as to whether appellant and May were ever alone together at the trailer, but even assuming appellant was left alone with May, Fedor testified that May previously threatened to harm appellant with a knife. This testimony is inconsistent with a reasonable conclusion that Dalton made an immediate surprise attack on May. One could more reasonably speculate that it was May who attacked Dalton, and Dalton disarmed her.[29]

Moreover, even if we assume, without conceding, that appellant concealed her purpose to kill May, watched and waited for an opportune time to act, and then attacked May from a position of advantage immediately after the waiting period ended, the special circumstance still has not been proved. There is absolutely no evidence that May was murdered during any alleged period of concealment and watchful waiting.

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[28] Respondent also cites the trial court's conclusion that the parties could have met the three requirements "despite the fact that the victim knew that they were there and waiting for an opportune time to act." (RB 76, citing 38 RT 3675.) The absence of concealment of purpose, however, is fatal to the prosecution's case for lying in wait. The element of concealment is satisfied by a showing "that a defendant's true intent and purpose were concealed by his actions or conduct." (*People v. Sims* (1993) 5 Cal.4th 405, 432-433, overruled on another ground by *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032.) "A concealment of purpose suffices if it is combined with a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Edwards* (1991) 54 Cal.3d 787, 825.) If there was no concealment of purpose, there was no lying in wait.

[29] Respondent also states that there was no mention of any signs of struggle, however, Baker testified that Dalton told Baker she did not know what had occurred while she was gone, suggesting that Dalton had experienced some ordeal prior to Baker's arrival. (33 RT 3126.)

To the contrary, the prosecutor firmly rejected such an interpretation of the events, and respondent makes no attempt to fashion one.[30]

In 1988, when the alleged murder took place, the requirements for the lying-in-wait special circumstance were slightly different from, and more stringent than, the requirements for lying-in-wait first degree murder. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.) Lying-in-wait first degree murder required that the murder be perpetrated "by means of" lying in wait (Pen.Code § 189). The lying-in-wait special circumstance, however, applies only to murder committed "*while* lying in wait" (§190.2, former subd. (a)(15), italics added). This special circumstance requires that "'that the killing take place during the period of concealment and watchful waiting.'" (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, quoting *People v. Sims* (1993) 5 Cal.4th 405, 434.) This factor, among others, sufficiently distinguished murder committed "while" lying in wait from other murders to satisfy the Eighth Amendment requirement that a death eligibility circumstance "'justify the classification of that type of case as one warranting imposition of the death penalty.'" (*People v. Gutierrez, supra*, at p. 1149, quoting *People v. Sims, supra*, at p. 434.)

Even respondent acknowledges that, to prove lying in wait, the killing must either be contemporaneous with or "follow directly on the heels of the watchful waiting." (RB 76, citing, *People v. Morales, supra*, 48 Cal.3d at p. 558; see also *Domino* v. *Superior Court* (1982) 129 Cal.App.3d 1000, 1011 ["the killing must take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends"].)

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[30] Indeed, respondent notes the prosecutor's theory of *conspiracy* to support the lying-in-wait special circumstance. (RB 76, fn.49.)

Just recently, in *People v. Lewis* (2008) 43 Cal.4th 415, this Court affirmed the language in *Domino* in a case where, before being murdered, each victim was kidnaped and driven around for a substantial period of time while defendant and his accomplices withdrew money from the victims' ATM accounts. This Court affirmed that Penal Code section 190.2, former subd. (a)(15), the lying-in-wait special circumstance charged in this case, requires "'that the killing take place during the period of concealment and watchful waiting.'" (*Id.* at p. 512, citations omitted.)

Under the prosecution's theory of this case, May was murdered several hours after any lying in wait could have occurred. Tompkins and Baker drove to the honor camp and then into Lakeside, before returning to the trailer, at least three hours after they left. (See 33 RT 3170.) Under less egregious facts, this Court in *Lewis*, stated:

> The facts here show that these killings did not occur in the course of lying in wait. The defendants accomplished the forcible kidnapping of each victim while lying in wait, but then drove the still living victims around in their cars for periods of one to three hours, while withdrawing money from the victims' bank accounts, before killing them. By the time of the killings, the concealment, the watchful waiting, and the surprise attack all had taken place at least one and up to three hours earlier.

(*People v. Lewis, supra*, 43 Cal.4th at p. 514.)

This Court rejected the argument that the special circumstance was satisfied because there was no lapse in contact with the victims between the watchful waiting and the time they were killed. "[W]e have never held that merely maintaining 'contact' with the victim satisfies the requirements of the lying-in-wait special circumstance." (*Ibid.*)

This Court reasoned:

> although the jury could have concluded that defendant and his accomplices lay in wait intending to rob and to kill thereafter, and that they began carrying out the intent to rob immediately

> after the lying in wait ended, there was no evidence that the defendants carried out their intent to kill immediately.

(*Ibid.*)

This is precisely the situation presented here. The prosecutor argued and the evidence, *at best*, proves concealment of purpose, watchful waiting and surprise attack. The killing, however, occurred at least three hours later.

In *Lewis*, this Court concluded:

> In sum, in each of the cases at issue here, there was a period of watchful waiting culminating in surprise kidnapping, a series of nonlethal events, and then a cold, calculated, inevitable, and unsurprising dispatch of each victim. We have never held the lying-in-wait special circumstance to have been established on similar facts. Were we to hold that sufficient evidence supports the lying-in-wait special-circumstance allegations the jury found true here, it would be difficult to say that there is any distinction between a murder committed "by means of" lying in wait and a murder committed "while" lying in wait. Such a construction of the lying-in-wait special circumstance would read the word "while" out of the statute. Although we do not "minimize the heinousness of defendant's deeds" (*People v. Hillhouse* [2002] . . . 27 Cal.4th [469,] 499. . .), we are compelled to conclude that on these facts "the circumstances calling for the ultimate penalty [on the basis of lying in wait] do not exist." (*Domino, supra*, 129 Cal.App.3d at p. 1011 . . . .) Accordingly, we will vacate the lying-in-wait special-circumstance findings as to murder victims Sams, Nisbet, and Denogean. Retrial of these special circumstance allegations is barred. (*Burks v. United States* [1978] 437 U.S. [1,] 18 . . . ; *People v. Hatch* [2002] 22 Cal.4th [260,] 271-272 . . . .)

(*People v. Lewis, supra*, 43 Cal.4th at p. 515.)

Similarly, the lying-in-wait special circumstance finding in this case must be vacated and a retrial on the special circumstance barred.

B. The Torture-Murder Special Circumstance Finding Was Not Supported by Substantial Evidence.

Once again, respondent fails to address appellant's lengthy and detailed analysis of the purported evidence but instead focuses on undisputed matters and issues conclusory statements regarding the sufficiency of the evidence. Once again, this response fails upon scrutiny.

Respondent initially states that Proposition 115 "eliminated the necessity to show *extreme* physical pain on the victim." (RB 72, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14.) Respondent omits the remainder of the *Crittenden* footnote, which notes that Proposition 115 passed on June 6, 1990, and states:

> Because the offenses herein were committed in January 1987, the applicable standard is the version of section 190.2, subdivision (a)(18), predating Proposition 115.

(*Crittenden, supra*, 9 Cal.4th at p. 140, fn. 14.) The offense in this case occurred in 1988, and also predates Proposition 115.

More importantly, in *People v. Elliot* (2005) 37 Cal.4th 453, 477-479, this Court affirmatively rejected respondent's interpretation of the effect of Proposition 115. After a lengthy discussion of Proposition 115, this Court stated:

> Consistent with decisions interpreting section 190.2, subdivision (a)(18) prior to its 1990 amendment, we conclude that for an intentional murder to involve "the infliction of torture" under section 190.2, subdivision (a)(18), as amended by Proposition 115, the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose.

(*Id.* at p. 479.)

As recently as 2008, this Court stated that "[t]he torture-murder special circumstance requires proof that a defendant intentionally performed acts that were calculated to cause extreme physical pain to the victim."

(*People v. Mungia* (2008) 44 Cal.4th 1101, 1136; see also, *People v. Cole* (2004) 33 Cal.4th 1158, 1228, citing *People v. Davenport* (1985) 41 Cal.3d 247, 271 ["the elements of the torture-murder special circumstance includ[e] that 'the perpetrator intentionally perform[ ] acts which [are] calculated to cause extreme physical pain to the victim'"].)

