IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

v.

GEORGE WILLIAMS, JR.
Defendant/Appellant

Supreme Court No.
Crim. S131819

San Diego County
Superior Court
No. SCD-172678

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
San Diego County
Honorable David J. Danielson, Judge

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CERTIFICATE PURSUANT TO CA. RULE OF COURT 8.630

I hereby certify that, according to my computer's word processing program, this brief, exclusive of tables, is 33,184 words, well within the 47,600-word limit specified in the California Rules of Court.

/S/

Paul J. Spiegelman

Attorney for Appellant

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INTRODUCTION

Guilt Phase Issues.

Four groups of errors during the guilt trial, individually and cumulatively, rendered the guilt trial fundamentally unfair and unreliable in violation of the 8th and 14th Amendments:

Issue I: The trial preparation and strategy of the defense was irreparably damaged when the prosecution surprised the defense five days after opening statements by disclosing for the first time key evidence the state had in its possession for years prior to trial; a new trial as required a matter of fundamental fairness.

The defense opening statement promised the jury that "Dr. Eisele's opinion, after looking at the slides, seeing only occasional random heads of sperm, was that this was the result of sexual intercourse that took place 48 to 72 hours before Rickie Blake died" (17 RT 2534), and that the defense's expert in sexual trauma, Dr. Gabaeff, would confirm that opinion. (17 RT 2535.) Five days *later* the prosecutor informed defense counsel that Dr. Eisele had been asked to review the slides and now saw an intact sperm. Based on this new information, his opinion had changed and he now believed that sex took place 24 to 48 hours before the *autopsy* (not 24-48 hours before *death*) as he had previously told the defense. (8 CT 1850.) This was a shock, not only because Dr. Eisele had reconfirmed his opinion only four days earlier after seeing the same new slides which the prosecutor's "rebuttal witness" Dr. Wagner had furnished to the defense (8 CT 1849-1850), but more importantly because it undercut a powerful defense: if Dr. Eisele's original opinion was correct, the prosecution theory that appellant killed Rickie Blake during a rape was untenable.

Even had there been no violations of disclosure requirements, the sudden change of opinion by a key state witness from one who was ready to testify to a strong defense to one who would eviscerate that defense would have justified a mistrial as a matter of fundamental fairness. As the trial judge recognized, despite "choices which ... were reasonably prudent ... on the defense side, ... in light of the opening statement, there is

clearly some damage that is going to be inflicted on the defense position and the defense counsel's credibility in front of this jury." (21 RT 4278:11-21). Such damage to the defense in a capital case (through no fault of its own), would have justified a mistrial because it far outweighed the inconvenience of having to select a new jury.

But when it is considered that during the entire pretrial process, the State had in its possession slides which showed intact sperm at the autopsy but had failed to disclose them despite a proper defense discovery request, the failure of the trial judge to grant a mistrial denied appellant due process and was reversible error. The federal case law is clear that the failure to disclose inculpatory evidence is reversible error because, such failure is "so serious a detriment to *the preparation for trial* and the defense of serious criminal charges that where it is apparent, as here, that his *defense strategy may have been determined by the failure to comply*, there should be a new trial." (*United States v. Padrone* (2d Cir.1969) 406 F.2d 560, 561 [emphasis added]; see generally pp. 12-16, *infra*.) And here there can be little doubt that defense strategy was determined by the failure to disclose: had the prosecution disclosed the evidence of intact sperm when it was requested, defense counsel would never have made the opening statement he did and there can be no doubt that this information would have affected his plea strategy.

Though this argument was made in Appellant's Opening Brief (AOB, pp. 80-81), Respondent's Brief simply does not address the prejudice to defense plea and trial strategy from the prosecution's admitted discovery violation; this silence appears to concede that prejudice. Respondent's principal response – that the prosecutor did not actually use the previously undisclosed slides at trial (RB 37-43) -- misses the key point that the prejudicial effect of not disclosing the slides had on the defense's plea and trial strategy was in no way remedied by excluding the slides from the trial. Moreover, respondent offers no reason why this Court should not follow the unanimous view of the four federal Circuits which have considered the issue that such effects on trial preparation and trial strategy require reversal. For these and other reasons (see ARB, pp. 13-21, *infra*), appellant submits that reversal of the guilty verdict is required.

Issue II: The prosecutor's impugning the integrity of defense counsel by suggesting that defense counsel concocted a phony defense was prejudicial misconduct in its own right, but also exacerbated the prejudice caused by the discovery violation discussed in Issue I.

But the failure to grant a mistrial based on the clear prejudice to the defense's ability to make intelligent plea and trial strategy decisions was not the only error in this case. In closing argument, the prosecutor committed misconduct by impugning the integrity of defense counsel, suggesting that defense counsel had concocted a phony defense – that the sex between appellant and Blake was consensual. (See Issue II, AOB pp. 84 to 90; ARB pp. 21-27 *infra.*) Respondent argues that the issue was forfeited by the defense's failure to object to every instance of this inappropriate impugning of opposing counsel (RB 48-49) that the reference to a made-up defense was not prejudicial error. (RB 49-53.) Appellant demonstrates below that the issue was not waived (ARB 24-25, *infra*) and that the impugning of the integrity of defense counsel was highly prejudicial because the accusation of impropriety went to a key defense and was the more egregious because the prosecutor was well aware that the defense of consensual sex was supported by Dr. Eisele's opinion prior to his dramatic change five days after opening statement. (ARB 21-24, 15-27, *infra.*) Thus, this prosecutorial misconduct was not only prejudicial in its own right, but also it exacerbated the prejudice from the failure to disclose the slides showing intact sperm by further damaging defense counsel's credibility in the eyes of the jury.

Issue III: Three erroneous rulings undercutting the defense's case that George Bell, not appellant, killed Rickie Blake deprived appellant of the ability to mount a full and vigorous defense and of his right to due process.

A third prejudicial group of errors in the guilt phase undermined appellant's second line of defense – that George Cardenas Bell was the actual killer. The trial judge made three important errors: (1) he excluded testimony by FBI Agent Kelly that the victim's mother had called him and told him that Bell had called her in the middle of the night ten years after Ricki Blake's death making a highly incriminating statement that "I can't live this way any more. I can't hurt you anymore." (2) when Bell admitted the

phone call, but equivocated on what he said, the trial judge restricted cross-examination by the defense on this crucial evidence; and (3) even though Bell had given a false alibi, the trial judge refused to give an instruction on false statements as consciousness of guilt directed at Bell.* Respondent argues with respect to error (1) that the trial judge was within his discretion in excluding Kelly's testimony (RB 55-59); (2) that the trial judge was within his discretion in sustaining three objections to cross-examination of Bell (RB 59-64); and (3) that the refusal to give the instruction concerning Bell's false alibi was proper even though the trial judge gave that very instruction with respect to appellant's denial that he knew the victim, Rickie Blake. (RB 64-69.) Appellant shows below that (1) the admission into evidence of Agent Kelly's testimony was constitutionally required under *Chambers v. Mississippi* (1973) 410 U.S. 300 and its progeny (ARB, pp.28-33, *infra*); (2) that the trial judge unconstitutionally restricted the cross-examination of Bell (ARB, pp. 33-35, *infra*) ; (3) that the instruction on false statement by Bell was supported by the evidence and the trial judge's failure to instruct the jury was error of constitutional dimension because the lack of even-handedness (he gave the identical instruction with respect to an allegedly false denial by appellant) denied appellant due process (ARB, pp. 36-42, *infra*); and (4) individually and cumulatively these errors were highly prejudicial and require reversal. (ARB pp. 42-43, *infra.*)

Issue IV: Aided by erroneous rulings by the trial judge, the prosecutor introduced evidence of the inflammatory details of uncharged sex crimes and used that evidence to make prejudicial arguments far beyond what is authorized by Evidence Code section 1108; such evidence should have been restricted to that relevant to proving that sex between appellant was not consensual, otherwise section 1108 is not constitutional.

A fourth significant group of errors occurred during the guilt trial: the admission purportedly under Evidence Code section 1108 of highly inflammatory details of other sexual offenses committed by the appellant and the exploitation of that admission to heap

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* This denial was the more egregious because the trial judge did instruct the jury about false statements by appellant as evidencing consciousness of guilt.

powerful prejudice on the defendant in ways far beyond the basic purpose of section 1108 (which is to allow the prosecution to introduce prior sexual offenses by the defendant in cases where the trial on sexual assault turns on resolving the "he-said, she-said" credibility issues which so often arise in rape cases). (See *People v. Jones* (2012) 54 Cal.4th 1, 49.) With the help of a trial judge who misunderstood his role in screening evidence proffered under section 1108 and who stated that "the lid obviously comes off under 1108 and there is a frank concession that, rather than pretend that this evidence is being used specifically for an isolated issue, that it is, in fact propensity evidence" (4 RT 644), the prosecutor argued that (1) the way in which these crimes were committed demonstrated a propensity for criminal conduct -- it showed "the kind of person we are dealing with, who is capable of this conduct" (28 RT 6441); (2) that the fact that he had tried to force alcohol on one of his victims established an "M.O." of forcing alcohol on his victims; and (3) the molestations of two six-year-old girls showed that he had propensity to sexually abuse "little girls," which somehow included the victim in this case, a fourteen-year-old teenager. Appellant demonstrates below that each of these uses of other crimes evidence in the guilt phase was not authorized by section 1108 and that these denied appellant a fair trial and due process of law. (ARB 44-59.) Respondent seeks to defend the use of section 1108 by arguing that (1) the abuse of discretion standard under which the trial judge's rulings are reviewed immunizes those rulings "'unless the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a gross miscarriage of justice.'" (RB 74 quoting *People v. Lewis* (2009) 46 Cal.4th 1255, 1286), (2) that the trial judge acted well within his discretion (RB 74-81); (3) that any error was harmless (RB 81-82) and (4) that section 1108 is constitutional (RB 82.) Appellant demonstrates below that the trial judge mistakenly conflated the reason why propensity evidence is excluded (that there was too grave a danger that the jury will convict the defendant because the prior bad acts establish that he is bad person, not because of the evidence that he committed the crime) into the notion that propensity evidence automatically had high probative value and that therefore he failed to exercise an informed discretion to which deference is owed (ARB 47-48,

infra); that the sordid details of the crimes that were admitted were highly prejudicial in their own right and were used by the prosecutor in even more prejudicial ways such that its prejudice far outweighed their probative value (ARB 48-55, *infra*); and that the prosecutor improperly used the evidence admitted under section 1108 as if it were admitted under section 1101(b) as evidence of a common plan, scheme or design, when there was an inadequate basis for doing so. (ARB pp. 56-59.) Although there is some support for respondent's arguments in some of the language of this Court's post-*Falsetta* opinions, appellant demonstrates below that the post-*Falsetta*[*] jurisprudence of this Court demonstrates seven serious structural defects in the application of section 1108 such that, if the Court adheres to that language, section 1108 is unconstitutional as applied. (ARB pp. 43-45; 60-66, *infra*) Rather than do so, this case presents an excellent opportunity to fine tune the use of section 1108 to its intended purpose and provide guidance to the trial courts so that they can apply it in a constitutional manner for the purposes for which it was intended and not as an open door to disparage the defendant's character and create "propensities" that circumvent section 1101(b) as was done in the instant case. Appellant urges the Court to re-examine section 1108 and either announce ways to restrict its use to its intended purpose of resolving credibility issues on the issue of whether sex was consensual or rape or hold that the section is unconstitutional as applied in this case.

Penalty Phase Issues

Three errors were committed during the penalty phase which rendered the verdict unfair and unreliable: V. the trial judge denied appellant his rights to mount a full mitigation defense by refusing to find a way to admit the testimony of two defense witnesses who were too ill to travel to court; VI. the trial judge refused to instruct the jury not to discriminate on the basis of race in the case of a black man convicted of raping a white teenage girl and VII. the trial judge refused to instruct the jurors that they were responsible for their verdict of death or life without parole.

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[*] *People v. Falsetta* (1999) 21 Cal.4th 903

Issue V: The refusal of the trial judge to find a way to admit important mitigating evidence from ailing witnesses by either videotape or conditional examination deprived appellant of his right to mount a full defense and a reliable penalty determination.

Issue V. concerns the exclusion of mitigating evidence from two ailing, elderly witnesses who were too ill to travel to court from Indiana. The evidence proffered included testimony that was available from no other source – (1) from appellant's foster mother, Annie Whitfield, that he showed the scars of physical abuse as a child and that his birth mother was drunk and verbally and physically abusive to appellant when appellant was with Whitfield and (2) from an elderly widow, Sophie Williams, that before and after her husband's death, appellant cared for her as if she were family and that he was a kind, loving person. The defense considered this testimony crucial to its case for life showing an aspect of his horrific upbringing that no other witness had provided and also showing the kindness he was capable of when not under the influence of alcohol. Appellant proffered videotapes and transcripts of their testimony, but after first indicating that he would admit the evidence in that form, the trial judge reversed directions and refused to allow videos or transcripts to be heard or seen by the jury, even in redacted form, because the prosecutor had objected that the statements had not been subjected to cross-examination.* The defense then asked the trial judge to order a conditional examination of the witnesses in Indiana, but he denied that solution after the prosecutor, who had previously based his objections on the lack of opportunity to cross-examine the witnesses, now opposed this procedure which would have given him precisely that opportunity. Respondent argues that the trial court acted within its discretion in refusing to admit the statements because they were hearsay, lacked foundation and their reliability was not tested by cross-examination (RB 88-97); that it acted within its discretion in refusing to briefly adjourn the trial to allow for the conditional examination of these two mitigation witnesses (RB 102-104) and that in any case any error was harmless because the

* The prosecutor had declined the defense's invitation to interview the witnesses or have defense counsel ask questions of the witnesses.

testimony of these two women was not particularly significant. (RB 97-98.) Respondent, much like the trial judge, minimizes the significance of the mitigation testimony of each of these witnesses (RB 94-96; 36 RT 8955-8956.) Appellant shows below that (1) the testimony of these two witnesses was highly reliable and important to the defense case of life because Whitfield's testimony undermined the prosecution's attempt to portray appellant's mother as the stability in appellant's life and because Sophie Williams' testimony showed that even after years of abuse as a child, alcoholism, and prison, appellant retained exceptional compassion and humanity, caring for a non-family member better than many biological children care for their aging parents. (ARB 67-69, *infra*); (2) the refusal of the trial judge to allow this important mitigation evidence in some form – either redacted videos and transcripts or by conditional examination -- violated appellants rights under *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114-115 and *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605. (ARB 69-79, *infra*); and that the errors were not harmless beyond a reasonable doubt. (ARB p. 80, *infra.*)

Issue VI: A black man convicted of raping and murdering a white teenager was entitled to have the jury not consider race in reaching their penalty verdict. Such an instruction would not "interject race" into the case; race was there from the outset.

Issue VI involves the trial judge's refusal, in a case in which an adult black man was convicted of raping and killing a white girl of fourteen, to instruct the jurors not allow race to govern their decision because to do so would interject race into the case. Respondent relies on this Court's decision in *People v. Smith* (2003) 30 Cal.4th 581 which upheld the refusal to give such an instruction in that very different case and which is the source of the argument that giving such an instruction would have "interjected race." (RB 108) Appellant demonstrates below that (1) in our society the potential for racial bias is inherent in any case where a black defendant is accused of killing a white victim and particularly strong in cases involving the rape of a white girl by a black man, which played such a prominent role in this country's ugly history

of lynchings; this made appellant's case quite distinguishable from *Smith*; (2) that the documented history of racial bias in in the administration of the death penalty justified the instruction; and that the error in failing to give the instruction was not harmless beyond a reasonable doubt. (ARB 81-89.)

Issue VII: Appellant was entitled to have the jury instructed that they were responsible for their verdict and not speculate on whether it would be carried out.

Issue VII involves the refusal of the trial judge to instruct the jury that that they were responsible for their penalty verdict and should not speculate on whether it would be carried out. Finding a proper way to instruct the jury about their verdict in a way that complies with the requirement in *Caldwell v. Mississippi* (1985) 472 U.S. 320 that jurors assume full responsibility for their verdict is an issue which has plagued this Court for decades. The trial judge failed to comply with *Caldwell* and this case offers an excellent opportunity to clarify how future juries should be instructed to both meet the requirements of *Caldwell* and to be given accurate information on their role in the process. (ARB 90-92, *infra*.)

ARGUMENT

I.

THE FAILURE OF THE TRIAL JUDGE TO GRANT A MISTRIAL AFTER KEY EVIDENCE WAS DISCLOSED ONLY AFTER THE DEFENSE OPENING STATEMENT DENIED APPELLANT A FAIR TRIAL AND VIOLATED HIS RIGHTS TO DUE PROCESS, TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND TO RELIABLE DETERMINATIONS OF GUILT AND SENTENCE

On September 7, 2004, appellant's defense counsel were blind-sided when, five days after their opening statement and only hours after Dr. Eisele had confirmed to them that he saw no intact sperm, the prosecution disclosed that Dr. Eisele had changed his testimony because he now saw an intact sperm in the sperm sample taken at the time of autopsy. The next day, the prosecution admitted a blatant discovery violation: for 18 years, the prosecution had evidence – bench notes from criminalist Lozknycky – that there was intact sperm in the sperm sample taken at the time of autopsy, but never disclosed it, despite a discovery order which required such disclosure. For eight months, defense counsel had relied on the statement from Dr. Eisele, the coroner who did the autopsy in 1986, that there were only sperm heads and no intact sperm and that he therefore estimated that intercourse had occurred 48 to 72 hours prior to the victim's death. Dr. Eisele confirmed this opinion prior to trial and even on the morning of September 7.

The time line was at the very heart of the defense case because other than appellant's sperm, there was insufficient evidence placing him with the Rickie Blake at the time of her death. The 48-hour period prior to her death would place defendant with Rickie Blake on April 8th or 9th, 1986, one or two days before she disappeared, and eviscerate the prosecution theory that appellant murdered Rickie Blake on April 10, 1986, during a rape. All of defense counsel's decisions on how to present a defense (and how to plead) were based on what appeared to be a strong defense that there was no evidence that appellant was with the victim at the time of her death (and that there was evidence of

another perpetrator). They made their opening statement in reliance on Dr. Eisele's statements to them, confirmed by their expert, Dr. Gabaeff, that without intact sperm, the prosecution's theory that appellant had raped and murdered Rickie Blake on April 10th was not supported by the evidence.

Nonetheless, Respondent contends that the failure to disclose criminalist Loznycky's 1986 notes that indicated there was intact sperm until after the defense made its opening statement caused no prejudice to the defense because even though the prosecution introduced evidence of intact sperm and induced Dr. Eisele to change his testimony, it never introduced Loznycky's notes themselves.* Respondent's argument fails for three reasons: (A) it ignores the *rationale* a long line of federal cases that makes clear the prejudice to the defense from failure to disclose inculpatory evidence stems not just from its immediate impact on the trial that actually occurred, but more importantly from the damage it does to the defense's ability to make knowledgeable decisions on how to plead and defend; (B) it glosses over the prejudice to appellant's defense caused by the discovery violation and other prosecution tactics which, as the trial judge found, damaged defense counsel's credibility with the jury; C) the prejudice to the defense was incurable because defendant was precluded from defending against the state's evidence and the reviewing court cannot determine or speculate on the trial that would have occurred had the prosecution not violated discovery orders. Each of these points is discussed in turn below.

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*Respondent also seems to suggest indirectly that because the defense's motion asked for relief in the alternative – "*the court should either grant a mistrial or prevent Mr. Loznycky from testifying*" (RB 34 quoting 8 CT 1847-1848 [emphasis supplied by respondent]) – that the defense was satisfied with the court's ruling that Loznycky not testify and had somehow abandoned the request for a mistrial. If that is respondent's position, it is without merit. The prayer for relief in the very motion from which respondent excerpts this language out of context, plainly requests "that a mistrial be declared and a new ... jury be impaneled" (8 CT 1856) and only "if such relief is denied that William Loznycky be precluded from testifying in the case." (8 CT 1857.) Moreover, the defense argued vigorously for a mistrial even after it was clear that Loznycky would not be allowed to testify. (21 RT 4265-4270.)

A. The Failure to Disclose Critical Inculpatory Evidence Prejudiced Appellant By Depriving His Counsel of the Ability to Investigate, Prepare and Present A Defense.

