SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent,	)	S163643 NA071779
v.	)	
FRANK GONZALEZ	)	
Defendant/Appellant	)	

APPELLANT'S REPLY BRIEF

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court,
Honorable Joan Comparet-Cassani, Judge

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A. SUMMARY OF APPELLANT'S ARGUMENT

As stated by this Court in *People v. Alvarez* (2002) 27 Cal.4th 1161, 1164-1165, "To convict an accused of a criminal offense, the prosecution must prove that (1) a crime actually occurred, and (2) the accused was the perpetrator." The first of these requirements is known as proof of the *corpus delicti*, or "body of the crime." Therefore, on appeal, a defendant may make a direct claim that there was insufficient evidence, aside from his own statements, of the corpus *delicti.*" (*Ibid;* AOB pp. 40-41.)

Appellant argued that in every criminal trial the prosecutor must prove the *corpus delicti*- i.e., "the fact of injury, loss or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez, supra,* 27 Cal.4th at p. 1168.) This requirement is over and apart from the requirement that the defendant committed the act and the "prosecutor cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant." (*People v. Ochoa*

(1998) 19 Cal.4th 353, 404; *People v. Jennings* (1991) 53 Cal.3d 334, 364; *People v. Beagle* (1972) 6 Cal.3d 441, 455; AOB at p. 42.)

This Court further stated,

> In requiring independent evidence of the *corpus delicti*, California has not distinguished between actual confessions or admissions on one hand, and pre-offense statements of intent on the other. Thus, the rule in California has been that one cannot be convicted when there is no proof a crime occurred other than his or her own earlier utterances indicating a predisposition or a purpose to commit it. (*Ibid; People v. Alvarez, supra,* 27 Cal.4th 1170-1171; *People v. Beagle, supra,* 6 Cal.3d 441, 455, fn 5.)

Appellant argued that *People v. Powers-Mochello* (2010) 189 Cal.4th 400, 406, citing to *Cruetz v. Superior Court* (1996) 49 Cal.App.4th 822, 830, stated that the *corpus delicti* rule was established by the courts to

> ...protect a defendant from the possibility of fabricated testimony out of which might be wrongfully established both the crime and its perpetrator...The ... rule arose from a judicial concern that false confessions would lead to unjust convictions... Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically. (AOB at pp. 42-43.)

Appellant therefore argued that the analysis of an insufficiency of evidence claim involving a *corpus delicti* component involves considering both the admission of all appellant's extra-judicial statements and the

evidence of proof of the body of the crime standing apart from these statements. (*People v. Powers-Mochello, supra,* 189 Cal.App.4th at p. 407; ARB at pp. 43-44.)

Considering the evidence, or lack thereof, presented to the jury, appellant argued that the only evidence that either an attempted robbery or a robbery was committed came from appellant's extra-judicial statements. Therefore, according to the above law concerning *corpus delicti* there was insufficient evidence to convict appellant of Count 2 of the information, attempted robbery of Maria Rosa. (AOB at pp. 48-50.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent referenced appellant's trial motion to set aside the attempted robbery charge pursuant to Penal Code section 995. In that motion, appellant claimed the prosecution failed to meet its burden of presenting independent evidence of the *corpus delicti.* (RB at p. 27.)

In support of his argument, respondent noted that the trial court denied the motion, (RB at p. 27), finding that the evidence showed two males riding bikes in the area before the incident and that they ran from the scene following it. (*Ibid.*) The court also found that Deputy Rosa's car trunk lid was open revealing various personal possession strewn about. (*Ibid.*) The trial court held that this evidence permitted a reasonable inference that

Ms. Rosa was "on her way to work and was disturbed as she opened the car trunk." (*Ibid.*) The trial court concluded that the open trunk and empty purse indicated "she was attacked, and a struggle, consistent with an attempted robbery, ensued." (*Ibid.*) The trial court also found that the fact the victim's clothing was undisturbed proved there was no sexual motive to the crime. (*Id.* at pp. 27-28.)

