IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	**S097363**
Plaintiff/Respondent,	)	
	)	**Ventura County**
	)	**Superior Court**
v.	)	**CR-45651**
	)	
JUSTIN JAMES MERRIMAN,	)	
	)	
Defendant/Appellant	)	
	)	

Ventura County Superior Court Case No. CR45651
The Honorable Vincent J. O'Neill, Jr., Judge

APPELLANT'S REPLY BRIEF

Glen Niemy, Attorney at Law
Attorney for Appellant
P.O. Box 764
Bridgton, ME 04009
207-647-2600
Bar # 73646

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TO THE HONORABLE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Ventura Superior Court, Honorable Judge Vincent J. O'Neill Presiding

I. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION WERE VIOLATED BY THE PREDISPOSITION OF JUROR 1

A. Brief Summary of Appellant's AOB Argument

The penalty phase started on February 27, 2001. In the morning of March 5, 2001, the court informed counsel that it had received a phone call

from Juror 1, who indicated that she was seeking to be excused due to her daughter's serious illness. (AOB at p. 95) In addition, the trial court told counsel that it had been informed by a bailiff that Deputy Sheriff Kathleen Baker had had lunch with an unspecified juror and that there may have been a discussion of the case in which said juror told Deputy Baker that the jury was "going to fry" appellant. (62 RT 10935-10936.)

Due to the possibility of serious juror misconduct, a testimonial hearing was subsequently held. Deputy Baker testified that she was the sister-in-law of Juror 1's daughter and that she had become acquainted with Juror 1 from various family encounters. She further stated that Juror 1 had left a message with Deputy Baker's husband saying that she was going to be in Ventura and wanted to get together for lunch. Deputy Baker returned Juror 1's phone call. During that conversation Juror 1 told Deputy Baker that she had been on the Merriman jury for several months and "we all want to fry him." (AOB at p. 97.)

Juror 1 testified she left a message for Deputy Baker and Deputy Baker called back approximately two to three weeks *before* guilt phase deliberations. (62 RT 10951-10957; 63 RT 11197-98; 63 RT 11204.) During this conversation, the two made tentative plans to meet for lunch. (AOB at p.98.) Juror 1 recalled that during this conversation, Deputy Baker said something to the effect that "I hope you put him away," and Juror 1

replied that appellant would be "put away." She also stated that she had no independent recollection of the "fry him" comments, but that Deputy Baker had no reason to lie about such a thing. (AOB at p. 99.)

In denying a Motion for Mistrial due to the above facts, the trial court held that the conversation between Juror 1 and Deputy Baker was misconduct (63 RT 11380-11381), because Juror 1 had been admonished not to talk to anyone about the case. (63 RT 11381.)

Because Juror 1 had been excused from the jury, due to her daughter's illness, the trial court found the question of whether she prejudged the penalty to be moot. (63 RT 11381-11382.) The court found, *contrary to Juror 1's own testimony,* that jury deliberations had already begun and most of the verdicts signed when the conversation took place and that by that time, it was legitimate for the juror to begin to form an opinion of the case. (63 RT 11382.) Further, the court held that there was no indication that the juror was reacting to bias as opposed to evidence. (63 RT 11382-11384.)

The court then concluded that the presumption of prejudice had been refuted, basing this upon the credibility of Juror 1 and the overwhelming evidence of guilt. (63 RT 11384-11386.) After the verdict of death, the court denied a Motion for New Trial that included this claim of juror misconduct. (65 RT 11577-11578.)

In the AOB, appellant argued that Juror 1 committed prejudicial misconduct in two separate, but interrelated ways. First, on both the questionnaire and oral voir dire she failed to mention her relationship with Deputy Baker. This made it impossible to conduct the voir dire necessary to assure an impartial jury. (AOB at p. 106.) This was particularly important in this case, as the Ventura County Sheriff's Department had directly participated in the investigation of appellant's instant crimes and several sheriff's deputies would testify against appellant at his trial. The knowledge that a sitting juror had a familiar relationship with a Ventura County deputy sheriff would have been very important to appellant's counsel in deciding whether to challenge Juror 1, either for cause or peremptorily.

Secondly, appellant argued that the communication that Juror 1 had with Deputy Baker was juror misconduct that raised an unrebutted presumption of actual prejudice. (*In re Hamilton* (1999) 20 Cal.4th at p. 295; AOB at pp. 103-104.) The test as to whether such presumptively prejudicial misconduct will mandate the reversal of the guilty verdict is determined by this Court's holding in *In re Hitchings* (1993) 6 Cal.4th 97, 121. *Hitchings* stated that the verdict must be set aside if either (1) the circumstances attending the juror misconduct are inherently and substantially likely to have influenced the juror, *or as in this case,* (2) the

nature of the misconduct and surrounding circumstances indicate that it is substantially likely that the juror was actually biased against the defendant. Appellant argued that while only one of these tests had to be met, there was prejudicial bias under either test.

Juror 1 made clear that long before the case went to deliberations she had made up her mind as to appellant's guilt. Whether or not her bias was at least partially the result of her conversation with Deputy Baker, or not, before deliberations commenced she had ceased to be an impartial judge of the facts.

This Court has interpreted the United States' Constitution's mandate for an unbiased jury to mean that every juror must be unbiased or the jury is constitutionally infirm. (*People v. Nessler* (1997) 16 Cal.4th 561, 578.) As such, appellant was deprived of a fair trial. Participation of a biased juror is never harmless error and a new trial is mandated without a showing of actual prejudice. (AOB at p. 118; *Dyer v. Calderon* (9th Cir 1998) 151 F.3d 970, 973.)

B. Brief Summary of Respondent's Argument

1. Concealment of Information

Respondent argued that the reviewing court owes deference to the trial court's determination of factual disputes regarding juror misconduct.

Respondent urged that there was no prejudicial jury misconduct relating to Juror 1's concealment of her relationship to Deputy Baker. The trial court was convinced beyond a reasonable doubt that the failure of Juror 1 to reveal her relationship to Deputy Baker was understandable in light of their "distant relationship and infrequent contacts." (RB at p.100.)

Further, the trial court held that there was no hint of bias on the part of Juror 1 and no reason to think that she withheld information to get on the jury. (RB at p.100.) Respondent further argued that the trial court found that the reason why Juror 1 did not mention Deputy Baker on her questionnaire was that she had simply forgotten about her and that this finding merited deference from this Court. (RB at p.105)

2. Misconduct Arising out of Conversation

Respondent also argued that even though Juror 1 committed misconduct by discussing the case with Detective Baker there was no prejudicial misconduct. It argued that Juror 1 "did not receive any outside information about the case from Deputy Baker, who had no particular interest in the case" and that "appellant was not prejudiced by this brief exchange." (RB at p.105.)

Further, respondent argued that any conversation occurred during the latter part of deliberations, after most of the verdicts had been returned and at a time when the juror was entitled to have formed impressions of the

evidence. As such, the conversation was not "inherently and substantially likely to influence Juror 1." (RB at p. 102.) The court also said there was no evidence that the juror was reacting to bias as opposed to evidence. (63 RT 11382-11384.)

Respondent further argued the trial court's ruling that the exchange between the two women was not prejudicial was supported by the overwhelming evidence of guilt. In addition, it argued the court's ruling was supported by the fact that Juror 1 did not engage in any deliberative type conversation with Deputy Baker. (RB at pp.107-108.)

Further, respondent argued that the trial court also found credible Juror 1's assertion she remained open minded during the deliberations. and this finding of credibility was substantially supported by the record and hence, was entitled to deference on appeal. (RB at p.109.)

C. Appellant's Reply Argument

1. Juror 1's Concealment on her Questionnaire as Prejudice

It is axiomatic that one accused of a crime has a constitutional right to a trial by impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *In re Hitchings, supra,* 6 Cal.4th at p. 110; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.) This Court has long

held that "[t]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*Ibid,* quoting *People v. Galloway* (1927) 202 Cal. 81, 92.) Further, a defendant's right to a fair trial is violated even if only one of his jurors is biased. (*People v. Nessler, supra,* 16 Cal. 4th at p. 578.)

It is an undisputed fact that, for whatever reason, Juror 1's questionnaire did not reveal her relationship with Deputy Baker. Whether this omission was intentional, negligent, or simply a slip of the mind is not important. The bottom line is that appellant's counsel was left unaware that Juror 1 had both a social and familiar relationship with a Ventura County Deputy Sheriff. The trial court mischaracterized the relationship when it referred to it as "very distant." (63 RT 11379-11380.) The deputy was a relative through marriage whom she had seen multiple times socially. This is precisely the type of information of which appellant's counsel needed to be aware to properly exercise his peremptory challenges.

Regardless of the *reason* for the omission on the questionnaire, the *result* was the same. It is critical to this issue that Deputy Baker was a member of the same police force that not only was involved in the investigation of appellant's case, but was actually victimized by appellant. Appellant's counsel had every right to know this. Whether it would have justified a challenge for cause or not, counsel clearly stated to the court that

this juror would have been the subject of a peremptory challenge had counsel known of this relationship. (63 RT 11270.) No further proof is needed of the wisdom of such a challenge than what actually happened. The two women did indeed know each other well enough for this misconduct to have taken place.

The concealment bore upon a clearly material fact of the case: that a person, with whom Juror 1 was well acquainted and with whom she felt comfortable discussing the case, had predictable prejudices against appellant. (See *People v. Diaz* (1984) 152 Cal.App.3d 926, 931.) In any event, appellant's counsel had every right to be forewarned of this relationship so as to avoid the exact type of incidents of misconduct that occurred. Therefore, the act of concealment was, in and of itself, an act of misconduct on the part of the juror. According to *Diaz*, whether this concealment was intentional or inadvertent is irrelevant. (*Id.* at 938.)

As stated in *In re Hitchings, supra,* 6 Cal.4th at 111, "Without truthful answers on voir dire, the unquestioned right to challenge a prospective juror for cause is rendered nugatory. Just as a trial court's improper restriction of voir dire can undermine a party's ability to determine whether a prospective juror falls within one of the statutory categories permitting a challenge for cause a prospective juror's false answers on voir dire can also prevent the parties from intelligently exercising their statutory

right to challenge a prospective juror for cause.(internal citations omitted.)"

Hitchings further recognized that this type of concealment "eviscerate[s] a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial. We have recognized that 'the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury.'" (*Hitchings, supra,* at p. 111.)

The failure of counsel to be informed of Juror 1's relationship with Deputy Baker completely negated the purpose of voir dire in that it burdened appellant with a juror that he never would have accepted if he had known the truth.

2.The Existence of Actual Bias

While respondent emphasized the *effect* on Juror 1 of the conversation she had with Deputy Baker, this is secondary to the most obvious issue of actual juror bias in this case: that Juror 1 clearly made up her mind as to appellant's guilt prior to any deliberations and most likely before all of the evidence was presented.

During the March 6, 2001, testimonial hearing, Juror 1 initially stated that the pertinent conversation between herself and Deputy Baker might have occurred in February but then corrected herself to say that she

"had no idea" as to the actual day. (63 RT 11197.) Upon further questioning by the court, Juror 1 stated that her conversation with Deputy Baker took place "three weeks, a couple of weeks. I really don't know" before February13, 2001. (63 RT 11198.) She then stated that she thinks that the conversation took place sometime after her son-in-law returned home in late January. [1] (63 RT 112103.)

However, what the Juror knew for sure was that the conversation occurred prior to deliberations commenced. (63 RT 11204.) As a result of this testimony, it is indisputable that by the time Juror 1 stepped into the deliberation room, she was an advocate for guilt. This clearly violated the admonitions given by the trial court in accordance to Penal Code section 1122, forbidding the jurors from reaching any conclusions as to guilt prior to the case being submitted to them. (*People v. Zurica* (1964) 225 Cal.App. 2d 25, 34.)

This does not mean that the conversation between Deputy Baker and Juror 1 was not misconduct and did not further prejudiced Juror 1. However, the conversation was primarily *evidence* of the true prejudicial juror misconduct, the pre-judging of appellant by Juror 1.

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1. Witnesses were still testifying as late as February 7, 2001, and the jury did not get the case until February 9, 2001. (CT 1891; 2028.) While Juror 1 may have been somewhat uncertain as to the exact date of the conversation, it seems that it is highly likely that it took place when evidence was being presented and prior to arguments by counsel.

In *People v. Allen* (2011) 53 Cal.4th 60, 72, this Court discussed this issue in depth. The Court distinguished between juror statements of prejudgement made *during* deliberations and those made while evidence was still being presented. This Court held that it is virtually impossible to vacate a verdict because of statements of prejudgment made in the deliberation room. (*Id.* at 73.) However, when such statements were made during the actual presentation of evidence, this Court cited to *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 794 which stated that improper prejudgment can be shown by "flat, unadorned statement(s) that the juror prejudged the case long before the deliberations began and while a great deal of evidence had yet to be admitted."

While the statements of Juror 1 do not definitively establish that the conversation took place during the presentation of evidence, evidence was still being received only two days prior to the deliberations and Juror 1 was positive that the conversation took place *before* the deliberations. In any event, it is indisputable that Juror 1 had made up her mind before deliberations had begun.

Citing *In re Carpenter* (1995) 9 Cal.4th 634, 654, respondent argued that a juror should not be held to super-human standards and that no juror can rise to a level of perfection. (RB at p. 102-103.) However, respondent missed the point. *Carpenter* was a case where the possible misconduct of

the juror involved her receipt of information from an outside source. Such situations do not necessarily require the replacement of the jurors in question or the vacating of the verdict as long as the jurors in question could still maintain their impartiality. (*People v. Famalaro* (2011) 52 Cal.4th 1, 32.) *Carpenter* did not involve a juror who irrevocably made up her mind long before all of the evidence was heard or who entered the deliberative process with a closed mind. (See *People v. Wilson* (2008) 44 Cal.4th 758, 840-841.)