Appellant's Opening Brief cited eight cases from four different U.S. Circuit Courts of Appeals in which failure to disclose inculpatory evidence resulted in reversal of a guilty verdict. (See AOB pp. 76-79.) All of these cases resulted in a new trial for appellant because the failure to disclose such evidence deprived defendant of the opportunity to intelligently prepare for trial or decide whether to plead guilty; respondent cites no case in which relief was denied to the defense where the prosecution failed to disclose crucial inculpatory evidence until after the trial began. Instead, respondent argues that because Loznycky's notes were never actually introduced at trial (the undisclosed facts were introduced from another source), this case is distinguishable from those cited by appellant, where the undisclosed evidence *was* introduced.

Respondent's argument is wholly unpersuasive because it misses a key point in the reasoning of these cases. In the cases relied upon by appellant, the court was concerned not only with the impact of the disclosure violation on what happened at the actual trial, but just as importantly with the ability of the defense to prepare its case or decide to plead guilty. As the Second Circuit said in *Padrone*, the failure to disclose inculpatory evidence requested in discovery is "so serious a detriment to *the preparation for trial* and the defense of serious criminal charges that where it is apparent, as here, that his *defense strategy may have been determined by the failure to comply*, there should be a new trial." (*United States v. Padrone* (2d Cir.1969) 406 F.2d 560, 561 [emphasis added].) Similarly, the Eleventh Circuit explained in *United States v. Noe,* (11th Cir. 1987) 821 F.2d 604, 608, under the government's theory, "the prosecution, by design or inadvertence, could withhold discoverable inculpatory evidence until the defendant asserted a defense strategy based on the apparent nonexistence of that evidence, thus *foreclosing other, possibly viable, defense strategies.*" (11th Cir. 1987) 604, 608 [emphasis added].) See also, *United States v. Pascual* (5th Cir.1979) 606 F.2d 561, 565-66, [prosecution failed to turn over a letter from defendant that was tantamount to a

"written plea of guilty to the allegations in the indictment....It would be hard to make an argument with any degree of plausibility that the use of this letter without prior production did not *seriously prejudice defendants in exercising their option to plead not guilty and in the preparation for trial"* (*Id.* at p. 565) [emphasis added]]; *United States v. Alvarez* (1st Cir.1993) 987 F.2d 77, 85 [failure to disclose evidence linking defendant to crime "sabotaged" defense and *deprived defense of opportunity to design intelligent litigation or plea strategy* that responded to evidence] [emphasis added]; *United States v. Thomas* (2d. Cir.2001) 239 F.3d 163, 168 [new trial ordered where prosecution failed to disclose transcript of defendant's prior testimony on key issue; prejudicial because a competent defense counsel would have been unlikely to advise defendant not to testify given admission in transcript].)

United States. v. Camargo-Vargara (11th Cir. 1995) 57 F.3d. 993, 999, is also instructive, involving a post-arrest statement that had not been disclosed to the defense. The court found withholding this statement substantially prejudiced defendant's defense and reversed: "Agent Schultz's testimony eroded the effectiveness of this trial strategy when she unexpectedly testified that [defendant] also said in his post-arrest statement that the kilos 'were strange.' If [defendant] had known the government would present such testimony, *he could have changed his trial strategy.*" [emphasis added] As the court noted in *United States v. Lanoue* (1st Cir.1995) 71 F.3d 966, 976, disclosure rules are "designed to contribute to the fair and efficient administration of justice *by providing the defendant with sufficient information upon which to base an informed plea and litigation strategy.*" [emphasis added].

Here, there was major prejudice to defense counsel's ability to determine upon what evidence he could "base an informed plea and litigation strategy." What's more, this was not evidence that came to the state's knowledge just prior to trial, rather it had been in the state's possession for 18 years. Had the prosecution disclosed the existence of Loznycky's notes to the defense, the defense would have had months to decide whether to assert their defense that intercourse occurred two days prior to death, whether

to feature that defense in its opening statement, whether to promise to call Dr. Gabaeff to corroborate Dr. Eisele's opinion of the time of intercourse, whether to pursue other potential defenses, or whether to reconsider the plea of not guilty and/or to try to negotiate a plea. The defense was deprived of all of these options by the state's violation of the discovery order. Under this line of cases, reversal is required when "defense strategy *may* have been determined by the failure to comply" with discovery orders. (*United States v. Padrone, supra,* 406 F.2d at 561 [emphasis added].) Respondent offers no cases to the contrary or reasons why this well-reasoned line of cases should not be followed.

Given the record in the present case, that defense strategy not only *may* have been determined by the prosecution's admitted discovery violation, it *was* determined by that violation. Had the prosecution turned over Loznycky's notes to the defense in a timely manner, the defense would have had months to question Dr. Eisele about them, request the slides on which they were based, consult with their own experts on the accuracy of the Loznycky's observations, and determine the strength of their defense. They could have determined that the evidence still was sufficient to raise a reasonable doubt regarding the time of sexual intercourse and couched their opening statement in that light (without promising that Dr. Gabaeff would confirm Dr. Eisele's statements that intercourse had taken place two or more days prior to death). Alternatively, they could have decided to recommend to appellant that he seek a plea bargain. The failure to make the disclosure deprived the defense of the ability to make these choices.

Respondent's argument that this long line of cases is inapplicable because the Loznycky notes themselves were not used at trial ignores the key element of the reasoning underlying the courts' recognition of the prejudice caused by discovery violations – the impact of the violation on decisions about trial and plea strategy . This does not appear to be by inadvertence. On pages 80 to 81 of Appellant's Opening Brief, appellant made the argument it discusses here, that the prejudice of non-disclosure was to the ability of the defense to make critical strategy decisions, concluding that: "All of the

cited cases were concerned with fact that the evidence which undermines a potential defense was not disclosed at the time when defense prepare to meet that evidence, but also could determine how to plead, how to shape its case and what trial strategy to pursue." *(Id.* at 81.) Thus, it is a fair inference that respondent has no answer. Respondent's silence on this crucial point concedes what it cannot deny: the failure to disclose the Loznycky notes deprived the defense of the ability to intelligently determine how to plead, how to shape its case and what trial strategy to pursue. Under such circumstances, this prejudice alone requires reversal.

B. The Discovery Violation Prejudiced Appellant's Case Before the Jury.

1. The Failure To Disclose Eviscerated The Defense Trial Strategy And Damaged Defense Counsel's Credibility In The Eyes Of The Jury. Not only did the prosecution's failure to disclose the sperm evidence prevent the defense from making informed decisions regarding pleading and preparation for trial, but it directly affected the course of the trial. Defense counsel's opening statement embodied two key tactical decisions concerning the crucial issue of time of intercourse which were directly affected by the lack of information about the Loznycky notes: (1) they relied on Dr. Eisele's expertise and featured his opinion that there were no intact sperm and that intercourse occurred more than 48 hours before Blake's death; (2) they promised that Dr. Gabaeff would testify and agree with Dr. Eisele's opinion. At trial, however, in the following colloquy at the close of his direct testimony, Dr. Eisele walked back his 48-hour estimate:

Q: Regarding the sexual activity of this child, are you able to determine – are you comfortable in determining when she last had sex?

A: No. There's a wide range of times when we see sperm present, and again, like time of death, so many unpredictable variables. I wouldn't be comfortable in putting a time on it.

(22 RT 4648:27 to 4649:5.)*

This was a distinct change from what he had told the defense – that the evidence was consistent with sex taking place more than 48 hours prior to the time of Rickie's

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* After testifying that he went back to look at the exhibits in the medical examiner's office and found one intact sperm, Dr. Eisele stated it did "not really" impact his ability or inability to set a time of sex though "it might tend to favor a shorter time, but again, the range of findings is so wide that I can't put a specific time on it." See RT 4649:15-22.

death (8 CT 1849). Thus, the change in testimony prejudiced the defense because defense counsel had relied heavily on Dr. Eisele's testimony in opening statement. As the trial judge found, damage was "inflicted on the defense position and the defense counsel's position in front of this jury." (21 RT 4278.) Indeed, the change in testimony served to make appellant look guilty, negating what had been the cornerstone of the defense case and, in its stead, replacing it with the highly damaging evidence that defendant had sex with Rickie Blake near the time of her death. Indeed, following this prejudicial turn of events, the defense could not call Dr. Gabaeff to testify about the time of intercourse, as they had promised in their opening statement, giving rise to an inference that Dr. Gabaeff could no longer testify that the time of intercourse was forty-eight hours prior to her death, as defense counsel had contended. The prosecutor used the failure to call Dr. Gabaeff to damning effect: in closing argument the prosecutor emphasized this failure as a reason for the jury to reject defense counsel's time line. (See 28 RT 6640-6641.) This sequence of events – damaging the substance of the defense and the credibility of defense counsel – was a direct result of the failure to disclose the Loznycky notes. This is both an independent and a cumulative reason why the trial judge's refusal to grant a mistrial should be reversed.

2. Intentional Withholding of Discovery of Dr. Wagner's Report Exacerbated the Prejudice. Respondent asserts that because defense counsel learned of Dr. Wagner's view that there was an intact sperm prior to their opening statement, this somehow eliminates the prejudice caused by the state's failure to disclose the Loznycky notes as required by Penal Code Section 1054.1, in April of 2003 when disclosure of other materials was done (8 CT 1855) or in response to the defense motion in December of 2003 to compel discovery *inter alia* of "all laboratory reports as well as the reports of any examination of the physical evidence" and "all reports, logs, handwritten notes and any other notes made by police or investigators" (8 CT 158). Predictably, respondent fails to discuss the fact that Dr. Wagner's findings only became available to the defense on August 24, 2004, the day before jury selection began. Moreover, the prosecution

caused a one-month delay in the defense receiving this information: (a) by not making Dr. Wagner's findings available when they received his report on July 29, 2004 and (b) by opposing disclosure of Dr. Wagner's findings in a hearing on August 12, on the ground that it did not know whether it would be calling Dr. Wagner because it depended on Dr. Gabaeff's testimony. (See 9 RT 914-922.) The defense cited the failure to disclose Dr. Wagner's report and to not designate Dr. Wagner as witness in its case in chief even after the intact sperm was discovered by Dr. Wagner as part of the reason why it violated fundamental fairness to proceed with the trial after the defense had made its opening statement in reliance on Dr. Eisele's opinion. (21 RT 4265.)

The prosecution's failure to disclose Dr. Wagner's opinion appears to have been a gambit to keep critical information from the defense: even though Dr. Gabaeff never testified, in fact, Dr. Wagner did testify in the case-in-chief. (21 RT 4270). He testified to the presence of an intact sperm and the prosecution knew all along he was going to testify to the presence of an intact sperm. Indeed, the prosecution was aware that Dr. Gabaeff was a derivative witness who had no independent knowledge of the presence or absence of an intact sperm, but would merely confirm that if there were no intact sperm, the time of intercourse was at least 48 hours prior to Rickie Blake's death. Thus, rather than demonstrating that the prejudice was cured by the defense's knowledge of Dr. Wagner's opinion, respondent's argument establishes that the prosecution intentionally withheld Dr. Wagner's key finding from the defense and prevented them from altering their strategy prior to the start of the trial. In fact, as late as the morning of September 7, 2004, the day Dr. Eisele was to testify, Dr. Eisele confirmed that he did not see any intact sperm on the slide. Had the prosecution complied with the discovery order and disclosed the findings in Dr. Wagner's July 29, 2004 report, the defense would have had an opportunity to reassess its trial strategy. Moreover, the failure of the prosecution to confront Dr. Eisele sooner with the new views discovered by Dr. Wagner exacerbated the situation. Had the prosecution done so before the defense opening statement was made,

the defense would have learned of this information and had the opportunity to reconsider not only its opening statement (21 RT 4265), but also its whole trial strategy.

3. Prosecutor Unfairly Exploited the Damage Caused by the Late Disclosures. Finally, the prosecution unfairly benefitted from the late disclosures because in closing argument the prosecutor used the failure of the defense to call Dr. Gabeaff, (the defense expert who was to be called to confirm Dr. Eisele's opinion that sex occurred more than two days before death) not only to support its position that sex took place closer to the time of death than Dr. Eisele had originally stated, but also to damage defense counsel's credibility with the jury:

> and I hope you have your notes marked somehow "Opening Statement" and "Evidence," because *in opening statements you were promised some doctor to come in here and explain all this stuff to you. It didn't happen. It didn't happen*

(28 RT 6446:19-24.)

As discussed below, incurable prejudice was inflicted on the defense by the combination of the admitted discovery violation; the withholding of Dr. Wagner's findings; the last-minute change in Dr. Eisele's testimony; and the prosecution argument that the failure to call Dr. Gabaeff negated the defense and completely undermined defense counsel's credibility before the jury.

C. The Damage to the Defense Case Was Incurable

Prior decisions of this Court establish the standard for reversal: "a mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. *People v. Hines* (1997) 15 Cal 4th 997, 1038 citing *People v. Woodbury* (1970) 10 Cal.App.3d 695, 708 and quoting *People v Haskett* (1982) 30 Cal.3d 841, 854.) Neither the trial judge's ruling, (which acknowledged prejudice to the defense, but focused on whether the prejudice of Dr. Eisele's late change in testimony was the fault of the prosecution), nor respondent (which argues that there was no prejudice) addresses this

standard. (*People v. Jenkins* (2000) 22 Cal.4th 900, 950; *People v. Pinholster* (1992) 1 Cal.4th 865, 941.)

The record demonstrates that appellant has more than met that burden. It was not until September 12 on a Sunday morning that the defense was informed by the prosecution that it intended to call Dr. Wagner as part of its case in chief. (21 RT 4275). Thus, the combination of the discovery violation arising from the state's failure to disclose the Loznycky notes, coupled with the DA's highly suspect claim that Dr. Wagner was only being called as a rebuttal witness to Dr. Gabaeff, effectively deprived appellant of a fair opportunity to prepare and present his defense. Instead, defense counsel was forced to make critical trial strategy decisions under the pressure of surprise, during the trial and without the benefit of an expert of its own.

Dr. Eisele was the best witness the defense had on the presence or absence of intact sperm. As the coroner, certainly he was not biased in favor of the defense. He had examined the slides Dr. Wagner photographed and did not see any intact sperm; he confirmed this opinion on the very day he was to testify. Thus, the defense understandably had decided they didn't need to call a witness of their own to establish the lack of intact sperm. When Dr. Eisele surprised everyone by suddenly seeing an intact sperm, eight months of carefully planned trial strategy went out the window. The defense was forced to scramble; the three-day delay they received to prepare for his about-face in testimony regarding the presence of intact sperm and its consequences for estimating the time of intercourse in relationship to the time of death was far from adequate to rebuild defense strategy.

The die was cast when the defense made its opening statement promising the jury Dr. Eisele's testimony that intercourse occurred more than 48 hours prior to Rickie Blake's death and Dr. Gabaeff's confirmation of that time line. Appellant could no longer get a fair trial on this issue from this jury; the prejudice could not be cured by granting more time to the defense because the jury had already heard defense promises

which, through no fault of the defense, could not be kept. Even if a prosecution discovery violation and an inaccurate representation by the prosecution that Dr. Wagner would only be a rebuttal witness had not been the cause of damage to the defense case, the change in Dr. Eisele's testimony nevertheless justified declaring a mistrial: there was no way to unring the bell sounded by the defense opening statement. Given the fact that the discovery violations caused the prejudice and in light of the prosecution's purposeful exploitation of the advantage it obtained by sandbagging the defendant and emphasizing to the jury that the defense had not fulfilled its promise to call Dr. Gabaeff, a mistrial was the only proper remedy. The failure to grant it requires this Court to reverse appellant's conviction and death sentence.

Although the issue of whether to grant a mistrial is normally committed to the trial court's discretion (see *Haskett, supra*), here, the trial judge clearly failed to properly exercise that discretion. He ignored the prejudicial impact on defense trial preparation caused by the prosecution's failure to timely disclose the Loznycky evidence and, rather than addressing whether the prejudice caused by the tardy disclosure of Loznycky's notes and the late change in Dr. Eisele's testimony was curable *after* the defense had made its opening statement, the court erroneously focused solely on who was at fault for the timing of the change in Dr. Eisele's testimony.

II.

THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT WHEN HE IMPUGNED DEFENSE COUNSEL'S CREDIBILTY AND INTEGRITY BY ARGUING TO THE JURY THAT DEFENSE COUNSEL HAD LIED TO THEM AND FABRICATED A "SECONDARY DEFENSE".

A. The Failure to Sustain Appellant's Objection to the Prosecutor's Unwarranted Attack on Defense Counsel's Integrity Was Erroneous

Appellant and respondent agree that personal attacks on the *integrity* of opposing counsel constitute prosecutorial misconduct. *People v. Hill* (1998) 17 Cal.4th 800, 832 ["'attack on defendant's attorney can be seriously prejudicial ... and is never excusable'" (quoting 5 Witkin & Epstein, Trial, section 2914, p. 3570)] [AOB 86] ; *People v. Fierro* (1991) 1 Cal.4th 173, 212 ["imply[ing] that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case" is improper] [RB 50]; *People v. Bain* (1971) 5 Cal.3d 839, 847 ["unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct] [AOB 86, RB 53]. Appellant and respondent also agree that attacks on the *arguments* of defense counsel are permissible and that the prosecutor is given wide latitude in doing so. Thus, in *People v Bemore* (2000) 22 Cal.4th 809, 844-48, relied on by respondent (RB 50-51), the Court found no prosecutorial misconduct where the prosecutor "did not accuse counsel of dishonesty in presenting a defense" but demonstrated with support in the record that defense counsel's assertions that defendant did not wear size 13 shoes and that defendant's car was not at the crime scene were untrue and that the defense theory had changed during the trial. (22 Cal.4th at 848.) *Bemore* is fully consistent with the distinction between attacking the *arguments* of defense counsel and attacking the *integrity* of defense counsel. The Court there properly rejected the notion that showing the arguments of opposing counsel were contrary to fact is somehow impermissible. Similarly, in *People v. Farnham* (2002) 28 Cal.4th 107, the Court rejected the claim of prosecutorial misconduct precisely because the prosecutor there paid appropriate attention to the distinction between permissible attacks on defense *arguments* and impermissible attacks on defense counsel's *integrity*:

> Although she contended that [defense] counsel's DNA and suppressed evidence arguments were not supported by the record, she did so without impugning defense counsel's honesty and integrity. Such arguments clearly were appropriate.

28 Cal.4th at 171.

But, the prosecutor here crossed the bright line when he asserted that defense counsel concocted or made up a "secondary defense." Appellant never testified, but his tape-recorded denial that he had ever known Rickie Blake was played for the jury. Thus, what the prosecutor said in his rebuttal to defense counsel's closing argument left no doubt that he was impugning the *integrity* of defense counsel:

> Prosecutor: After listening to what you were just presented with, for about 45 minutes or so, not one mention , not one mention of what the defendant said about why he's not guilty. He says he is not guilty because he didn't do anything. That's his choice, his defense, his words on tape. Everything else is a secondary defense.
>
> What can *we* find, because that first one he wants to use doesn't work. *We* got to scramble to find something else. And that is what we heard about from the defense, the second best defense. Jesus, Williams why didn't you come up with the best one the first time? I thought I did. But he didn't.
>
> Defense Counsel: I would object that that is improper argument.
>
> The Court: Overruled.

(28 RT 6634-6635.) The trial judge's rejection of this well-taken objection was erroneous. Although the prosecutor did not mention defense counsel by name, he clearly was referring to defense counsel personally – the one who made the arguments "presented ... for about 45 minutes" – whom the DA then characterized as telling defendant, "We got to scramble to find something else." The only inference the jury could draw from the DA's argument was that defense counsel was so lacking in integrity and credibility that he had to "scramble" to make up a defense because "the first one...doesn't work."

The sequence of arguments here was strikingly similar to the conduct of the prosecutor in *State of North Carolina v. Hembree* (Supreme Court of North Carolina,

April 10, 2015) slip opinion, pp. 27-28. In *Hembree*, the prosecutor began by suggesting that the defendant who had taken the witness stand had lied and then went on to suggest that:

> Not until two years later when he could look at everything, when he can study the evidence, when he can get legal advi[c]e from his attorneys, does he come up with this elaborate tale as to what took place.
>
> ....
>
> Two years after he gives all these confessions, to the police and says exactly how he killed Heather and Randi Saldana . . . .. The defendant, along with his two attorneys, come together to try and create some sort of story.