Respondent also cited to trial evidence that "showed that Deputy Rosa opened her car trunk before the crimes and that, after the shooting, several items were strewn about inside the trunk, including her purse, which was partially open." Respondent argued that from this evidence, the jury could infer that there was an attempted robbery which Ms. Rosa forcibly resisted, which resulted in her death. (RB at pp. 29-30.) Once again, respondent argued that the state of the body and its dress refuted any sexual motive. (*Id.* at p. 30) and also that only a slight evidentiary showing was needed to permit the reasonable inference that the evidence presented provided was sufficient to meet this test. (RB at p. 30.)

Respondent also argued the jury was properly instructed using CALJIC 2.72, "that it could not convict appellant of a charge based on his out-of-court statements alone, but that it needed other evidence to show the charged crime was committed." (RB at p. 30; 4 CT 891.) Respondent finally

argued that "jurors are presumed to understand and follow the court's instruction." (RB at p. 30.)

C. APPELLANT'S REPLY ARGUMENT

1. General Law of *Corpus Delicti*

This Court has summarized the law of *corpus delicti* on many occasions.

> In any criminal prosecution, the *corpus delicti* must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant. The elements of the *corpus delicti* are (1) the injury, loss or harm, and (2) the criminal agency that has caused the jury, loss or harm. Proof of *corpus delicti* need not be beyond a reasonable doubt; a slight or prima facie showing is sufficient. (*People v. Crew* (2003) 31 Cal.4th 822, 836; *People v. Diaz* (1992) 3 Cal.4th 495, 528-529.)

To meet the corpus delicti requirement, a prima facie case must be shown permitting the reasonable inference that the crime was committed. However, it is not necessary to prove that defendant did the crime, only that a criminal agency was at work. (*People v. Ruiz* (1988) 44 Cal.3d 589, 610.) This is true even though there may be an equally plausible non-criminal explanation of the event. (*Id* at p. 611.)

Prima facie evidence "is that degree of evidence which suffices for proof of a particular fact until contradicted and overcome as it may be, by other evidence, direct or indirect. (*People v. Van Gorden* (1964) 226

Cal.App.2d 634, 636-637.) As stated in Merriam-Webster's dictionary, "prima facie" is described as "true, valid, or sufficient at first impression" and "legally sufficient to establish a fact or a case unless disproved." (Merriam-Webster's Collegiate Dictionary (11th ed. 2006) at pp. 985-986.)

However, while circumstantial evidence can lead to the inferences necessary to establish a prima facie case, these inferences must be the product of logic and reason. Speculation, conjecture or surmise is not sufficient to establish a prima facie case. (See *People v. Marshall* (1997) 15 Cal.4th 1, 35.) Furthermore, in order to determine whether the independent corpus delicti evidence met the prima facie standard, the reviewing court must look to the entire record and not just those isolated portions that might be favorable to the prosecution. (*People v. Holt* (1997) 15 Cal.4th 619, 667.)[1]

2. Operative Facts

Respondent cited to the facts adduced at the preliminary hearing. (RB at pp. 27-28.) However, this evidence is irrelevant to the determination whether there was sufficient evidence to prove the *corpus delicti*. The only evidence that can be considered in determining whether the *corpus delicti* was been established is that evidence adduced at trial.

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[1] *Holt* was a sufficiency of evidence case.

According to that evidence, Genero Huizar, a resident of Eucalyptus Street in Long Beach, had just parked his car after driving home from work at about 6:00 a.m. He observed two males on bicycles riding past him. (9 RT 1828-1830.) He exchanged glances with these two males, but they kept riding. (9 RT 1831.) Not too long after entering his home, Mr. Huizar heard several shots. (9 RT 1831.) At some point, he viewed a live lineup in which appellant and his co-defendant Flint participated. Mr. Huizar was unable to identify either person as anyone whom he had ever seen before. (9 RT 1834 et seq.)