Respondent's assertion that the prosecution no longer needs to prove the commission of acts calculated to cause extreme physical pain to establish the special circumstance of torture-murder is simply wrong.

Respondent's assessment of the sufficiency of the evidence of torture is equally flawed. Appellant raised serious questions about the sufficiency of the evidence of torture presented at trial.[31] The prosecutor argued that appellant tortured May with electric shock, but seriously misrepresented the actual evidence supporting such a claim. As appellant pointed out in the opening brief, Baker never saw an electric cord or observed anyone being shocked. (33 RT 3176; 8 CT 1567.) Indeed, no one saw May being shocked with anything. Further, the prosecutor conceded and the trial court ruled there was insufficient evidence to support overt act six, which alleged that appellant administered an electric shock to May. The court thus dismissed the overt act and the Penal Code section 12002(b) enhancement alleging appellant personally used a dangerous weapon, to wit, an electric

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[31] Respondent dismisses appellant's concerns as amounting to nothing more than an argument that Fedor's testimony was insufficient because she was a "scumbag" and the prosecutor assured the jurors of facts beyond what had been established. (RB 71.) Appellant at no time referred to Fedor as a "scumbag." It was prosecution witness Baker who stated that Fedor was a "scumbag" who was "lying about a lot of that stuff." (20 CT 4160 [7/5/94 interview].) As explained more fully above and in the opening brief, appellant relied on more than Fedor's reputation as a dishonest and unreliable "tweaker" to refute her testimony. More importantly, Fedor witnessed nothing that may have happened to May. She merely observed things that no one else appeared to observe.

cord. (38 RT 3678, 3673; 11 CT 2180-2181.) Appellant also deconstructed the conflicting testimony regarding telephone cords, extension cords, and cut chandelier wire observations in different rooms of the trailer and explained how these diverse accounts were extrapolated into a unified, but absolutely unsupported, account of what occurred. Despite appellant's analysis of how this evidence was misconstrued, respondent states that Fedor and "other witnesses" saw "a lamp cord that had been cut away from the lamp, remained plugged in, and had **burned** ends." (RB 74, bold in original.) Fedor said the chandelier in her bedroom had been cut down; the cord was plugged in and the electrical wire was exposed and the ends were burned. (30 RT 2605-2606.)[32] San Diego Sheriff Deputy Wilson was in Fedor's bedroom the night of the incident and he did not see a cut lamp and dangling plugged-in, burnt cord – nor did Fred Eckstein, nor did Kathy Eckstein, whenever it was that they were at the trailer.

In her opening brief appellant also refuted the other evidence of torture – blood, a bloody bar of soap, hots shots and Dalton's alleged statements. (AOB 160-169.) Rather than address any of the concerns appellant has raised, however, respondent cites "electric shock . . . , shots of battery acid . . . , and teeth marks in bloody soap" and concludes that "all these things imply torture and constitute substantial evidence to support the jury's finding." (RB 73.) They constitute substantial evidence only if one ignores the detailed refutation of the evidence presented in the opening brief. Moreover, respondent again misstates the record to make its point. Respondent refers to teeth marks in a bloody soap bar, which leads to the image of a tortured May clenching the bar of soap between her teeth in pain. In fact, Fedor did not mention teeth marks during her testimony, and

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[32] Fedor and her daughter Alisha were the only witnesses to mention any cord being burnt.

respondent earlier suggests the bar of soap was bloody because appellant showered with it. (RB 69.) Respondent also argues that May was poked with a screwdriver. (RB 74.) No one testified to this effect; indeed, Baker did not recall seeing a screwdriver being used. (RT 3133.) Respondent acknowledges this, but states that Baker testified that Tompkins killed May by stabbing her in the neck and chest (RB 74), implying that Tompkins used a screwdriver. In fact, Baker testified that she was quite certain he used a knife and *not* a screwdriver. (33 RT 3175.)

Most compelling, however, is the absence of evidence on the key element of torture – the *intent* to cause pain. Recently, this Court reiterated that "[t]he torture-murder special circumstance requires proof that a defendant intentionally performed acts that were calculated to cause extreme physical pain to the victim. Required is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136, internal citations and quotations omitted.)

In *Mungia*, this Court concluded that there was strong evidence that defendant entered the victim's house intending to kill her, and that when defendant battered the victim to death, he caused her to experience great pain and suffering. Still, this was not evidence from which a rational trier of fact could infer that he beat the victim to death for a sadistic purpose. Rather, defendant's statements suggest that he killed her to ensure that she would not survive to identify him as the person who had robbed her. (*Id.* at pp. 1136-1137.) This Court also looked at the circumstances of the offense. The defendant killed the victim by hitting her repeatedly in the head with a blunt object. "The killing was brutal and savage, but there is nothing in the nature of the injuries to suggest that defendant inflicted any of them in an attempt to torture [the victim] rather than to kill her." (*Id.* at p. 1137.)

In this case, the only evidence of appellant's intent comes from informant Baker, who had no reason to minimize appellant's involvement or intent.[33] Baker, from her first interview through trial, insisted that no one intended to cause May pain. (See, e.g., 8 CT 1565-1566; 33 RT 3127, 3130, 3132, 3133.)

This is not the type of evidence that shows appellant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering. In *Mungia*, this Court described the cases where it had found the defendant had acted with such intent: see *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [defendant "methodically poured" hot oil on multiple portions of the victim's body]; *People v. Chatman* (2006) 38 Cal.4th 344, 390 [the defendant inflicted over 50 stab wounds all over the victim's body, and later told a friend he persisted in stabbing the victim because it "felt good"]; *People v. Elliot* (2005) 37 Cal.4th 453, 467 [the defendant inflicted 81 stab wounds, only three of which were potentially fatal, and meticulously split the victim's eyelids with a knife]; *People v. Cole*, *supra*, 33 Cal.4th at pp.1212-1214, 1229-1230 [defendant made statements indicating he was angry at the victim, poured gasoline over her body, and set it alight]; *People v. Bemore* (2000) 22 Cal.4th 809, 842 [defendant inflicted eight unusual nonfatal wounds in the victim's flank before stabbing him to death and made statements implying that he inflicted those wounds in an effort to persuade the victim to open a safe]; *People v. Crittenden* (1994) 9 Cal.4th 83, 141 [the defendant broke one victim's jaw

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[33] Appellant has argued that Tompkins' alleged statement that he tortured May was inadmissible. Even if it were something that the jurors could consider, the introduced statement does not support a finding of appellant's intent to torture. (See *People v. Wilson* (2008) 44 Cal.4th 758, 804 ["the torture-murder special circumstance requires proof that the *defendant himself* intended to torture the victim"]; *People v. Petznick* (2003) 114 Cal.App.4th 663.)

before killing him and inflicted "fairly superficial cuts that clearly were not intended to be lethal" in an attempt to persuade another victim to write a check payable to the defendant]; *People v. Proctor* (1992) 4 Cal.4th 499, 531[the defendant severely beat the victim and inflicted a series of nonfatal "incision-type stab wounds to her neck, chest, and breast area" before strangling her]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 [the defendant made incisions with "a nearly scientific air" that demonstrated a calculated intent to inflict pain]; see also *People v. Cook* (2006) 39 Cal.4th 566, 602-603 [evidence sufficient to show first degree torture-murder where the defendant kicked and beat the victim with a stick for a long period while he lay unresisting in the street]; *People v. Raley* (1992) 2 Cal.4th 870, 889 [evidence sufficient to show first degree torture-murder where the defendant inflicted 41 knife wounds on the victim while she screamed, wrapped her in rugs and left her (still conscious) in the trunk of his car for hours before throwing her down a ravine].) (*Mungia*, *supra*, 44 Cal.4th at pp.1137-1138.)[34]

Here, as in *Mungia*, and unlike the cases described above, there is no evidence that appellant deliberately inflicted nonfatal wounds to the victim in an attempt to increase her suffering.