There is no ambiguity present, nor is it necessary to question Juror 1's character or basic honesty. It is not necessary for appellant to prove that Juror 1 harbored any malice toward him nor that she lied to the trial court in any way. The simple fact is that she violated her oath by closing her mind to the evidence, as well as violating the daily admonition of Penal Code section 1122 not to discuss the case with anyone outside of formal deliberations. The inconvenient truth that respondent seeks to avoid is that the Juror 1 simply chose not to restrict her exposure in this case to the evidence.

Regardless of Juror 1's hindsight glance that she kept an open mind during deliberation (RB at p. 97), her statements to Deputy Baker manifest her inability to perform her duties as a fair and impartial juror. This Court has made it clear that when a juror fails to comply with repeated

admonitions not to discuss the case, serious doubts are cast on her willingness to follow other court instructions, such as being a fair and impartial juror and deciding the case on only the evidence. [2] (*In re Hitchings* (1993) 6 Cal.4th 97, 120; see *People v. Leonard* (2007) 40 Cal.4th 1370, 1411; also *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1108 fn 6 (the court of appeals endorsed the trial court's instruction that refusing to discuss case outside of deliberations was a critical component to a fair trial.)

Juror 1's statements evidencing prejudgment cannot be brushed off as simply as a lack of perfection that naturally accompanies any system comprised of humans. It was indisputable that appellant did not have a jury of 12 impartial judges of the facts, hence, was deprived of due process of law. (*People v. Nessler,supra*,16 Cal.4th at p. 578.)

3. Respondent's "Overwhelming Evidence" Argument is Inapplicable to this Case

The trial court and respondent further misplaced its reliance on the "overwhelming" evidence presented by the prosecution to rebut the presumption of prejudice. (RB at pp. 107-108.) It has been held that, "in general, when the evidence of guilt is overwhelming, the risk that exposure

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2. The trial court stated that one of the reasons that he found that Juror 1 was not biased was that the entire jury had been admonished so many times as to the requirements of section 1122. (RT 11386.) In making this comment, this trial court completely ignores the fact that Juror 1, by her own admission, *did* disobey this admonition, which under law, only further casts doubt on her fairness.

to extraneous information will influence a juror is minimalized." (*People v. Tafoya* (2008) 42 Cal.4th 147, 192.) However, the factual situation in the instant case does not fit the general rule for the reasons stated below and the cases relied upon by respondent are not relevant to the instant fact situation.

The cases that speak to the effect of "overwhelming" evidence can be readily distinguished from the instant case in that in those cases the nature of the evidence had to be factored into the "substantial likelihood" standard to determine if there was juror bias. Each of these cases dealt with actual *factual information,* received by a sitting juror from an outside source and this Court's determination as to whether that information imparted to a juror constituted prejudicial misconduct. In *People v. Tafoya, supra,* 42 Cal.4th 147, the juror misconduct at issue was a penalty phase juror who briefly spoke to a priest about the Catholic Church's position on the death penalty. This conversation was neutral in that the priest told the juror that the Catholic Church believes in following the law of the land. (*Id.* at 193.) The juror related this to her fellow penalty phase jurors. The court removed the juror from the penalty phase jury and instructed the jury to disregard her remarks.

This Court held that in light of the neutrality of the remarks, there was "no inherent or substantial likelihood that the extraneous information influenced the other jurors or resulted in any juror's actual bias in rendering

the penalty phase." (*Ibid,* citing to *In re Carpenter, supra,* 9 Cal.4th at 653.)

In *Carpenter,* the misconduct consisted of a juror inadvertently learning, during the guilt phase, of the defendant's prior conviction for a related murder. The juror did not share this information with the other jurors. The jury convicted petitioner. However, there was no evidence that the juror had any actual bias toward the petitioner nor was there evidence to indicate an inherent bias. It was under this set of facts that this Court factored into the equation of prejudice the "overwhelming" nature of the evidence. This Court held that there was no indication that the juror decided the case upon anything other than the "overwhelming evidence" presented at trial, and further indicated that there was no substantial likelihood the juror was biased as a result of the extraneous information. (*Id.* at 656.)

In *In re Hamilton, supra,* 20 Cal.4th 273, it was revealed that one of the jurors who returned guilty and death verdicts against petitioner had some discussion about the case with her neighbors long before she was chosen as a juror. (*Id.* at p.286.) The discussion was brief and fairly neutral. There was no mention in the discussion that the juror in question thought that petitioner was guilty or deserved the death penalty. The juror never revealed this discussion to the court or counsel or fellow jurors. (*Id.* at p.287.)

This Court found there to be no prejudice to petitioner in that the discussion that the juror had was "brief, isolated and ambiguous" and there was no substantial likelihood that it would have created any actual bias in the mind of the juror. (*Id.* at 305.) In doing so, this Court weighed in the fact that the evidence was "very strong" as to petitioner's "brutal crimes." (*Id.* at 301, fn 21.)

The above cases made clear that the fact that the evidence presented against the accused was very strong or even "overwhelming" is only a factor to be considered in determining whether there was a substantial likelihood that the accused suffered prejudice because a juror had been contaminated by actual information from an outside source. Nowhere in these cases, or any others, is there even a suggestion that a trial in which it has been established that one or more jurors has an ongoing actual bias against a defendant is constitutional as long as the evidence against him is relatively strong.

Unlike the cases upon which respondent relied, this case was not about measuring the effect of outside information to determine whether there was outside bias. It is about an undisputed declaration of opinion of appellant's guilt prior to deliberations, and very likely prior to the close of evidence.

4. Summary

Juror 1 did not receive outside information from which actual prejudice can be established or inherent prejudice be inferred. No inference is necessary. In the instant case, the bias was established directly from the juror's own mouth. The juror's prejudgment as to the guilt of appellant were plainly stated. During the guilt phase of the trial she expressed her actual bias against appellant. She assured Deputy Baker that appellant would be convicted and "put away." It is not necessary to weigh whether, in light of the evidence, there was a substantial likelihood of prejudice. Juror 1 was actually biased against appellant.

This Court has long held that an accused's entitlement to an unbiased jury is grounded in the United States Constitution. (*In re Hamilton supra,* 20 Cal.4th at 293; United States Const., Amends VI and XIV.) This Court has interpreted this to mean that *every* juror must be unbiased for the jury to be constitutionally acceptable. (*People v. Nessler supra,* 16 Cal.4th at 578.) Appellant was not judged by such a jury and hence was deprived of his right to a fair trial, effective representation of counsel and due process of law under the California and United States Constitutions.

Therefore, the judgment against him must be reversed.

II. UNDER CALIFORNIA LAW, THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO SEVER COUNT I (THE MURDER COUNT) FROM THE BALANCE OF THE INDICTMENT

A. Brief Summary of Appellant's Argument

The joinder of the murder count with the other counts was erroneous and prejudicial in that the great majority of the evidence in the other counts had no relevance to the murder yet by its sheer volume and inflammatoriness completely overshadowed the relative weak evidence that appellant committed the murder. The fundamental nature of this irrelevant evidence was to present to the jury a portrait of man who deserved to be convicted of murder and sentenced to die, not so much for what he did on the night of November 29, 1992, but for certain traits of his character.

The capital crime in this case that resulted in appellant's death sentence involved the murder of Katrina Montgomery. If the prosecutor's two chief witnesses (Nicassio and Bush) are believed, appellant raped and murdered Katrina Montgomery after she voluntarily went to appellant's house for a reason only known to her.

There was no physical evidence connecting appellant to the crime. Ms. Montgomery's body was never recovered. No murder weapons were found. No DNA of the victim was discovered in the room where the murder allegedly took place. In addition, every single witness who testified

against appellant about the murder (1) was extremely biased against appellant; (2) received some sort of a beneficial deal from the District Attorney to testify; (3) was himself the possible murderer and/or (4) was part of a criminal gang that had absolutely no respect for the truth or the law.

The evidence as to the murder count was weak. Therefore, it was very advantageous for the prosecution to be able to prejudice appellant to such an extent that the jury would be predisposed to find appellant guilty of the capital crime. The trial court allowed the prosecutor to gain this improper advantage by permitting such improper joinder.

The trial commenced with evidence of the charges that arose out of appellant's arrest on January 30, 1998. (Counts 9-15.) Before the jury heard any evidence pertaining to the murder, they heard evidence that branded appellant as a person deserving of their disgust and moral condemnation.

This evidence, by itself, made it impossible for appellant to get a fair trial on the murder count and attendant special circumstances. However, this was just the beginning of a concerted effort by the prosecution and supported by the decisions of the trial court, to paint appellant as an individual deserving to be found guilty of the murder and sentenced to death irrespective of the weakness of the evidence in the capital crime.

The prosecutor was also allowed to join two unrelated sets of sexual

assault charges. (Counts 2-4 (Robin Gates) and Counts 5-9 (Billie Bryant.)) The alleged victims of these offenses had been in consensual relationships with Mr. Merriman. Their testimony was intended to, and did paint, a portrait of a man who did not hesitate to take advantage of women for his own gratification. The evidence pertaining to these sets of counts had scarce probative value as to the murder count. However, it was all too probative of the prosecutor's theory that appellant was a monster, as he referred to appellant in his summation. (57 RT 10127.)

The final set of counts that the court improperly joined to the murder count were counts 16-20, and the associated Penal Code section 186.22 criminal street gang allegation for count 16. While there might have been some limited relevance to this evidence as to consciousness of guilt, the probative value was completely outweighed by its prejudicial aspect of this evidence.

As the alleged conspiracy to silence witnesses (Count 16) involved members of appellant's gang, in support of the section 186.22 allegation the second half of the trial testimony was a long litany of the violent, racist and misogynistic activities and attitudes of the gang members, including the testimony of a prison gang expert who described their anti-social attitudes in detail. The jury was exposed to an in depth exposure to the world of "white power" organizations with Nazi sympathies, who treated woman like chattel,

despised blacks and Jews, and had no compunction against using deadly violence against their enemies.

Neither the evidence of the joined counts nor the uncharged acts bore significant probative value as to the murder of Ms. Montgomery. Instead, what this evidence did was prejudice appellant beyond the point where he could get a fair trial on the capital charge and violated appellant's rights under both California state law and the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

B. Summary of Respondent's Argument

Respondent argued that the joinder of the murder and non-murder counts met the statutory requirements of Penal Code section 954 because "all of the counts involved crimes of the same class of assaultive behavior and because the murder count was substantially linked to the resisting arrest and witness intimidation crimes in that the appellant attempted to avoid arrest and prosecution for the murder by committing those crimes." (RB at pp. 113-114.)

Since joinder of the counts was permitted under statute, to prevail upon this claim appellant must clearly establish below that there was a substantial danger of prejudice requiring that the charges be separately tried. (RB at p. 114.)

Regarding the joinder of Counts 2-8 with the murder charge,

respondent argued that the trial court was within its discretion in finding that the evidence in these counts would have been admissible in a separate trial on the murder count as to a propensity for sexual misconduct under Evidence Code section 1108, and to show rape and lack of consent, under Evidence Code section 1101 (b). (RB at p. 116.) Respondent stated this cross-admissibility would dispel any possible prejudice. (RB at p.115.)

Even if there was no cross-admissibility, respondent argued, appellant did not show danger that the joinder of these counts would create a substantial danger of prejudice to appellant according to the factors set forth in *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; RB at pp.118-119.)

Regarding counts 9-15, respondent argued that the evidence of appellant's flight from the police indicated consciousness of guilt of the murder. (RB at pp. 120-121.) As such, these counts would also have been admissible in a separate trial of the murder count. Respondent relied on the assumption that, at the time of these offenses, appellant was well aware that the authorities were looking to apprehend him for the murder charge. Again, respondent argued that even if the evidence was not cross-admissible, appellant failed to show the requisite degree of prejudice to mandate reversal of the judgment. (RB at pp. 121-122.)

Regarding Counts 16-20, the witness intimidation counts, respondent essentially made the same argument as to cross-admissibility and prejudice.

(RB at pp. 122-123.) In addition, respondent argued that the trial court cured any potential prejudice with a limiting instruction that any gang-related evidence admitted is only relevant to the gang allegation attendant to count 16 and that "appellant's efforts to fabricate or suppress evidence by themselves were not sufficient to prove his guilt in other counts." (RB at p. 123.)

Respondent argued that none of the counts that were joined were as inflammatory as the allegations of Count 1.

C. Appellant's Reply Argument

Appellant was tried, convicted, and condemned to death for the murder of Katrina Montgomery. However, the majority of the evidence presented at his trial spoke to who he was as a person, rather than what he did or did not do to Ms. Montgomery.

After hearing the evidence not related to the murder, capital offense, there was no way the jury could have separated this evidence from the evidence of the actual murder. They did not learn about this in the normative penalty phase, but in guilt phase itself. They saw before them a person whose severe mental impairments made him capable of almost anything, including murdering Katrina Montgomery.

However, none of this evidence was at all relevant to what happened in the early morning hours of November 29, 1992. The percipient evidence

of appellant's guilt of the murder came predominately from two young neo-Nazi gangsters, both of whom were suspected by the police of having a direct role in Ms. Montgomery's death. There was no forensic evidence of appellant's involvement in the crime and no incriminating statements by appellant to the authorities or credible witnesses.

What respondent dismissed as evidence unlikely to prejudice the jury in any meaningful way was, in fact, an overwhelming array of appellant's misdeeds, politically incorrect opinions, and racial politics that had nothing to do with the murder, yet, taken as a whole, would so prejudice any rational jury as to make guilty the only possible verdict.