(slip opinion at p.28.) The North Carolina Supreme Court held that:

> the import of these arguments is clear: The State argued to the jury, not only that defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel. Whether or not defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys. Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu.*

State v. Hembree, supra, slip opinion at p. 28.

In this case, the suggestion that defense counsel fabricated the claim that consensual sex had occurred more than 48 hours before Rickie's death was particularly reprehensible because the prosecutor knew that defense counsel's assertion about the timing of sexual intercourse was based on the coroner's representation to him prior to his opening statement that he had not seen any intact sperm in the samples taken from the victim. Thus, rather than being a fabrication, the opening statement was based on defense counsel's reliance on the coroner's statement, which he intended to offer to demonstrate that the prosecution's theory of a rape-murder was not supported by the evidence.

B. The Issue Of Prosecutorial Misconduct Was Preserved.

The objection to the prosecutor's suggestion that defense counsel had fabricated the defense that consensual sex had occurred was preserved by the defense objection to the most explicit of the prosecutor's insinuations concerning the integrity of defense counsel. (See 28 RT 6634-6635.) The prosecutor made defense counsel's "fabrication" a theme of his summation to the jury, beginning with a crescendo at end of the prosecutor's first closing argument:

> now he has the nerve to say it was love, consensual sex, and George Bell did it. But actually he didn't say that. He said "I didn't do anything." That is his defense. He lied the first time. Don't let it happen a second time.

(27 RT 6456-6457.) Because appellant did not testify, defense *counsel* was the only person to whom the prosecutor could have been referring, as it was defense counsel who argued the sex was consensual. Thus, an objection on that ground was possible. But because the prosecutor referred to appellant's denial of ever knowing Rickie Blake during the police interrogation and because the words "he lied the first time" referred to appellant (and were supported by evidence), it was not immediately clear that the argument was objectionable. It was only after the prosecutor returned to this theme in his rebuttal argument did the improper attack on defense counsel's integrity become clear. Consequently, when the prosecutor began his rebuttal argument by making direct references to defense counsel's integrity – "What can *we* find, because that first one *he* wants to use doesn't work. *We* got to scramble to find something else" — defense counsel immediately objected. (28 RT 634-6635.) This objection was sufficient to give the trial judge time to correct the misconduct and admonish the jury, but the trial judge instead overruled the objection, giving his stamp of approval to the improper argument.

Armed with court approval of this line of argument, the prosecutor returned to the theme that defense counsel was concocting a defense as the last thing the jury heard from him:

"His first defense fails. His second defense, stand-by defense, cannot be supported by the evidence. He's guilty of all the charges."

(28 RT: 6655-6656.) Only in the context of the earlier accusation that defense counsel had fabricated the "stand-by defense," was this argument objectionable. But given the judge's overruling of the earlier objection, it would have been futile for defense counsel to object further. It is well-settled that when it would have been futile to object because of prior rulings, the failure to object does not waive an objection already properly made. (See *People v. Hill* (1998), *supra* 17 Cal.4th at 833.) Indeed, the Supreme Court of North Carolina has suggested that in cases where the prosecutor accuses defense counsel of helping defendant fabricate a defense, no objection is necessary because the trial court should intervene "*in mero motu.*" *State v. Hembree, supra*, at p. 28. Here, as in *Hembree*, defense counsel did object to the most egregious of the prosecutor's suggestions and as in *Hill*, given the trial judge's ruling on that objection, objections to the other improper statements would have been futile. Thus, respondent's argument that this issue was forfeited on appeal is without merit.

C. The Misconduct Was Prejudicial

Respondent asserts that there was no prejudice. According to respondent, because of "the mild nature of the prosecutor's comments in this case" (RB 52), the conduct was not prejudicial. Respondent's argument lacks merit. First of all, the assertions made by the prosecutor were factually untrue. Moreover, these comments were neither mild nor isolated, but repeated and emphasized by the DA. The comments directly and deliberately attacked the integrity of defense counsel, which is a serious transgression of appellant's rights. (See *People v. Hill*, *supra*, 17 Cal 4th at 832 ("attack on defendant's attorney can be seriously prejudicial ... and is never excusable.'") Moreover, contrary to *People v. Wash*, relied on by respondent, these were not "passing remarks" (6 Cal.4th at 265), but rather were a theme emphasized by the prosecutor by placing them as the end of his first argument and at the very beginning, as well as at the very end of his final closing argument.

To be sure, the breadth of the misconduct by the prosecutor in *People v. Hill* was far broader than the misconduct challenged here, but that hardly absolves the prosecutor of the misconduct in appellant's case. In *Hill*, "the outrageous and pervasive misconduct on the part of the state's representative" was so extreme that "the cumulative prejudice flowing from the combination of prosecutorial misconduct and other errors rendered defendant's trial fundamentally unfair and caused this Court to vacate the judgment on all counts. (17 Cal.4th at 814.) Misconduct need not be so extreme as to require reversal where, as here, the misconduct went to the heart of the key issue in the case – whether sex had occurred near the time of Rickie's death or more than 48 hours before her death, as the coroner originally concluded and represented to defense counsel. If Dr. Eisele's original estimate was correct, then the prosecution's theory that this was a murder in the course of a rape would fall apart. The prosecutor's misconduct was highly prejudicial—he not only repeatedly misled the jury about this crucial issue by casting aspersions on defense counsel's integrity, but he falsely implied that defense counsel fabricated a defense when he knew full well counsel had relied on the opinion than of Dr. Eisele, the prosecution's own coroner. This denied appellant a fair trial and due process of law. The prosecutor's misconduct was even more egregious in the context of a case where the court acknowledged that defense counsel's credibility was damaged by the timing of the prosecution's disclosure of a discovery violation. (See 21 RT 4278:11-21.) This made the personal attack on defense counsel particularly prejudicial. Moreover, in light of the other errors discussed in this brief and Appellant's Opening Brief (Issues I, III-VII), the cumulative effect of the prosecutor's misconduct when combined with those other errors, rendered the trial fundamentally unfair. (*People v. Hill, supra,* 17 Cal.4th at 814; *State v. Hembree,* supra, slip opinion at p.2.) For all of these reasons, the misconduct was prejudicial, denied appellant a fair trial and requires reversal of the rape and murder convictions in this case.

III.

THE EXCLUSION OF CRITICAL EVIDENCE OF THIRD PARTY SUSPECT EVIDENCE, RESTRICTIONS ON CROSS-EXAMINATION AND REFUSAL TO GIVE INSTRUCTIONS ON CONSCIOUSNESS OF GUILT DEPRIVED APPELLANT OF THE RIGHT TO PRESENT A DEFENSE AND TO DUE PROCESS OF LAW

At trial, the trial judge excluded evidence that confirmed that George Bell, a third party suspect, had called the victim's mother in the middle of the night, ten years after her daughter's death, telling her: "I can't go on living like this anymore. I can't hurt you anymore. I need to speak to Olias [police investigator]" (26 RT 5714:15-18). The court also sustained objections to defense counsel's cross-examination of George Bell, thereby interfering with appellant's right to establish Bell's untruthfulness and lack of credibility. Moreover, although the court instructed the jury that *defendant's* false statements could be considered as consciousness of his guilt, it inexplicably refused the same instruction regarding *Bell's* false statements.

In Appellant's Opening Brief, appellant argued that each of these rulings was erroneous and that individually and cumulatively they were prejudicial. Respondent contends that each of the judge's rulings was correct and that even if any was erroneous, there was no prejudice either individually or cumulatively. Below, appellant discusses in turn the court's refusal to admit the evidence of Bell's words from Agent Kelly, the limitations on the cross-examination of Bell, and the refusal to give instructions with regard to Bell's conduct which showed consciousness of guilt. Defense counsel argued that Bell could have been the killer and that the instructions he requested as to Bell's consciousness of guilt were comparable to the instructions given with respect to appellant and that due process required even-handed instructions. Each of the court's rulings was erroneous and worked individually and cumulatively to prejudice appellant and deny him due process of law and the right to present what was a viable and credible defense supported by the evidence.

A. The Exclusion of Agent Kelly's Testimony Was Erroneous

The unexpected change in Dr. Eisele's testimony undermined appellant's defense that intercourse took place more than 48 hours before death and, thus, he couldn't have been the killer. (See Issue I, *supra.*) Once this surprising turn of events occurred, the primary defense was that George Bell was the killer. As appellant explained in his opening brief, there was substantial evidence pointing to Bell as a suspect: he claimed that he was with his girlfriend the night of the crime, but she testified that she was in Los Angeles attending a funeral that night, people who knew him indicated that his statements and obsessive interest in the crime and bizarre behavior following Rickie Blake's death caused them to regard him as a suspect and even ask him if he killed Rickie (a question he failed to answer), and Bell's wife testified that Bell held her nose and choked her on a number of occasions during sex in a manner similar to the way Rickie Blake was choked. (See 23 RT 4891-92. See generally AOB 23-27 for a summary of the evidence suggesting Bell was the killer.)

His statements to Mrs. Blake were highly indicative of guilt, confirming what his neighbors and his wife suspected. At trial, George Bell was equivocal about what he said to Mrs. Blake in the middle of the night years after the death of her daughter. On the one hand, he admitted making that statement:

> Q: And when you called up Mrs. Blake you told her, "I can't live like this anymore. I can't hurt you anymore," didn't you?
>
> A: Yes. I don't remember it. But I did eventually, yes.

But later in his testimony, he backtracked:

> Q: Sound like something you might have said?
>
> A: ***No.***

26 RT 5713:8-20 [Emphasis added].)

The words "I can't live like this anymore. I can't hurt you anymore," uttered at 12:20 a.m., *ten years* after the murder, were highly probative of consciousness of guilt.

But Bell's initial admission that he said them, followed by his denial that these words sounded like something he might have said, left the record unsettled on this point. Defense counsel tried to nail down the point by having Agent Kelly testify to what Mrs. Blake called to tell him. Agent Kelly's notes, a contemporaneous recording of Bell's incriminating statements as reported to Kelly by Mrs. Blake, made his proffered testimony highly reliable. His source, the mother of the victim, was also highly reliable – she was not going to mislead the officers investigating her daughter's death. In such circumstances, the hearsay rules should not and cannot constitutionally be allowed to exclude this highly relevant and reliable evidence. *Chambers v. Mississippi* (1973) 410 U.S 300 [compulsory process violation to exclude reliable out-of-court admissions by co-defendant that co-defendant was the real killer]; *Green v. Georgia* (1979) 442 U.S. 95 [violated due process to exclude, on hearsay grounds, admissions by a different defendant who was tried separately that he was the actual killer].) *Chia v. Cambria,* (9th Circuit 2003) 281 F.3d 1032 *vacated sub nom McGrath v. Chia* (2003) 538 U.S. 902 *reaffirmed on remand* (9th Cir 2004) 360 F.3d 997 [conviction for conspiracy to rob and kill federal agents vacated on federal *habeas* where trial court excluded four hearsay statements of conspirator admitting the crime, but indicating defendant did not participate].) As the Supreme Court said in *Chambers*, the courts cannot apply the hearsay rule "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi, supra,* 410 U.S. at 302.)

Respondent contends, however, that the *Chambers-Green-Chia* line of cases does not apply here because this Court "has repeatedly rejected the broad reading of *Green v. Georgia* ... [where hearsay evidence] bore no special indicia of reliability." (Respondent's Brief, p. 59 quoting *People v. Eubanks* (2011) 53 Cal.4th 110, 150, which in turn cited *People v. Weaver* (2001) 26 Cal.4th 876, 980-981.) Respondent also contends that even if it was error to exclude evidence confirming that Bell uttered these highly incriminating words, the error was not prejudicial. For the reasons stated below, appellant was greatly prejudiced by the refusal to admit Agent Kelly's testimony,

supported by his contemporaneous notes reciting Mrs. Blake's words to him which, under the circumstances, bore special indicia of reliability.

1. ***Agent Kelly's Testimony And The Statements to Him By Mrs. Blake Were Highly Reliable And It Was Error To Exclude Them.*** Appellant and respondent agree that the reliability of otherwise inadmissible hearsay evidence is critical to the constitutionally-compelled rule that such reliable hearsay crucial to the defense must be admitted. Significantly, respondent makes no argument that Agent Kelly's testimony as to what Mrs. Blake said was unreliable. Indeed, Agent Kelly's proffered testimony, supported by his contemporaneous notes regarding his conversation with the Rickie Blake's mother about a suspect who contacted her and made seemingly incriminating statements about her daughter's murder, bore special indicia of reliability: as a sworn federal law enforcement officer involved in the investigation, his contemporaneous notes presented the type of substantial reliability contemplated in excepting certain out-of-court statements from the hearsay rule.

People v. Eubanks, supra, 53 Cal.4th at 150, on which respondent relies, is wholly distinguishable because the out-of-court statement there was from a witness who denied personal knowledge of the matter whereas here both Agent Kelly and Mrs. Blake were reporting on matters they personally experienced. In *Eubanks*, defendant sought to show that she was sexually abused by her cousin Greg by questioning Greg's father; the trial court sustained an objection to defense counsel's question to Greg's father, Don, about whether an "inappropriate relationship" had developed between Greg and defendant while defendant was living with Don's ex-wife Rose. The objection was properly sustained for lack of foundation because Don had testified moments earlier that he "wasn't involved," with defendant, Greg, or Rose at the time in question, he "didn't see them much" at that time, and he "didn't pay much attention" to what they were doing. 53 Cal.4th at 150.) Thus, the ruling in *Eubanks* rested on the fact that the witness had no knowledge of the matter about which he was being questioned. The testimony sought from him was not only unreliable, it violated the basic evidentiary rule that a witness

can testify only to matters within his own knowledge. In contrast, the statements in question here were statements against interest, made by a suspect to the victim's mother and supported by contemporaneous notes of a sworn law enforcement officer. Respondent's reliance on *Eubanks* is misplaced.

Nor does *People v. Weaver, supra*, 26 Cal.4th at 980-981, support Respondent's position here. *Weaver* involved the degree to which the jury could use a videotape of defendant's own statements (submitted in the sanity hearing for the limited purpose of showing the basis for a doctor's opinion) as substantive evidence of the truth of the matters stated by defendant; not surprisingly, this Court held that such self-serving statements by the defendant had no special indicia of reliability. (26 Cal.4th at 981.) Like *Eubanks*, *Weaver* has no applicability to the facts of this case, which have nothing to do with self-serving statements by the defendant, but statements against interest by a third party suspect.

Respondent concedes, as it must, that reliability is the touchstone of the *Green* rule and makes no credible argument that Agent Kelly's testimony was unreliable. In the face of the clear evidence of reliability demonstrated by the underlying circumstances in appellant's case, excluding Agent Kelly's testimony was error of federal constitutional magnitude under *Chambers*, *supra*, 410 U.S. 300, *Green v. Georgia*, *supra*, 442 U.S. 95, and *Chia*, *supra*, 360 F.2d 997. His testimony was relevant to the crucial issue of who killed Rickie Blake and appellant should have been permitted to present to the jury all evidence relevant to its determination of both guilt and sentence.

2. The Error in Excluding Agent Kelly's Testimony was Prejudicial. Given the error depriving appellant of his federal constitutional right to present a defense under the *Chambers-Green-Chia* line of cases, the error is reversible unless respondent can demonstrate that it was harmless beyond a reasonable doubt. *Chapman v. California* (1972) 385 U.S. 18, 24). Here, respondent does not even attempt to argue that the error was harmless beyond a reasonable doubt argument because such an argument is

untenable on these facts. Instead, respondent contends that if there is error, it is only a state law error and subject to the prejudice test articulated in *People v. Watson.* (1956) 45 Cal.2d 818, 836. Respondent's argument is wholly without merit.

Respondent relies on *People v. Cudjo,* (1993) 6 Cal.4th 585, 611, to support its *Watson* argument but that case is in no way applicable. *Cudjo* involved the issue of whether a trial judge's determination that a witness would not be allowed to testify should be assessed as state-law error under *Watson* or federal constitutional error under *Chapman.* This Court declined to find a constitutional error -- "we will not lightly assume that a trial court invites federal constitutional scrutiny each and every time it decides, on the basis of the particular circumstances, to exclude a defense witness as unworthy of credit." (*Ibid.*) Justice Kennard dissented, opining that the federal constitutional right to present a defense and compulsory process extended to the trial court's ruling excluding the witness as not credible. (6 Cal.4th at 638-644.) This Court need not adopt Justice Kennard's reasoning to conclude that the exclusion of reliable hearsay here falls squarely within the constitutional right established by the *Chambers-Green* line of cases to which *Chapman* clearly applies.

Regardless of the standard, respondent contends that because Bell admitted to making the call and the statement ("I can't live like this anymore. I can't hurt you anymore"), and because defense counsel twice in closing argument quoted and characterized the statement as consciousness of guilt, there was no prejudice and therefore no basis for reversal. It is certainly true that the defense argued that Bell made the highly incriminating statements, but what respondent conveniently ignores is that Bell also denied making that statement ("it didn't sound like something [I] would say." (26 RT 5713:19-20.) Thus, the jury might have found the defense arguments unconvincing because of Bell's denial. Once that occurred, defense counsel was entitled to impeach him with the words he said to Mrs. Blake, which she had related to Agent Kelly, who contemporaneously recorded them in his investigative notes. Such statements were statements against interest that are excepted from the hearsay rule. Agent Kelly's

testimony regarding Bell's statements were crucial to the jury's deliberations regarding guilt and the failure to allow him to testify was error that denied appellant's 6th, 8th and 14th Amendment rights.

Respondent also fails to address the judge's refusal to allow the defense to cross-examine Bell on this very subject. As discussed below, these restrictions on cross-examination exacerbated the error in refusing to admit Agent Kelly's testimony.

B. The Rulings Restricting Cross-Examination of Bell Were Erroneous and Prejudicial.

The trial judge's ruling restricting defense attempts to cross-examine Bell on what he said and his state of mind exacerbated the prejudice caused by the erroneous ruling preventing Agent Kelly from testifying to Mrs. Blake's report of Bell's incriminating statements. As noted above, Bell's equivocation about these statements left the defense without a clear, unequivocal admission from Bell. Defense counsel sought to nail down the ambiguity three times and each time was rebuffed:

Instance 1: First, the trial judge prevented defense counsel from exploring the precise words that Bell said to Mrs. Blake:

> Q: Okay. Did you tell her you wanted to talk to Olais after you said "I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais"
>
> Mr. Dusek [prosecutor] Objection. Misstates the evidence.
>
> THE COURT: Sustained.

(26 RT 5713:21-26)

Instance 2: The trial judge next prevented defense counsel from exploring Bell's mental state in 1986. This not only deprived the jury of considering the context in which his words were uttered, but denied appellant's right to present a defense by precluding a showing that Bell was obsessed with the killing, as stated by Bell's wife and acquaintances:

[DEFENSE COUNSEL: Q: Back in 1986 weren't there times where you would do or say things and not remember them because of alcohol or drugs?

A: Can you repeat that again?

Q. Sure. You would because of alcohol and drugs, you would do or say things and then later on not remember them?

MR. DUSEK: Calls for speculation.

THE COURT: Sustained.

(26 RT 5814:17-25.)

Instance 3: Finally, the trial judge prevented defense counsel from presenting to the jury the words and meaning of Bell's after-midnight call to Mrs. Blake:

[DEFENSE COUNSEL Q. Isn't it true that when you would get liquored up or get high on drugs, you'd start talking about what happened with Rickie

Blake, isn't it?

A: Only when I was by myself, not jibber jabber with everyone. Just mental things, kicking back, drink a couple of beers, think and praying, you know.

Q: And then you'd decide to call Mrs. Blake at 12:30 at night 10 years after this accident?

MR. DUSEK: Asked and answered.

THE COURT: Sustained.

(26 RT 5838:6-15.)