Respondent argues that tying up the victim "speaks of torture." (RB 73.) The Attorney General argued similarly in *Mungia*. This Court held that "[b]inding may take place in some instances of torture" (*Mungia*, *supra*, 44 Cal.4th at p. 1138, citing *Chatman*, *supra*, 38 Cal.4th at p. 391),

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[34] This Court has stated that "[t]he jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the body." (*People v. Chatman*, *supra*, 38 Cal.4th at p. 390.) While this Court cautioned against giving undue weight to the severity of the wounds, as the cases cited above suggest, the courts have frequently relied on the condition of the decedent's body to infer intent to torture. In this case, of course, no body was ever recovered.

but concluded that in cases where it had noted binding in finding the torture special circumstance, "the evidence of binding was accompanied by other strong evidence of the defendant's sadistic intent. We have never found that evidence that the defendant bound the victim is, by itself, substantial evidence of an intent to inflict sadistic pain." (*Mungia, supra*, 44 Cal.4th at p. 1138.)

The record in this case does not contain "substantial evidence – that is, evidence that is reasonable, credible, and of solid value" (*Cole, supra*, 33 Cal.4th at p. 1212) – from which the jury could find that defendant intended to torture Melanie May. The torture-murder special circumstance must be vacated.

In *Mungia*, this Court determined that reversal of the torture-murder special circumstance did not require reversal of the judgment of death. (*Mungia, supra*, 44 Cal.4th at p. 1139.) Appellant submits that the error in this case is not harmless and does require reversal of the death judgment. Appellant has argued that the other special circumstance, lying in wait, is also invalid; thus appellant is not eligible for the death penalty.

Unlike the situations in *People v. Lewis, supra*, 3 Cal.4th at p. 522[35] and *People v. Morgan* (2007) 42 Cal.4th 593, 628,[36] it is likely in this case

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[35] "Given the horrific facts before the jury demonstrating defendant's proclivity for repeated violent criminal activity, and the lack of any indication in the record that the jury's true findings regarding the invalid lying-in-wait special circumstances played any role in its penalty determination, we are satisfied the jury's consideration of those special circumstances under section 190.3, factor (a) did not affect the penalty verdict." (*People v. Lewis, supra*, 3 Cal.4th at p. 522.)

[36] Reversal of a simple kidnapping conviction and the kidnapping-murder special-circumstance finding did not require setting aside the death judgment because the jury would not have given significant independent weight to the kidnapping conviction itself rather than the

(continued...)

that the jury's true finding regarding the invalid torture special circumstance played a significant role in its penalty determination. This is not a case involving the mere number of feet a victim was dragged. This is a case where the jurors were exposed to evidence that should never have been admitted and asked to imagine torture that was not proved – electrical shock and the use of a screwdriver – a blood-soaked crime scene and a codefendant's alleged comment to his cellmate that pain is the name of the game. Surely in their largely moral and normative endeavor (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137) the jurors placed great weight on their erroneous finding that appellant went out of her way to torture May. The inappropriate consideration of this characterization of the evidence so skewed the penalty determination process as to result in constitutional error.

Finally, the Court should reconsider its determination in *Lewis* that the Sixth Amendment does not require a jury redetermination of the penalty whenever the jury has considered improper matter under section 190.3, factor (a). (*People v. Lewis, supra*, 43 Cal.4th at p. 520.) Harmless error analysis of the effect of the invalid torture special circumstance on the penalty involves making findings that go beyond the facts reflected in the jury's verdict in violation of the Sixth Amendment as construed by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220, and *Blakely v. Washington* (2004) 542 U.S. 296.

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[36] (...continued)
overall circumstances of the capital crime and the aggravating and mitigating evidence. "We see no reasonable possibility the difference in the number of feet defendant dragged his victim affected the penalty determination."

For all these reasons, the special circumstance findings and death penalty judgment must be reversed.

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VI.

THE COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE SHERYL BAKER'S MARCH 4, 1992, TAPED STATEMENTS TO LAW ENFORCEMENT OFFICERS.

Appellant has argued that the trial court committed error when it allowed the prosecutor to introduce Baker's March 4, 1992, taped interview as prior consistent statements that predated any bias or motive and as prior inconsistent statements. (AOB 189-215.)

A. Taped Interview Not Admissible as Prior Consistent Statement.

Respondent initially argues that appellant's claim that Baker's motive to fabricate arose before her 1992, recorded interrogation "has been forfeited since it was not presented on these grounds at trial." (RB 78. See also RB 81, fn. 51 ["'opposition was based on (1) the prosecutor had the testimony of the witness (35 RT 3412) and Evidence Code section 352 (35 RT 3413). As now presented the issue should not be considered on appeal"].) In fact, as plainly stated in the opening brief (AOB 189-190, fn. 115), defense counsel argued that Baker's March 4, 1992, interview was neither a prior inconsistent nor a prior consistent statement. (6 CT 1248.) Specifically, the defense opposition to the prosecutor's motion requesting to offer into evidence previously tape-recorded interviews as prior consistent statements contains the following unequivocal language: "Counsel for Ms. Dalton maintain that a motive to fabricate was in fact in existence prior to or at the very beginning of the March 4, 1992 interview, thus the interview is not a prior consistent statement." (6 CT 1254.) Respondent's argument that the issue has been waived is meritless.

Respondent also argues that Baker had no motive to fabricate during the March 4 interview because she was not under arrest, did not think she could be arrested, and the detective assured her she would not be. (RB 80-

81.)[37] Respondent neglects to mention that at the outset of the interview, Investigator Cooksey informed Baker that law enforcement had enough information to charge her with murder *and* that he believed that they *would* charge her with murder. (8 CT 1522.) Baker clearly understood that an arrest was imminent. "You're not gonna take me into custody today, that means you do plan on arresting me?" (8 CT 1515.)

Respondent states that appellant's contention that Baker had a motive to downplay her role to obtain a good plea bargain "totally ignores that implied bias arose only once the accomplice-witness made a 'deal' with the prosecution." (RB 83.) It is true that this Court has ruled that where a witness has more than one motive to fabricate testimony, a prior consistent statement is admissible if it was made before the existence of any one of the motives. (*People v. Jones* (2003) 30 C.4th 1084, 1106.[38]) In *Jones,* a witness to a murder implicated the defendant while being interviewed by the police. The witness was subsequently offered a plea bargain and testified against the defendant. The defendant argued it was error to admit a prior consistent statement made prior to the plea bargain because at the time the witness made the statement, he feared his own arrest for the murder. This Court held the statement was properly admitted because it was made before the plea bargain, which was also a motive to fabricate testimony. (*Id.* at pp. 1106-1107.)

Here, it is clear that Baker's one and only motive to fabricate her account of the events was to receive favorable treatment by the prosecution. Her different statements and testimony provided new opportunities to act on

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[37] Respondent also argues that Baker had no motive to fabricate during her conversation with Collins, but that statement is not at issue here.

[38] Respondent cites this case as *People v. Torres*, but it appears to be a typographical mistake. (RB 83.)

that motive, but not a new motive. As pointed out in the opening brief, Baker knew at the time of her March 4, 1992, statement that she would be imprisoned for her involvement. (See, e.g., 8 CT 1520.) During the interview she insisted "I'm going into protective custody, you can believe that." (8 CT 1533.) The investigator assured her, "[t]here's lots of things we can do. You may not even have to do time in California, it could be in another state. There's lots of arrangements that could be made." (8 CT 1533.) Baker was obviously aware that her cooperation could result in a lighter punishment or special treatment for herself. Her motive to fabricate in order to procure a better deal for herself, a motive either impliedly or expressly alleged by the cross-examination, *clearly* existed at the time of the March 4, 1992, interview.

B. Taped Interview Not Admissible as Prior Inconsistent Statement.

Respondent understandably does not address appellant's argument that the videotape was inadmissible as evidence of prior inconsistent statements. As explained, the prosecutor could at most impeach Baker with the three inconsistent statements. Playing the entire videotape was not necessary – or permissible.

The prejudice caused by admission of the March 4, 1992 videotaped interrogation was aggravated by the leading, misleading and inflammatory interrogation techniques employed by those interrogating Baker, and, as argued in the opening brief, admission of the videotape deprived appellant of her constitutional rights to due process, a fair trial, confrontation and a reliable guilt and penalty phase determination. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Once again, respondent disposes of appellant's argument by simply ignoring it. Without addressing the concerns appellant presented, respondent characterizes the error as a "simply ordinary evidentiary rule[] that would be judged by the

harmless error standard enunciated in *Watson.*" (RB 83.) Rather than repeat what has already been written, appellant refers to the opening brief where she argues that the investigators' interview techniques minimized Baker's role, involved leading questions, introduced unsupported and inadmissible aggravating information, and misled and confused the jurors with false and extraneous evidence. In addition, the videotape contained a number of statements that were inadmissible as prior consistent or inconsistent statements and others that were inadmissible victim impact evidence. (AOB 196-215.)