This prejudicial effect of this evidence cannot be analyzed by examining each particular incident in a vacuum to see if each, standing alone, caused the requisite prejudice to require a reversal. This evidence must be examined as a whole. When this is done it revealed a prejudice that is truly incalculable. Respondent centered much of its prejudice argument on whether an individual incident or crime presented "more inflammatory" evidence than the murder itself, essentially reaching the conclusion that nothing is more inflammatory than a rape culminating in murder. (RB at p. 118.) However, as this Court stated "prejudice is a highly individualized exercise necessarily dependant upon the particular circumstances of each individualized case." (*People v. Balderas* (1985) 41 Cal.3d 144,173.)

Therefore, the analysis must focus not upon some inevitably arbitrary and subjective assignment of relative heinousness to each set of offenses. Instead, the inquiry must rest upon the aforementioned highly individualized evaluation of whether or not the joint trial of two or more sets of charges would have produced in appellant's jury a tendency to convict appellant of the murder because the joint trial of all of the crimes unfairly preyed upon the jury's emotions, convincing them that appellant is the type of person that would commit murder.

Using the above practical and Court approved application of the concept of inflammatoriness, it is difficult to conjure up a situation where joinder would produce a degree of reversible prejudice equal to this case. In the instant case, the number, diversity and morally disturbing nature of the evidence of the non-murder counts could have had no other effect than to convince the jury that appellant was capable of virtually any type of violent crime. The sheer volume of this evidence was overwhelming in both volume and content. In no other reported case where joinder was not based upon cross-admissibility was there evidence of so many unrelated alleged crimes and anti-social behaviors as in this case. (See, e.g., *People v Mason* (1991) 52 Cal.3d 909; *People v. Sandoval* (1992) 4 Cal.4th 155; *People v. Mendoza* (2000) 24 Cal.4th 130; *People v. Balderas* (1985) 41 Cal.3d 144; *People v. Bean* (1988) 46 Cal.3d 919; *People v. Musselwhite* (1998) 17 Cal.4th 1216.)

An individualized and pragmatic analysis of this improperly joinded evidence, and its effect on the jury, follows.

Counts 9-15

The evidence as to these counts started with an incident that occurred over five years after Ms. Montgomery disappeared. This testimony had nothing to do with neither rape nor murder. Instead, it was a extended look into appellant's character and behavior that introduced him to the jury in such a way that inevitably created in their minds "an overstrong tendency to believe the defendant guilty of the charges merely because he is a likely person to do such acts."

Respondent argued that this evidence was cross-admissible and would have been admissible at a separate murder trial in that defendant's flight from the police evidenced appellant's consciousness of guilt of the murder charge.

This claim is highly speculative, at best. The evidence only indicated that Deputy Sheriff Jesse Howe noticed appellant and a woman on bicycles stopped on Ventura Avenue. The officers approached these two individuals, because their bicycles had no illuminated headlight. (36 RT 6274-6275.) Upon seeing the two officers, the bicyclists attempted to leave the scene. (36 RT 6274-6275.)

Deputy Howe identified himself as an officer and ordered appellant to

stop but appellant pedaled away rapidly, telling Deputy Howe to "leave me the fuck alone." (36 RT 6275-6276.) The two bicyclists pedaled away and the deputy sheriffs chased appellant. (36 RT 6313.)

Appellant had an unpleasant history with law enforcement that started long before November 29, 1992 and continued through that evening of his arrest. There are any number of more logical reasons why appellant may have fled the police which had nothing to do with his consciousness of guilt of the murder.

Nevertheless, appellant will assume, for the sake of this argument, that appellant ran from the police to avoid arrest for the murder charge. In such a case, evidence of the initial flight would have been admissible in a separate trial for murder. However, the events that followed the initial flight served no other purpose than to instill in the minds of the jurors that appellant was the type of individual who likely committed the rape and murder of Ms. Montgomery.

These events, taken as a whole, were of the most inflammatory nature with no concomitant probative value of any issue relating to the murder counts. They initially included appellant defying lawful police orders, pulling a gun on the officers and threatening to kill himself. As the testimony progressed the jury heard how appellant, while under the influence of drugs, broke into a home, destroyed much of its contents

including irreplaceable family heirlooms, and placed its occupants in extreme danger. (AOB at pp 155 et seq.) Further, his ultimate arrest was accomplished only after a large contingent of police officers had to subdue appellant. (*Ibid.*)

If the prosecutor's true intent was to simply show that appellant's flight was circumstantial evidence of his guilt, all that needed to be shown was that he rode off when Deputy Howe first approached him. The rest of the highly prejudicial evidence proved absolutely nothing vis a vis the murder[3], yet strongly biased the jurors against appellant to the extent that before the evidence of the murder was even presented, the jury learned that he was exactly the type of human being that was more than capable of killing Ms. Montgomery.

Respondent's citation to this Court's holding in *People v. Valdez* (2004) 32 Cal.4th 73, 120, is unavailing. (RB at p. 121.) In *Valdez,* this Court affirmed the trial court's decision to join a murder count with an escape count arising from defendant's attempt to escape from custody for the murder. This Court held that the two counts were joined together in their

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3. Respondent claimed that appellant's comment that he was going to "go out with a bang" while in the Trembley-Rail house indicated that he would rather be killed by the police than be tried for the murder. (RB 120) Therefore, it would have been cross-admissible. This interpretation by respondent is nothing but conjecture. Such a statement could have meant any number of things and is not justification for the admission of such obviously prejudicial evidence.

commission and the evidence of the escape would have been admissible in a separate murder trial.

However, *Valdez* can be easily distinguished from the instant case in two vital aspects. Firstly, no speculation was necessary to prove that the escape was indeed directly related to the murder, as defendant was in custody for the murder itself. There was absolutely no ambiguity in the object of the escape. This was opposed to the instant case where the "escape" did not occur until 5 years after the murder, itself. Secondly, the evidence of the escape in *Valdez* did not show anything more than defendant's attempt to flee, hence, was not replete with the type of evidence presented to the jury in this case; evidence unrelated to the murder count but directed to showing the jury that appellant was a generically dangerous, immoral person.

Respondent also cited to *People v. Arias* (1996) 13 Cal. 4th 92, 127-128 to support its contention that the joinder of Counts 9-15 with the murder count was proper. Once again, this case can be distinguished from the instant case for the same reasons as *Valdez*. In *Arias,* there were two sets of counts: one set involving a murder of a gas station attendant (the Beacon crimes) and the other the kidnaping, robbery and sexual abuse of a young woman, Judy N. 13 days later.

As this Court noted, there was evidence that the kidnaping and

robbery of Judy N. was impelled by defendant's need for money and transportation to escape apprehension for the Beacon crimes. Hence, the murder incident supplied evidence of motive for the robbery and kidnaping, which in turn indicated consciousness of guilt in the murder matter.

Moreover, the court cited the prosecution's representations that during Ms. N.'s ordeal, defendant terrorized her with repeated death threats, boasting that he had killed before and it would not bother him to kill again. Such statements, the court reasoned, would be competent circumstantial evidence of defendant's identity as the killer of the gas station attendant.

In *Arias,* like *Valdez,* there were two discrete sets of counts, that occurred in close temporal proximity and had a direct relationship with one another. They did not involve voluminous evidence that essentially spoke to character and nothing else. It cannot be overly stressed that respondent failed to address the practical prejudicial implications of the admission of the non-murder evidence. Instead, it simply cited to generic cases that had no factual similarities to the instant case.

Counts 16-20

Appellant concedes that some reference of appellant's alleged attempt to dissuade witnesses from testifying is relevant as consciousness of guilt as to the murder count. However, as in the discussion of Counts 9-15, what should have been a limited proffer of evidence turned into a torrent of

irrelevant, overwhelmingly prejudicial evidence. The evidence revealed selective negative aspects of appellant's character and attitudes for the greatest part irrelevant to the murder that revealed every aspect of appellant's dysfunctional life *except* for the murder itself. This included evidence of gangs, racism and other violent crimes that so far outweighed any probative evidence of consciousness of guilt that the inference of prejudice cannot be dispelled.

It was to a large extent the gang enhancement to count 16 that opened to door to this evidence which was totally irrelevant to the murder yet so damning to appellant. Count 16 was a conspiracy to dissuade a witness by force or threat. The special allegation was that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang, to wit, the Skin Head Dogs, with the specific intent to promote, further and assist in criminal conduct of gang members on or about January 6, 1998, to May 20, 1999. (Count XVI; P.C. sections182 (a) (1),136.1 (c) (1), and 186.22)

This allegation, which, on the surface, appeared to be almost an afterthought in comparison to the lead count, became a vehicle that the prosecutor used to transmit to the jury the history of the Skin Head Dogs both in and out of prison and appellants role therein.

Over the years, this sort of "gang" evidence has been subject to

particular scrutiny by this Court. Due to its highly prejudicial and inflammatory nature, this Court has condemned the use of such evidence unless it is more than tangentially relevant to the charged offenses. (*People v. Cox* (l991) 53 Cal.3d 616, 630.) This Court has further held that in cases not involving specific gang enhancements, evidence of gang membership should not be admitted. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Therefore, the illegal joinder permitted the introduction of evidence that would not otherwise be allowed under the law.

Even if such gang evidence can be said to be somewhat relevant to prove an issue pertinent to the guilt of a charged crime, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

In the instant case, neither the murder, rapes nor any of the other substantive offenses charged were related to gang activity. The rape and murder of Ms. Montgomery was not a gang activity, nor was it done to further any gang purpose. However, the prosecutor's presentation throughout the entire case emphasized every possible aspect of appellant's relationship with certain racist gangs and the acts performed in their name. The problem here is not so much the inflammatory nature of the joined counts but the inflammatory evidence that was attendant to the joined non-murder counts.

This evidence was predisposition evidence at its worse and was expressly forbidden by Evidence Code 1101(a), which prohibits evidence of a defendant's character if used to prove his actions on a specific occasion. There were dozens of letters that illustrated appellant's gang contacts, unpopular political and social beliefs, racism, bigotry, use of drugs, violent nature, lack of respect for the system and willingness to use other people to suit his ends. Appellant's Opening Brief discussed in detail the nature of this evidence that had nothing at all to do with what appellant did to Ms. Montgomery, yet could not have helped but shock the jurors into a profound anger and bias against appellant. Respondent did not address the likely cumulative impact of this evidence on the jury. It simply concluded this evidence was both cross-admissible to the murder charge and not "inflammatory" in comparison to the murder, itself.

Respondent was wrong. The evidence was probative of the fact that appellant was a "neo-Nazi," with all of the attendant hateful bigoted implications spelled out in detail. (AOB at p.158.) Once this was established, the prosecutor wandered even farther afield, proceeding to expand his inquiry into the subject of the tattoos that appellant and his fellow gang members sported, including tattoos that proclaimed their allegiance to "white power" and their devotion to Adolph Hitler. (AOB at p. 159.)

The improper joinder of these accounts also allowed expert testimony

describing in great detail the prison origin of the Skin Head Dogs. (AOB at p.160.) Neither appellant's devotion to Nazi philosophy nor the detail of the prison origins had any meaningful relevance to the actual murder of Ms. Montgomery. The only possible connection was to provide a motive, not for appellant, but for his fellow gang members to cooperate in the silencing of the witnesses. However, as in Counts 9-15, while a very brief presentation as to the basis of the binding ties between appellant and his co-conspirators might have been appropriate, the joinder of counts paved the way to the introduction of evidence that never would have been allowed at a separate murder trial.

Respondent's dismissal of this evidence as non-inflammatory and non-prejudicial cannot be supported by any rational reading of the facts. The sheer volume of this irrelevant evidence prevented appellant from receiving a fair trial on the count that sent him to death row. The same jury that was charged with determining whether to believe Nicassio and Bush and convict appellant of capital murder was "aided" in their task by days of testimony relevant only to irrelevant aspects of appellant's character. Scott Porcho testified at length as to the origins and nature of this gang. He was allowed to regale the jury with tales of appellant's character, attitudes, and associations that bore no relevance to Ms. Montgomery's murder. (39 RT 7000.) Porcho then recounted his own criminal record, which was nothing less than an

attempt by the prosecutor to urge the jury to find appellant guilty by association. (39 RT 7000-7001.)

Porcho then further described the violence that would be used against persons that cooperated in any way with the police. (39 RT 7004.) Moreover, he further described the completely irrelevant "jumping in" rituals by which a new aspirant would have to be beaten up to become a member. (39 RT 7020.) Porcho further testified that appellant was a leader of the gang. (39 RT 7022.)

In addition to the state law relevance considerations, the High Court has noted several times that evidence of gang activity and membership should not be presented to the jury unless it possesses clear probative value to the crime charged as evidence of a defendant's abstract beliefs and associations are protected by the First Amendment. (*Romano v. Oklahoma* (1994) 512 U.S. 1,10; *Delaware v. Dawson* (1992) 503 U.S. 159, 162; *Wisconsin v. Mitchell* (1993) 508 U.S. 476, 486.) Much of the evidence presented in the instant case fell under the purview of these cases.

This evidence improperly presented to the jury a very selectively limited portrait of a violent, racist individual, given to ordering and participating in acts that prejudiced him in the eyes of the jury. Further, as part of the evidence of the special allegation to the improperly joined Count 16, the prosecutor was permitted to call an expert witness, Wesley Harris,

who led the jury to a place completely remote from what happened to Ms. Montgomery on November 29, 1992.

Mr. Harris's testified that many street gangs originated in state and federal prisons, clearly implying, without any personal knowledge, that as a leader and "shot caller of the Skin Head Dogs," appellant was an old hand at prison gang politics and violence. (Vol 47 RT 8412; Vol 47 RT 8421-8424.) Mr. Harris also emphasized the violent nature of prisons gangs, in general, and how that violence would be used to silence "rats." (*Ibid.*) Yet another gang expert, Mark Volpei, further educated the jurors as to the internal structure of the Skin Head Dogs and their culture of hate, violence and retribution. (Vol. 48 RT 8589-8591.) He also detailed the violent crime convictions of the members of appellant's gang, yet another urging to the jury to find appellant guilty by association of the murder of Ms. Montgomery. (48 RT 8577-8588.)