Although respondent tries to defend these rulings, each of them was error, denying appellant's constitutional right to confront the evidence and to cross-examine the witnesses against him. Instances 1 and 3 both involved defense counsel's effort to clarify what Bell said during the phone call. The trial judge should have allowed defense counsel to do so in both situations; the prosecution was obstructing the presentation of this critical evidence and the trial judge joined in to deny appellant's right to present a defense. Respondent argues that after the trial judge sustained the

"misstates the evidence" objection in instance 1, the defense should have pursued the questioning further (RB 63 ["Counsel for appellant could have clarified with Bell what he said to Ms. Blake but chose not to."].) But this is exactly what defense counsel twice attempted to do in questioning Bell about various statements he had made about Rickie Blake's murder and each time it was the DA who interfered with that effort. Indeed, when the court sustained the "asked and answered" objection, it was a clear signal from the trial judge that any further attempts to pursue that line of questioning would have been futile.

Thus, individually and cumulatively, the three erroneous rulings by the trial judge restricting defense cross-examination of Bell prejudiced appellant by denying his right to present to the jury all the facts relevant to his third party suspect defense—that it was Bell, not appellant, who killed Rickie Blake. Coupled with its refusal to permit Agent Kelly's testimony, the court's rulings effectively undermined the defense. In so doing, the court denied appellant's right to a trial before a jury fully apprised of all the facts relevant to a reliable determination of guilt and sentence. Such interference with appellant's rights to present a defense and to a reliable determination of guilt and sentence by a jury fully apprised of all facts relevant to its determination violates the 6th, 8th and 14th Amendments to the U.S. Constitution and requires reversal unless respondent can demonstrate that the errors were harmless beyond a reasonable doubt. Respondent cannot meet this burden because it is impossible to speculate about how the jury would have decided this case had appellant been able to fully present his defense that Bell was the killer by presenting to the jury all the evidence that bore on that issue, including Bell's interactions with the victim and his statements and conduct following her death.

C. By Refusing Pinpoint Instructions Requested by the Defense, But Giving Pinpoint Instructions Requested by the Prosecution, the Trial Judge Denied Defendant a Fair Trial, and Due Process of Law.

1. The requested instructions were strongly supported by the evidence. Appellant and respondent agree that a defendant has the right to instructions that pinpoint the defense theory of the case. (RB 67; AOB 102; *People v. Rogers* (2006) 39 Cal.4th 826, 878; *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Wright* (1988) 45 Cal.3d 1126, 1137. Both of the instructions that are at issue on this appeal were requested by appellant below and were modifications of standard CALJIC instructions. Defense request for Special Instruction No. 2 was as follows:

> If you find that before and during the trial George Cardenas Bell made willfully false or deliberately misleading statements concerning the crime for which defendant, George Williams is now being charged, you may consider those statements as raising a reasonable doubt as to the guilt of the defendant in that they tend to prove a consciousness of guilt on the part of George Cardenas Bell.
>
> However, its weight, and significance, if any are matters for your determination.

(9 CT 1968 [based on CALJIC 2.03(Consciousness of Guilt – Falsehood)].)

Defense Special Jury Instruction No. 5 was as follows:

> If you should find from the evidence that there was an occasion when George Cardenas Bell, under conditions which reasonably afforded him an opportunity to reply, failed to make a denial in the face of an accusation expressed directly to him, charging him with the crime for which the defendant is now on trial, or tending to connect him with its commission and that he heard the accusation and understood its nature, then the circumstance of his silence on that occasion may be considered against him as indicating an admission that the accusation was true.
>
> If you find that this circumstance occurred you many view that evidence as raising a reasonable doubt as to the guilt of the defendant, George Williams.
>
> However, its weight and significance, if any, are matters for your determination.

(9 CT 1970 [Based on CALJIC 2.71.5 (Adoptive Admission – Silence, False or Evasive Reply to Accusation].)*

Respondent does not and could not contend that appellant had not introduced evidence sufficient to justify the giving of these instructions. There was a strong evidentiary basis for each request. As to Special Instruction No. 2 (Falsehood suggesting consciousness of guilt), at trial, Greg Richardson testified that Bell claimed he was with his girlfriend, Tink Armstrong, the night Rickie Blake disappeared. (25 RT 5341, 5143). Bell himself testified that he told Richardson he was with Armstrong that night. (26 RT 5807) However, Armstrong testified that she was in Los Angeles at a funeral that night and spoke with Bell by phone; she was not with him at all that night. (25 RT 5421.) Thus, Bell gave the same false alibi on two occasions. This was more than enough to warrant Special Instruction No. 2.

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* **CALJIC 2.71.5 Adoptive Admission—Silence, False or Evasive Reply to Accusation**

> If you should find from the evidence that there was an occasion when [a] [the] defendant (1) under conditions which reasonably afforded [him] [her] an opportunity to reply; (2) [failed to make a denial] [or] [made false, evasive or contradictory statements,] in the face of an accusation, expressed directly to [him] [her] or in [his] [her] presence, charging [him] [her] with the crime for which this defendant now is on trial or tending to connect [him] [her] with its commission; and (3) that [he] [she] heard the accusation and understood its nature, then the circumstance of [his] [her] [silence] [and] [conduct] on that occasion may be considered against [him] [her] as indicating an admission that the accusation was true. Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the [silence] [and] [conduct] of the accused in the face of it. Unless you find that [a] [the] defendant's [silence] [and] [conduct] at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.

As to Special Instruction No. 5 (Silence, False or Evasive Reply to Accusation), the defense introduced evidence that because Bell talked about the crime so much and as if he was there, that his then wife and a friend, Greg Richardson, each asked him on separate occasions whether he had killed Blake. Bell did not deny it or answer in any way. (23 RT 4885 [Testimony of his wife, Gloria Zertuche]; (25 RT 5345 [Testimony of Greg Richardson].) Again, there was a solid basis for requesting the instruction.

2. The instructions were carefully worded to track CALJIC instructions and were not argumentative. Despite this strong evidentiary basis, respondent maintains that the instructions requested were "attempts to direct the jury to specific pieces evidence," (RB 68), a purpose which respondent asserts is barred by this Court's decisions in *People v. Wright*, *supra*, 45 Cal.3d at 1135, *People v Kraft* (2000) 23 Cal.4th 978, 1063, and *People v. Mincey* (1992) 2 Cal.4th 408, 437). None of these cases support respondent's position here.

In *Wright*, the defense requested a special instruction that listed five separate pieces of evidence and asked the judge to instruct the jury that they should consider that evidence in determining whether there was a reasonable doubt as to defendant's guilt.* This Court held that such an instruction amounted to a comment on the evidence, and

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* The instruction requested was as follows:
In determining whether a reasonable doubt exists as to the guilt of Mr. Wright you may consider that:
1. All of the robbers wore masks;
2. The testimony of Inspector Cisneros regarding Peter Marino's comments at the time he viewed defendant Wright's photograph;
3. The testimony of Inspector Cisneros regarding whether or not he showed Erica Albertsen defendant Wright's photograph, and whether or not she recognized that photograph;
4. The testimony of Inspector Cisneros regarding Stephanie Sung's comments at the time she signed defendant Wright's photograph;
5. People's Exhibit Number 20, a pink card with the name Stephanie Sung.

(45 Cal.3d at 1167, fn.5.)

was improper because it was not identified as comment and was argumentative as well. (Id. at 1135.)

Despite respondent's reliance on *Wright, supra*, it cannot be read to invalidate CALJIC 2.03, a standard instruction which has been used routinely for years. Reliance on *People v. Kraft* or *People v. Mincey, supra*, is equally unavailing. In *Kraft*, this Court found that "the trial court properly refused the requested instructions, which merely invited the jury to draw inferences favorable to him from selected items of evidence." (23 Cal.4th at 1063 citing *People v. Mincey*[*].)

In contrast, the instructions requested here were aimed at helping the jury understand defendant's theory of the case. Their purpose was not to invite the jury to infer defendant's version of the facts, but to assist the jury in applying the relevant legal principles regarding how it should consider false statements by a third party suspect. Like the CALJIC 2.03 instruction the judge gave the jury on falsehoods uttered by the defendant,[†] appellant was entitled to an instruction relevant to his defense and warranted by the evidence presented at trial, to wit, instructions regarding falsehoods uttered by the third party suspect . Moreover, both special defense instructions were modeled on existing CALJIC instructions, modified only to reflect the evidence presented in appellant's case. This Court has approved of the use of the giving of CALJIC instructions and has held that they are required by Evidence Code section 403:

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[*] *People v. Mincey*, involved a request in which defense asked the "trial court to emphasize to the jury the possibility that the beatings were a "misguided, irrational and totally unjustifiable attempt at discipline rather than torture." In rejecting the claim of instructional error, this Court held that the defendant there "sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense" and found the instruction argumentative. (2 Cal.4th at 437.)

[†] CALJIC 2.03: If you find that before the trial defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide. (9 CT 1981.)

When the court admits evidence subject to the existence of preliminary facts, it

> [m]ay, *and on request shall*, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury *finds* that the preliminary fact does exist." (Evid.Code, § 403, subd. (c)(1), italics added [by Court])

(People v. Carter (2003) 30 Cal.4th 1166, 1197-98.) Indeed, *Carter,* specifically held that a trial court must give CALJIC No. 2.71.5 "when the defendant requests it." (*Ibid.*) Thus, the failure to give Defense Special Instruction No. 5, based on CALJIC 2.71.5, was clear error.

The pronouncement in *Carter* is not limited only to the exact wording of CALJIC instructions regarding the defendant's consciousness of guilt or defendant's failure to deny accusations. Such an interpretation would violate the requirement of equal treatment and even- handedness articulated in *Wardius v. Oregon* (1973) 412 U.S. 470, 474-475: "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (See also *Cool v. United States* (1972) 409 U.S. 100, 103 n. 4 [reversible error to instruct jury that it may convict solely on the basis of accomplice testimony but not that it may acquit based on the accomplice testimony].) "There should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) The false statements allegedly made by Bell and by appellant were not handled impartially by the trial court. Rather, they were handled in a manner that favored the prosecution and undermined the defense.

The two instructions requested by the defense must be given where, as here, there was a strong evidentiary basis for them. Had the trial judge found aspects of the instructions argumentative, the trial judge should have tailored the instruction to conform to the requirements of *Wright*, supra, 45 Cal.3d 1126, rather than deny the instruction outright. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 (error not to give requested

instruction on the unreliableness of eyewitness identification); *Accord:* People v. Hall (1980) 28 Cal.3d 143, 159.) Thus, the trial judge should have instructed the jury to consider the evidence of Bell's false statements (Defense Special Instruction No. 2) and his failure to deny the accusation that he killed Rickie Blake (Defense Special Instruction No.5). Such evidence could raise a reasonable doubt as to appellant's guilt.

3. Respondent's reliance on People v Hartsch is misplaced. Respondent cites *People v. Hartsch* (2010) 49 Cal.4th 472, 500-501 as authority supporting the trial judge's denial of the defense request for a modified version of CALJIC 2.03, instructing the jury to infer consciousness of guilt from Bell's false alibi that he was with his girlfriend on the night of the crime. But respondent's reliance on *Hartsch* is equally misplaced. While *Hartsch* upheld the trial judge's refusal to give a defense modification of CALJIC 2.03, its reason for doing so was based on the fact that the instruction requested by the defense suggested that a false statement by *any* witness would give rise to an inference of consciousness of the guilt of that witness.*

As this Court noted in *Hartsch*, the instruction requested there

> would have told the jury that false or misleading statements by a witness regarding the crimes charged against the defendant could be considered a circumstance tending to prove the witness's guilt. Defendant offered no authority below, and provides none here, supporting this notion. The instruction would have told the jury that untruthful testimony about the crimes from any witness could be taken as an indication of that witness's guilt. This might lead to absurd results.

(49 Cal.4th 500-501.) The Court's analysis in *Hartsch* supports the instruction requested here. The problem with the instruction in *Hartsch* was that it was not limited to the person whom the defense claimed had committed the crime. Instead, the requested

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* "If you should find that before this trial court a witness made wilfully false or deliberately misleading statements concerning the crime(s) for which the defendant is now being tried, you may consider such statement(s) as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt."
(49 Cal.4th at 500-501, fn 29.)

instruction suggested that the jury was free to infer that any witness in the case who gave false or misleading statements was guilty of the crime, even if there was no other evidence that the witness had anything to do with the crime. In appellant's case, however, the instruction requested was narrowly limited to the person about whom substantial evidence had already been admitted pointing to his liability as a third party suspect. (For summaries of the evidence pointing to George Bell as the killer, see AOB 23-28.) Thus, *Hartsch* is inapplicable to the present case.

Moreover, the infirmity in the *Hartsch* instruction was its failure to limit the instruction to a person against whom there was evidence that he or she committed the crime. In appellant's case however, there is no such infirmity. Indeed, the *Hatrsch* decision puts the lie to respondent's contention that instruction proposed in appellant's case was argumentative; the instruction in our case met the requirement specified in *Hartsch* – the instruction related only to Bell, against whom there was substantial incriminating evidence; even the trial judge ruled Bell was a proper target of a third party liability defense. (4 RT 708.) Surely it cannot be argumentative to give the precise level of specificity required by the Court in *Hartsch*.

4. The Errors in Refusing Pinpoint Instructions were not harmless. Respondent also argues that even if was error to deny the defense these two instructions, the error was harmless because the substance of the instructions was included in the trial judge's general instruction on reasonable doubt. Specifically, the trial judge instructed the jury that:

> You have heard evidence that George Cardenas Bell may have committed the crime or crimes for which Defendant, George Williams, has been charged. The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime.
>
> If after considering the evidence regarding George Cardenas Bell and all of the other evidence in this case you have a reasonable doubt whether the defendant was the person who committed the crime or crimes, you must give the defendant the benefit of the doubt and find him not guilty.

(28 RT 6672-6673.) But nothing in this instruction told the jury what to make of Bell's false alibi that he was with his girlfriend the night of the killing and his failure to deny the crime when confronted by both his wife and Greg Richardson. Moreover, the trial court prevented the defense from presenting all the evidence about Bell. When the trial judge instructed the jury with CALJIC 2.03, allowing it to infer that appellant's false denial of knowing Rickie Blake could be considered as consciousness of guilt, the defense was entitled to the same instruction with respect to George Bell's consciousness of guilt. The failure to do so not only violated the court's duty to instruct on all issues supported by the evidence, but it was patently unfair: having given such an instruction about appellant's false statement, the trial judge was required to be evenhanded and give an identical instruction about Bell's false statement.

Contrary to respondent's assertion, the fact that defense counsel argued that Bell's false alibi and his failure to deny that he had committed the crime was evidence of his consciousness of guilt did not cure the unfairness or the harm created by the trial judge's erroneous rulings. The failure to give the instructions requested by the defendant left the jury with no guidance for fair consideration of the defense case. This was error of constitutional dimension and respondent has failed to show that it was harmless beyond a reasonable doubt.

D. Cumulatively These Errors Were Prejudicial

Even if the errors discussed in parts III. A., B. and C. above were not sufficiently prejudicial individually, they operated in combination to exacerbate the prejudice of the others. In violating the *Chambers-Green-Chia* rule and refusing to admit Agent Kelly's testimony regarding Bell's exact words, the trial judge effectively negated the defense by not allowing cross-examination of Bell regarding his incriminating statements. Cumulatively, these errors seriously undermined the defense that the evidence of Bell's guilt raised a reasonable doubt as to appellant's guilt. Respondent has not shown these errors to be harmless beyond a reasonable doubt. Reversal is required.

IV.

THE ADMISSION OF OTHER ACTS OF SEXUAL ASSAULT AS PROPENSITY EVIDENCE AT APPELLANT'S CAPITAL MURDER TRIAL WAS UNDULY PREJUDICIAL, VIOLATED DUE PROCESS, AND SHOULD HAVE BEEN BARRED UNDER EVIDENCE CODE SECTION 352; TO THE EXTENT IT PERMITS SUCH EVIDENCE, EVIDENCE CODE SECTION 1108 IS UNCONSTITUTIONAL

A. To preserve the constitutionality of Evidence Section 352, the courts must perform a searching analysis to avoid undue prejudice.

Respondent's Brief gives inadequate attention to the reasons why there is a rule against admission of propensity evidence that goes back hundreds of years and is embodied in Evidence Code section 1101(a). The United States Supreme Court explained the rationale of the rule as follows:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt . . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

(*Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

The rule against propensity evidence embodied in Evidence Code 1101(a) is a bedrock principle of due process under Anglo-American jurisprudence, (See AOB 114-118, citing *inter alia*, *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 235; *Old Chief v. United States* (1997) 519 U.S. 172, 180; *Brinegar v. United States* (1949) 338 U.S. 160, 174; Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases (submitted to the Congress in accordance with section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322), reprinted in 159 F.R.D. 51. 53 (1995); Natali & Stigall, *Are You*

Going to Indict His Whole Life: How Sexual Propensity Evidence Violates the Due Process Clause (1966) 28 Loyola U. Chi. LJ. 1, 8-14 [recounting the centuries-old history of the rule against propensity evidence].) Evidence Code Section 1108 is a controversial exception. (See Sheft, *Federal Rule 413: A Dangerous New Frontier* (1995) 33 Am. Crim. L. Rev.57, 77-82); Myrna S. Raeder, American Bar Association Criminal Justice Section Report to the House of Delegates, in (1995) 22 Fordham Urb. L.J. 343, 345-46; (*State v. Cox* (Iowa 2010) 781 N.W. 2d 757 [statute authorizing use of other sex crimes to prove disposition to commit sex crimes violates due process clause of Iowa constitution]; *State v. Ellison* (Mo. 2007) , 239 S.W.3d 603 [statute admitting other sex crimes with a child under 14 violates state constitutional provisions that guarantee a defendant has "the right to be tried only on the offense charged."]; *State v. Burns* (Mo. 1998), 978 S.W.2d 759, 760 [same].)

Nevertheless, in *People v. Falsetta* (1999) 21 Cal.4th 903, this Court upheld section 1108 against a challenge that it violated due process because, even "if the rule [against admitting propensity evidence] were deemed fundamental from a historical perspective, we would nonetheless uphold section 1108 if it did not unduly 'offend'. . . fundamental due process principles." (21 Cal.4th 915) The Court reasoned that "the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge." (21 Cal.4th at 917). Thus, under *Falsetta's* analysis, the constitutionality of section 1108 rests on vigilant use of section 352 to guard against the danger of undue prejudice inherent in propensity evidence. Moreover, the Falsetta court approved of a searching analysis under Section 352 before admitting evidence of uncharged offenses under section 1108:

> As for the third factor disfavoring propensity evidence, the possible undue prejudice arising from the admission of defendant's other offenses, again we believe section 352 provides a safeguard that strongly supports the constitutionality of section 1108. By reason of section 1108, trial courts may no longer deem "propensity" evidence unduly prejudicial per se, *but must engage in a careful weighing process under section 352. Rather than admit or exclude every*

sex offense a defendant commits, 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*.

(21 Cal.4th at 916-917 [emphasis added].)

Yet, despite these pronouncements, subsequent decisions of this Court indicate that rather than being a bulwark against improper use of propensity evidence, section 352 guards only against the most irrational rulings of the trial court, those in which "the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Lewis, supra*, 46 Cal.4th at 1286; *People v. Hovarter* (2008) 44 Cal.4th 983, 1004; RB 74.) These decisions show that the abuse of discretion standard set out in section 352 is inadequate to provide the protection this Court contemplated in *Falsetta*. Either there must be stricter limitations on the admission of propensity evidence or stricter scrutiny of the trial judge's decisions to admit sexual propensity evidence. Otherwise, section 1108 cannot pass constitutional muster.

With this background in mind, appellant discusses the reasons why the trial court erred in admitting evidence of appellant's uncharged sexual offenses and why the conviction should be reversed.

B. Irrelevant, But Inflammatory Details of Sexual Assaults Were Clearly More Prejudicial Than Probative and Should have been excluded under Evidence Code Section 352.

There were three major reasons why the trial judge's rulings permitting the inflammatory details of the Velma Williams incident and the incident with appellant's

daughter were misapplications of Evidence Code section 352: (1) the trial judge misunderstood his role in screening propensity evidence proffered under section 1108 and the rulings he made are entitled to no deference; (2) the admission of the uncharged offenses was highly prejudicial and outweighed any probative value they may have had; and (3) section 1108 was misused as an end-run around the requirements of section 1101(b), allowing the prosecutor to argue falsely that forcing alcohol on the victim was a common scheme utilized by appellant when the prosecutor was well aware that none of the three other offenses introduced in the penalty phase involved forcing alcohol on the victims. Each of these errors is discussed in turn below.