Respondent's only acknowledgment of these arguments is contained in a footnote, where respondent dismisses appellant's argument concerning the detectives' interrogation techniques by stating that interrogation is not governed by the rules of evidence. (RB 80, fn. 50.) Exactly. Interrogations are not governed by these rules, but trials are, and the rules cannot be circumvented in this fashion. Respondent disposes of appellant's argument that the tape contained irrelevant and inadmissible statements by claiming that the tape was edited to omit other irrelevant material. (*Ibid.*) It is true that some statements were redacted, but the transcript of the videotape played for the jurors (Exh. 37A, at 8 CT 1514-1591) contains the numerous irrelevant and prejudicial statements set forth in the opening brief. The fact that some redaction occurred does not immunize the tape from error.

The error in allowing the prosecution to play the March 4, 1992 videotape was not harmless because respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. 18, 24; *Sullivan v. Louisiana, supra*, 508 U.S. 275, 279.)

The error is not harmless even under the less restrictive *Watson* standard. There is a reasonable probability or chance that a more favorable

result would have been reached had the videotaped statement not been played for the jury. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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VII.

THE COURT ERRED IN ADMITTING PREJUDICIAL AND SPECULATIVE TESTIMONY FROM A PATHOLOGIST AS TO THE EFFECT OF ELECTRIC SHOCK AND BATTERY ACID ON THE HUMAN BODY.

Appellant has argued that the testimony of Dr. Blackbourne, a pathologist who did not autopsy or examine May's body, did not examine any physical evidence connected with the case, and had no basis by which to ascertain or evaluate May's purported injuries, was irrelevant, unnecessary and prejudicial, and as such, violated appellant's rights to a fair trial, to due process of law, and to a reliable determination of both guilt and penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 12, 15, 16, 17.) (AOB 216-232.)

Respondent argues that Blackbourne's testimony was proper because "the effects of battery (sulfuric) acid and electricity on the human body is sufficiently beyond the common experience of the jurors." (RB. 85.) Although appellant disputes this statement, if true, it *proves* that Blackbourne's testimony was not relevant to establish any disputed issue. The issue the jury had to decide regarding the torture-murder special circumstance was *not* whether the victim experienced pain but, rather, whether Dalton intended to inflict such pain, with a sadistic purpose. If, as respondent insists, the painful effects of battery acid and electric shock are beyond "common experience," then in the absence of any evidence that Dalton shared the doctor's expertise or possessed greater than common experience of the effects of these purported weapons, she clearly could not have possessed the requisite intent. In other words, since the prosecution made no showing that appellant was aware of the specialized expert knowledge about which Blackbourne testified, his testimony was wholly irrelevant to the question of whether the torture-murder special

circumstance was true.

Other than that, appellant believes that the points tendered in respondent's one-page argument were anticipated and fully addressed in the opening brief and do not require further discussion here, other than to point out that respondent has once again misstated the evidence. Respondent refers to the "several people" who "saw the plugged-in lamp cord whose ends had been stripped . . . [and] burned." (RB 85.) Fedor and her 11-year-old daughter were the only witnesses who so testified. Deputy Wilson, present in Fedor's bedroom on the night of the alleged crime, did not see any type of cord, nor did Sheryl Baker, who was present when May was allegedly killed. Kathy Eckstein and her son Fred, at some time *other than* the near the event, saw a looped extension cord with one end cut off, but no stripped, burned lamp cord. (31 RT 2860, 2671.)

Introduction of Dr. Blackbourne's testimony was yet one more attempt by the prosecution to bolster a very weak case with frightening speculation, unsupported by any concrete evidence. With virtually no evidence to prove torture, the prosecutor relied on a doctor's expert speculative opinion regarding the pain that could be caused by items never produced, on a body that was never examined. The court erred in allowing such testimony.

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VIII.

THE COURT COMMITTED ERROR WHEN IT ALLOWED PROSECUTION WITNESS JUDY BRAKEWOOD TO TESTIFY REGARDING STATEMENTS MADE BY STEVE NOTTOLI.

Appellant has argued that Judy Brakewood's testimony regarding Steve Nottoli's statements made outside the presence of appellant was irrelevant, more prejudicial than probative and inadmissible hearsay. (See AOB 233-241.) While most of the points tendered in respondent's argument were fully addressed in the opening brief and require no further discussion here, a few points must be clarified.

Brakewood testified that around midnight one night, she brought drugs to Nottoli, who was with appellant and another woman in his van at a 7-11. Brakewood entered the van and injected drugs with Nottoli and the women. When Dalton was *not* in the van, but outside on the phone, Nottoli told Brakewood that they had shot up this girl with battery acid and burned her. Respondent misleads this Court as to the record by claiming Brakewood testified appellant "agreed with what Nottoli had been saying about shooting a girl up with battery acid . . . ." (RB 87). Brakewood never said that Dalton agreed with Nottoli; in fact she testified consistently that Dalton was not even present when Nottoli made the statement with which she purportedly agreed. On direct, Brakewood testified that while Dalton was out of the van, Nottoli and Brakewood had a conversation. When Dalton returned to the van, she stated, "we really fucked that girl up." (33 RT 3254-3255.) The prosecutor asked Brakewood if Dalton gave any details about what she meant, and Brakewood said no. The prosecutor asked Brakewood whether Dalton was in the van when Nottoli said whatever he said, and Brakewood replied, "I don't think that she [Dalton] was in there at the time." (33 RT 3255.) Brakewood gave essentially the

same testimony on cross-examination. (33 RT 3267.)

Respondent argues that appellant's contention that Dalton did not hear the statement she purportedly adopted was a question for the jury, not the judge. (RB 87.) The judge overruled counsel's foundational objection, thereby erroneously finding the testimony admissible. It is that ruling that is challenged here.

Brakewood's testimony should never have come before the jury for any reason. While respondent asserts its introduction was harmless, the prosecution referred to it a least four times in his argument, to establish both murder and torture.[39] (39 RT 3775; 3780; 3783; 3796.) Given the lack of other evidence, its inclusion here was prejudicial.

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[39] Brakewood's testimony was not probative of murder as she did not hear any statements by Nottoli or Dalton to suggest a murder was committed. (33 RT 3268.)

IX.

THE TRIAL COURT ERRED IN UNDULY RESTRICTING CROSS-EXAMINATION OF PROSECUTION WITNESSES.

Appellant has argued that the trial court improperly restricted cross-examination of prosecution witnesses in violation of the Confrontation Clause. (AOB 242-259.) Respondent contends that it was within the trial court's discretion to restrict impeachment, but ignores the fact that the trial court did not exercise discretion – the trial court in fact misapplied the law as it pertains to impeachment with pending cases and arbitrarily excluded *all* impeachment with non-felony conduct.

A. Restricted Impeachment of Fedor.

At the time of her testimony at appellant's trial, Joanne Fedor had a pending grand theft felony charge. The trial court improperly ruled that this charge was inadmissible as impeachment. (30 RT 2519.) The court erred. Respondent does not acknowledge the error, but argues that Fedor was adequately impeached and the excluded impeachment would not have produced a significantly different impression of Fedor's credibility. (RB 91.) Respondent, however, fails to differentiate between impeachment with prior convictions as a general attack on credibility and "[a] more particular attack on the witness' credibility" through examination designed to reveal possible biases, prejudices or ulterior motives. (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) Fedor's credibility may have been called into question by evidence of her drug use and felonies (see RB 91),[40] but a pending charge gave her a strong motive to provide testimony favorable to the prosecution in hopes of getting something in return. The pending case, therefore, was

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[40] Contrary to respondent's assertion (RB 91), there were no "character witnesses" presented by the defense or prosecution regarding Fedor's reputation for honesty, although several prosecution witnesses commented that they did not believe Fedor was credible.

not cumulative general impeachment. As explained in the opening brief, without information about the grand theft and forgery charges, Fedor appeared to be bias-free and, at most, unreliable, but not necessarily dishonest. The prohibited cross-examination regarding the pending charges would have produced a significantly different impression of Fedor and the trial court's error in restricting cross-examination thus violated the Sixth Amendment.