In spite of all of this, respondent continues to claim that the jurors in this case entered their deliberations for the capital counts with the presumption of innocence firmly in place and their minds solely on the evidence of the murder. That the judge instructed the jury to consider each count separately meant nothing in light of the overwhelming negative evidence they had concerning appellant's proclivities and attitudes.

There would have been reversible prejudice against appellant had this

sort of disposition evidence had stopped here. However, it did not.

This content generally presented appellant in such a extraordinarily negative light that his conviction on the murder count was assured. None of this evidence would have been admissible if the murder count was tried alone.

It is unimaginable that this irrelevant evidence of appellant's attitudes would not have inflamed the jury beyond the point of combustability. One can only imagine the reaction of a trial court if the prosecutor attempted to introduce appellant's racial or sexual attitudes or his admiration of Hitler in a separate trial for murder. None of this evidence has more than a passing familiarity with the murder of Ms. Montgomery. Yet through the improper joinder of Counts 16-20, the prosecutor was allowed to do that, and much more.

Therefore, the largest part of the evidence justified by the inclusion of the gang enhancement was irrelevant to the murder of Ms. Montgomery, as her killing had nothing at all to do with gangs. The lack of connection to the crime and its extraordinary prejudice to appellant mandated its exclusion. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1049.)

The jury brought into the deliberation room with them not a man protected by the presumption of innocence but a person whose attitude and beliefs warranted his conviction regardless of the evidence. In this lies the prejudicial error.

Counts 2-8

Respondent claimed that the evidence of sexual assaults on Robyn Gates (Counts 2-4) and Billie Bryant (Counts 5-8) would have been admissible at a separate trial on the murder count, therefore appellant suffered no prejudice from their joinder. (RB at p.115) It also argued that even if said evidence was not cross-admissible, its inclusion in a joint trial did not unduly prejudice appellant under the test in *People v. Bradford.* (RB at p.116.)

Respondent was wrong in both respects. The evidence of these otherwise irrelevant counts simply added to the tsunami of highly prejudicial evidence that had very little to do with the capital count yet washed away any hope of appellant being judged fairly by the jury.

In arguing that these Counts were cross admissible, respondent stated,

> Appellant followed a very similar pattern of sexual abuse against all of his victims. For example, he targeted young women who were "skinhead groupies," were his friends, had alcohol and/or drug abuse problems, and were not inclined to seek law enforcement help against appellant due to fear of or loyalty to SHD. Katrina, Robyn, and Billie all made bad or tragic decisions to be with appellant under circumstances that rendered them vulnerable to his sexual assaults. He forced them to engage in multiple sex acts (usually rape and oral copulation) for a prolonged time (probably due to his failure to ejaculate),even if they complained about vaginal or mouth pain. The victims did not fight him back but, instead, submitted out of fear. Appellant treated the women as objects

> that belonged to SED. During the sexual assaults, appellant was not inhibited by the presence of third parties, whom he deemed loyal due to their gang affiliations. Appellant ended up killing Katrina because he believed that she, unlike the other victims, would have ratted on him. (RB at pp. 115-116.)

In his AOB, appellant fully discussed why Counts 2-8 were not cross-admissible under Evidence Code section 1101(b) and 1108) and it will not be repeated herein. However, the above self-contradictory passage from respondent's brief reenforces appellant's position. Respondent claimed that the similarities between the murder count and counts 2-8 rest in the nature of the victims. According to respondent, all were easily intimidated "skinhead groupies" whom appellant could abuse however he liked because there was no chance that they would "rat" on him to either the gang or police authorities. Yet in the very same paragraph, respondent urges upon this Court that the reason why only Ms. Montgomery was killed was because appellant *could not* count on her silence, presumably because she was not at all similar to the victims in counts 2-8.

Therein lies the fatal flaw in respondent's argument. While there was evidence presented that Ms. Montgomery, to some extent, led the gang life, there was no evidence presented that she was so under appellant's sway that he could count on her to submit to his advances. In fact, the prosecutor went out of his way to demonstrate that Ms. Montgomery had in the past rejected appellant's sexual overtures. In Argument V of the AOB, appellant objected

to the improper admission of Ms. Montgomery's alleged spontaneous admissions as to two separate incidents during which appellant allegedly attempted to force himself upon her. (RB Argument V, infra.) According to the prosecution, in both of these incidents Ms. Montgomery's words and actions made it perfectly clear that she was not a "skinhead groupie" as were Ms. Gates and Ms. Bryant, never sought his sexual companionship and certainly could not be counted upon to meekly submit to satisfy appellant's sexual needs.

Yet, the same respondent who in Argument V wants to show the jury that Ms. Montgomery was a "good girl" who fought off appellant as best she could, in *this* Argument wants her labeled as a "skinhead groupie" to facilitate its argument that the counts should not have been severed due to the inevitable cross admissibility of evidence due to the similarity of the victims.

Unlike the victims in counts 2-8, there was no evidence that appellant and Ms. Montgomery ever had any sexual relationship. Further, there was no evidence that Ms. Montgomery had "drug or drinking problems," other than for the fact that she was drunk the night she disappeared. There was no evidence that she submitted to appellant for any other reason than most rape victims submit; that they are being physically overwhelmed. In fact, on two prior occasions, Ms. Montgomery escaped from appellant when he tried to

force himself upon her. (Argument V, *infra.*)

As fully discussed in the AOB, these fundamental differences in the nature of the victims and circumstances of the assault defeat respondent's argument that Counts 2-8 would have been cross-admissible in a separate murder trial. There are insufficient similarities between the facts of counts 2-8 and the murder count to invoke the use of Evidence Code section 1101(b) for either intent, common plan or scheme or identity. The alleged circumstances surrounding Counts 2-8 involve the participation of appellant's then-current sexual partners who would never have reported these acts to the police. The circumstances of the murder count rested on a crime of opportunity and a murder to either cover up that crime or a rage reaction against the victim.

Respondent also claimed that the application of Evidence Code section 1108 would have also made the incidents that were the basis of counts 2-8 admissible in a separate trial for the murder of Ms. Montgomery, thereby defeating appellant's argument of joinder error.

Under section 1108, trial courts retain broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value. (*People v. Falsetta* (1999) 21 Cal.4th 903, 919.)

As stated in *People v. Story* (2009) 45 Cal.4th 1282, 720,

> Trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

In addition, it also must be taken into account as to whether or not the other sexual offenses resulted in a prison term "so the jury would not be attempted to convict defendant just to punish him for these other offenses, and that the jury would not be diverted by having to make a separate determination whether the defendant committed the other offenses." (*People v. Falsetta, supra*, 21 Cal.4th at 917.) In addition, this Court has held that the trial court must consider whether or not there was any independent evidence of the sex crimes committed under the umbrella of Evidence Code section 1108. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1287.)

The abuse of the trial court's discretion in its admission of this evidence lies in the above directions from this Court. Neither the Gates nor Bryant counts were related to the police when they occurred. Both sets of counts seem to be the product of the government seeking as much prejudicial information against appellant as possible, as opposed to the product of

reliable witnesses coming forward. It is highly unlikely that either of these crimes would have ever been charged had not appellant been charged with murder.

Further, there is no independent reliable evidence to indicate that these crimes ever occurred. The Gates incidents occurred in late 1994-early 1995 and were little more than a snapshot taken at a given time of a very odd, yet predominantly consensual relationship, between appellant and Ms. Gates. (42 RT 7484; 7510.) On the occasion in question, she found herself with appellant below decks in a boat owned by her father. She was there voluntarily, with the expectation of sex and drugs. (42 RT 7486-7490.) According to Ms. Gates things turned rough. (42 RT 7492-93.)

Similarly, Ms. Bryant's relationship with appellant was a drug-fueled, mostly consensual affair. Once again, she never reported the incidents that would later become counts 5-8 of this indictment to the police. There were no independent witnesses. As with the counts relating to Ms. Gates, the inclusion of these incidents in the indictment were driven by the police investigation of the murder, not the complaint of the alleged victims.

In short, it is highly questionable that these offenses were committed at all. Certainly, if not for the fact that appellant was charged with murder years after their commission, they never would have seen the pages of a

police report, let alone the inside of a courtroom. *Falsetta's* admonitions as to the care that should be taken to avoid jury confusion and distraction apply to the instant case. According to the law of Ev. Code 1108, these ephemeral incidents would not have been allowed as evidence in a separate murder case, ergo, should not have been joined as they are obviously highly prejudicial to the murder count.

III. THE JOINDER OF THE NON-MURDER COUNTS AND THE MURDER COUNT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's Argument

Not only did the improper joinder discussed in Argument II violate California law, it also deprived appellant of his right to due process of law under the United States Constitution. The United States Supreme Court has recognized due process protections not specified in the Bill of Rights, holding that any trial error that fails to ensure fundamental fairness in the determination of guilt violates the Due Process Clause of the United States Constitution as it applies to the states. (*Albright v. Oliver* (1994) 510 U.S. 226, 283; *Estelle v. McGuire* (1991) 502 U.S. 62, 68.) As stated by this Court, trial court error that made the trial fundamentally unfair violates federal due process rights. (*People v. Partida* (2005) 37 Cal.4th 428,436.)

In the instant case, the joint trial of the various counts of the

indictment resulted in the type of fundamental unfairness that violated the due process clause. (*Park v. California* (9th Cir 2000) 202 F.3d 1149.) Further, appellant contended that as applied in this case, the admission of evidence under Evidence Code section 1108 violated the Due Process Clause of the United States Constitution in that it created a fundamentally unfair paradigm in which a defendant's charged and uncharged sex offenses served to unconstitutionally prejudice him as to the murder count in the eyes of the jury.

The improper joinder of the murder and non-murder counts substantially prejudiced appellant and violated his right to due process of law and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. (*Bean v. Calderon* , *supra,* 163 F.3d at p. 1084.) A trial court violation of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.)

B. Summary of Respondent's Argument

Respondent recognized that if appellant was able to show that a joinder of counts actually resulted in "gross unfairness" amounting to a denial of due process or rendered the trial fundamentally unfair, he would be entitled to reversal of his conviction for murder. (RB at p. 126.) However, respondent argued there was no prejudicial error in denying appellant's

severance motion and trying the counts together due to the cross admissibility of the evidence and the lack of improper "spillover effect" from the non-murder counts to the murder count. (*Ibid.*)

Respondent further argued that contrary to appellant's assertion, the prosecutor's argument did not improperly encourage the jury to consider the charges in concert. (RB at p.126.) It was further argued that appellant's due process challenge to Evidence Code section 1108 has been rejected by this Court.

C. Appellant's Reply Argument

The due process clause of the United States Constitution is violated by the simultaneous trial of more than one offense actually rendered the trial "fundamentally unfair." (*Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 638.) Pursuant to this constitutional mandate, this Court has held that even if there was no error in granting a motion for joinder, the reviewing court must still determine whether, by the end of the trial, joinder of the counts resulted in a gross unfairness depriving defendant of federal due process. (*People v. Rogers* (2006) 39 Cal.4th 826, 850.)

While the courts have not given a practical definition of gross unfairness in these type of cases, one thing does differentiate this case from the cases cited by respondent. The sheer amount of evidence that was extraneous and fundamentally irrelevant to the central murder charge

dwarfed anything in the cases cited by respondent. For the greatest part, the cases cited by respondent involved the joinder of two sets of similar and clearly related crimes that transpired on temporally proximate occasions. (*People v. Soper* (2009) 45 Cal.4th 759, 783 (two murder cases joined); *People v. Rogers*, *supra,* 39 Cal.4th at pp. 850-853); (*Davis v. Woodford, supra,* 384 F.3d at pp. 634-336 (sexually motivated murder and attempted rape); *Webber v. Scott* (11th Cir. 2004) 390 F.3d 1164, 1176- 1179 (evidence of two sets of sexual offenses cross-admissible to one another to show common plan or scheme); *Sandoval v. Calderon* (9th Cir 2000) 241 F 3d. 765, 772 (retaliation murder of a witness to the joined crime.)

In these cited cases, the different sets of crimes were *directly* related to one another and were clearly cross-admissible to one another. For example in *Soper,* the two sets of crimes involved the killings of two homeless men in a common plan or scheme. In *Webber*, both sets of crimes involved child molestation and the evidence of one was employed by the prosecutor to counter the defense claim in the other of innocent horseplay. In *Sandoval,* one set of crimes were committed in retaliation on a witness for speaking to police about the second set of crimes. *Davis* involved two related sets of sexual offenses occurring within a very short time of each other on the same day.

The circumstances in the instant case can easily be distinguished. As

stated above, this case stands alone in the sheer volume of highly prejudicial evidence that had scant relationship to Ms. Montgomery's murder. The incidents underlying the joined counts took place years after the murder and had no factual nexus with it.

The courts have recognized that the risk of undue prejudice is particularly great when the joinder of counts allows other inadmissible evidence to be admitted against a defendant. (*Sandoval v. Calderon* (9th Cir 2000) 241 F3d 765, 772.) The requisite level of prejudice is reached "if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict." (*Davis, supra*, 383 F.3d at p. 638; *Park v. California* (9th Cir 2000) 202 F.3d 1149.)

Park discussed this issue in terms of whether or not the jury was able to "compartmentalize" the different counts as to the extent that they were able to decide each one individually on the evidence presented. (*Park* at 1149-1150.) In *Park*, the court held that the fact that the jury did not convict on all of the jointed counts was proof that it remained able to separate the counts from one another. Clearly, that was not the case here.