1. The trial judge misunderstood the law and his role in screening propensity evidence proffered under section 1108 and the rulings he made are therefore entitled to no deference. The record demonstrates that the trial judge clearly completely missed *Michelson*'s point that propensity evidence biases the jury against the defendant way out of proportion to its actual probative value:

> I start, first with observation that I think as I recall the older cases, the probative value was always characterized as being that these things were *perhaps too relevant*, that perhaps their disposition had such a disproportionate impact that the policy of the state was to eliminate *that too relevant evidence.*
>
> *So we start with idea that this is evidence with significant probative value.* And the question is whether there is undo [sic] prejudice to the defendant.

(4 RT 661-662.) In six short lines, the trial judge stood *Michelson* on its head: (a) whereas the thrust of *Michelson* stated that propensity evidence was not allowed in evidence because it "over-persuade[d]" the jury by causing them "to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge," the trial judge converted that into the idea that propensity evidence had "significant probative value" and did not further examine the weight of that evidence; (2) at the same time, the trial judge disregarded the dangers inherent in propensity evidence proving too much – having the jury convict appellant of murder because they thought his previous sex

crimes meant he was an evil person who could commit murder. Given the trial judge's misunderstanding of the law as to both prongs of section 352 analyis, his conclusions are entitled to no deference. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1065-70; *People v. Green,* (1980) 27 Cal.3d 1, 26; *People v. Cortez* (1971) 6 Cal.3d 78, 84-85; *Hrnjak v. Graymar,* (1971) 4 Cal.3d 725, 732.)

This Court must therefore consider the question of admissibility *de novo.* As discussed below, the admission of the inflammatory details of the Velma Williams incident and the incident with appellant's daughter created unnecessary prejudice which greatly outweighed any probative value these incidents had and the prosecution used these two incidents in ways far beyond the authorization of rule 1108 to make arguments that contended that the sex offenses showed that appellant was "the kind of person ... who is capable of this conduct....." (28 RT 6441) and to suggest patterns of behavior which would not have passed muster under Evidence Code section 1101(b).

2. Admission of Inflammatory Details of the Prior Offenses Was Highly Prejudicial and Outweighed Any Probative Value The Offenses May Have Had. During the guilt phase, the prosecutor proffered evidence concerning the rapes of Velma Williams and her daughter, ostensibly to show that appellant raped rather than had consensual sex with Rickie Blake. This evidence was highly prejudicial because many of the underlying details of the crimes prejudiced the jury against appellant, particularly in the context of the crimes charged in the Blake case. Velma Williams testified that appellant raped her at knife point, tied her up, and cut off some of her pubic hair with the knife. He then molested her six-year-old daughter despite Velma's pleas to spare the child. The details of the Velma Williams case, other than the fact that a rape was committed at knife point, had no probative value whatsoever to the issues presented in the Rickie Blake case. Yet, introduction of this evidence and presentation of the victim's testimony presented a grave danger that the jury would be prejudiced against appellant.

Indeed, the way the prosecutor used the incident in closing argument to show that appellant was an evil person resolves any doubt about the state's purpose in presenting this evidence—to prejudice the jury against him:

> This man used the knife to cut off her pubic hairs. That's the kind of person we are dealing with, who is capable of this conduct..... "Please don't. Please leave her alone. Do me. Do me again.
>
> Don't touch my daughter. Don't touch my daughter."

(28 RT 6441.)

These details were highly inflammatory. They were not there as an argument that appellant had a propensity to commit sex offenses and therefore it was more likely that the intercourse with Rickie Blake was rape rather than consensual; rather they were used for the very kind of character assassination which Evidence Code section 1101(a) forbids: inviting jurors to infer that because defendant has committed sexual assaults, he was therefore "capable of" killing the Rickie Blake. In the face of the highly inflammatory and irrelevant details presented regarding the rape of Velma Williams and appellant's molestation of his daughter, it would have been impossible for the jury to ignore or disregard this evidence in deciding appellant's guilt of murder, especially because there was no instruction that the jury not consider these crimes or details in deciding whether appellant *murdered* Rickie Blake. (See CALJIC 2.50.01, 9 CT 1991; discussed *infra* pp.59-60). This erroneously admitted evidence, which was far more prejudicial than probative on the issues surrounding Blake's death, presented a very high risk of biasing the jury against the defendant and should have been kept from the jury as this Court suggested in *Falsetta* by "excluding irrelevant though inflammatory details surrounding the offense." (21 Cal.4th at 916-917.)

The prejudice arising from the inflammatory details introduced outweighed any potential probative value that the evidence had on the murder charge in this case where there was no dispute that defendant had sexual intercourse with the victim. That prejudice against appellant was magnified by the introduction of the incident in which appellant

inappropriately touched his daughter. The introduction of that incident created even more risk that the jurors would convict appellant of Rickie Blake's murder because they considered him an evil man, rather than based on evidence that proved beyond a reasonable doubt that he was guilty of the murder. The incident with his daughter was highly likely to inflame the jury's passions against appellant as a person who would molest his own daughter. It is unclear how that incident is probative of whether appellant raped Rickie Blake. What is clear, however, is that such evidence was introduced to show that appellant was a bad man, capable of the crime of murder, not that the intercourse with Rickie Blake was not consensual.

Despite the high danger of prejudice from the testimony concerning uncharged sexual crimes by appellant, respondent argues that because the crime of murder is so much more serious than the crime of rape, no undue prejudice results from the introduction of the rape charge. See *People v. Jones,* 54 Cal.4th at 51 ["Although serious crimes, they certainly were not more serious or inflammatory than the charge that defendant raped, sodomized, paralyzed, viciously beat, and strangled *Eddings* to death before setting her house on fire"].); *People v. Loy* (2011) 52 Cal.4th 46, 62 ("The facts of the previous offenses, although unpleasant, were not particularly inflammatory compared to the horrendous crime of this case."]); *People v. Lewis*, *supra,* 46 Cal.4th at 1287 ["Although evidence of the prior offense would elicit a negative emotional response from the jurors in this case, it was less inflammatory than the charge that defendant raped, strangled, and cut the throat of Patricia Miller while her children slept upstairs."].)

Respondent's reliance on these cases is misplaced because: (a) the cases themselves rely on the flawed reasoning that because the uncharged sexual offense is not more inflammatory than the more serious crime of murder, no prejudice results from the admission of the details of a rape, no matter how prejudicial the act; (b) the probative value of the evidence in appellant's case was very limited; and c) *Jones, Loy* and *Lewis* are all distinguishable from the present case because the evidence of uncharged crimes in those cases had much higher probative value than the evidence introduced here.

a. The proper inquiry is to compare the probative value of the uncharged sex crimes to the potential prejudice caused by introducing them; comparing the potential prejudice of the uncharged crimes to the prejudice a juror might feel against the perpetrator of the charged murder is illogical and violates the presumption of innocence. Respondent argues that "although the rapes of Velma Williams and her daughter would not have reflected well on appellant, appellant's participation in those crimes or the molest of his daughter would not have evoked a stronger emotional reaction than appellant's crime against Rickie Blake, the brutal rape and murder of a sweet, 14-year-old child." (RB 80.) This argument is both illogical and violates the presumption of innocence. The issue is not whether the facts of the charged crime are more likely to evoke a stronger emotional response from the jury than the facts of the uncharged sexual offense; it is whether the circumstances of the uncharged crime could lead the jurors to be biased against the defendant and convict him because they consider him to be an evil man, rather than based on the evidence against him. To compare the prejudice that the jury could feel toward the perpetrator of the crime against Rickie Blake to the prejudice evoked by the uncharged crimes is to assume that the defendant is guilty before the jury has reached a verdict; the jury would have to ignore their instructions to consider defendant innocent and violate that presumption of innocence to be biased against the defendant because he is charged with that murder.

Nothing in the facts of *Lewis, Loy* or *Jones, supra,* suggests the broad principle that as long as the crime charged is a more serious offense than a sexual offense, evidence of an uncharged sexual offense can never be prejudicial, no matter how inflammatory. Rather, these cases stand for the proposition that where the facts of the uncharged sex crimes are highly relevant to proving the charged murder, any prejudice to defendant was outweighed by the high probative value of the uncharged crimes in that case. To the extent that language in *Jones, Loy* or *Lewis* could be read to support respondent's contention that the correct inquiry for determining the admissibility of prior bad acts

turns on whether the uncharged crimes are more inflammatory than the charged crime*, this Court should clarify that other crimes evidence can be prejudicial in a murder case and that admissibility cannot be determined by mere resort to an inquiry as to whether the inflammatory nature of the charged crime is greater than the inflammatory nature of the uncharged crime or crimes. The correct inquiry in determining admissibility is what probative value, if any, the uncharged crime has with respect to proving the charged crime and whether that probative value is outweighed by the prejudice arising from admission of the evidence related to the uncharged offense.

b. Here the probative value of the other crimes evidence introduced was limited.

Had the trial judge examined the actual probative value of the evidence here, he would have concluded that the probative value was limited and was substantially outweighed by the prejudice arising from the inflammatory nature of the crimes and their underlying facts. Virtually none of the details of the uncharged crimes bore on the issues in the charged crime. Once the court ruled that the other crimes evidence could come in, the prosecutor took that as *carte blanche* to use the prior offenses for a good deal more than the propensity inference. He argued that there were critical similarities between the crimes. Yet, contrary to respondent's argument, the two uncharged crimes were not sufficiently similar to the crime with which appellant was charged to justify admission of these prior offenses. One involved the molestation of his daughter; the other involved the rape of Velma Williams and the molestation of her young daughter. Though respondent suggests that there were similarities and that in both of these incidents appellant attempted to force alcohol on the victims – those alleged similarities were insufficient to support the inference that appellant murdered or even raped Rickie Blake. If such evidence had been offered under section 1101(b), it would not pass muster under the requirements of that section of the Evidence Code.

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* See RB 80: "Although the rapes of Velma Williams and her daughter would not have reflected well on appellant, appellant's participation in those crimes or the molest of his daughter would not have evoked a stronger emotional reaction than appellant's crime against Rickie Blake, the brutal rape and murder of a sweet, 14-year-old child."

As discussed more fully below, the prosecutor was well aware that the "forced alcohol" similarity was not supported by evidence which he later introduced in the penalty phase: the three other sexual offenses introduced in the penalty phase did not involve forcing alcohol on anyone.* Thus, there were no viable inferences of a common pattern or scheme.† The only permissible inference from the evidence is a general propensity inference which is permitted by section 1108 -- that appellant had a disposition to commit sex offenses and thus it was more likely to have raped rather than had consensual sex with Rickie Blake. Had the prosecution been limited to introducing evidence that appellant had raped Velma Williams without the inflammatory details, then this would be a closer case. But the way the prosecution used those inflammatory details makes clear that they were used to paint appellant not as a man who had a propensity to commit sexual offenses, but rather as a monster capable of killing Rickie Blake:

> This man used the knife to cut off her pubic hairs.
>
> That's the kind of person we are dealing with, who is capable of this conduct.

(28 RT 6441.) Such an argument goes well beyond the propensity inference that section 1108 allows.

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* The three uncharged crimes introduced at the penalty phase were the rape of 15-year-old Sandra Stephens (31 RT 7141-73244) ; the rape of Valender Rackley, a fellow member of the Navy (31 RT 7296-7297); and the molestation of his 13 year-old nephew, Leon Fuller (30 RT 3944).

† Moreover, the evidence was equivocal on the issue whether Blake had even ingested alcohol or if the alcohol in her system at the autopsy was a by-product of decomposition. (See 22 RT 4642 [testimony of Dr. Eisele that alcohol found in Rickie Blake's blood was likely the result of both decomposition and ingestion]; 22 RT 4813 [Testimony of Dr. Walker that the alcohol was attributable to both or entirely to ingestion]; 22 RT 4684, 4686 [Testimony of Dr. Eisele that he told the defense prior to trial that the alcohol in the blood was *not* the result of decomposition and confirmed that opinion to a defense investigator on the morning he was to have testified.) Thus, it is not even clear that alcohol was forced on Rickie Blake, much less that appellant had an "M.O." of doing so.

c. Jones, Loy and Lewis are all distinguishable because the other crimes evidence there had a much higher probative value than propensity evidence here.

In *Jones*, the other crimes evidence was permitted under section 1101(b) to show that defendant there formed the intent to rape his victim before he killed her. (54 Cal.4th at 50.)* It was propensity evidence plus evidence of intent: "Evidence from the Toni P. case was probative of defendant's propensity to commit sexual offenses, *and* to refute the claim that he formed the intent to sexually assault *Eddings* only after killing her. (54 Cal.4th at 50-51 [emphasis added].) There, the uncharged offenses had a clear relevance not only to a general propensity to commit sexual crimes, but also to another disputed issue in the case – when defendant formed the intent to sexually assault his victim. In contrast, in the instant case, the uncharged crimes could only be properly used to show appellant had a propensity to rape, which in turn gave rise to the inference that he raped, rather than had consensual sex with the victim; but there was no probative value beyond that.

In *Lewis*, the uncharged offenses were introduced under both section 1101(b) and section 1108. This Court's own analysis of the probative value of the evidence illustrates the distinction between Lewis and appellant's case:

> The probative value of the evidence was strong. First, the two sexual assaults shared many similarities. Defendant was acquainted with both victims before the assaults, and therefore may have chosen them because they would be more inclined to grant him access to their homes, where the assaults occurred. Both attacks occurred late in the evening after defendant socialized and ingested drugs with the victims, suggesting they were induced to let down their guard. Both

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* The trial court in *Jones* admitted the uncharged crimes evidence under section 1101(b) to prove intent and declined to admit it under section 1108 because the constitutionality of section 1108 had not yet been ruled on by this Court. 54 Cal.4th at 50. On appeal, this Court ruled that the uncharged sex crimes were admissible under section 1108 which this Court had, in the interim between the Jones trial and appeal, ruled constitutional in *Falsetta.*

> victims were physically small in stature and therefore less able to resist a physical assault. The hands of both victims were pinned above their heads. Both victims were strangled. Defendant threatened to slice Christa B.'s throat, and Miller's throat was cut.

Lewis, 46 Cal.4th at 1287. In *Lewis,* the similarity of the crimes met the requirements of 1101(b). See *People v. Ewoldt.* (1994) 7 Cal.4th 380. In contrast, the facts of appellant's case would not make the other crimes evidence eligible for admissibility under section 1101(b) – there was no common plan or scheme to the uncharged offenses other than they involved sexual assaults; the victims ranged from six-year-olds to adults and no common methodology was used. Thus, the prosecutor in appellant's case relied on the propensity evidence to create an inference of guilt that was much more likely to bias the jury against the defendant than to help it in its deliberations on when sexual intercourse occurred or whether it was consensual.

Even *People v. Loy, supra,* on which respondent relies, acknowledged that the similarities between the uncharged and charged offenses were "relevant to the trial court's exercise of discretion." (46 Cal.4th at 63.) In explaining how the nature of the uncharged other sex crimes was relevant to identifying Loy as the perpetrator, the Court stated:

> Although the previous sexual offenses may not have been sufficiently similar to be admissible under Evidence Code section 1101, they were not entirely dissimilar. Ramona M. was only four years older when defendant assaulted her than Monique was when she died. Defendant choked both of his previous victims. Because Monique's body decomposed in a vacant lot for several days, exactly how she was sexually assaulted and how she died could not be determined forensically. But it appears she died by asphyxiation which, Dr. Scheinin testified, is the most common means of killing in cases of sexual assault. Thus, evidence of the choking was highly relevant, weighing in favor of admission.

(46 Cal.4th at 63.)

Respondent has not shown how the other crimes evidence presented against appellant bore any similarities to the capital crime beyond an allegation of rape. Given the prosecutor's discovery violations and appellant's defense that the sex between

appellant and the victim was consensual and that a third party committed the murder, it is hard to deny that there was a grave danger that this evidence would be used by the jury to conclude that he was indifferent to the suffering of his victims, he was an evil man and therefore he was more likely to have killed Rickie Blake. That inference is the precise propensity inference prohibited by Evidence Code 1101(a) and due process.

3. *Even though the Trial Court Did Not Admit the Uncharged Rapes As Evidence of Common Plan or Scheme under section 1101(b), the Prosecutor Nonetheless Used them this Way, Knowing Full Well That No Such Pattern Existed in the Other Uncharged Crimes the Prosecutor Sought to Introduce at the Penalty Phase.*

a. **The other crimes were not admitted under section 1101(b).** As respondent acknowledges, the prosecution originally sought admission of three prior sexual offenses not only section under 1108, but also under section 1101(b) to prove intent, common plan or scheme and identity. (See RB 71; 5 CT 1032-1041.) But the trial judge did not admit the uncharged offenses pursuant to Section 1101(b), stating "the lid obviously comes off under 1108 and there is a frank concession that, rather than pretend that this evidence is being used specifically for an isolated issue, that it is, in fact propensity evidence." (4 RT 644 [trial judge explaining his ruling on why section 1108 is not an *ex post facto* law].) Thus, the evidence was allowed in as pure propensity evidence.

b. **Nonetheless, the prosecutor also used the circumstances of the crimes as if they were relevant under section 1101(b).** In discussing the cause of Rickie Blake's death, he argued that there was evidence that Rickie drowned as a result of alcohol forced down her throat and that the conflicting evidence on this point could be resolved by the fact that "we do have a pattern here with his own daughter, with Rickie Blake and then with Velma Williams." (28 RT 6436.)

The so-called pattern was so vague as to be meaningless, not only because there was no evidence that appellant *forced* alcohol on his daughter, but also because the prosecutor was well aware that of the five uncharged sexual offenses committed by

appellant, only two involved appellant offering or forcing alcohol on the victim: the incident with his daughter involved him *giving* [*]alcohol to her and the rape of Velma Williams involved him first offering, then trying to force her to drink beer. (20 RT 3942-3943.) Thus, the prosecutor's argument to the jury that appellant had a pattern of forcing alcohol on his victims was false and misleading. The prosecutor knew that four of the five sexual assaults alleged against appellant never involved alcohol being forced on the victim.[†] Indeed, the prosecutor had received permission from the judge to bring in evidence of the molestation of Leon Fuller under section 1108, but did not do so, possibly because there was no evidence that Fuller was offered or forced to drink alcohol. (30 RT 3944 [Fuller woke up when appellant had his hand in Fuller's pants].) Thus, the "pattern" upon which the DA relied to justify admission of this "propensity" evidence did not exist.

The prosecutor went on to argue to the jury that because appellant had molested his daughter and Velma Williams's daughter, when they were each six years old, this showed that he "likes little girls." (28 RT 6440-6441) made it more likely that he raped and killed Rickie Blake a fourteen year old. The equation of six-year-olds with teenagers was a leap that was not supported in law or in fact and should not have been allowed.[‡]

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[*] There was no testimony that stated she was forced to drink the alcohol. [See 20 RT 3866 – 3858 [testimony of appellant's daughter Idella: she does not remember the alcohol, but acknowledges she must have told the police about the alcohol); [20 RT 3890 [testimony of appellant's wife Brenda that Idella had told her that "her dad had *given* her some pina colada."]

[†] The offenses were molestation of his daughter, the rape of 15-year-old Sandra Stephens (31 RT 7141-73244); the rape of Valender Rackley, a fellow member of the Navy (31 RT 7296-7297); and the molestation of his 13 year-old nephew, Leon Fuller (30 RT 3944).