B. Restriction of Impeachment to Felony Convictions of Moral Turpitude.

Respondent has listed the trial court's purported reasoning for refusing to allow impeachment with certain prior conduct and convictions, as if each of the court's decisions was an independent exercise of judicial discretion. In fact, the trial court stated early on, "I'm not going to allow misdemeanor priors to be used for impeachment" because it is too time-consuming." (29 RT 2480.) True to its word, the court refused to allow ***any*** impeachment with misdemeanor conduct. The court also refused to allow impeachment with felony convictions not involving moral turpitude. (See, e.g., 30 RT 2509 ["not a moral turpitude offense, therefor, is not relevant"], 2510 [same], 2512-2516, 2518-2520.) As set forth in the opening brief, a witness may be impeached with any felony conviction and with misdemeanor conduct involving moral turpitude, which is interpreted broadly. The trial court refused to follow this law. The fact that it eventually proffered reasons for its rulings restricting impeachment did not transform each ruling into a proper exercise of judicial discretion. The trial court believed *all* impeachment with misdemeanor conduct to be too time-consuming and all felony convictions not involving moral turpitude to be irrelevant. To restrict impeachment in conformity with these beliefs does not amount to an exercise in discretion.

C. Restricted Cross-Examination of Kandy Koliwer and Fred Eckstein.

After May's attorney Kandy Koliwer testified on direct examination about May's devotion to her children, her desire to do all that was necessary to regain custody of her children, and Koliwer's belief that May would never leave or abandon her children, defense counsel asked Koliwer whether she was aware of May's methamphetamine problem. (31 RT 2833.) Obviously, Koliwer's knowledge or lack of knowledge of this information related to her credibility and reliability as a witness to May's priorities in life. The prosecutor's objection to the question as irrelevant and calling for speculation was sustained. (*Ibid.*) Defense counsel questioned Fred Eckstein regarding his parents' use of methamphetamine, but again, the prosecutor's objection was sustained on the same grounds. (31 RT 2879.)

The trial court erred in sustaining the objections. Koliwer's knowledge of May's drug use related to her reliability as a witness of May's character and Kathy Eckstein's drug use related to her credibility, reliability and powers of observation. Respondent contends that appellant's arguments were "waived at trial for failure to raise an objection on the grounds now advanced." (RB 94.) Respondent's claim is specious. It was not appellant but the prosecutor who raised the objection. Appellant argues that the trial court's decision to sustain the objection was error because the questions were not, as the prosecutor stated, irrelevant. Respondent has not, and cannot, cite any authority for its apparent proposition that counsel must make an offer of proof every time an objection is sustained in order to challenge that ruling on appeal.

Respondent also argues that other witnesses testified to May's drug use and that Kathy Eckstein testified as to her drug use. (RB 94-95.) But the issue is not whether May was using drugs, but whether Koliwer was

aware of her drug use. Respondent points out that there was nothing in the record suggesting that Koliwer knew of May's drug use (RB 94), which, although irrelevant to whether the trial court erred in prohibiting cross-examination on this issue, supports appellant's argument that impeachment on this issue would have demonstrated that Koliwer lacked sufficient knowledge regarding May's lifestyle to opine about her priorities. While Kathy Eckstein testified that she was using drugs, she denied that she was using drugs on a regular basis. If her son knew otherwise, it was relevant not only to her reliability but also to her credibility on the stand.

The cumulative effect of the trial court's rulings to restrict impeachment denied appellant her rights to confrontation, cross-examination, a fair trial, due process and a reliable guilty and penalty determination.

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X.

THE COURT ERRED IN FAILING TO GRANT A MISTRIAL FOLLOWING FEDOR'S UNSOLICITED AND UNFOUNDED STATEMENT THAT APPELLANT DALTON MOLESTED HER CHILDREN.

Eleven of the twelve jurors heard Joanne Fedor, the prosecution's first witness, tell the trial court that appellant molested her children. (30 RT 2616, 2684-2694.) Although each juror assured the court that he or she could follow the admonition to disregard Fedor's comment and give appellant a fair trial, appellant has argued that Fedor's statement was so prejudicial that no admonition could cure its harm. Accordingly, the trial court's failure to grant the requested mistrial was an abuse of discretion that violated California law and denied appellant her constitutional rights to due process, a fair trial and a reliable guilt and penalty determination. (AOB 260-266.)

Respondent argues that any possible prejudice was cured by striking the comment and admonishing the jury, and that the accusation paled in comparison to the torture-murder and was thus harmless. (RB 98.) In so doing, respondent ignores appellant's arguments regarding the particularly inflammatory nature of the accusation. As appellant noted in the opening brief, "evidence of sex crimes with young children is especially likely to inflame a jury." (See *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 138.) This is certainly true in this case where two of the seated jurors described experiences with molestation charges during voir dire. (11 CT 2316; 27 RT 2204-2206; 12 CT 2476; 27 RT 2245, 2248.)

Moreover, the jurors may very well have believed that they could not let the accusation affect their consideration of the evidence of guilt, but it is difficult to believe that it did not color their impression of appellant, especially where the prosecutor relied so heavily on speculation to prove his

case. Appellant's relationship with her own children was a significant part of the penalty phase presentation, and the prosecutor spent a substantial portion of his argument pointing to appellant's lack of care for her children. (RT 4537-4540.) At the very least, the comment certainly had a prejudicial impact during the penalty phase of trial and requires reversal of the death judgment.

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XI.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL.

In her opening brief appellant argued that California's lying-in-wait special circumstance fails to provide a meaningful basis for distinguishing capital from noncapital cases, and it does not punish only the most extreme offenders. (AOB 267-273.)

Respondent does not seriously address appellant's argument as to the constitutionality of the lying-in-wait special circumstance, but merely repeats its contention that the evidence of lying in wait in this case was sufficient.[41] Respondent contends the facts "fully support the guilty verdict of first degree murder premised on a theory of lying in wait." (RB 101.) Respondent is either unaware or fails to acknowledge that appellant was not charged with first degree murder by lying in wait, that the jury was not instructed on murder by lying in wait or that, at the time of the crime and trial in this case, the elements of such a murder differed significantly from the elements of the special circumstance.

Moreover, respondent's heavy reliance on *People v. Morales*, *supra*, 48 Cal.3d 527, must be examined in light of *People v. Lewis, supra*, 43 Cal.4th 415, discussed above in Argument V. Respondent argues that this case presents facts virtually identical to those in *Morales*, where this Court found sufficient evidence of lying in wait based on defendant's watchful

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[41] Once again, respondent stretches the evidence beyond all reasonable inferences. It states "[a]ppellant must have taken Melanie by surprise because Baker mentioned no signs of struggle." (RB 101.) Baker was never asked, by either the prosecution or the defense, whether there were "signs of struggle" and the condition of trailer was so disorderly that the significance of any such testimony would have been questionable. Moreover, given the victim's heavy drug use and lack of sleep the night before, even if there was no sign of struggle, that fact would not logically or reasonably tend to establish the victim was taken by surprise.

waiting from a position of advantage in the backseat of a car, while the car was driven to a more isolated areas, and defendant's surprise attack from behind without warning. (RB 100, citing *People v. Morales*, *supra*, 48 Cal.3d at p. 555.) Respondent fails to mention that in this case, unlike what occurred in *Morales*, the killing was not contemporaneous with or directly on the heels of the watchful waiting. As this Court made clear in *Lewis*, the lying-in-wait special circumstance requires that "'the killing take place during the period of concealment and watchful waiting.'" (43 Cal.4th at p. 512.) For all the reasons stated in Argument V, above, and in the opening brief, this case is distinguishable from *Morales*, and the lying-in-wait special circumstance finding must be reversed.

It should also be noted that, although this Court has consistently upheld the constitutionality of the lying-in-wait special circumstance, members of this Court have begun to express concern about the breadth of this special circumstance. Shortly after respondent filed its brief, this Court issued its opinion in *People v. Stevens* (2007) 41 Cal.4th 182, where the majority rejected the appellant's constitutional challenge to the special circumstance.[42] The concurring and dissenting opinions in that case, however, reveal that this issue is still very much alive. In his concurring and dissenting opinion, Justice Moreno stated that the lying-in-wait special circumstance,

> as interpreted by this Court and applied in this case, violates the Eighth Amendment to the United States Constitution.