Even if this Court feels that the trial court was initially correct when it granted the motion allowing all of the counts to be tried together, the end result was a trial where the jury's view of the actual evidence of the capital crime was hopelessly entangled with the evidence of appellant's *character,*

evidence not having even an arguable basis of admissibility under Evidence Code sections 1101(b) or 1108. Appellant was on trial for his life for Ms. Montgomery's murder, not for the fact that he had character flaws or unpopular beliefs.

Through the admission of the evidence relating to Counts 9-15, the prosecutor was able to take the jury on a guided tour of any number of appellant's prejudicial acts which not only had virtually nothing to do with the murder count but occurred over *five years* after Ms. Montgomery disappeared. The jury heard how appellant went on a rampage through a residential neighborhood, armed with a gun threatening the police and residents, and engaging in a variety of bizarre and scary behavior.

What compounds the prejudice of this evidence vis a vis the murder charge and special circumstances was that all of it was admitted *before* a single piece of evidence related to the murder was introduced. By the time the prosecutor called any of his highly questionable gangland witnesses to testify as to the murder, two things had occurred. Firstly, appellant had essentially been stripped of his presumption of innocence and, secondly, the credibility of the upcoming otherwise inherently incredible witnesses had been greatly enhanced. Practically speaking, the chances of appellant receiving a fair trial on the capital count was reduced to zero before any evidence relevant to the murder was admitted.

If anything, the joinder of Counts 16-20 had even a more profoundly prejudicial affect. The nature of this evidence was discussed in painstaking detail in Argument II. The evidence presented did not stop at the fact that appellant was involved in gang activities. The affect of this on the jury would have been prejudicial enough. However, this evidence proceeded to laboriously detail appellant's anti-social and at times utterly bizarre *character and beliefs*.

The prosecutor took advantage of the joinder to expose appellant's jury to his repulsive "poetry," vulgar comments on homosexuality, unalloyed respect and admiration for Adolph Hitler, utter contempt for women and any number of ruminations that the jury could only find utterly repulsive.

Further, the jury was exposed to the inner workings of appellant's skinhead gang. If the murder was a gang-related murder, perhaps this would be acceptable. However, as stated throughout appellant's brief, it was not. According to the evidence presented and the special circumstance charged and the prosecutor's summation, the murder was done in a fit of anger to cover-up a rape and kill the victim so she could not testify against him. None of this has *anything* at all to do with gangs, let alone with appellant's frightening character and beliefs as stated in the above paragraph. Appellant has not been able to find a single case where this sort of peripheral "gang"

evidence was sanctioned by the court for use in a non-gang related murder case.

There has been no reported case in this state that even approaches the instant case in the volume and impact of prejudicial and irrelevant evidence that tainted a jury's perception of a capital defendant. This evidence had only the most minimal connection with the capital crime, yet had everything to do with the jury's willingness to convict appellant of it. This is the very essence of a fundamentally unfair trial. As such, the entire verdict must be vacated by this Court.

IV. THE ADMISSION OF EVIDENCE OF UNCHARGED ALLEGED OFFENSES AGAINST OTHER WOMEN VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL UNDER BOTH STATE LAW AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's Argument

1. Introduction

In addition to the improper and highly prejudicial joinder of the non-murder counts to the murder count, the trial court improperly permitted testimony as to a series of uncharged incidents. These incidents had very little relevance to the murder count and once again served only to convince the jury that appellant was the type of person ready willing and able to commit any sort of crime.

2. Factual Summary

a. Kristin Spellins

Kristin Spellins first met appellant at a party where they consumed drugs together. (Vol. 44 RT 7873-7874.) On one particular evening thereafter, the two had been using methamphetamine in an apartment. (Vol. 44 RT 7875-7877.) Ms. Spellins' memory of that night was hazy, at best. However, her grand jury testimony indicated that she knew they were going to have sex. There is no doubt that Ms. Spellins willingly went with appellant to a bedroom where they started kissing. (Vol. 44 RT 7944-7948; 7958-7959.) According to Spellins, the sexual acts turned to things that she did not particularly like to do. She said that he had her touch his anus and masturbate him while he was looking at pornographic magazines. He wanted her to orally copulate him and she said she "probably did," although she could not say for sure what happened. (44 RT 7878-7880.)

Ms. Spellins stated that this went on for "a couple of days." However, she never tried to run away, and doesn't remember if appellant tried to restrain her. (44 RT 7881.) She said that she was scared of his behavior but could not articulate what was frightening her. (44 RT 7882.) Eventually, she voluntarily left the apartment and both went their separate ways. She never reported any of this to the police. (44 RT 7884-7885.)

Ms. Spellins next remembered seeing appellant one night at a tattoo

shop where she was getting a white power tattoo, designed by appellant. After she received the tattoo, she and appellant went into the bathroom together, where appellant started shooting drugs into his arm. He then used the syringe to squirt his blood at Ms. Spellins. According to Ms. Spellins, she got upset and tried to leave. Appellant told her to shut up or he would "slit her throat" like Trina. (44 RT 7886-7890.) Again, she never called the police (44 RT 7995) and continued to see appellant on a regular basis. (44 RT 7978-7979.)

Over objection of counsel, the trial court held that the sexual incident was admissible either under Evidence Code sections 1101(b) or1108. (33 RT 5843-48.) It also held that the entire tattoo incident was admissible as the court did not feel that it was proper to change the context of what was done and said at the tattoo parlor. (33 RT 5843.)

b. Corrie Gagliano

Corrie Gagliano met appellant in 1985, when she was about 16 years old and appellant a year younger. They became sexual active and remained so for parts of their relationship over the ensuing years. (Vol. 41 RT 7313-7314.)

On one occasion, the two were in the back of a pickup truck being driven to Ojai, California. According to Ms. Gagliano, when they arrived, appellant would not let her get out of the truck. She sensed that he wanted

sex but she did not want to oblige him in the truck. He held her arms so she could not move. Ms. Gagliano testified she knew that it would only be worse if she fought back as he was much bigger than her and had a reputation for violence. She started to scream but no one came to her aid. Appellant and Ms. Gagliano eventually had sex. (41 RT 7319-7325.)

Ms. Gagliano admitted to using a lot of drugs during this period of time. (41 RT 7329-7333.) She did not report this alleged incident to the police when it occurred, revealing it to them only years after it happened. (41 RT 7334-7336.) She also continued to associate with appellant after this alleged incident and felt safe with him. (41 RT 7340-7342.) Over the objection of counsel, the trial court ruled that the Gagliano incident was admissible under Evidence Code section 1108. (33 RT 5843.)

3. Legal Argument in AOB

As he did in Argument II and III, appellant argued that the Spellins and Gagliano incidents were not admissible under either Evid. Code section 1101 (b) or 1108. (AOB at pp. 179-181; 184-185.) Once again, the jury who decided appellant's guilt on a capital murder charge was exposed to ugly, prejudicial evidence that could only have had the effect of insuring appellant's conviction of the capital charge.

Appellant also argued that the recollection of the act by Ms. Spellins

was so vague, disjointed and inherently unreliable that it should have been excluded for these reasons alone. (AOB at p. 180.) He also argued that Ms. Spellins account, even if credited in its entirety, did not establish that appellant committed any sort of criminal act or forced Ms. Spellins to do anything against her will. (*Ibid.*) Regarding the "tattoo" incident, appellant argued that while appellant's alleged statements that he would "slit" Ms. Spellins throat as he did to Ms. Montgomery, was admissible, the trial court's refusal to exclude the surrounding incident is both improper and legally inexplicable. (AOB at pp. 181-182.) The jury was allowed to hear about yet another irrelevant incident that could not have had any other effect than to make them even more repulsed by appellant's lifestyle. (*Ibid.*)

B. Respondent's Argument

Respondent argued that the sexually related uncharged offenses as to Ms. Spellins and Ms. Gagliano were admissible under Evidence Code sections 1101 (b) and 1108. (RB at p. 129.) It further argued that this Court's decision in *People v. Falsetta* (1999) 21 Cal.4th 903, 911 applied directly to this evidence in that it showed appellant's propensity to sexually abuse women that he knew, which would have direct relevance on the credibility on the testimony of those that witnessed the murder. (RB at pp. 129-131)

Respondent argued that in the instant case, under section 1108, the

trial court acted within its allowable discretion in admitting the alleged sexual offenses because this evidence was "critical to provide the jury with an accurate picture of how appellant behaved with young female groupies of his gang and his propensity to sexually abuse them after he befriended them. More specifically, evidence that appellant had a long history of sexually, mentally and physically abusing young female groupies of his gang, such as Corrie and Kristin, tended to show that he acted according to this disposition at the time of the charged offenses and that Billie, Robyn, Nicassio and Bush were telling the truth about appellant's sexual offenses," including the murder of Ms. Montgomery. (*Ibid.*)

Respondent also argued that the non-charged sexual offenses were "sufficiently similar to the charged offenses that they were highly probative not only to the issue of propensity but also to prove the requisite special intent of the offenses or special allegations in Counts 1-8." (*Ibid.*) Respondent further advanced the argument that Corrie, Robyn, Billie, Kristin and Ms. Montgomery were all "skinhead groupies" who had "befriended appellant and would not have been inclined to seek law enforcement help against appellant due to fear or loyalty." [4](RB at p.131)

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4. As stated in Argument II, respondent doesn't seem to be able to decide whether Ms. Montgomery was a "skinhead groupie" or someone who had to be murdered because she was too independent to keep her mouth closed about acts of

C. Appellant's Reply

1. Sexual Offenses

Appellant has discussed, in Argument II of this brief, the applicability of Evidence Code sections 1101(b) and 1108 to this case vis a vis the joinder issue. However, in the case of the admission at trial of the facts underlying an uncharged offense, the legal analysis is completely different from that involving joinder. When the prosecution seeks to admit such uncharged evidence, it bears the burden of convincing the court that "the potential prejudice from the jury becoming aware of the uncharged offense is outweighed by the probative value of this evidence. This is so because evidence of uncharged offenses is generally inadmissible." (*People v. Soper* (2009) 45 Cal.4th 759.) As indicated by this Court, it is "appropriate to place upon the prosecution the burden of showing the evidence of the uncharged offense has *substantial* probative value that clearly outweighs its inherent prejudicial effect." (*Ibid.*) In short, the "burden is reversed" compared to the joinder of counts under Penal Code section 954 where the prosecution is entitled to effect joinder by statute. (*Ibid*; *People v. Ruiz* (1988) 44 Cal.3d 589, 605.)

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rape perpetrated upon her.

This reversal of burden is significant as it relates to the alleged sexual offenses against both Ms. Spellins and Ms. Gagliano. As in the case of incidents that relate to Ms. Gates and Ms. Bryant, neither one of the uncharged sexual offenses was reported to the police, nor was there any independent evidence to support the veracity of the complaining witnesses. As described above, Ms. Spellins cannot even state for certain exactly what happened the night in question. All she can recollect is that in the evening in question she and appellant were taking methamphetamine and engaging in consensual sex. According to Ms. Spellins, during the course of this hazily recollected incident, the sex became less pleasant to her as appellant started doing things she did not particularly like. She said that this went on "for days," but implied that she could have left whenever she wanted. In fact, she finally did voluntarily leave appellant's apartment.

According to Ms. Spellins, this incident occurred while she was under the influence of a powerful drug and related long after it happened. Her statement that the incident "went on for days" is inherently incredible. However, even if this lurid tale can be believed, it is in no way relevant to the murder of Ms. Montgomery. Ms. Spellins was a voluntary sex partner of appellant, who willingly shared drugs with him during their sexual encounters. As stated several times in this brief, Ms. Montgomery was not a

sex partner of appellant, did not take drugs with him and, in fact, fought off his attempts to sexualize their relationship.

Respondent's argument that this evidence was admissible to demonstrate to the jury how appellant would sexually abuse his women friends is both factually and legally flawed. The factual dissimilarities between the alleged attacks on any of the other women and the attack on Ms. Montgomery are fundamental. The other women involved in both the charged and uncharged incidents were all "girlfriends" of appellant with ongoing sexual relationships with him. This stands in direct contrast to Ms. Montgomery who clearly wanted nothing to do with appellant, sexually.

As stated in the Argument II discussion of admission of evidence under Evidence Code section 1108,

> [t]rial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

Further, as stated by this Court in *People v. Thompson* (1980) 27

Cal.3d 303, 317, and recently cited in *People v. Soper, supra,* 45 Cal.4th at p. 773, one of the true dangers of the trial court allowing uncharged offenses is that the introduction of such collateral matter will confuse the issues by tempting the jury to punish defendant because he managed to avoid "adequate punishment in the past."

The alleged incidents involving appellant's uncharged sexual conduct cannot overcome the prosecutor's burden against their admission. There is little certainty of their commission, no evidence to support the testimony of the two complaining witnesses and they are impossible to defend against years after their occurrence. As with the great majority of evidence in this case, it only served to distract the jurors from their central task of judging appellant's guilt *as to the murder* of Ms. Montgomery on November 29, 1992 based upon the evidence pertaining to that crime. The inclusion of the evidence not pertinent to these acts telegraphed to the jury that appellant's prior acts and life style needed to be answered by a verdict of guilty on the murder and special circumstance allegations.

2. Non-Sexual Uncharged Acts

The trial court's holding that the entire "Tattoo Bob" incident was admissible to provide context for appellant's alleged statement that he slit

Ms. Montgomery's throat is mistaken in that this evidence is utterly without probative value. Concomitantly, the prejudice that it engendered in the jury's mind cannot be overestimated.

This entire concept of "context" as used in the trial court ruling, is a microcosm of this entire trial. What should have been a trial that focused like a laser on the specific events of November 29, 1992, instead turned out to be an evidentiary shotgun blast of a plethora of unrelated acts of appellant, essentially all under the umbrella of "context."