[‡] To support this inference, respondent argues that the age of the victims was a similarity between the charged and uncharged offences: "[i]n both of the uncharged incidents, appellant had sex with children, six year olds; while in the current case he raped a 14-year-old who was small in stature and prepubescent. (RB 79.) Equating the sexual interest of an adult in a six year old and a fourteen year old seems far-fetched. Indeed, the Penal Code in section 288 makes it a crime to perform a lewd or lascivious act on person *under* the age of 14; it thus recognizes age 14 as a significant dividing line between

Although the prosecutor introduced evidence of three additional uncharged sexual offenses in the penalty phase, the crimes which the prosecutor chose to introduce in the guilt phase were about the molestation of two six-year olds which had high inflammatory value, but little probative value concerning an alleged sexual interest in a fourteen-year-old young woman.

c. **The lack of any definition in section 1108 as to the meaning of "a disposition to commit sexual crimes" allowed the prosecutor to make arguments which would not have passed muster under section 1101(b).** With little or no evidence to support the inferences he urged the jury to draw, the prosecutor argued (1) that in the Velma Williams incident, "this man used the knife to cut off her pubic hairs. That's the kind of person we are dealing with, who is capable of this conduct" (28 RT 6441); (2) that forcing alcohol on his victims was a pattern he followed, "part of his M.O." (28 RT 6441.) and (3) that appellant's molestation of two six year olds made it more likely that he molested a fourteen year old. (17 RT 2523 ["He likes sex with kids. And he likes violence, and sex"]; 28 RT 6440-6441.) The range of inferences, particularly (2) and (3) above, bypasses the safeguards of rule 1101(b), which require a finding by the trial judge of sufficient similarity to demonstrate identity, common scheme or plan, motive or intent. (See *People v. Ewoldt, supra,* 7 Cal.4th 380.) No such findings were made here because

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children and adolescents. Moreover, the question of whether a sexual interest in children over the age of 13 is mental disorder was a major debate among psychologists drafting the fifth edition of the DSM. (See Prentky, R.; Barbaree, H. (2011). "Commentary: Hebephilia--a would-be paraphilia caught in the twilight zone between prepubescence and adulthood," 39 *The Journal of the American Academy of Psychiatry and the Law* 506–510. The debate was between those who thought that an interest in early teens was a mental disorder (separate from pedophilia) and those who thought it was not a mental disorder to have sexual interest in youngsters in their teens (though it was still criminal to molest or assault them). Thus, evidence that appellant had molested six-year-olds gave rise to no strong inference that he had a propensity to sexually assault Rickie Blake.

the trial judge believed once rule 1108 was invoked, "the lid ... comes off" (4 RT 644) and apparently the prosecutor was free to argue any inference he fancied, whether or not supported by the facts. This violated the due process and reliability requirements mandated in the guilt phase of a death penalty case.

d. No limiting instruction was given as would be the case if the evidence were admissible under section 1101(b). Generally, when evidence is admitted pursuant to section 1101(b) to prove common scheme or plan, a court not only decides whether there are sufficient similarities to justify the inference, but also gives a limiting instruction pursuant to CALJIC 2.50 to guide the jury's consideration of such evidence:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than those for which he is currently on trial. Such evidence, if believed, was not received and *may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.* Such evidence was received and may be considered by you only for the limited purpose of determining, if it tends to show, the existence... of the specific intent or mental state which is a necessary element of the crime or special circumstance charged. For these limited purposes and as I previously instructed you with regard to the credibility of witnesses, you must weigh such evidence in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(CALJIC 2.50 as given in *People v. Jones, supra,* 54 Cal.4th at 52 [emphasis added].) In contrast, in appellant's case, the trial judge concluded that "the lid obviously comes off under section 1108 and there is a frank concession that, rather than pretend that this evidence is being used specifically for an isolated issue, that it is, in fact propensity evidence." (4 RT 644.) The lack of limiting language in the instruction given to appellant's jury led to the inference that appellant committed another *sexual* crime. This

erroneous instruction permitted the jurors to infer that appellant "did commit the sex crime of which he is accused*," which in this case included murder:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case.
>
> ....
>
> If you find that defendant committed a prior sexual offense, you may, but are not required to, *infer that the defendant had a disposition to commit sexual offenses*. If you find that the defendant had this disposition to commit sexual offenses, you may, but are not required to, infer that *he was likely to commit and did commit the sex crime of which he is accused.*
>
> However, if you find by preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient to itself to prove beyond a reasonable doubt that he committed the charged crime. If you determine an inference can be drawn from the evidence, this inference is simply one item for you to consider, with all the other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.
>
> Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(CALJIC 2.50.01, 9 CT 1991 [emphasis added.]) The instruction's reference to appellant's propensity to commit other sexual crimes was highly prejudicial because it allowed the jury to infer that appellant committed murder because he committed other sex crimes. This is especially problematic the prosecutor's argument went well beyond the basic propensity inference. This effectively created an unguided "free-for-all" approach in the way the jury was allowed to consider this evidence.

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* *People v. Story* (2009) 45 Cal.4th 1284, 1285 held that murder is a sex crime. Thus, the jury was permitted to infer that appellant murdered Rickie Blake because he committed sexual assaults, none of which were related to killing.

C. Section 1108 Jurisprudence Post-*Faletta* Contains Major Structural Flaws and Inconsistencies Which Render the Section Unconstitutional

The post-*Falsetta* cases, including the present one, illustrate that the application of section 1108 has led to incoherent, inconsistent and unfair rulings, rather than the orderly, rational, and even-handed application required by due process. This has led to problematic doctrinal and practical issues which undermine the fairness of current practice at all levels of the criminal justice system. In addition to the failure of appellate review to require that Section 352 act as a safeguard as this Court contemplated in *Falsetta*, there are six additional problems with application of section 1108 which render it inconsistent with due process and a reliable death penalty procedure:

1. ***Confusion abounds over what section 1108 is intended to do.*** The record in this very case demonstrates how confused and confusing Section 1108 jurisprudence is. The trial judge made two rulings that make clear that he did not understand either the probative value or the potential prejudice from section 1108 evidence or that there were any limitations on the propensity inference. First, as discussed in section B.1. pp. 47-48, *supra*, he simply did not understand what the High Court meant in *Michelson* when it said:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

(*Michelson v. United States, supra,* 335 U.S. at 475-476.) Somehow, the trial judge took the U.S. Supreme Court's concern that juries would take propensity evidence for far more than its actual probative value and converted that into the idea that propensity evidence had "significant probative value" and that he did not need examine the weight of that evidence further. In the very same misunderstanding, the trial judge disregarded the dangers inherent in propensity evidence proving too much – having the jury convict

appellant of murder because they thought his previous sex crimes meant he was an evil person who could commit murder, not because of any relevance to the issue of consent. Second, he stated that "the lid obviously comes off under section 1108 and there is a frank concession that, rather than pretend that this evidence is being used specifically for an isolated issue, that it is, in fact propensity evidence." (4 RT 644.) That statement demonstrates that he did not understand the difference between allowing evidence of a prior sexual assault to be introduced in a "he-said, she-said" case to help prove that the sex was not consensual (the basic purpose of section 1108, See *People v. Jones, supra,* 54 Cal.4th at 49)*, and having the "lid ...come... off" to any argument the prosecutor choses to make about possible similarities in the manner that the charged and uncharged victim was assaulted, thereby bypassing the requirements of section 1101(b). That section allows for the admission of evidence of bad acts to prove things other than character "such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented."

And, as this Court explained in *People v.* Ewoldt, *supra,* 7 Cal.4th 380, each of the different theories of proof listed in section 1101(b) requires a different quantity of proof of similarity between the uncharged conduct and the charged crime in order to be

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* Section 1101(b) confirms that section 1108 was limited to cases involving credibility disputes and not a major change in the principles of section 1101(b):

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, ***or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented***) other than his or her disposition to commit such an act.

[emphasis added]

admissible. No such inquiry was made in this case because the judge mistakenly believed that the "lid [had] ... come... off" to such requirements if evidence was proffered under section 1108. This opened the door to the prosecution's improper argument that because appellant did abhorrent things to Velma Williams and her daughter he is "the kind of person we are dealing with, who is capable of this conduct."

If the trial judge was this confused, the jury was as well and the doctrine underpinning propensity evidence is too confusing to be consistent with due process, fundamental fairness and the reliability demanded by the 8th and 14th Amendments.

2. ***Empirical evidence does not support the inference that one who commits a sex crime is more likely to commit another sex crime.*** The passage of the federal counterpart to section 1108 was opposed by the Judicial Conference of the United States and the ABA Criminal Justice Section in part because the concept of a propensity to commit sexual offenses was "unsupported by empirical evidence." (Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, *supra,*\159 F.R.D. at 53 (1995); Myrna S. Raeder, American Bar Association Criminal Justice Section Report to the House of Delegates, *supra,* 22 Fordham Urb. L.J. at 345-46; [reviewing study which showed a lower recidivism rate for rape than all crimes other than murder and concluding that there is no evidence to support reliance upon a propensity inference to prove rape as opposed to any other crime]; Sheft, *Federal Rule 413: A Dangerous New Frontier. supra,* 33 Am. Crim. L. Rev. at 75; See also, Jennifer Dukarski, *The Sexual Predator's Scarlet Letter Under The Federal Rules Of Evidence 413, 414, And 415: The Moral Implication Of The Stigma Created And The Attempt To Balance By Weighing For Prejudice* (2010) 87 U. Det. Mercy U. L. Rev 271, 281 [Condemning the special exception for sex crimes as among other things, a "'once a thief, always a thief' mentality" no more valid for sexual offenses than other offences.].

Despite these observations from judges, lawyers, and commentators, neither Congress nor California were deterred from implementing rules permitting the propensity

inference to be made in cases of sexual offenses. But the fact that California Evidence Code section 1108 became law does not give the inference from prior sexual offenses any greater strength than it has in the particular case in which such evidence is proffered. Rather than permitting the propensity inference automatically, section 1108 requires the trial judge to "engage in a careful weighing process under section 352":

> Rather than admit or exclude every sex offense a defendant commits, 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.

(Falsetta, 21 Cal.4th at 916-917.) The nature of the propensity inference and its probative strength must be considered. The present case illustrates how easy it is to slip into loose inferences that are not supported by the facts of the case (e.g. that appellant's "M.O." was forcing alcohol on intended victims of rape) or of empirical evidence (e.g. that a propensity to molest six-year-old children is evidence that appellant had a sexual interest in fourteen-year-old teenagers). This Court must give guidance to trial judges on how to handle such unsupported arguments.

3. ***This Court's opinions contain language suggesting that unless the facts of the uncharged sex crime are more inflammatory than facts of the charged crime, prejudice does not result from the introduction of the uncharged crime.*** Language indicating that there is no prejudice in admitting other crimes evidence where the uncharged crimes are less inflammatory than the charged crime, (See *People v. Jones,* * *supra,* 54 Cal.4th at 49;

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* For example, in *People v. Jones*, the court stated, "Although [the uncharged sex offenses were] serious crimes, they certainly were not more serious or inflammatory than the charge that defendant raped, sodomized, paralyzed, viciously beat, and strangled Eddings to death before setting her house on fire." (Jones, 54 Cal.4th at 51)

People v. Loy, supra, 52 Cal.4th at 61; *People v. Lewis supra* at 1287), led respondent here to argue that as long as defendant is charged with murder, nothing in the introduction of uncharged sex crimes can be more inflammatory than the murder. Coupled with the trial judge's erroneous view that "the lid obviously comes off under 1108" with respect to the other crimes evidence, no matter how prejudicial, admission of this evidence resulted in a proceeding that violated appellant's 6th, 8th and 14th Amendment rights and denied him a fair trial. (For a discussion a fuller discussion of these cases, see ARB, pp. 54-56, *supra.*)

4. ***The definition of "sexual offense" has been expanded to include murder thereby allowing this exception to swallow much of the rule against propensity evidence in capital cases.*** Adding to the risk that inheres in section 1108 is the fact that this Court has expanded the definition of "sexual offense" to include murder. (See RB 81 [citing *People v. Story*, 45 Cal.4th at 1285]) This expanded the scope of section 1108 beyond its original justification, which was to help resolve credibility disputes in "she-said, he-said" cases. (See *People v. Jones, supra,* 54 Cal.4th 1, 49 ["trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations"; Evidence Code section 1101(b) [exeption for when "a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented.]) This means the need to protect the defendant against prejudice arising from his status as a sexual offender is greater in murder cases because the jury may use the evidence not just to resolve the credibility issue, but also to resolve the murder issues. But the expansion of the definition of sexual offense to include murder pushes in exactly the opposite direction, inviting the jury to treat the murder as a sex crime and therefore to infer that because the accused committed an uncharged sex crime he committed the charged murder. (See CALJIC 2.50.01, given in this case, 9 CT 1991: "If you find that the defendant had this disposition to commit sexual offenses, you may, but are not required to, infer that he was likely to commit and did commit the *sex crime* of which he is accused.")

5. ***There are no established rules guiding courts and litigants about whether or when it is appropriate to argue that specific aspects of uncharged crimes admitted under section 1108 to show a propensity can be used to show identity, common plan or scheme, motive or intent without the safeguards of section 1101(b).*** See discussion pp 56-58, *supra.*

6. Assuming that similarities between the uncharged and charged crimes *are* ***sufficient to justify an argument beyond the basic propensity inference, it is unclear how CALJIC 2.50 and CALJIC 2.50.01 should be applied to situations in which the prosecutor contends that evidence admissible under 1108 gives rise to the inferences allowed to be drawn under section 1101(b).*** See discussion, pp. 59-60.

These six structural defects demonstrate that, as applied in the courts, section 1108 is not being used in the circumscribed way this Court expected when it upheld its constitutionality. Appellant respectfully urges the Court to take a careful look at what has happened in the aftermath of *Falsetta,* particularly in death penalty cases. The Court should either clarify how the lower courts should apply section 1108 in the manner articulated in *Falsetta* or reconsider its ruling and find that section 1108 as applied in the instant case and in post-*Falsetta* decisions is unconstitutional. Regardless of which option the Court takes, it is clear that the way section 1108 was used in the present case were erroneous and individually and cumulatively deprived appellant of due process and a reliable guilt phase verdict.

D. The Error in Admitting Propensity Evidence Was Prejudicial

There is great irony in respondent's assertion that the multiple errors in admitting uncharged offenses were harmless because the case against appellant was so strong the jury would have convicted appellant even if the prosecutor had not biased jurors against appellant with irrelevant but inflammatory details of uncharged crimes. If the prosecution's case was as strong as respondent claims, there would have been no need to inflame the jury as he did in this case. Respondent should not be allowed to have it both

ways and claim that the verdict was fair and reliable notwithstanding the inflammaotry evidence and argument presented by the prosecution and the multiple errors demonstrated by appellant. These errors denied appellant a fair trial before an impartial jury unbiased by the inflammatory uncharged crimes evidence and the way that evidence was used by arguments made by the prosecutor.

The prosecutor introduced this evidence which served to inflame the jury against appellant. This prejudicial effect was not harmless beyond a reasonable doubt, particularly in the face of a credible third-party-suspect defense that George Bell committed the murder: George Bell gave a false alibi claiming that he with his girlfriend the night Rickie disappeared when in fact his girlfriend was in Los Angeles (Compare 26 RT 5807 [Bell claimed he was with his girlfriend the night Rickie Blake disappeared]; 25 RT 5341 [Greg Richardson testified that Bell told him that he was with his girlfriend that night] with 25 RT 3531 [girlfriend Tink Armstrong testified that she was in Los Angeles at funeral that night]); he engaged in bizarre behavior including calling the victim's mother ten years after Rickie's death and telling her, "I can't live like this anymore," and otherwise behaving in ways that caused his wife and friends to suspect him of the murder (see AOB pp. 23-26; and he had engaged in strangling his wife during sex (23 RT 4891; 24 RT 5004), a fact relevant to the manner in which the victim died. These facts raised a reasonable doubt about appellant's guilt and, in order to distract the jury from appellant's defense, it was necessary to inflame the jury against him by introducing prejudicial other crimes evidence with little or no probative value on the disputed issues in the case.

In a case in which a constitutional violation has been committed, settled law requires the state to demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California supra,* 385 U.S. at 24.) Where there was substantial evidence that a third party committed the crime and where the prosecutor presented misleading, highly inflammatory, and irrelevant details of uncharged crimes to urge the jury to infer that appellant had raped and killed the victim, the state cannot meet this burden. The verdict of guilt should be reversed.

V.

THE TRIAL JUDGE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, TO PRESENT A PENALTY DEFENSE, AND TO A RELIABLE PENALTY DETERMINATION WHEN IT PREVENTED THE JURY FROM HEARING IMPORTANT MITIGATING EVIDENCE FROM TWO ELDERLY WITNESSES WHO WERE TOO ILL TO TRAVEL TO COURT

Both parties agree that, in the words of respondent, "[t]he Federal Constitution prohibits the State from imposing limitations resulting in the exclusion of relevant mitigating evidence that can be considered by the court or jury considering the appropriate sentence in a capital case." (RB 89, citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114-115 and *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; AOB 141, citing in addition, *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [evidence about defendant's background and character relevant].) Both parties also agree that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death..." (RB 89-90, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; AOB 141-142.) We also agree that due process requires the admission of hearsay in the penalty phase where "the evidence [is] highly relevant to a critical issue in the punishment phase of trial ... and substantial reasons exist to assume its reliability (AOB 142 quoting *Green v. Georgia, supra,* 442 U.S. at 97; *People v. Morrison* (2004) 34 Cal.4th 698, 725; Accord RB 90-91) and that the Constitution does not require the admission of unreliable evidence or evidence without a proper foundation. (See RB 92-93.)

Where appellant and respondent differ is on whether the Constitution requires the admission of relevant mitigating evidence when it is offered in the form of *either* a video/transcript package *or* by way of conditional examination. There is no reported case cited by either party that governs precisely a situation where the proponent of the evidence offers to cure any foundational deficiencies by conducting a conditional examination of the witnesses. Nevertheless, where "the Federal Constitution prohibits

the State from imposing limitations resulting in the exclusion of relevant mitigating evidence" (*Eddings, supra*), this core principle of capital jurisprudence required the trial judge in appellant's case to ensure that defendant was able to present to the jury all mitigating evidence relevant to its penalty determination.

Respondent's argument on this issue is inconsistent and incorrect. On the one hand, respondent argues that allowing videotaped statements of two ailing, elderly women would be unfair and unreliable because it lacked the foundation that cross-examination would have provided. (RB 92-93). On the other hand, respondent contends "the relevant admissible evidence that Ms. Whitfield and Ms. Williams could have provided was minimal and cumulative to evidence presented by other witnesses."* (RB 105.) If their testimony was so inconsequential, the prosecution would not have gone to such lengths to exclude it. Had the DA been focused on justice and ensuring that appellant received a fair trial, he would have acceded to defense counsel's request and attended the videotaping sessions or interviews of the witnesses, as defense counsel invited him to do. Moreover, a prosecutor seeking justice would not have opposed those portions of the videotape which were objectionable solely because they were not live testimony, nor opposed the conditional examination, which would have provided the opportunity to cross-examine these witnesses. Given the prosecution's relentless efforts to keep relevant mitigation evidence from the jury, the trial judge erred in denying defense counsel's request to get this critical mitigation evidence before the jury through either the video or conditional examination. At the least, the prosecutor could have permitted redacted video and transcripts in evidence. The failure to employ either of these options denied appellant a fair penalty trial, due process, and a reliable death verdict.

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* Neither respondent nor the trial judge ever identified any testimony from any other witness that discussed the subjects covered by Ms. Williams or Ms. Whitfield.

The excluded evidence was highly relevant and sufficiently reliable. Due process and the Eighth Amendment required that it be admitted in some form and the failure of the trial judge to allow this mitigating evidence was prejudicial error.

A. The Excluded Evidence Was Reliable and Important and the Trial Judge Erred When He Characterized It As Insignificant.

If the evidence the defense sought to have admitted by either a redacted videotape and transcript or by a new conditional examination was reliable and relevant to the mitigation case, then the trial judge should have permitted the defense to get it before the jury. In the AOB, appellant established that each of the witnesses in question had given highly relevant and reliable evidence from their own personal knowledge of appellant. (See AOB 127-132 [catalogue of Annie Whitfield's statements from her own personal knowledge to which prosecutor raised no specific objection]; 132-136 [catalogue of Sophie Williams' statements from her own personal knowledge to which the prosecutor raised no specific objection]; 143-148 [detailed explanation of how the statements of each woman were integral to the overall case for life].)

Sophie Williams' testimony established that, following appellant's release from prison, he had shown strong qualities of love and kindness toward her and her husband, acting like a good son to them both. After her husband died, he continued to look after her welfare as would a devoted family member, even though appellant was not related to her. Her first-hand knowledge was a powerful rebuttal to the prosecutor's argument that appellant was just "evil" (37 RT 9302) and to the testimony of prosecution witness Dr. Park Dietz, who opined that George Williams was a sociopath. (37 RT 9119.)