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[42] In *Stevens*, as here, the jury was instructed that in order to find the special circumstance true, defendant must have *intentionally* killed the victim and done so *while* lying in wait. (See *Stevens, supra*, 41 Cal.4th at p. 201, fn. 10.) Accordingly, any distinction between the current special circumstance and the prior version in effect at the time of appellant's crime and in *Stevens* does not serve to meaningfully narrow the class of murders that could be subject to the death penalty.

> Unfortunately, the meaning and significance of this circumstance has not been interpreted with sufficient intellectual rigor, notwithstanding the fact that its application in a given case many mean the difference between life and death.

(*Stevens, supra*, 41 Cal.4th at p. 216 (con. & dis. opn. of Moreno, J.).)

Justice Moreno explained that in *People v. Morales*, *supra*, 48 Cal.3d at p. 557, this Court ruled that lying in wait within the meaning of the special circumstance statute did not require actual physical concealment, but only concealment of purpose, and did require a substantial period of watching and waiting. A few years later, in *People v. Sims*, *supra*, 5 Cal.4th at pp. 433-434, the Court found that the second requirement of lying in wait also did not distinguish it from ordinary premeditated murder by holding that the particular period of time need only be of a duration long enough to show "a state of mind equivalent to premeditation or deliberation. . . ." .) This was the tipping point, according to Justice Moreno, where the special circumstance of lying in wait became no more than ordinary premeditated murder. (*Stevens, supra*, 41 Cal.4th at pp. 220 (con. & dis. opn. of Moreno, J.).) "'[T]he substantial period of watching and waiting' as interpreted in *Morales* has become no more than the watching and waiting needed to establish premeditation and deliberation required in the 'ordinary' premeditated murder." (*Ibid.*, footnote omitted.)

Where the lying in wait factors set forth in *Morales* do not actually distinguish lying in wait from ordinary first degree murder, what is left is "murder by surprise." (*Stevens, supra*, 41 Cal.4th at p. 220 (con. & dis. opn. of Moreno, J.).) Justice Moreno concluded that a capital sentencing scheme that allowed death eligibility for murder by surprise does not pass constitutional muster because a capital sentencing scheme must "'genuinely narrow the class of persons eligible for the death penalty and must *reasonably justify the imposition of a more severe sentence on the*

defendant compared to others found guilty of murder.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1, 7, italics added.) Death penalty eligibility criteria must provide "a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427. See *Stevens, supra*, 41 Cal.4th at p. 221 (con. & dis. opn. of Moreno, J.).)

> The lying-in-wait special circumstance as interpreted by this court declares in effect: "The defendant deserves a greater punishment than the ordinary first degree murderer because not only did he commit first degree murder, but he failed to let the person know he was going to murder him before he did." How can we make sense of this kind of special circumstance? Not only is surprise a common feature of murder – since murderers usually want their killings to succeed, and victims usually don't want to be murdered – but it is not at all obvious that a murderer who does not conceal his purpose before murdering the victim is less culpable than one who does. One of the examples of murder without the lying-in-wait special circumstance furnished by the Ninth Circuit, is "a sadistic person who wants the victim to know what is coming, and who has no doubt of his ability to accomplish the crime, [and who] confront[s] the victim face to face, say[ing] 'I'm going to kill you'" (*Morales v. Woodford* [(9th Cir. 2004) 388 F.3d 1159, 1175)].) How is this murderer less culpable and less deserving of the death penalty, by any conventional standard of morality, than someone who conceals his purpose before murdering? To put it another way, because a murderer must gain an advantage over his victim, why is it at all morally significant that he gained the advantage through surprise rather than through overpowering, or that he murders right after the surprise rather than sadistically toying with the victim? And how is the murderer who announces his intention to murder just before carrying it out against a defenseless person less culpable than one who maintains surprise?

(*Stevens, supra*, 41 Cal.4th at p. 223 (con. & dis. opn. of Moreno, J.).)

Justice Moreno, and Justice Kennard in her concurring and dissenting opinion, also concluded that the lying-in-wait special

circumstance as set forth by CALJIC No. 8.81.15.1, the same instruction given in this case, "does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eight Amendment." (*Steven, supra*, 41 Cal.4th at p. 225 (con. & dis. opn. of Moreno, J.); see also, 41 Cal.4th at p. 215-216, (con. & dis. opn. of Kennard, J.).) Under the jury instruction in *Stevens*, identical to the one given in this case, the jurors are instructed that in order to find the lying-in-wait special circumstance they need only find that the lying in wait continued for the length of time necessary "to show a state of mind equivalent to premeditation or deliberation." (CALJIC No. 8.81.15; 8 CT 1653, 39 RT 3895-3896.)

Justice Werdegar wrote in a separate concurring opinion that in light of holdings that the lying-in-wait special circumstance does not require physical concealment, but only concealment of purpose coupled with surprise attack from a position of advantage, and that the period of watchful waiting need only be so long as to show a state of mind equivalent to premeditation or deliberation,

> the concept of lying in wait threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have "merely" committed first degree premeditated murder.

(*Stevens, supra*, 41 Cal.4th at p. 213 (con. opn. of Werdegar, J.).)

Justice Werdegar believed that the lying-in-wait special circumstance did not need to be construed so broadly as to pose a constitutional problem in *Stevens*. (*Ibid.*) Such is not the case here, and appellant urges this Court to reconsider its previous rulings finding that the lying-in-wait special circumstance and jury instruction defining this special circumstance do not violate the federal constitution.

XII.

THE TRIAL COURT'S ERRONEOUS, MISLEADING AND INCOMPLETE INSTRUCTIONS TO THE JURY AT THE GUILT PHASE WERE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND MANDATE REVERSAL.

Appellant has argued that the trial court committed a number of errors in instructing the jurors and that the errors, individually, and certainly taken together, confused and misled the jurors. (AOB 274-320.) Respondent gives only the most perfunctory of responses to the arguments made.

A. Failure to Instruct That Mark Tompkins Was an Accomplice as a Matter of Law (CALJIC No. 3.18).

The trial court instructed that Sheryl Baker was an accomplice as a matter of law and that the testimony and out-of-court statements of an accomplice must be viewed with distrust and corroborated. (CALJIC Nos. 3.10, 3.11, 3.12, 3.16, 3.18 at 39 RT 3880-3881.) It did not, however, instruct that Tompkins, like Baker, was an accomplice as a matter of law, nor did it instruct with CALJIC No. 3.19, which would have informed the jurors that they were to decide whether Tompkins was an accomplice as a matter of law.

Respondent argues that the accomplice instruction "could" be applied to Tompkins, but does not explain how. The trial court's decision not to designate Tompkins as an accomplice as a matter of law, while so designating Baker, doubtlessly left the jurors with the belief that, for whatever reason, the accomplice instructions did *not* apply to Tompkins. If Tompkins were an accomplice, the trial court would have so informed them. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable jury as to the scope of the

instruction].)

B. Failure to Instruct that an Accomplice must Be Corroborated by Someone Other than Another Accomplice (CALJIC No. Nos 3.11 & 3.13).

The trial court failed to instruct the jurors that the testimony of one accomplice cannot corroborate another accomplice. (CALJIC No. 3.13.) Respondent failed even to acknowledge this argument, much less respond to it. Respondent's evasion is understandable as the trial court clearly erred in failing to instruct with CALJIC No. 3.13, and the error was highly prejudicial since the prosecutor compounded the problem by arguing the opposite – Tompkins' hearsay statements introduced through McNeely corroborated Baker (39 RT 3780). Given the importance, and unreliability, of the accomplice testimony in this case, the error requires that the convictions be reversed.

C. Failure to Instruct That Appellant's Oral Statement of Motive Should Be Viewed with Caution (CALJIC No. 2.71.7.).

Baker testified regarding pre-offense statements of appellant that the prosecutor used to establish appellant's motive to kill May. Appellant has argued that, given this testimony, the trial court was obligated to instruct, sua sponte, with CALJIC No. 2.71.7, which informs the jurors that oral statements of motive ought to be viewed with caution. (See AOB 278-282.) Respondent counters that there was no error because the trial court gave CALJIC No. 2.71, which instructs that a defendant's out-of-court oral *admission* should be viewed with caution. (RB 104.) Respondent fails to acknowledge or respond to appellant's argument that CALJIC No. 2.71 was insufficient because appellant's pre-offense statement was not, and was not likely to have been viewed as, an admission. (AOB 281-282.) For all the reasons stated in the opening brief, the error was prejudicial under either *Chapman* or *Watson* and requires that the verdict be reversed.