There is no reported case that would support admission of Ms. Spellins testimony that appellant squirted blood at her from a recently used syringe. Respondent's reliance upon *People v. Harris* (2005) 37 Cal.4th 310, 335 is completely misplaced as *Harris* discusses the propriety of editing a statement under Evidence Code section 356. This incident, including the fact that Ms. Spellins was at the tattoo parlor to have appellant's "white power" designed tattooed onto her buttocks, is so manifestly and obviously prejudicial and so devoid of any probative value that the trial court clearly erred by its admission. It would have been more than sufficient for the jury to have heard that there was a disagreement between Ms. Spellins and appellant during which appellant blurted out his alleged statement about killing Ms. Montgomery.

The admission of this prejudicial material was yet another brick in the wall of prejudicial evidence that assured the jury that appellant deserved a conviction of murder due to his general life style and anti-social acts.

V. THE ADMISSION OF THE HEARSAY STATEMENTS OF TRINA MONTGOMERY TO SHAWNA TORRES, KATHERINE MONTGOMERY AND LEE JANSEN PREJUDICED APPELLANT AND DENIED HIS RIGHT TO A FAIR DETERMINATION OF BOTH GUILT AND PENALTY UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE LAW OF THE STATE OF CALIFORNIA

A. Summary of Facts and Appellant's Argument

Over objection of counsel on hearsay grounds, Shawna Torres testified that in the summer of 1992, she and Ms. Montgomery drove to appellant's house so Trina could "straighten out a couple of things." (37 RT 6548-6549.) Upon arriving at appellant's house, Ms. Montgomery went inside while Ms. Torres remained in the car. After some time, Ms. Montgomery returned to the car. She was upset and told Ms. Torres that appellant had "gotten mad" and attacked her and she also showed Ms. Torres red marks on her neck. (37 RT 6549-6551.) After hearing testimony and argument, the court held that the testimony of Ms. Torres was admissible under the spontaneous declaration doctrine of Evidence Code section 1240. (33 RT 5787-5788.)

Over the same objection, Kathryn Montgomery, Trina's mother, testified about a conversation she had had with her daughter. This conversation took place on a Monday morning when Trina had just returned from spending the weekend in Ventura. (33 RT 5793.)Trina looked agitated, emotional and afraid. (33 RT 5792.) Trina began to relate an alleged incident that occurred between her and appellant either one or two nights before. (33 RT 5793-5794.)

Trina told her mother that she visited appellant at his house to say hello. It was late at night and Justin's mother suggested she spend night. (33 RT 5794-5795.) She went to sleep in an extra bedroom and when she woke up appellant was in bed with her making sexual advances. Trina told him to stop. (33 RT 5795.) To escape from the situation Trina told appellant she was sick and had to go to bathroom. She then ran off to her car. (33 RT 5796.) Ultimately, Mrs. Montgomery was ultimately allowed to testify about Trina's hearsay statements pursuant to Evidence Code section 1240. (37 RT 6485-6488.)

The prosecutor also proffered the statement of Lee Jansen that Trina told her that one evening she has stayed over appellant's house and had been subjected to sexual advances by him. (AOB at p. 193.) While the court acknowledged that Trina's statement was not a spontaneous declaration, it did

allow Ms. Jensen to testify Trina's statement that there was an incident at appellant's house that caused her to flee in that it went to Trina Montgomery's state of mind at the time of her murder (that she would not have had consensual sex with appellant.) (AOB at pp. 193-194.) Ms. Jensen ultimately testified that at some point during the summer of 1992, Trina told her that "something happened" at appellant's house. (37 RT 6566.)

Appellant argued in his AOB that the trial court's admission of this evidence was improper in that it did not qualify under either the spontaneous declaration hearsay exception (Evidence Code section 1240,) nor the state of mind hearsay exception. (Evidence Code section 1250.)

B. Summary of Respondent's Argument

Respondent argued that the statements of Trina Montgomery to both Ms. Torres and Kathryn Montgomery were admissible under Evid. Code section 1240, the spontaneous declaration exception to the hearsay rule. (RB at p. 141.) Respondent cited to this Court's decision in *People v. Gutierrez* (2009) 45 Cal.4th 789,809-810, which identified the following criteria for a statement to be admissible under this code section:

> (1) the event must be startling enough to produce a nervous excitement and render the utterance spontaneous and unreflecting;
> (2) the statement was uttered before there has been time to

contrive and misrepresent; and

(3) the statement must relate to the circumstance of the occurrence proceeding it.

Further, respondent argued that Trina's statements to Lee Jensen were admissible under the state of mind exception to the hearsay rule, Evidence Code section 1250; RB at p. 144.)

C. Appellant's Reply Argument

What the trial court failed to factor into the equation was that Ms. Montgomery had been misrepresenting her life for many years prior to the statements in question. According the evidence presented at trial, she led what could only be described as a double life. One life consisted of a reckless and anti-social life style as a female associate of a skinhead gang, with all of the ugliness that such a life entailed. In the other, she was a loving daughter, kind family member, hard worker, dedicated student and good friend.

Ms. Montgomery's ongoing deception that defeats prong 2 of the *Gutierrez* test for the application of Evid. Code section 1240. The statements to both Ms. Torres and her mother could not have been uttered before there was any time to contrive and misrepresent, because Ms. Montgomery's life for years before this incident was one of contrivance and misrepresentation.

It is not necessary to deem Ms. Montgomery a generally dishonest person who can not be believed. This Court has clearly stated that the application of the section 1240 test related to the "peculiar facts of the case." (*People v. Lynch* (2010) 50 Cal.4th 693, 754-755.) The peculiar facts in the instant case reveal that hiding the truth of her gang affiliations from the people in her other life made contrivance and misrepresentation a way of life for Ms. Montgomery.

Respondent argued that "there was nothing about Katrina's relationship with appellant or other skinheads or her 'dual life' that rendered any of her statements innately unreliable or untrustworthy." (RB at p. 143.) Nothing can be further from the truth. Respondent simply denied appellant's contentions, but did not dispute any of the facts that appellant marshaled to support his argument. Ms. Montgomery had a continuing motivation to portray appellant as an unwelcome aberration in her life, as opposed to a gang associate who held similar anti-social beliefs. Therefore, she had a reason to color her statements about appellant to both her mother and Ms. Torres in such a way as to make herself look more of a victim of appellant than a participant in his life.

The statement that Ms. Montgomery to Ms. Jensen did not fall under the hearsay exception created by Evid. Code section 1250. As with all

exceptions to the hearsay rule, the out of court statement must possess a "circumstantial probability of trustworthiness" sufficient to justify the presentation of the evidence in question to the jury. (*Showalter v. Western Pacific R.R.* (1940) 16 Cal.2d 460, 468; see *People v. Cudjo* (1993) 6 Cal.4th 585, 607.) As stated above, due to the particular circumstances of this case, very little that Ms. Montgomery stated about appellant can be deemed sufficiently trustworthy to form the foundation of a hearsay exception.

Further, the statement made to Ms. Jensen did not reflect Ms. Montgomery's state of mind as to appellant, as much as it was a declaration as to a past event, which does not fall under any hearsay exception. (*In re Estate of Anderson* (1921) 185 Cal. 700.)

VI. BY ALLOWING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT APPELLANT POSSESSED A STOLEN CAR, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND OF A FAIR DETERMINATION OF GUILT AND PENALTY UNDER BOTH STATE LAW AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

VII. BY ALLOWING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT APPELLANT ASKED HIS MOTHER TO DO CERTAIN POSSIBLY ILLEGAL ACTIVITIES FOR HIM, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A FAIR DETERMINATION OF GUILT AND PENALTY UNDER BOTH STATE LAW AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

VIII. THE IMPROPER USE AND ADMISSION OF INFLAMMATORY PHOTOGRAPHS DEPRIVED APPELLANT OF A FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

IX. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR DETERMINATION OF GUILT AND PENALTY BY THE ADMISSION OF PREJUDICIAL EVIDENCE AS TO THE RELUCTANCE OF WITNESSES TO TESTIFY

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

X. THE CUMULATIVE EFFECT OF THE DUE PROCESS VIOLATIONS IN THE GUILT PHASE REQUIRES REVERSAL OF THE JUDGMENT

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

PENALTY PHASE ARGUMENTS

XI. THE TRIAL COURT COMMITTED FUNDAMENTAL CONSTITUTIONAL ERROR UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY EXCLUDING QUALIFIED POTENTIAL JURORS

Potential Juror Shannon Billic

A. Summary of Appellant's Argument re Potential Juror Billic

Over objection of counsel, prospective juror Sharon Billic was improperly excused for cause. The trial court erred in doing so. According to her voir dire, the juror's personal beliefs did not impair her ability to follow the law and choose the appropriate penalty according to CALJIC 8.88. The trial court used the wrong standard for excusal and unconstitutionally excused this juror for cause because she stated she was unlikely to impose the death penalty.

B. Summary of Respondent's Argument re Potential Juror Billic

In excusing potential juror Billic, the trial court stated,

> I think under the standard-she was difficult to read because she just swayed with the wind but we did have the advantage of her coming in with a comment that was very revealing. And I think that under the current standard, the duty she would have as a potential capital juror would have as a potential capital juror would be *impaired by her reluctance to impose the death penalty in single -victim cases.* I read into it, generally speaking a *general reluctance* to do so. (Emphasis provided.) It is a close one but she did not inspire the confidence in me that what she says today will apply in January, let alone ten minutes from now. So for that reason I am going to excuse her. (28 RT 4793-4794.)

Respondent's argument in large part was that Ms. Billic's statements on voir dire as to her qualifications to sit were equivocal and ambiguous. (RB at pp.166-171.) In essence, respondent argued that while the juror stated in the questionnaire that she could vote for the death penalty, the import of her oral voir dire was that she could not do so in a case where there was a single victim. (RB at pp.167-169.) Respondent further argued that as there was this equivocation and ambiguity, the law required that this Court defer to the trial court's resolution of that uncertainty as to the juror's true state of mind. (*People v. Lynch* (2010) 50 Cal.4th 693; RB 171.)

Respondent further argued that the trial court's excusal of Ms. Billic

for cause was justified under the law in that her answers to questionnaire and oral voir dire clearly indicated that because of personal beliefs she could not "consider conscientiously imposing the death penalty as a 'reasonable possibility.'" (RB 167; *People v. Schmeck* (2005) 37 Cal.4th 240,262.)

Respondent further stated that potential juror Billic had an unequivocal view that the death penalty should be reserved for serial murderers and child killers and this belief justified her excusal for cause. (RB at p.170.) In addition, Ms. Billic stated in the oral voir dire that it would be "very unlikely" for her to return a death verdict in this case, even if she listened to the evidence. (RB at p.169.)

Respondent also argued that the fact that Ms. Billic stated that she was not sure she could be "fair" to the prosecution was proper grounds for the cause dismissal by the trial court. (RB at p. 169.)

C. Appellant's Reply

Respondent's position that the excusal of Ms. Billic was justified fails for two reasons. Firstly, respondent's brief did not consider Ms. Billic's voir dire responses as a whole. Instead, it relied only upon isolated sections of her voir dire to support its factually inaccurate conclusion that

she could not impose the death penalty in a one victim case. Contrary to the position of both the trial court and respondent, Ms. Billic's responses to the questions of counsel were neither self-contradictory nor ambiguous. The reality was that she never contradicted herself and was very clear as to her beliefs; that she believed in the death penalty and, although she might be unlikely to do so, she could impose it in a single victim case such as the instant case.

Just as importantly, respondent used the wrong standard in arguing that the trial court's actions were justified. As stated in the AOB, both relative "likelihood" of a juror's imposition of the death penalty and her willingness to be "fair" to both parties is legally irrelevant under the law as set forth by the United States Supreme Court and this Court.

As stated by this Court in *People v Stewart* (2004) 33 Cal.4th 425, 447,

> [a] prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death

> penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra,* 469 U.S. 412, 105 S.Ct. 844. . .A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (*Stewart* at p. 447.)

By stating the above, this Court made it unmistakably clear that a prospective juror's personal opposition to the death penalty or the unlikeliness that said juror would impose said penalty in a given case is not, in and of itself, grounds for excusal for cause. The only such ground is the prospective juror's inability or unwillingness to follow the trial court's instructions.

Contrary to respondent's factually unfounded claim of Ms. Billic's "ambiguity" in her voir dire, there was nothing in the record that would support an excusal on this standard. In fact, in her questionnaire, Ms. Billic, on a scale of "1-10" with "10" being most in favor of the death penalty rated herself a "9." (XXI CT 6186, Q 41.) She also stated that the death penalty served a purpose in that "people that kill other people should not be let go to do it again." (XXI CT 6187, Q 48a.) She also said she felt she could be

open minded about the imposition of the penalty. (XXI CT 6188, Q 50.) There was no indication in her questionnaire that she could not follow the law; the only pertinent question in this inquiry.

The pertinent transcript of the oral voir dire was included in the AOB at pp.225-232 and will not be repeated here. What is clear from that transcript is that there was never an indication that her personal beliefs would substantially impair her ability to follow the law. Ms. Billic did originally state that she would automatically vote for a life sentence, unless the crime involved a serial killing. (28 RT 4768-4769.) This was the statement that initially precipitated a challenge for cause from the prosecutor. (28 RT 4769.)

However, upon more detailed questioning by appellant's counsel, Ms. Billic admitted that she really hadn't given too much thought to her prior answer. (28 RT 4771.) She further stated that in a situation such as a child killing or other type of brutal, remorseless killings[5], she could impose the death penalty even thought there was only one victim. (28 RT 4770-4772.)