Defense counsel represented to the trial court that Annie Whitfield was "perhaps the single most important mitigation witness for the defense." (29 RT 6826.) As a foster mother of over 100 children over the years, she was uniquely qualified to provide information critical to issues before the jury in the penalty case. She established from her own knowledge and personal observations four points critical to appellant's penalty

defense: (1) that appellant was a sweet, loving child when he was with a normal, loving family, but was aching for love he had not received during his early childhood (30 Supp. CT 6003); (2) that appellant's mother was physically and emotionally abusive (see. E.g. 30 CT 5978-5979, 5984-5984) which countered the prosecutor's contention that she was someone who worked hard to make a decent life and support appellant. (See (38 RT 9274); (3) that appellant had telltale scars of having been beaten with a belt or switch at age 10 (30 CT 5986), countering the prosecutor's contention that childhood beatings were not proved; and (4) that, in her interactions with appellant's mother, she had seen her when she appeared drunk, rebutting contentions that appellant's mother did not drink. (30 CT 5982, 5985.)

1.***The trial judge mischaracterized the mitigating evidence.*** The proffer of testimony from these two ailing women was based on their own knowledge and was of vital importance to the defense case. (See AOB, 143-148.) Nonetheless, the trial judge unfairly and inaccurately characterized their testimony as insignificant and irrelevant: As to Sophie Williams' compelling testimony, for example, regarding George's devotion to her and her husband, the trial judge stated:

> I think what is admissible comes to expressions of what other people told her, including her husband, as basically that George Williams called, asked how she was doing and one day her lawnmower stopped, he fixed it, and that he called and checked on her occasionally. And I think she related the story that he cooked for her one time. That would be the extent of any relevant testimony.

(36 RT 8956.)

Similarly, with respect to Annie Whitfield's first-hand observations, the trial judge erroneously dismissed her testimony as inadmissible hearsay:

> ...she has no idea what happened to him before he came to her house. And she even said at one point she had no idea of what happened to him after he left her house. Much of her testimony is hearsay of the most unreliable kind.

(36 RT 8956.)

In the AOB (pp. 127-136) appellant demonstrated that the trial judge's characterization of Williams' and Whitfield's testimony was grossly inaccurate. More importantly, his comments underscored the fact that he totally misunderstood the concept of mitigation and the importance of this evidence to the penalty phase defense case. The evidence offered by Sophie Williams and Annie Whitfield *was* based on their first-hand observations and had great significance to appellant's case for life, including its powerful evidence of George's good traits when he was sober. It provided a more complete profile of appellant, a context to help the jury understand his inability to overcome the problems with alcohol that precipitated his prior offenses, and a basis for a sentence of less than death. The court's denial of the defense request to present this evidence was error.

2. ***Respondent fails to offer sufficient reasons to exclude the evidence.*** Respondent's Brief disputes none of this. It has not identified a single item in the proffered testimony of Sophie Williams or Annie Whitfield that that was objected to by the prosecution when the trial judge initially ruled that the videos would be admissible under *Green, supra,* 442 U.S. at 97. When the court invited the prosecutor to object to any individual portion of the proffered testimony on grounds other than that it was being offered in the form of a videotape, rather than live testimony subject to cross examination, the prosecutor made no additional objections to any of the items recited in the AOB*. Nor has Respondent's brief identified a single item in Appellant's recitation that was not within the personal knowledge of these witnesses.

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* Apparently unable to find a single item in either Ms. Williams' or Ms. Whitfield's statements that was not from personal knowledge, respondent changes the subject. Respondent erroneously claims "a major premise asserted by appellant" is "that the prosecutor had no objection to portions of Ms.Williams's and Ms. Whitfield's statements being admitted and even identified portions of the recorded statements he found objectionable." (RB 88.) Appellant is not contending that at all and it is not a premise, major or minor, of appellant's argument. In fact, the prosecutor objected to the entire videotape being admitted. After the trial judge initially indicated that he would admit the tapes subject to specific objections by the prosecutor, the prosecutor objected to some items in writing in the transcript itself, but did not object to others. Appellant's catalogue of those items in the transcript that were highly relevant includes *only specific*

Like the trial judge, respondent restricts itself to speaking in generalities about deficiencies in portions of the transcript which appellant never sought to be admitted. Defense counsel repeatedly offered to redact from the video and the transcripts any matters that were not from the witness's personal knowledge. (36 RT 8950-8952.)* Appellant's Opening Brief restricts itself to those items which were based on each woman's personal knowledge and not one iota of it fits the trial judge's characterization of Sophie Williams testimony ("expressions of what other people told her") (36 RT 8955) or of Annie Whitfield's testimony ("much of her testimony is hearsay of the most unreliable time") (*Ibid.*)

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items to which the prosecutor failed to raise any such specific objections. It is those portions of the video that are at issue in this appeal. Appellant makes no claims that the prosecutor did not object to the videos or that he waived any objections. Appellant only contends that when the prosecutor was asked to make objections to specific portions of the video testimony, not one of the items cited by appellant was objected to, and every one of them was based on the personal knowledge of the woman who offered it.

* Defense counsel made clear his willingness to make substantial redactions in the video and transcripts:

> Defense Counsel: I will represent to the Court that I will slavishly work as long as it takes on my own behalf to redact the transcript, eliminating any multiple layers of hearsay, any prejudicial material. I understand where the prosecution is coming from in hearing its argument, and I have heard the Court and I understand the Court's concern. And I think I can do that and present a redacted version of the transcript and the tape, and at least with that fall-back position, we will have the evidence that Dr. Minigawa relied upon in stating that in his opinion the mother was an alcoholic; we'll have the foster mother's personal observations of the injuries and those are of what is of prime concern to the defense.

(36 RT 8952.)

Moreover, because the portions of the tape being discussed were from the personal knowledge of the two women, the trial judge's concerns that they were not reliable because they were not subject to cross-examination is overblown. Virtually all out-of-court statements admitted pursuant to *Green v. Georgia, supra,* 442 U.S. at 97 have never been subject to cross-examination; the kind of information each woman offered was unlikely to be made significantly more reliable by cross-examination. Cross-examination of Sophie Williams was not likely to dispel her view that appellant was like a son to her; that he looked in on her after her husband died, calling her up to four times a week to see how she was doing in the way that a devoted relative would; or that he was a kind, caring person whom she missed. Nor would cross-examination have changed Annie Whitfield's personal observation of appellant's sweet nature as a child; or of the telltale scars of physical abuse she observed; or of her witnessing appellant's inebriated mother slap her young son across the face because he accepted an Easter suit from the Whitfields; or her recollection of his mother's drunken demeanor when she called in the middle of the night asking to speak to appellant, who was just a child. This court should not countenance respondent's claim that the lack of cross-examination disqualified this evidence, particularly when the prosecutor chose not to avail himself of opportunities to question the witnesses: (1) defense counsel notified the prosecutor about Ms. Whitfield's health, gave him contact information and invited him to interview her, but he did not do so (32 RT 7418-7420); (2) the defense invited the prosecutor to submit questions which the defense would pose to the witnesses for the prosecutor (30 RT 6826) and (3) the prosecutor rejected defense counsel's offer of a conditional examination which would have given the prosecutor a full opportunity to cross-examine.

Although Respondent raises legitimate questions about the lack of precise time frames in the testimony of either witness, these concerns could have been addressed had the DA accepted defense's counsel's offer to participate in interviewing these witnesses. More importantly, the DA had full access to the power and resources of the state and

easily could have obtained this information. Any disadvantage claimed by the prosecutor then, or the attorney general now, was created by the prosecutor's own inaction.

Moreover, the prosecution easily could have challenged this evidence by arguing to the jury that the lack of specifics in the video/transcripts reduced their probative value. If the reliability of this evidence would have been enhanced by cross-examination, then the solution was a conditional examination of these two defense mitigation witnesses, who were too ill to travel from Indiana. Thus, there is more than a little sophistry in the argument that the video statements were unreliable and unfair to the prosecution because the witnesses were not cross-examined, but that conditional exams should not be permitted because what Williams and Whitfield had to say was not significant enough to conduct a conditional examination. The disingenuousness of respondent's position is made manifest when it is considered that the prosecution refused an invitation from the defense to question Whitfield (32 RT 3419) or to accept defense counsel's invitation to submit questions to be asked of these witnesses (30 RT 6826.)

The bottom line is that appellant was on trial for his life. Thus, he was constitutionally entitled to present mitigation that supported a sentence less than death. Evidence that could have moved jurors toward mercy – that appellant was a kind, loving man who looked after an elderly widow, that the damage from his deprived upbringing was exacerbated by an abusive mother – was kept from the jury on the basis of a dubious and inconsistent rationale that the evidence was at once so significant that it was unfair to the prosecution to admit it without cross-examination, but at the same time so inconsequential that it did not justify adjourning the penalty trial for a couple of days to conduct a conditional examination in Indiana where the ailing witnesses were available. Especially in the penalty phase, where the proceeding is about the moral worth and culpability of the defendant and not the elements of the crime, the Eighth and Fourteenth Amendments require that such evidence be admitted. The trial judge erred when he prevented the jury from hearing this critically important mitigating evidence.

B. The Eighth and Fourteenth Amendments Require That The Defendant Be Permitted To Present All Mitigating Evidence To The Jury That Is Relevant To Its Penalty Determination.

The issue before this Court, then, is whether evidence relevant to the case for life, evidence which defense counsel characterized as coming from "perhaps the most single most important mitigation witness for the defense" (29 RT 6826 [referring to Annie Whitfield]), was properly excluded by the trial judge because of the prosecutor's foundational objections to video interviews of two defense witnesses who were too elderly and ill to travel to the proceedings. Appellant submits that both U.S. Supreme Court cases and this court's precedents make clear that principles of reliability and due process under the Eighth and Fourteenth Amendments to the federal constitution require that a defendant on trial for his life be able to present to the jury all mitigating evidence relevant to its penalty determination, whether through live testimony or some other form, such as the video interviews proffered by defense counsel in this case.

1. ***It was error to exclude relevant mitigating evidence.*** As respondent acknowledges, the principles enunciated in *Eddings*, *Lockett, Woodson,* and *Penry v. Lynaugh* "prohibit the State from imposing limitations resulting in the exclusion of relevant mitigating evidence that can be considered by the court or jury considering the appropriate sentence in a capital case." (RB 89; *Eddings v. Oklahoma, supra,* 455 U.S. at 114-115 and *Lockett v. Ohio, supra* 438 U.S. at 604-605; AOB 141, citing in addition, *Penry v. Lynaugh, supra* 492 U.S. at 319.) Yet, that is exactly what happened in this case. The trial judge excluded relevant mitigating evidence based, in part, on his unwillingness to delay the proceedings to allow the appellant to present this testimony, as well as the concerns raised by the prosecutor regarding the evidentiary foundation of the proffered witnesses' testimony. These concerns could have been addressed through a variety of options available to the trial court, including a stipulation about the time period Sophie Williams and Annie Whitfield knew appellant or testimony by a defense investigator about that subject; the prosecution's ability to rebut the evidence through argument or other witnesses; and a conditional examination of each woman in Indiana.

The Eighth and Fourteenth Amendments required that the important, relevant mitigating evidence proffered here be presented to the jury. Appellant's constitutional right to present this evidence far outweighed the trial judge's concerns about delay and the prosecutor's specious claims that this evidence was hearsay or lacked a proper foundational basis.

2. The cases respondent relies are not applicable. None of the cases cited by respondent are to the contrary. *People v. Morrison*, *supra*, 34 Cal.4th at 720-26, relied on by respondent (RB 90-91), held only that it was not error even at the penalty phase to exclude hearsay evidence that was clearly irrelevant and for which there were "no reasons, substantial or otherwise, supporting its reliability." (34 Cal.4th at 725-726.) Although *Morrison* opined that "the United States Supreme Court has never suggested that states are without power to formulate and apply reasonable foundational requirements for the admission of evidence," (*Id.* at 724), that comment was limited to a discussion of whether hearsay evidence that the victims had a large amount of cash in their home at the time of the crime was admissible. More importantly, in that case, the defense was unable to cure the foundational deficiencies in that evidence. In contrast, what is at issue in appellant's case was whether the offer of videotaped statements, combined with a request for a conditional examination of the two infirm witnesses was sufficient to address the foundational concerns raised by the prosecutor as a basis for excluding the evidence.

Nor does *People v. Phillips* (2000) 22 Cal.4th 226, 238, provide any support for respondent's position that the trial judge had no duty to protect appellant's 8th and 14th Amendment rights to present relevant mitigating evidence to the penalty phase jury. *Phillips* involved an attempt to get hearsay statements suggesting defendant did not commit the murder into evidence at the penalty phase. This Court ruled that "absent some basis for concluding that Graybill [the now deceased hearsay declarant] related his personal observations, rather than repeated what someone else told him, no substantial reason exists to assume the statement is reliable .... [i]ts exclusion violated none of

defendant's constitutional rights." (22 Cal.4th at 238) Thus, the exclusion of the hearsay evidence there turned on its lack of reliability due to concerns that the declarant's statement was not based on his personal knowledge. Here, as appellant has repeatedly demonstrated , the witnesses' statements at issue in this appeal were based on their personal knowledge. Both witnesses were available and their testimony could have been subjected to cross-examination during the video interviews conducted by the defense or the conditional examination which defense sought, but respondent opposed.

People v. Champion (1995) 9 Cal.4th 879, 937-938 is not on point, either. It merely held that the attempt to introduce the statements of fellow gang members through their parole officer that they did not believe defendant committed the crime was neither highly relevant, nor reliable. In appellant's case, the videotapes were hearsay only because they were of statements made out of court due to the age and infirmity of the witnesses, which precluded them from traveling. Unlike the declarant in *Champion*, Sophie Williams and Annie Whitfield made the statements from their own knowledge, rather than based on what others told them. The court should have ordered a conditional examination, which would have allowed respondent to cross-examine them and to lay bare any foundational or other concerns the prosecutor or the trial judge had.

Nor do the two cases cited by respondent involving the exclusion of videos in other cases support exclusion of the testimony of Sophie Williams or Annie Whitfield in *this* case. In *People v. Stanley* (1995) 10 Cal.4th 764, 839, this Court upheld limiting the use of a videotape of the defendant under hypnosis to show the basis for the defense expert's opinion. Additionally, the court disallowed use of the videotape's content for its truth, concluding that to do otherwise would have "permitted defendant to give self-serving testimony free from cross-examination as to its validity." (*Ibid.*) The facts of *Stanley* are clearly distinguishable from appellant's case. Appellant was not offering a self-serving video of himself, but rather videos of two independent elderly witnesses who knew information about the appellant which bore on the issue of penalty and which the federal constitution requires the jury to consider in determining the appropriate

punishment. Nor was it an attempt to do an end-run around cross-examination. Indeed, defense counsel suggested the conditional examination to provide the prosecutor an opportunity to cross-examine the witnesses.

In *People v. Weaver*, *supra*, 26 Cal.4th at981, another case cited by respondent, the defendant was allowed to offer a videotape of himself being questioned by a defense expert as the basis for the defense expert's opinion, but not for the truth of the statements made in the video. This court reversed for the same reasons it upheld the exclusion of the evidence in *Stanley*: the video contained self-serving statements by the defendant himself. Thus, it presents an entirely different scenario than appellant's case, which concerns the statements of two witnesses with no agenda other than to tell what they knew about appellant based on their personal knowledge and recollections of him. Nevertheless, despite all the indicia of reliability, as well as the opportunity for cross-examination that a conditional examination offered, the court erroneously barred appellant's proffer here.

Nor does *People v. Eubanks*, *supra* 53 Cal.4th at 150 support respondent here. In ruling that exclusion of certain hearsay evidence was proper, the *Eubanks* Court noted that neither of the statements in question was highly relevant (defendant's statement she had been molested and a note in a medical file that defendant helped another inmate get medical assistance) and held that even if the exclusion was error, it was harmless. Again, the self-serving nature of the statements at issue seemed to be the dispositive factor in upholding exclusion of the evidence. Finally, *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1290 does not support respondent here either. There, defendant was on trial for the murder of his daughter. *Gonzalez* upheld exclusion of a hearsay statement by defendant's wife that she had put the daughter in the bath and went to cook dinner. The statement had been admitted in the guilt phase as a false statement used to prove consciousness of guilt. In the penalty phase, the defense sought to admit these statements for their truth in an effort to diminish defendant's responsibility; this Court affirmed the trial court's exclusion of this evidence from the penalty trial, finding that it was neither highly relevant nor reliable. Moreover, this Court found any error in excluding the

statements harmless beyond a reasonable doubt: "there is no reasonable possibility that the jury would have returned a different penalty verdict had they been admitted into evidence." (*Ibid.*)

None of the seven cases relied on by respondent support the notion that administrative or evidentiary concerns trump the constitutional rights of a capital defendant to present relevant mitigating evidence, particularly where there was substantial evidence of reliability and relevance and there were alternatives available to address such concerns. Respondent's position lacks merit and is disingenuous as well. On the one hand, respondent extols cross-examination as "the greatest legal engine ever invented for the discovery of truth, (RB 93 quoting *California v. Green* (1970) 399 U.S. 149, 158; *People v. Brock* (1985) 38 Cal.3d 180, 197), but on the other hand, it was the prosecutor who refused to cooperate in questioning these ailing, elderly women on videotape. This Court should not allow the state to engage in this kind of sophistry to justify the denial of appellant's right to present to the penalty jury all mitigating evidence relevant to its decision whether appellant lived or died.

C. The Errors in Keeping Relevant Mitigation Evidence From The Jury Were Not Harmless Beyond a Reasonable Doubt

As discussed at length in the AOB (pp. 40-62), the defense presented a powerful mitigation case – that appellant George Williams had overcome a childhood marked by abuse, chaos and poverty to do outstanding service to his country in the Army. That evidence showed that when he entered the Navy, he fell victim to his family history of susceptibility to alcoholism which, in turn, led to his criminal behavior. Although there was substantial aggravating evidence related to the circumstances of the crimes charged, as well as other uncharged offenses, this was a close case in which there was substantial evidence supporting a sentence less than death, not only due to third party suspect evidence (some of which the court also erroneously excluded), but because there was evidence available which could have persuaded appellant's jury that death was not the

appropriate punishment. In the context of a close case such as this one, the statement of Sophie Williams offered compelling evidence of the "good" George Williams – a man who, despite his inability to overcome the numerous risk factors that his life presented, including the alcoholism that precipitated his problems, had many good qualities about which the jury never heard from the very witnesses who knew him and who could speak to those qualities. It not only undermined the prosecution's depiction of appellant as a purely "evil" (37 RT 9302) sociopath who deserved to die (37 RT 9119), it provided the jury a basis for sparing his life. Similarly, Annie Whitfield's statement countered the prosecutor's attempts to deny or minimize the severity of the deprivation and abuse appellant suffered as a child and to characterize appellant's mother as "someone who worked her butt off and made a decent life so that she could support her son." (38 RT 9274) Annie Whitfield could have told the jury about the scars she observed on appellant's back when he was 10 years old, indicating he had been beaten with a belt or switch. She would have provided the jury with a much different picture of appellant's life and a basis for a sentence less than death.

For respondent to claim that the errors in excluding this evidence is harmless beyond a reasonable doubt stands the burden on its head. The penalty phase is a unique proceeding in which jurors are literally asked to weight the moral worth of an individual. It is unique both in the sense that jurors in no other kind of case are asked to make that sort of judgment and in the sense that each juror has to make their own subjective judgement . Given that there was substantial mitigation to balance the aggravation, it is impossible to know—in the absence of the excluded evidence—what verdict the jury would have rendered had these errors not occurred. The harmless error standard of review, articulated in *Chapman v. California* puts a heavy burden on respondent which it cannot meet.

VI.