Jose Burgos testified he was delivering newspapers on Eucalyptus St. At 5:45 that same morning he observed a woman's body lying on a concrete walkway leading to a house. (9 RT 1787, 1813-1814.) He tried to revive the woman with CPR but was unable to do so. (9 RT 1815.) Witness James Knapp was driving up the street at the same time and noticed Mr. Burgos trying to help the woman. Mr. Knapp also attempted to assist to no avail. (9 RT 1786-1787.)

Jenny Martin was Maria Rosa's domestic partner for eight and one-half years. (9 RT 1794.) Ms. Rosa had been a Los Angeles County Deputy Sheriff for the past six and one-half years and Ms. Martin a detective with the same department. (9 RT 1793-1794.) On the morning in question, Ms.

Martin was awakened by her nephew who told her Ms. Rosa was lying on the ground outside of the Martin residence at 2951 Eucalyptus Street. (9 RT 1795-1796.)

Ms. Martin looked out her front door and observed Ms. Rosa lying on the ground outside of her home where the two had spent the previous night. (9 RT 1797.) At trial, Ms. Martin testified that Ms. Rosa carried a duty gun, a Heckler and Koch 9 mm which she would often wear in a waist holster or in a large purse. She also owned an off-duty Beretta handgun. (9 RT 1797-1798.)

The first officer at the scene, Robert Davenport, arrived within minutes of the 911 call. (9 RT 1868.) He noticed a car with an open trunk in the driveway of 2951 Eucalyptus Street. (9 RT 1873.) Officer Davenport made an inventory of all of the items that were in the trunk. (9 RT 1879.) He remembered seeing a partially opened purse, a boot, a duffel bag, and some miscellaneous papers. (9 RT 1879-1881.) There was nothing in Officer Davenport's report or testimony that indicated that he was at the scene of a robbery, or that anything was taken from the victim. Upon arrival at the scene, Detective Patrick O'Dowd, looked into the trunk and observed a large black gym bag with a Converse shoe on top of it. Just to the right of the bag was a gun. (9 RT 1891.) A woman's purse was in the trunk next to a

makeup bag. In addition, there was a closed badge on top of a brown plastic bag and a partially concealed off-duty holster. (10 RT 2055.) Another gun was located in the right side of the trunk. (10 RT 2058.) Detective O'Dowd testified to the condition of this gun, stating that there were six live rounds in the magazine and one jammed in the chamber. (10 RT 2059.)

The keys to the car were found in the key hole of the trunk and a woman's wallet was recovered from inside the trunk. (10 RT 2064-2065.) After photographing the contents of the trunk, Detective O'Dowd removed all of the items for further processing. (9 RT 1893.)

3. Legal Argument

As stated above (ARB at p. 7), neither the evidence adduced at the preliminary hearing, nor the magistrate's findings at the section 995 hearing are relevant to the resolution of the legal question whether the *corpus delicti* was established. The only relevant evidence was that presented at trial, which was completely insufficient to sustain the inference that an attempted robbery had occurred.

All that was presented to the jury was a frozen tableau: a dead woman lying next to a car. There was absolutely no evidence that anything was taken from the woman or from the car. In fact, the two police officers, who first responded to the scene, testified there were two guns in the trunk,

at least one of them in plain view. There were also other personal items in the trunk that a robber would have found attractive, such as a woman's wallet. There were no items on the ground beside the car and no items belonging to the victim were ever reported missing.