D. The Trial Court Erred in Instructing on Consciousness of Guilt.

In her opening brief, appellant argued that the delivery of CALJIC Nos. 2.03 (false or misleading statements) and 2.06 (efforts to suppress evidence) unfairly, unconstitutionally and prejudicially permitted the jury to draw adverse inferences against her with respect to the charged offenses and the special circumstance allegations. (AOB, pp. 282-296.)

Appellant has argued that the instructions are partisan and argumentative based upon an analysis of this Court's cases delineating why the instruction is proper. She reasoned that the Court has drawn illusory distinctions in those cases where it has upheld this instruction, and needs to re-examine those distinctions in light of its acknowledgment in *People v. Seaton* (2001) 26 Cal.4th 598, 673, that the instruction actually is an instruction that benefits the prosecution. (AOB 287.) Appellant has also argued that the instructions are duplicative and permitted the jurors to draw irrational permissive inferences about her guilt.

Respondent does not respond to any of appellant's arguments or cite a single case. Since respondent does not directly address appellant's arguments, there is nothing to which appellant need reply.

E. The Trial Court Erred in Delivering CALJIC No. 2.13, which Unfairly and Prejudicially Bolstered the Credibility of Baker.

Appellant has argued that CALJIC No. 2.13, which provides that a witness's prior statements are evidence of the truth of "the facts" as stated by the witness, was a one-sided instruction as it was applied to Baker, who gave two statements prior to trial. (AOB 297-299.) Appellant argued that by instructing the jurors that they could consider Baker's prior inconsistent statements for their truth, while not also telling them they could consider the statements for their falsity, the trial court unfairly skewed the credibility

determinations in the prosecution's favor. Respondent rejoins that no case requires that jurors expressly be instructed that they could consider prior statements for their falsity and that CALJIC No. 2.13 is a "standard" instruction. (RB 105-106.) The fact that an instruction is standard does not mean that it is a correct statement of law. As this Court has recognized, CALJIC instructions "are not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) The rote recitation of general form instructions will not always suffice to fulfill the trial court's instructional obligations. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) "[T]he so-called CALJIC stereotyped instructions are no more sacrosanct than any others. Unless a particular instruction fits the evidentiary situation and presents a fair and impartial picture of the issues, it should not be given." (*People v. Mata* (1955) 133 Cal.App.2d 18, 21.)

Given the state of the evidence in *this* case, CALJIC No. 2.13 was not an impartial instruction. Whether or not any court has found CALJIC No. 2.13 to be improper in a case presenting similar evidentiary issues, courts have uniformly ruled that jury instructions may not be one-sided. (*People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Rice* (1976) 59 Cal.App.3d 998, 1004; *People v. Mata*, *supra*, 133 Cal.App.2d at p. 21.)

F. The Instructions Erroneously Permitted the Jury to Find Guilt Based upon Motive Alone.

The trial court instructed the jurors that, under CALJIC No. 2.51, the presence of motive may tend to establish guilt and that the absence of motive may tend to establish innocence. Appellant has argued that this instruction, unlike every other instruction that addressed an individual circumstance, fails to expressly admonish the jurors that motive alone is insufficient to establish guilt, and thus, the jurors could have reasonably concluded that they could determine guilt based upon motive alone. (AOB

299-305.) The instruction shifted the burden of proof to appellant to establish innocence. Accordingly, this Court should find that the instruction violated appellant's state and federal constitutional rights to due process and a reliable penalty verdict.

Respondent dismisses appellant's argument as "nonsense," but offers no substantive response to appellant's argument. For all the reasons stated in the opening brief, the instruction violated the constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case and requires that the convictions be reversed. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

G. The Instructions Impermissibly Undermined and Diluted the Requirement of Proof Beyond a Reasonable Doubt.

In her opening brief, appellant argued that her constitutional rights were violated by various jury instructions that, whether considered individually or, especially, when taken together, diluted the reasonable-doubt standard and lightened the prosecution's burden of proof. (AOB 305-320.) Respondent ignores appellant's arguments regarding CALJIC Nos. 2.90, 2.01, 2.02, 8.83 and 8.83.1, there thus is nothing to which appellant can reply. Respondent acknowledges, but does not directly address appellant's arguments regarding CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 and 8.20. Instead, respondent relies upon previous decisions of this Court rejecting similar challenges. (RB 107-108.)

Appellant has acknowledged this Court's previous rejection of similar claims of instructional error, but requested that this Court reconsider its decisions in this area in light of the facts of this case.

PENALTY PHASE ARGUMENTS

XIII.

DAWN CRAWFORD'S TESTIMONY WAS INADMISSIBLE.

Appellant has argued that the trial court erred in allowing Dawn Crawford to testify that she allegedly overheard Dalton describe the victim to another inmate as a "bitch," and tell that inmate that the victim's screams were the greatest high she had ever experienced. (AOB 336-344.) At trial, defense counsel pointed out that Crawford initially reported these statements only in response to Investigator Cooksey's question about whether appellant had shown remorse, sadness or pity. (42 RT 4013.) The prosecutor argued that Crawford was testifying about a circumstance of the crime, not an expression of lack of remorse. (42 RT 3973-3980.) The trial court ruled that appellant's words showed a "complete lack of remorse" and described her attitude while committing the crime, and was therefore admissible as a circumstance of the crime. (42 RT 4012.) Defense counsel argued that the prosecution should not be allowed to prompt a witness to say something and then claim it is a circumstance of the offense. (42 RT 4016.) The court admitted that it was a "gray area," but concluded there was no requirement that the defendant had to express the mental state during the commission of the offense for it to be admissible as a circumstance of the crime. (42 RT 4018.)

Crawford's testimony regarding Dalton's lack of remorse was inadmissible non-statutory aggravating evidence. Moreover, even if the testimony was admissible, its value was far outweighed by its prejudicial effect and the undue consumption of time and confusion the testimony engendered.

Respondent's four-page response is little more than a summary of what occurred at trial and the undisputed assertion that evidence of a

defendant's mental state is "clearly relevant." (RB 110.) Appellant has not argued that a defendant's mental state at the time of the crime is irrelevant as a circumstance of the crime. Rather, appellant contends that Crawford's testimony was elicited not as a circumstance of the crime, but to prove appellant's lack of remorse.

Respondent states that the fact that appellant "said she enjoyed the victim's screaming at the time of the offense" is admissible, even if gathered in response to the investigator's question whether appellant showed any remorse. (RB 111.) Appellant need not have expressed her mental state at the exact time of the crime. (*Ibid.*) In fact, Crawford did *not* say that appellant said she enjoyed the screams "at the time of the offense." Crawford was asked whether appellant expressed remorse and gave a response about appellant's state of mind six and one-half years after the crime.

The trial court and respondent rely on this Court's opinion in *People v. Gonzalez* (1990) 51 Cal.3d 1179, for the proposition that statements made after the offense can qualify as state of mind evidence. In *Gonzalez*, this Court observed that "the prosecutor did suggest as an aggravating consideration that defendant had shown lack of remorse by his defiant behavior when captured,[43] by his boasts to jailmate Acker about 'bagging a cop' who 'had it coming,' and by 'stick[ing] to' his gang attack defense." (*Id.* at p. 1231.)

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[43] During its case in chief, the prosecution had presented evidence that *at the scene of the crime*,

> [a]s defendant was taken by gurney to an ambulance, several officers observed him raise his left fist and say "Viva Puente." This was considered a defiant salute to the local street gang known as "Puente." Deputy Araujo also heard defendant hurl the epithet "puto," meaning "fag," at nearby officers.

(*Id.* at p. 1200.)

This Court did not rule that all of this evidence was admissible at the penalty phase, only that "[i]nsofar as the prosecutor was urging defendant's overt remorselessness *at the immediate scene of the crime*, the claim of aggravation was proper. Overt remorselessness is a statutory sentencing factor in that context, because factor (a) of section 190.3 allows the sentencer to evaluate all aggravating and mitigating aspects of the capital crime itself." (*Id.* at pp. 1231-1232, emphasis in original.) Significantly, this Court added, "[o]n the other hand, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*Id.* at p. 1232, citation omitted.)