THE TRIAL JUDGE DENIED APPELLANT DUE PROCESS AND A RELIABLE PENALTY PHASE TRIAL, WHEN, AFTER APPELLANT, A BLACK MAN, HAD BEEN FOUND GUILTY OF KILLING AND RAPING A YOUNG WHITE WOMAN, THE JUDGE REFUSED TO INSTRUCT THE JURY THAT THEY SHOULD NOT CONSIDER RACE IN ARRIVING AT THE PENALTY VERDICT

A. The Potential For Racial Bias Was Inherent In A Case Where Appellant, A Black Man, Was Charged With The Rape And Murder Of A Young White Girl; The Proposed Instruction Could Not Interject An Issue Of Race That Already Existed In The Case

In a case in which a 29-year-old black man had been convicted of raping a 14-year-old white girl and in which there was testimony that the victim had a black boyfriend but did not want her family to know about his race because of fear of disapproval (RT 5118, 5143), respondent contends the trial judge did not err in refusing to instruct the jury, as requested by appellant, that race should not enter into its sentencing deliberations. At trial, the DA cited *People v. Smith*, *supra* 30 Cal.4th 581 as authority, arguing that the instruction would have "interjected racial bias into the trial and penalty determination and then directed the jury not to consider it, contrary to this court's reasoning in *Smith.*" (RB 108, citing *People v. Smith, supra,* 30 Cal.4th at 639.)

The *Smith case, however, presents a factually* distinguishable scenario that presented none of the issues cited by appellant here and, thus, compels a different result. Although like appellant, defendant in *Smith* was African-American and was charged with, *inter alia*, rape and murder, the circumstances in appellant's case, involving the alleged rape of a young white girl, implicated all the historical and political attitudes in this culture that are synonymous with racial hatred and bias against black people and black men, in particular. In contrast, *Smith* involved the rape and murder of a young Japanese woman and there was evidence of overt indicia of defendant's own racial animus that were on the record and inextricably intertwined with the facts of the crime. In appellant's case, the issue of racial bias was inherent in the factual circumstances of the

offenses charged--the rape and murder of a young white girl by a black man. This scenario historically has generated virulent racial violence against blacks that led to countless unjustified lynchings of black men. This shameful feature of American culture is well-documented in the history of this country and, unfortunately, the attitudes that precipitated it persist. (See Robert A. Gibson, The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950 (1979)*; See also Forrest G. Wood, *Black Scare: The Racist Response to Emancipation and Reconstruction* (U. CA Press 1968) 143-144; David Pilgrim, *The Brute Caricature* (2000) Ferris State University Museum of Racist Memorabilia, *http://www.ferris.edu/htmls/news/jimcrow/brute/* [all cited in AOB at 167-169, but not addressed in Respondent's Brief].)

Given this legacy, the risk of racial bias existed from the moment appellant was charged with the rape of a white girl. Thus, Smith's rationale for not giving an instruction "interjecting racial bias" is inapposite and respondent's reliance on it is misplaced; the risk of racial bias was already there and the court should have given appellant's requested instruction to address and attempt to ameliorate it.

B. The Abundant Evidence of Racial Bias in the Administration of the Death Penalty Warranted The Instruction Requested By Appellant

In Turner v. Murray, (1986) 476 U.S. 28, the U.S. Supreme Court held that trial judges were required to allow defense counsel, at their option, to question prospective jurors about racial prejudice, stating that:

> the risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized... By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.

476 U.S. at 36.

The court went on to say that:

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* *http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html#b*

> a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

(Turner v. Murray, supra, at 35 [footnote omitted].)

In light of abundant evidence of racial prejudice recognized by the U.S. Supreme Court over thirty years ago in *Turner* and the continuing racial bias in the administration of the death penalty, this Court should reconsider its holding in *Smith, supra*, 30 Cal.4th 581). It should extend the rationale and methodology of *Turner* to jury instructions, such as that offered by appellant here, which seek to minimize racial prejudice by admonishing the jury that such considerations should not infect their deliberations. Such an approach is justified by the wealth of empirical data generated since *Turner* and which respondent has not disputed.

1. **Blacks who kill whites are sentenced to death at a grossly disproportionate rate.** Respondent's Brief ignores the chilling statistics from a sophisticated study of 2000 Georgia death penalty cases showing that blacks who kill whites are 22 times more likely to receive the death penalty than whites who kill blacks. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 286 [cited in AOB 166].) Nor does respondent acknowledge a study on the administration of the California death penalty finding that those who kill whites are 7.6 times more likely to be sentenced to death than those who kill non-Hispanic African Americans and 11 times more likely to be sentenced to death than those who kill Hispanics. (Glenn L. Pierce & Michael L. Radelet, The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, (2005) 46 SANTA CLARA L. REV. 1, 37 [cited in AOB at 157.)

2. **Events of the last year show that racial disparity and animus continues to persist despite claims of a "post-racial" America.** Since the election of Barack Obama in 2008, many people assert that we are living in a post-racial America in which an African-Amerian man can be elected president and, thus, racism is no longer an issue. But events of the past year have made it more evident than ever that wide racial divisions continue to plague our society. Various incidents have illuminated the differences in perception between whites and people of color regarding the criminal justice system; numerous highly publicized shootings of unarmed blacks by police officers have led to increasing tensions and confrontations between law enforcement and communities of color; and there are intensifying demands for comprehensive police reform. See generally, The Sentencing Project (2014) RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf ; Marist Poll (12/7/2014) Race Shapes Americans' Attitudes about Decisions in Ferguson and Staten Island http://maristpoll.marist.edu/127-race-shapes-americans-attitudes-about-decisions-in-ferguson-and-staten-island/#sthash.xqjIs3oN.dpuf. These factors show that profound racial divisions continue to an integral part of life in the United States.

3. **The dynamics of subtle racism in jury deliberations.** Interestingly, respondent has no comment on the body of literature which analyzes the dynamics of racism in the jury room. (See Mona Lynch & Craig Haney, *Looking Across The Empathic Divide: Racialized Decision Making On The Capital Jury*, 2011 Michigan State L. Rev. 573 [cited in AOB 166 and 172] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* (1987) 39 STAN. L. REV. 317; Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* (2008) 40 CONN. L. REV. 931 (2008); Sherri Lynn Johnson, Unconscious Racism and the Criminal Law, 73 CORNELL L. REV. 1016 (1988) [all cited in AOB at 171.) Moreover, respondent has nothing to say about the frightening history of the extralegal death penalty system employed in this

country for generations – lynching – for black men accused of raping white women. This legacy of racism and the attitudes underlying it remain an undercurrent that unwittingly impacts virtually every aspect of American culture including, in appellant's case, penalty phase jury deliberations. (See authorities cited at AOB 167-169 and above at p.82.)

Taken together, these factors, which do not purport to be exhaustive, present the context in which appellant's request for an instruction on race must be considered.

C. The Instruction Requested By Appellant Is Consistent with The Rationale of the United States Supreme Court in *Turner v. Murray*

In its brief, respondent relies on the *Smith* decision to contend the trial court properly refused to instruct the jury that it should not consider race in its penalty determination. But respondent misstates Smith's rationale: the court essentially found that the instruction in question, also modeled on the federal statute, was not required because it was obvious that "the jury may not consider the defendant's or the victim's race in deciding whether to impose the death penalty." In appellant's case, however, it was far from obvious that the jury would not consider the issue of race in fixing penalty, because it was a prominent issue in the case: Rickie had asked her friend Ramy to keep secret her relationship with a black man because her parents would not approve (RT 5118, 5143); George Bell testified that there was "no way a black dude in our neighborhood" and if he "came near" his sister he'd be "in his face" (26 RT 5835) which evokes "racist myth of Negroes uncontrollable desire to rape white women...." See authorities cited at AOB 167-169 and above at p.73) Given the circumstances of appellant's case, which differed greatly in character and significance from the facts in *Smith*, it was all the more imperative to instruct the jury that race should not enter into its deliberations in order to ensure that appellant received a fair trial.

Respondent imputes a much broader reading to *Smith*'s holding than is warranted. Extrapolating from a decision of the North Carolina Supreme Court, which held that *Turner v. Murray*, *supra*, does not support the proposition that because racial prejudice must be addressed in *voir dire*, it must also be addressed in the jury instruction context,

the *Smith* Court found that such an instruction was not constitutionally required. (See RB 107-108 relying on *State v. Roseboro* (2000) 351 N.C. 536, 528 S.E.2d 1,13.) But North Carolina is no bastion of racial justice and equality, sharing as it does with the rest of the South a history and legacy of slavery, lynching and racism. The *Smith* Court relied on *Roseboro* to support its conclusion that an instruction not to consider race unnecessarily "interjects" race into jury deliberations. (See *Smith, supra, Id.* at 639.)

Respondent's reliance on *Smith* is a bridge too far in appellant's case, which mirrored exactly the kind of racial dynamics that led the United States Supreme Court in *Turner v. Murray*, supra, 476 U.S. 28, to require *voir dire* on issues related to race. As the High Court noted, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id. at* 35 [discussed in AOB at 163-164.). This is precisely the concern that led defense counsel to request the court to instruct appellant's jury that it should not consider race in its penalty deliberations.

Appellant argued in the AOB that *Turner's* rationale in favor of allowing *voir dire* on racial bias also strongly supported allowing defense counsel to request an instruction on racial bias: Both remedies are aimed at ameliorating racial bias in the jury room, require minimal intrusion into the trial process, and respect counsel's judgment as to whether to request such instructions. Respondent's Brief offers nothing that refutes this logic; it simply cites *Smith* and *Roseboro, supra,* which both employ the "interjection" rationale. But even the *Smith* court recognized that such an instruction might be warranted if issues of race were implicated, suggesting that there was no need to interject race into deliberations "at least absent some indication the jury might improperly consider race," (*Smith, supra*, 30 Cal 4th at 639). This Court cannot ignore the reality of racial bias that exists in every facet of American culture, nowhere more intensely than in the context of a rape and murder involving a black perpetrator and a white victim. Under these circumstances, it was error not to instruct the jury that it should not let the race of the

perpetrator or the victim affect its decision on sentencing. Appellant's conviction and sentence should be reversed.

D. How the Instruction Should Be Worded

In *Smith*, this Court stated that the language of the proposed instruction at issue, taken verbatim from the federal death penalty instruction, was not constitutionally required. Appellant agrees that the precise language of the Federal Death Penalty Act is not constitutionally mandated. Nevertheless, the law requires the judge to instruct on issues where the facts support such an instruction and the issue is relevant to the case or is necessary to protect a defendant's right to a fair trial. Race was clearly an important issue impacting the defense, especially in light of testimony that the victim's family would not have approved of her dating a black man and that she asked her best friend to keep this information secret. Once defense counsel requested an instruction that jurors should "not consider the race ... of defendant or any victims," it was the trial judge's duty to tailor an instruction which accomplished that important, constitutionally-required purpose and excise those portions of the proposed instruction that were inappropriate or argumentative. (*People v. Fudge*, *supra* 7 Cal.4th at 1110 ["To the extent that the proposed instruction was argumentative, the trial judge should have tailored the instruction ... rather than deny the instruction outright]; *People v. Hall, supra*, 28 Cal.3d at 159 [Although the trial court did not err in refusing to give the instruction, it should not have refused to tailor the instruction to the facts of this case"]. It was error not to do so.

This Court, in its supervisory role, could promulgate an appropriate instruction in ruling on appellant's claim. The language of the Federal Death Penalty Act, proposed by appellant in this case, is a good starting point. It represents the considered view of the Congress and the President of the importance of prophylactic measures to prevent racial bias; it not only instructs the jury not to consider the race of the defendant or the victim, but also requires each individual juror to sign a certificate that he or she did not allow race to affect his or her decision on penalty and the jury to agree unanimously that they

would have reached the same sentence regardless of the race of the perpetrator and victim. If the proposed instruction is too "argumentative," the Court could excise the second paragraph, eliminating the individual certificate requirement, or it could excise both the second paragraph and the last sentence of the first paragraph, eliminating both prophylactic measures. It could also follow the suggestion of commentators on how to sensitize jurors to the subtle forms of prejudice which could infect their deliberations.

In *Roseboro*, supra, 528 S.E. 2d 1, relied on by the *Smith* Court, the defense proposed an instruction which contained neither of the prophylactic measures included in the Federal Death Penalty Act. (Id. at 13; quoted in AOB at pp. 171-172) Similarly, in an important study on *Racialized Decision Making on the Capital Jury*, the authors outlined concepts that might be included in an instruction designed to combat "modern racism" by explaining to the jurors the kind of racial disparities that might affect their decision. (See *Racialized Decision Making, supra,* 2011 Michigan State L. Rev. at 603.)

This Court should not throw the baby out with the bath water by allowing the trial judge to refuse to give the entire instruction when it seeks to assure equal protection because it disagrees with portions of the wording of the proposed instruction. Rather, it should suggest instructions which meet the constitutional mandate: "the risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." (*Turner v. Murray*, *supra*, 476 U.S. at 36.).

E. The Availability of *Voir Dire* on Racial Bias Was Not A Substitute for an Instruction from the Trial Judge.

Respondent argues that because "either party could have addressed the jury in *voir dire* regarding any aspect of race or racial bias...," this somehow cures the error in failing to instruct the jury not to consider race. (RB 109.) But, almost 30 years later, the issues recognized in *Turner, supra,* continue to give rise to the kinds of troubling statistics such as those showing extreme disparities in the rates at which blacks who kill whites are sentenced to death as compared to the rate at which whites who kill blacks are

sentenced to death. (See AOB 166-167.) In *Turner's* words, these disparities are "unacceptable in light of the ease with which they could have been minimized" by the giving of a carefully crafted instruction.

More importantly, it should be noted that *voir dire* may be limited in its ability to fully expose the racial bias that potentially infects the death sentencing process. Inasmuch as *voir dire* occurs before the guilt phase and before the jury has heard all the evidence that might engender such attitudes, it may be impossible to anticipate all the questions that an attorney should ask in an attempt to expose such views. There is also a risk of antagonizing prospective jurors and thereby prejudicing the client's case from the outset, especially if the defense counsel does not consider himself or herself skillful at the delicate task of rooting out racial bias in the *voir dire* process. By permitting an instruction such as that proposed here, after the evidence is in and where, as here, there is some indication or risk that the jury might improperly consider race, (See *Smith*, supra, 30 Cal. 4th at 639), the risk of racial bias is at least minimized. In appellant's case, there was no credible downside to giving the instruction and respondent has presented nothing to refute that conclusion. The instruction requested by appellant should have been given to protect his right to a fair trial by an impartial jury instructed that it should not let racial bias enter into its deliberations. This would have ensured the proceedings comported with constitutional demands of fair trial, due process, equal protection, reliability and fundamental fairness under the 6th, 8th and 14th Amendments to the U.S. Constitution and its California analogues.

F. The Error Was Prejudicial Per Se and Not Harmless Beyond a Reasonable Doubt

For the reasons stated in the AOB (173-174), this Court cannot speculate what would have happened had the jury been properly instructed not to consider race in reaching its verdict. The error was prejudicial *per se*. The burden was on respondent to show the error harmless beyond a reasonable doubt and respondent cannot credibly make that argument. Therefore, appellant's death sentence should be vacated.

VII.

THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURORS THAT THEY WERE RESPONSIBLE FOR THEIR VERDICT AND SHOULD NOT SPECULATE OR ASSUME THAT IT WOULD NOT BE CARRIED OUT.

Respondent does not dispute the holding in *Caldwell v. Mississipp,i supra,* 472 U.S. 320, "that the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." (Id. at 333.) Nor is it disputable that, to meet *Caldwell*'s requirements, the jury should be informed their decision is likely to be determinative in the decision for life without parole or for death and that each juror should take responsibility for that decision by assuming it will be carried out. Yet, as discussed in AOB, three decades of litigation in this Court over the proper wording of an instruction which complies with *Caldwell*, but which does not unequivocally inform jurors that "your sentence will definitely be carried out," have resulted in a situation where jurors' experience hearing both about parole hearings for notorious criminals like Charles Manson on the one hand, and delays in carrying out the death penalty on the other, may lead them to doubt that their sentence will be carried out; this could lead them to choose death because they not believe life without parole will be carried out or make it easier to choose death because they don't really believe that the death penalty will be carried out. These are legitimate defense concerns, consistent with *Caldwell, supra,* and is an issue of constitutional proportions that should concern this Court as well.

This Court can correct this problem in cases such as appellant's by crafting a model instruction that is not argumentative, but which directs the jurors to take responsibility for their verdict. (*See People v. Fudge, supra,* 7 Cal.4th at 1110 ["To the extent that the proposed instruction was argumentative, the trial judge should have tailored the instruction ... rather than deny the instruction outright]; *People v. Hall, supra,*

28 Cal.3d at 159 [Although the trial court did not err in refusing to give the instruction, it should not have refused to tailor the instruction to the facts of this case"].)

Appellant's case presents an excellent opportunity to provide trial courts the appropriate language for an instruction consistent with the principles enunciated in *Caldwell,* informing jurors that their sentence will be carried out and that they alone are responsible for their verdict. In the AOB, appellant proposed an instruction that would accomplish that purpose:

> You are instructed that *you should assume that* life without parole means exactly what it says: The defendant will be imprisoned for the rest of his life.
>
> You are instructed that *you should assume that* the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(10 CT 2238 as revised AOB 179.)

That instruction, supplemented by another instruction proposed by appellant below concerning the power of commutation,* accurately conveys the jurors' duty to follow the court's instructions and fosters a sense of responsibility for their verdict, consistent with *Caldwell, supra.* The instructions actually given in appellant's case were silent on the issue of the potential for jurors to speculate or question whether their verdict would be carried out. Any concern or lack of clarity on the part of jurors regarding whether the death penalty would be carried out could adversely influence a juror uncertain whether to vote for death or LWOP because of uncertainty that it would not happen. Similarly, concern or confusion regarding parole could lead a juror to vote for death to ensure a

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* "It is true that the Governor is granted the power to commute a sentence of death to one of life in prison, with or without the possibility of parole. It is also true that the Governor is granted the power to commute a sentence of life without parole to life with parole. However, it would be a violation of your oath to base your decision in whole or in part on a consideration of the governor's commutation power." (2 CT 375, 379; see AOB 178.)

defendant could never be paroled, even though the juror did not believe death was the appropriate punishment. The judge's ruling sustaining the objection to defense counsel's argument that "it is difficult, if not impossible, for [courts to] .... say, well this jury got it wrong," (38 RT 9308), was *Caldwell* error because it gave rise to the inference that responsibility for any ultimate decision of death rests with others. Moreover, it was a missed opportunity to inform the jurors that it was not proper for them to consider the possibility that their decision could be modified or overturned. These errors rendered the death verdict unreliable and it should be vacated and a new trial ordered.

VIII. CUMULATIVE ERROR

In the AOB at pp. 181-182, appellant detailed the errors which resulted in a "grossly unfair guilt and penalty trial in which errors infected every aspect of the case. Respondent concedes that "multiple errors may have a cumulative effect." (RB 115 citing *People v. Hill, supra*, 17 Cal.4th at pp. 844-848; *People v. Holt* (1984) 37 Cal.3d 436. 458-459.) Its only defense to the cumulative error argument is that if the reviewing court rejects all (or nearly all) of defendant's claims of error, then reversal would not be warranted. Appellant agrees that without multiple errors, there cannot be cumulative error. However, this brief and the AOB have established multiple errors which individually and cumulatively denied appellant a fair guilt and penalty trial. If this Court agrees that multiple errors were committed then it should consider the cumulative effect of those errors and reverse the guilt and penalty determinations.

IX.

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

These issues are fully briefed in Appellant's Opening Brief, pp. 182-192. No reply to Respondent's brief is needed. Appellant stands on the arguments in the AOB and urges the Court to declare the Death Penalty Statute unconstitutional for the reasons stated therein.

CONCLUSION

For all of the foregoing reasons, the guilty verdicts should be reversed, the special circumstances findings vacated, and the sentence of death vacated.

Respectfully submitted,

PAUL J. SPIEGELMAN
Attorney for Appellant,
GEORGE WILLIAMS, JR

DECLARATION OF SERVICE BY MAIL

Re: *People v. Williams*, Supreme Court No. S131819

I, Paul J. Spiegelman, declare that I am over 18 years of age and am not a party to this action. My business address is P.O. Box 22575, San Diego, CA 92192-2575. I served a copy of the attached:

APPELLANT'S REPLY BRIEF

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

Mr. George Williams V-70703
SQSP 5EB70
San Quentin, CA 94974

Kamala Harris, Attorney General
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Aundre Herron, Staff Attorney
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San Diego, CA 92101

Each said envelope was then, on April 21, 2015, sealed and deposited in the United States mail at San Diego, California, with postage fully prepaid.

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

Executed at San Diego, California this 21st day of April, 2015.

PAUL J. SPIEGELMAN, DECLARANT