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5. As the prosecutor emphasized during the entire trial, in both guilt and penalty phases, how brutal the crime was and the remorseless and monstrous nature of appellant, respondent cannot argue now that this was not precisely the type of case in which Ms. Billic stated she could find for the death penalty.

The following exchange then occurred between appellant's counsel and Ms. Billic.

COUNSEL:	Okay. I don't want to change your attitudes and views about it. I just think you didn't have enough information before right now --
JUROR:	Uh-huh.
COUNSEL:	-- is that fair?
JUROR:	Okay.
COUNSEL:	Because I'll tell you what, in the right case with only one victim it sounds to me like your set of values says yeah, maybe, in another case life without parole but in this case death penalty, depending on what you hear. True?
JUROR:	Yes.
COUNSEL:	What we're trying to find out is if you have an opinion that cannot be changed based on your attitudes and life experiences, because if you come in here and tell us, "Look, no matter what happens, one body, forget it, life without parole all the time. More than one body, I'll consider it. I don't think you're saying that.
JUROR:	I'm willing to listen to the case, I think, before I make my decision.
COUNSEL:	And right case, you are gonna give the appropriate verdict no matter how it comes down? (Juror nods head.) (28 RT 4772-4774.)

Nowhere after this unequivocal acceptance of the law, does Ms. Billic even hint that her personal beliefs would prevent her from following the trial court's instructions to duly consider both penalties under the law. Under questioning by the prosecutor, Ms. Billic said she could walk into the

courtroom and state in open court that her verdict was "death" even if there were only one victim. (28 RT 4777-4779.) Ms. Billic told the prosecutor that she initially told the judge that the she would only vote for the death penalty in a serial murder case because that is the way she "felt" and that there was a "potential" she could not be fair. (28 RT 4780)

However, Ms. Billic never stated that her personal briefs would substantially impair her from considering the death penalty and returning a death verdict if appropriate in this type of case. There was never an indication of a personal, ethical or religious belief against her imposition of said penalty. More importantly, there was no indication that he could not follow the law. On the contrary, Ms. Billic clearly stated that she could, telling the prosecutor that she could walk into this courtroom and announce her death verdict "if there was evidence that the crime was aggravated and there wasn't much evidence that the crime was mitigated." (28 RT 4779.) Later she told trial counsel that if she was convinced that the appropriate penalty was death based on the evidence, she could return a death verdict. (28 RT 4783.)

Further, Ms. Billic assured the court that she could weigh the evidence according to the instructions that the court gave her and this would be the "fair" way to proceed. (28 RT 4784.) She further stated that she

could impose the death penalty "if appropriate." (*Ibid.*) After much additional questioning by both sides, when asked by the prosecutor whether she could return a verdict "in a case like this" she answered "Truthfully, yes."[6] but indicated she was "very unlikely she would do so." (28 RT 4788-4788.)

The fact that Ms. Billic's expression of her views as to the imposition of the death penalty more fully developed as the voir dire proceeded was not a sign of equivocation or confusion as to her true position. Like virtually every potential penalty phase juror, Ms. Billic came into the courtroom without much knowledge of her obligations under the law or under what circumstances the law permitted the imposition of death.[7] The fact that a potential juror refines the expression of her views as she becomes more familiar with the law and process and as she becomes less uncomfortable with being questioned in court is almost universal.

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6. Trial counsel objected to this question as being too specific as to this particular case. The objection was sustained, yet the trial court heard the answer and it was clear from the context that Ms. Billic was referring to a one victim case.

7. In his argument to the court urging the excusal of Ms. Billic, the prosecutor agreed with trial counsel that Ms. Billic was unsophisticated and further stated that she was not well-educated, did not think clearly and was not articulate.(28 RT 4791.) There is nothing in the law that suggests that a potential juror in a death penalty case must be "sophisticated," "well-educated" or "articulate." In any case, Ms. Billic was articulate enough to make it clear that she could vote for death in a one victim case.

This entire concept of "fairness" as introduced into this process by the respondent, has no place in the law. Nowhere in any of the case law, either federal or state, is such a concept discussed. The reason for this was clearly stated in *Stewart.*

If a juror possessed such a bias for or against a verdict in the guilt phase, he or she obviously would be excused for cause as being "unfair" to one side or the other. However, a penalty phase juror is *expected* to bring his or her biases for or against the use of the death penalty into the deliberations as to penalty. In this sense, perhaps the juror could be said to be "unfair" to the prosecution if he leans against the imposition of death, as did this juror. Nevertheless, the inclusion in the venire of these type of jurors whose beliefs make it unlikely for them to impose the death penalty, yet who can follow the law is mandated by the United States Constitution. In *Witherspoon v. Illinois* (1968) 391 U.S. 510, 518-159, the High Court specifically ruled that individuals who have expressed reservations about the use of the death penalty cannot be excluded from a death penalty jury just because they would tend to be less likely to vote for death as long as they can follow the trial court's instructions as to the law.

In its argument, respondent failed to recognize that basic nature of this law. This nature does not demand an objective "fairness" toward the

parties. The jurors' duty under both federal and state law is *subjective* and specifically stated in in CALJIC 8.88.

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

This instruction has been specifically approved by this Court in *Stewart, supra,* 33 Cal.4th at p.442. The decision as to the imposition of sentence is a decision for each individual juror to make. This decision is not reached by a "mechanical weighing" of the aggravating and mitigating factors. Instead, each *individual juror* is "free to assign whatever moral or sympathetic value it deems appropriate to each and all of the various factors that it is allowed to consider in the choice of the penalty decision." Further, even if a juror finds that the aggravating factors substantially outweigh the mitigating, he is *never* compelled to vote for death. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 293; *Edmund v. Florida* (1982) 458 U.S.

782, 812.)

It is precisely because of the above law that the concept of fairness, as erroneously applied by both the trial court and respondent, has no place in this discussion. Such a concept necessarily implies an objective state of mind in which a juror enters the trial with an unbiased state of mind, not favoring either position and with no preconceived notions of his general feelings that could affect his ultimate verdict. Such must be the case in the guilt phase of the trial. However, under the California death penalty scheme, it need not be the case in the penalty phase as it is fully expected that each juror may have a different personal attitude toward the death penalty and a different personal threshold for its imposition.

The dichotomy between the juror's duties in the two separate phases of a capital trial is discussed by this Court in *Stewart.* In *Stewart*, the question in the questionnaire the trial court relied upon to justify its cause challenge was whether the prospective juror's conscientious opinions or beliefs concerning the death penalty would *either* (emphasis provided in text) "prevent *or* (emphasis provided in text) make it very difficult...to ever vote to impose the death penalty." (*Stewart*, *supra,* 33 Cal.4th at p.446.)

This Court held that the question was constitutionally inadequate to inform the trial court under the *Witt* standard because there is a fundamental

difference between a potential juror who was prevented by his beliefs from finding for death and one that would simply find it "very difficult." After a review of the precedents of the United States Supreme Court and this Court, *Stewart* stated none of these precedents allowed a juror tobe automatically excused if they merely express personal opposition to the death penalty. "The real question is whether the juror's attitude will 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Stewart, supra,* 33 Cal.4th at p. 446; see *Wainwright v. Witt, supra,* 469 U.S. at 424.) *Stewart* continued by affirming that the fact that a juror's personal beliefs may dispose him to give a greater than average weight to the mitigating factors may not be excluded for cause unless such beliefs "would actually preclude him from engaging in the weighing process and returning a capital verdict." (*Ibid.*)

The law contemplates that the jurors will take into account their own values in determining whether the aggravating factors outweigh the mitigating factor. The fact that these values would make it very difficult for the juror to impose the death penalty is irrelevant as to the issue of cause challenge. (*Stewart,* 33 Cal.4th at p. 447.) "A juror might find it very difficult to impose the death penalty, and yet such a juror's performance

still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case in determining whether death is the appropriate penalty under the law." (*Ibid.*)

Therefore, the fact that the juror's personal beliefs may be even completely opposed to the imposition of the death penalty is only relevant to the extent that it effects her ability to follow the law and set aside those personal beliefs as to the juror's true state of mind. (*People v. Lynch* (2010) 50 Cal.4th 693, 738-733.)

The trial court's specifically stated reasons for excusing Ms. Billic were completely contrary with the above law. As stated above, the reason why the trial court granted the challenge was based on the finding that she was "impaired by her reluctance to impose the death penalty in single - victim cases," the trial court dismissing her based upon this "general reluctance." (28 RT 4793-4794.)

Respondent also argued that due to the ambiguous and equivocal nature of Ms. Billic's responses this Court must defer to the trial court's judgment that her personal beliefs so impaired her that she could not follow

the law. [8]

One of the most recent cases decided by this Court regarding a *Witt* cause challenge of prospective juror, *People v. Pearson* (2012) 53 Cal.4th 306, reiterated the standard of appellate review regarding deference as to the trial court's decision to excuse a juror for cause. "On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding on the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. (*Pearson* at p. 327 citing to *People v Heard* (2005) 31 Cal.4th 946, 958.). However, "when the juror has not made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life in prison, the court's ruling will be upheld if supported by substantial evidence." (*Id.* at pp. 327-328.)

Appellant does not disagree that the trial court is in the best position to resolve ambiguities in juror responses and to this end can look to the individual juror's demeanor and the totality of his or her voir dire to make the determination as to whether he or she should be excused under the

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8. The only comment that the trial court made regarding any ambiguity was what it stated at the end of his explanation for granting the challenge "It's a close one (the decision to grant the challenge) but she did not inspire confidence in me that what she says today will apply in January, let alone ten minutes from now." (28 RT 4794.)

above law. (*Darden v. Wainwright*) 477 U.S. 1268, 178; *Wainwright v. Witt, supra,* 469 U.S. at p. 421.) In cases where after proper questioning, a particular juror's state of "substantial impairment" is still ambiguous, the trial judge must resolve this ambiguity.

However, the central flaw in respondent's argument regarding Ms. Billic lies in its faulty analysis of what Ms. Billic said at her voir dire. Her responses were neither ambiguous nor equivocal. As stated above, on her questionnaire she said that she ranked herself as a "9" out of "10" in favor of the imposition of the death penalty and stated that it served an appropriate purpose to prevent those who have killed once from killing again.

Nowhere in her oral voir dire did she stray from this basic position. Respondent argued that the best measure of Ms. Billic's "true" feelings on the imposition on the death penalty was revealed in her initial statement to the court that she could only impose the death penalty in serial murder cases. (RB at p. 170.) Actually, Ms. Billic's initial opinion on the death penalty was that she strongly supported it. While it took her awhile at voir dire to fully understand her obligation under the law and express her feelings to the court, she very unambiguously stated that she could return a verdict in a single victim case and she would indeed follow the law of

weighing the aggravating and mitigating factors as prescribed by CALJIC 8.88. Her initial comment as to possibly limiting a death verdict to serial killers was immediately modified upon additional questioning, in which she readily admitted that she could impose the death penalty in "brutal, remorseless killings." As the voir dire progressed and Ms. Billic became more familiar with the process, she continued to make it clear that she could listen to the evidence, apply the law as the court gave and impose the death penalty, if appropriate. (28 RT 4783-4784.)

The cases cited by respondent to support their position that it was proper to excuse Ms. Billic were unavailing in that the facts of those cases were completely inapposite to the facts of this case as it pertained to Ms. Billic. These cases all dealt with the excusal of jurors who, unlike Ms. Billic, all clearly stated their inability to impose the death penalty or gave ambiguous and conflicting answers to voir dire questions from which the trial court rightfully concluded they could not impose the death penalty.

In *People v. Martinez* (2009) 47 Cal.4th 427, this Court upheld the excusal of several death penalty jurors for cause. In doing so this Court confirmed that it is not essential that the prospective juror make it "unmistakably clear" that he or she is impaired, as many venire persons are not capable of articulating these feelings. (*Id.* at p. 427) Therefore, in such

cases where the juror ambiguously expresses concern about being able to follow the law, it is within the trial court's discretion to determine whether the prospective juror is qualified to sit on a penalty jury and that discretion is entitled to deference by the reviewing court. (*Ibid.*)

However, the statements of the prospective jurors in *Martinez* clearly distinguished it from the instant case. One prospective juror stated she would brand anyone who impose capital punishment as "a killer,"and that the death penalty "makes killers of all of us" leading the trial court to resolve any ambiguous statements in favor of her excusal. (*Martinez* at pp. 429-431.)

Another prospective juror was excused when she became very emotional, defensive and irritated while discussing the death penalty. (*Martinez* at pp. 435-437.) This Court stated that the trial court properly resolved any ambiguities in her statements about the death penalty having an opportunity to observe, first hand, the juror's reactions. (*Ibid.*)

People v. Tate (2010) 49 Cal 4th 635 was also cited by respondent to support its argument that the ruling of this trial court was entitled to deference. (RB at p.167.) In *Tate,* this Court upheld the excusal of a prospective juror who essentially said that if she was the foreperson she could not bring herself to sign the death verdict and twice stated that she

could never vote to execute another person. (*Id.* at p. 673.) Even though she somewhat modified her position in the voir dire, the trial court held that her statements were ambiguous and conflicting and determined after actually seeing the juror answer, it felt that the juror could not follow the law. (*Id.* at pp. 673-674.)

Another prospective juror in *Tate* expressed serious doubts that he could ever impose the death penalty. This Court held that this juror was also properly excused by the trial court. (*Tate,* at p. 675.) Yet another was properly excused by the trial court when he stated that the death penalty was a "social dilemma" and if life in prison was an option "that's perhaps insurmountably the way to go." (*Id.* at pp. 676-677.) Another two properly excused potential juror expressed on multiple occasions their doubts that they could vote for the death penalty. (*Id.* at pp. 678-680.)