In this case, Crawford's testimony regarding appellant's statements six and one-half years after the crime, unlike defendant's defiant gang salute immediately after the shooting in *Gonzalez*, did not amount to an overt act of remorselessness at the immediate scene of the crime. It was, at most, the inadmissible postcrime evidence of remorselessness.

Moreover, respondent does not even address appellant's argument that the value of Crawford's testimony was far outweighed by its prejudicial effect and the undue consumption of time and confusion her testimony engendered.

Even if Dawn Crawford testified truthfully, which appellant has disputed, she described an in-custody conversation that bore little indicia of reliability and could be dismissed as jailhouse puffing, rather than accurate reporting of a mental state experienced years earlier.

Further, an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is *above and beyond* the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 77-78.) Torture necessarily includes "the cold-blooded intent to inflict pain for

personal gain or satisfaction." (*People v. Steger* (1976) 16 Cal.3d 539, 546.) Appellant's subsequent statement, even if it reflected a mental state at the time of the offense, was not properly aggravating evidence above and beyond the elements of the torture special circumstance. It did not reveal an attitude toward the crime that was more remorseless than may be inherent in any torture-murder situation.

In addition, Crawford's testimony was so inflammatory that the defense was compelled to call five witnesses to testify regarding Crawford's reputation for dishonesty. They also called four witnesses from Las Colinas to testify that no one would talk about anything private in a cell because the guards might be listening and that a conversation made in a normal tone of voice could not be overheard from an adjoining cell. They called two investigators to testify that they entered adjoining cells at Las Colinas and could not hear someone speaking in an adjoining cell. In response, the prosecution called two witnesses to testify that they *could* hear someone speaking in an adjoining cell.

In all, ten witnesses testified in response to Crawford's 19 pages of testimony, consuming 139 pages of the 386 page penalty trial. This would seem to fit precisely within the definition of the type of collateral evidence that section 352 was designed to prevent from confusing and misleading the jurors.

This, in combination with the untrustworthiness of Crawford's testimony, required the court at least to consider weighing the probative value of Crawford's testimony against its prejudicial impact. It did not do so.

For all these reasons, the trial court committed prejudicial error in allowing Dawn Crawford to testify.

XIV.

THE COURT ERRED IN ADMITTING EVIDENCE THAT DALTON SPAT AT CODEFENDANT TOMPKINS DURING A PRE-TRIAL PROCEEDING.

Appellant has argued that the testimony of Tompkins' attorney, Athena Shudde, that during a pretrial court appearance appellant and Tompkins were speaking in hushed tones and then appellant spat in Tompkins' direction was inadmissible, irrelevant, prejudicial and should never have been presented to the jurors. (AOB 345-349.) Appellant acknowledged that a character witness may be questioned as to whether she has heard rumors or reports of wrongful acts of the defendant, because it is relevant to the witness' qualifications to speak on the defendant's reputation. (*People v. Caldaralla* (1958) 163 Cal.App.2d 32, 41.) The true inquiry, however, is general talk about the defendant, *not* the truth of the rumors. (*Michelson v. United States* (1948) 335 U.S. 469.) Respondent concedes this, stating that "the truth of the rumor is not as important as the community talk about the defendant." (RB 112.) Respondent does not, however, address appellant's argument that even if the prosecutor could question witness Coleman about "whether" she had heard that appellant spat on a codefendant, the prosecutor could not present affirmative evidence that appellant had spat on a codefendant.

A deliberate attempt by the prosecutor to introduce evidence of specific wrongful acts by inquiries as to knowledge of such acts is misconduct and is often held to be reversible error. (See *People v. McDaniel* (1943) 59 Cal.App.2d 672, 677.) In *McDaniel*, the court stated:

> Reputation is not what a character witness may know about defendant. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of him either by the witness or others. By no rule of evidence would plaintiff have been permitted to "prove the particular things," referred

to during the purported cross-examination.

(*Ibid.*)

In *People v. Caldaralla*, *supra*, 163 Cal.App.2d 32, defendant, charged with assault with a deadly weapon, called character witnesses who testified that he had a good reputation for "peace and quiet." On cross-examination, they were asked if they knew about several arrests for violation of the Alcoholic Beverage Control Act. On appeal, the court ruled that the subject of the questions was proper. "But they were not properly put. The witnesses were all asked whether they knew of the arrests, an improper form of the question since the inquiry is general talk about the defendant, *not the truth of the rumors*." (*Id.* at p. 41.)

Respondent's final argument is that any error was harmless. (RB 115.) However, as appellant stated in her opening brief, while the evidence on its own appears inconsequential, it must be viewed as part and parcel of the prosecutor's attempt to place appellant in the most negative light possible. Under such circumstances, it cannot be proved beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XV.

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

In her opening brief, appellant argued that Penal Code section 190.2 is impermissibly broad; the broad application of section 190.3 (a) violated appellant's constitutional rights; the use of unadjudicated criminal activity as aggravation, factor (b), violated appellant's constitutional rights to due process, equal protection, trial by jury and a reliable penalty determination; the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof; failing to require that the jury make written findings violates appellant's right to meaningful appellate review; the instructions to the jury on mitigating and aggravating factors violated appellant's constitutional rights; the prohibition against inter-case proportionality review guarantees arbitrary and disproportionate impositions of the death penalty; the California capital sentencing scheme violates the equal protection clause; and that California's use of the death penalty as a regular form of punishment falls short of international norms. (AOB 350-369.) Appellant has acknowledged that this Court has previously rejected similar claims of error, but urged the Court to reconsider them. Respondent relies on this Court's rejections of the issues without additional analysis. Accordingly, no reply to respondent's argument is necessary.

XVI.

THE TRIAL COURT ERRED BY REFUSING SEVERAL REQUESTED JURY INSTRUCTIONS.

Appellant has argued that the trial court erred in refusing to read several instructions requested by appellant. (AOB 370-378.) The defense requested and the trial court refused to give a proposed instruction defining life without possibility of parole (9 CT 1731), a proposed expansion of the factor (k) instruction (9 CT 1755-1756); a pinpoint instruction on mitigation (9 CT 1756-1757), a proposed expansion of CALJIC No. 8.88 to include that the jury could recommend a life sentence even in the absence of any statutory mitigating evidence (9 CT 1758-1759), and proposed mercy and sympathy instructions (9 CT 1759, 1761-1762).

Appellant has acknowledged that this Court has previously rejected some of these claims of error, but urged the Court to reconsider them. Respondent relies on this Court's rejections of the issues without additional analysis. Appellant believes that other points tendered in respondent's argument were anticipated and fully addressed in the opening brief and do not require further discussion here.

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XVII.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION.

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 379-381.) Respondent claims, without any substantial analysis, that any errors are harmless. (RB 124.)

As stated in the opening brief, appellant was convicted and sentenced to death based on hearsay and speculation. The specific errors in her trial that resulted in the introduction of the testimony of McNeely, Dr. Blackbourne, and Brakewood, as well as codefendant Baker's videotaped interview and the argument regarding Baker's guilty plea, were each, individually, serious and prejudicial. The combination of these errors, especially when considered in light of the erroneous rulings restricting impeachment and incomplete and inaccurate jury instructions, resulted in undisputable prejudicial error.

Appellant was denied a fair trial and due process of law, requiring reversal of her conviction. Reversal of her death sentence is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect the penalty verdict.

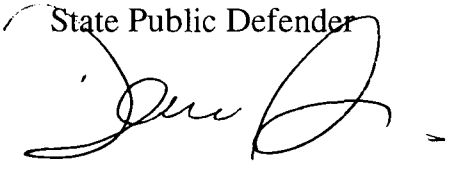
CONCLUSION

For all of the reasons stated above and in appellant's opening brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: June 9, 2009

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



DENISE ANTON
Supervising Deputy State Public Defender

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2)

I, Denise Anton, am the Senior Deputy State Public Defender assigned to represent appellant KERRY LYN DALTON in this Appellant's Reply Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 24, 996 words in length.

DENISE ANTON
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Kerry Lyn Dalton* Cal. Sup. No. S046848

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; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

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Each said envelope was then, on June 9, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with postage thereon fully prepaid.

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

Executed on June 9, 2009, at San Francisco, California.

DECLARANT