Respondent also cited *People v. Lynch* (2010) 50 Cal.4th 693,728, to support of the deference owed to the trial court by the reviewing court in the event conflicting or ambiguous answers are given by the prospective juror. (RB at pp. 167-172.) The facts of *Lynch* were also so dissimilar to the instant case to be unavailing to respondent's position. One of the excused jurors directly indicated to the court that she could not be the one to impose the death penalty even though she theoretically approved of it. (*Id.* at

p.730.) Two other jurors told the court that they did not believe that they could impose death. (*Id.* at pp.730-732.) A fourth juror stated that it was "beyond her wildest imagination" to think of a case in which she could impose the death penalty. (*Id.* at p.733.) The fact that this Court upheld the trials court's inevitable excusals of these jurors has no precedential value in this case in that none of Ms. Billic's statement on voir dire even vaguely approached the level of impairment of these properly excused jurors.

In *People v. Hawthorne* (2009) 46 Cal.4th 67, also cited by the respondent, this Court was presented a factual situation which was facially similar to the instant case, but was in fact clearly distinguishable. On voir dire, a prospective juror stated that she "may lean toward death" in cases involving "serial killers." She also stated that it would be "very difficult" to impose the death penalty. (*Id.* At pp.83-84.) However, in contrast to this case, the prospective juror made it very clear that she did not think that she could vote for death in a non-mass murder case and would have to be shown that the case involved a mass murder before she could vote for death. (*Ibid.*) This Court upheld the challenge, citing to *People v. Ochoa* (2001) 26 Cal.4th 398, 430-432 in stating that a juror's refusal to vote for death except in the case of mass murder was grounds for a cause challenge.

Hawthorne stands in contrast with the instant case. Unlike the juror

in *Hawthorne,* Ms. Billic neither directly said nor implied that she could not impose the death penalty in a non-mass murder case. In fact she said that she could most definitely follow the law but it would be "very unlikely" that she would impose the death penalty. However, she made clear that she could consider all of the factors and come into court in a sufficiently "brutal" single victim case and find for death. This dichotomy between "won't ever impose" the death penalty and "highly unlikely" to impose the death penalty was discussed above and it is clear that the instant case is the type envisioned by *Stewart*, not *Hawthorne.* (See also *People v. Friend* (2009) 47 Cal.4th 1, 57-62.)

D. Summary

In *Uttecht v. Brown* (2007) 551 U.S. 1, 9, the United States Supreme Court reiterated the applicable constitutional principles:

> First, a criminal defendant has a right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. (citation omitted.) Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. (Citation omitted.) Third, to balance these interests, a juror who is substantial impaired in his or her ability to impose the death penalty can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible.

> (Citation omitted.) Fourth, in determining whether the removal would vindicate the States' interest without violating the defendant's right, the trial court makes a judgment based in part upon the demeanor of the juror, a judgment owed deference by the reviewing court.

Employing these principles and the other cases discussed above, the trial court erred in excusing Ms. Billic for cause. She lacked the impairment that would have justified such a challenge. She was neither ambiguous in her stated feelings as to the death penalty nor did she give conflicting answers. As such this Court need not defer to the trial court's ruling. In fact, the central basis of the trial court's ruling was that Ms. Billic would be "highly unlikely" and "reluctant" to impose the death penalty. It has been stated by the United States Supreme Court and this Court that a prospective juror's general dislike of the death penalty, or reluctance to impose it is not the controlling standard. The controlling standard is whether a prospective juror's personal beliefs impair her from following the law, a law which not only allows but requires that a juror bring his or her personally sensibilities to the deliberation room.

Relying on the rulings of the United States Supreme Court, this Court has held that a trial court's error in excluding jurors who were not "substantially impaired" pursuant to the above law requires reversal of the death penalty, "without inquiry into prejudice." (*People v. Stewart, supra,*

33 Cal.4th at 454, citing to *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667.)

The death penalty must be reversed.

Potential Juror Bill Tallakson

Appellant will rely upon the argument set forth in the AOB.

XII. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, REASONABLE DETERMINATION OF PENALTY AND FREEDOM OF EXPRESSION PURSUANT TO THE FIRST, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION

A. Summary of Appellant's Argument

A great portion of the evidence that the jury heard in the penalty phase did not correspond to any of the statutory aggravating factors of Penal Code section 190.3. Evidence that does not correspond to one of the listed aggravating factors in that section may not be heard by the penalty jury. (*People v. Boyd* (1985) 38 Cal.3d 762, 773-775.)

Yet this evidence was improperly received by the jury either through

the unconstitutional joinder of counts or admission of any number of uncharged offenses and would not have been otherwise heard by the jury in the penalty phase. (See Arguments II-VIII, *supra.*) This evidence included damning evidence of appellant's Nazi beliefs, his white power affiliations and attitudes, ambiguous, yet always socially unacceptable, comments on homosexuality, admiration of Adolf Hitler, hatred of blacks and Jews, his bizarre relationship with his family, his negative attitude toward society's most cherished institutions, his apparent willingness to morally corrupt young people, and a seemingly unremitting personal grudge against society in general. This evidence portrayed appellant as a person completely unworthy of any sympathetic consideration from the jury.

In addition, the admission of some of this evidence violated the United States Supreme Court's mandate in *Delaware v. Dawson* (1992) 503 U.S. 159, pursuant to the First Amendment to the United States Constitution, evidence that shows no more than a capital defendant's beliefs or associations is inadmissable in the penalty phase of a capital trial.

B. Summary of Respondent's Argument

Respondent argued that appellant forfeited this argument because no objection was made below that the guilt phase evidence of appellant's lifestyle should not have been admitted in the penalty phase. (RB at pp.

174-175.) It further argued that in the penalty phase the individual juror can consider any acts of violence or threat of violence as long as proven beyond a reasonable doubt. (RB at pp.176-177.)

Further, respondent argued that the trial court instructed the jurors not to consider any purely "lifestyle or background" evidence. (RB at p.177.) In addition, it argued that the evidence of appellant's white power beliefs, drug use, sexual perversion, abuse of gang groupies, and bizarre relationship with his mother was not lifestyle evidence, but, rather, "circumstances of the offense," under Penal Code section 190.3 (a). (RB at pp. 177-178.)

C. Appellant's Reply Argument

1. Forfeiture of Issue for Failure to Object Below

Respondent's claim that appellant forfeited this issue at trial because he failed to object on the trial level is unavailing. Appellant made a full and complete objection to the joinder of evidence of any of the non-murder counts to the murder count and accompanying murder trial (See Argument II-III, *supra.*) Counsel also objected at trial to the admission of the uncharged sexual offenses. (Argument IV-VII.) Further objection was made to the admission of pornographic magazines, which served no other purpose

than to highlight appellant's lifestyle. (Argument VIII, *supra.*)

None of the above evidence would have been heard by the jury had the trial court properly heeded trial counsel's objections. Hence, objection had already been made well prior to the penalty phase and further objection would have been futile. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 654.)

2. Consideration of Non-Statutory Aggravating Factors

Respondent's claim that the jury may consider acts of violence or threatened violence as long as they were proven beyond a reasonable doubt (RB at pp. 176-177) missed the point of appellant's Argument XII. Appellant never argued that such consideration was improper. The argument centered on the consideration of evidence that did not correspond to any of the aggravating factors of Penal Code section 190.3. (AOB at pp. 248-249.)

The evidence objected to in this Argument involved appellant's non-violent conduct and beliefs, including his neo-Nazi beliefs, admiration for Adolph Hitler, racism, misogynistic attitudes, sexual proclivities and relationships, and his relationship with his mother. (AOB at pp. 248-249.) Appellant argued that this evidence was inadmissible in the penalty phase in

that it did not fall into any of the Penal Code section 190.3 aggravating factors, yet served to unconstitutionally prejudice appellant in the eyes of the jury. (*Ibid.*)

Respondent apparently based its argument on the premise that the above described evidence was "circumstances of the crime" under section 190.3 (a). Such an overly broad interpretation of the meaning of "circumstances of the crime" would render this aggravating factor so vague as to be unconstitutional. Not every conceivable aspect of a defendant's character can be used in aggravation. Evidence of a defendant's background or character or conduct not probative of "any *specific* sentencing factor" (emphasis provided) is irrelevant to the statutory penalty sentencing scheme. (*People v Nelson* (2011) 51 Cal.4th 198, 222-224.)

While this Court has not specifically defined the term "circumstances of the crime" it has often stated that this phrase means "not merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Blair* (2005) 36 686, 749.

A perfect example of what *Blair* referred to can be seen in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1156, where the capital crime was the murder of his ex-wife's lover. During the commission of this crime, he

kidnaped his ex-wife and attempted to murder a police officer during his arrest. This Court held that these non-capital crimes were "circumstances of the crime" according to Penal Code section 190.3 in that they were clearly connected to the murder. Another example can be seen in *People v. Ramos* (1997) 15 Cal.4th 1133. This Court stated that evidence that defendant told his cell mate that he shot the victims and enjoyed hearing them beg for their lives was relevant to factor (a) in that it was relevant to defendant's lack of remorse during the commission of the crime. In *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1232 this Court similarly held that evidence of defendant's boasts to a cell mate about "bagging a cop" who "had it coming" was relevant under 190.3(a). In reaching that holding, this Court held that section 190.3 (a), the circumstances of the offense, encompassed a defendant's callousness and lack of remorse at the time of the murder in that it bears upon the jury's "moral decision whether a greater punishment, rather than a lesser, be imposed." (Ibid.)

Further, the statutory language of Penal Code section 190.3 (a) refers to the circumstances of the "crime" not the "crimes." From this unambiguous language, it is clear that only those circumstances attendant to the *capital* crime may be considered as an aggravated factor.

The evidence complained in the instant case did not "surround" the

capital crime in any way, whatsoever. If respondent is to be taken at its word, the murder occurred to prevent the victim from turning him into the police. The fact that he respected Hitler, was a racist, wrote atrocious and outrageous poetry, held women in contempt, had bizarre and ambiguous sexual orientations, embraced a gang lifestyle, and, in general, was possessed of an anti-social personality, were not circumstances of the murder or any other offense. They were indications of his *bad character,* and generalized bad character is not a statutory aggravating factor. (*People v. Nelson, supra,* 51 Cal.4th at p. 222.)

Because the jurors were permitted to consider non-statutory aggravation, the death verdict violated state law and the federal constitution. Allowing consideration of non-statutory facts, such as prior non-violent criminal activity, artificially inflates the aggravation in the case and skews the jury's delicate weighing process in violation of California law. Moreover, because appellant's jury was allowed to consider non-statutory aggravating factors, he was arbitrarily deprived of vital state procedural protections and liberty interests in violation of appellant's Fourteenth Amendment right to federal due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

The error also violated the Eighth Amendment which requires that

"where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U,.S. 153, 189 (opinion of Stewart, Powell, and Stevens, JJ.).) In particular, the Supreme Court's Eighth Amendment jurisprudence since *Gregg* has explained that while sentencers may not be prevented from considering any relevant information offered as a reason for sparing a defendant's life, the decision to impose death must be guided by "carefully defined standards that must narrow a sentencer's discretion." (*McCleskey v. Kemp* (1987)481 U.S. 279, 304.)

In addition, jury consideration of these non-statutory factors violates the central teaching of *Furman v. Georgia* (1972) 408 U.S. 328, 313- that death penalty statutes must focus discretion in a consistent and rational manner.

The decision to impose the death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process." (*Johnson v. Mississippi*, supra, 486 U.S. at p. 585, quoting, *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, 887, fn. 24.) This, however, is precisely the effect of the evidence which

was wrongly admitted by the court and distorted by the prosecutor's argument.

Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad - mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." Alex Kozinski and Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L.Rev. 1, 30 (1995).

To allow the use of the type of non-statutory aggravating factors used in this case would so broaden the scope of the death penalty as to render any the statutory scheme constitutionally meaningless. As such, the death sentence must be reversed

XIII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

XIV. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

XV. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING, AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

XVI. CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

Appellant respectfully relies upon its argument as fully stated in his Opening Brief.

XVII. EVEN IN THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

XVIII. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

XIX. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

Appellant respectfully relies upon his argument as fully stated in his Opening Brief.

January 12, 2013

Respectfully submitted,

Glen Niemy, Attorney at Law
Attorney for Appellant
P.O. Box 764
Bridgton, ME 04009
207-647-2600
Bar # 73646

CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains 23,244 words.

January 12, 2013

Glen Niemy, Attorney for Appellant

DECLARATION OF SERVICE

re: People v. Justin James Merriman
S068863

I, Glen Niemy, declare that I am over 18 years of age, not a party to the within action, my business address is P.O. Box 764, Bridgton, ME 04009. On January 12, 2013, I served a copy of :

APPELLANT'S REPLY BRIEF

on each of the following, by placing the same in envelopes addressed respectively as follows;

Clerks Office
California Supreme Court
350 McAllister St
San Francisco, CA 94102
Original and thirteen copies

Jaime L. Fuster
Office of the Attorney General
300 South Spring St
Los Angeles, CA 90013

Mordecai Garelick, Esq
California Appellate Project
101 2nd St
Ste 600
San Francisco, CA 94105

Justin James Merriman
T 15293
San Quentin State Prison
San Quentin, CA 94974

Ventura County District Attorney
800 So. Victoria Ave
Ventura, CA 93009

Ventura County District Attorney
800 So. Victoria Ave
Ventura, CA 93009

Susan Garvey, Esq
Habeas Corpus Resouse Center
303 2nd St
Ste 400
San Francisco, CA 94107

Each said envelope was then on, sealed and deposited in the United States Mail in Bridgton, ME, with the postage thereof fully prepaid on January 12, 2013

I declare under the penalty of perjury and laws of the States of California and Maine that the foregoing is true and correct.

Executed on January 12, 2013
Bridgton, ME

Glen Niemy