In arguing that the *corpus delicti* was established, respondent pointed to the evidence showing items "strewn about" the trunk, including a purse that was partially open. In reality, this established nothing more than the fact that items were in the trunk in a condition consistent with being transported in a car trunk. There was no sign of a struggle. The fact that a purse was partially open, along with the fact that Ms. Rosa possibly tried to fire her gun, arguably shows that for some reason she went for her gun. It is unknown whether she did so to protect herself or some third party, but this does not establish an attempted robbery occurred.[2]

None of this evidence establishes either a *reasonable* or *logical* inference that Ms. Rosa was the victim of a completed or attempted robbery. The fact that the scene was not necessarily inconsistent with a robbery or attempted robbery is insufficient to support even a "slight" inference that the *corpus delicti* of a robbery had been established. As stated above, to overcome the *corpus delicti* bar, there must be

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2. Jenny Martin testified that Ms. Rosa would often carry her duty revolver in her purse. (ARB, *supra,* at p. 9.)

sufficient evidence to prove that an attempted robbery/robbery was committed. (*People v. Van Gorden* (1964) 226 Cal. App. 2d 634, 636-637.)

Respondent argued that the fact there was no evidence of any attempted sexual assault is probative of an attempted robbery or robbery being committed. (RB at p. 30.) Such an argument is completely unavailing and based on rank speculation. Moreover, even if this supposition could be proven, it does not logically follow that because no sexual assault occurred, a robbery or attempted robbery did.

People v. McNorton (2001) 91 Cal.App.4th Supp. 1, 6 is instructive regarding the degree of evidence needed to prove the *corpus delicti*. In *McNorton,* defendant was charged with driving while intoxicated. A vehicle was observed parked on the side of the highway with a flat tire. The court held that a reasonable inference could be drawn that the flat tire occurred while someone was driving the car. Only two persons were in the vicinity, one of them being the defendant. Both persons were intoxicated. Because there was nothing in the record to suggest that either or both of the two individuals had consumed alcohol after the car became disabled, the court held this evidence met the standard of proof necessary to show the *corpus delicti* of driving while intoxicated. Defendant's extra-judicial statements were therefore admissible to prove that he was the source of that criminal

agency, thereby allowing for his conviction.

In *People v. Crews, supra,* 32 Cal.4th 822, victim Nancy Andrade was an acquaintance of defendant. On August 23, 1982, she and defendant allegedly left California for South Carolina. (*Id.* at pp. 829-830.) Ms. Andrade was never heard from again, nor was her body ever found. (*Ibid.*) Evidence was introduced that Ms. Andrade had always called certain friends on a regular basis on regular occasions. Before she supposedly left for South Carolina, she told a friend that if she was not heard from in two weeks to call the police. (*Ibid.*) There was evidence that defendant sold various items of Ms. Andrade's property not long after her disappearance. (*Id.* at p. 836.)

The court of appeal held this evidence was sufficient to establish the *corpus delicti* for the murder of Ms. Andrade, finding that even without any extra-judicial statements by defendant, that Ms. Andrade's death was a result of criminal agency. (*People v. Crews, supra,* 31 Cal.4th at pp. 837-838.)

This Court held similarly in cases involving allegations of a sexual assault. In *People v. Marshall, supra,* 15 Cal.4that p. 36, there was sufficient evidence of *corpus delicti* of sexual assault when the victim was found with her pants down and abrasions on her face. Likewise, in *People*

v. Osband (1996) 13 Cal.4th 622, 691, *corpus delicti* of rape was deemed to be present when the victim was found with her pants down, abrasions on her face, and semen in her pubic area. In *People v. Cain* (1995) 10 Cal.4th 1, 45 this Court made a similar finding where pubic hairs found on the victim's partially undressed body.

While the standard for *corpus delicti*, and sufficiency of evidence is somewhat different[3], examination of several sufficiency of evidence cases decided by this Court support appellant's *corpus delicti* argument. In *People v. Kraft* (2000) 23 Cal.4th 978, 1057, the coroner originally stated the victim died of an accidental overdose. However, this Court upheld the conviction for murder on sufficiency grounds, as the body was found bound in a trash bag on the side of the road. Similarly, in *People v. Ruiz*, *supra,* 44 Cal.3d at p. 610, the sudden disappearance of the deceased, her failure to contact friends, after that disappearance and her failure to seek resumption of social security payments was sufficient to sustain a conviction for murder. Both *Kraft* and *Ruiz* make plain the type of evidence required to show the criminal agency needed to prove *corpus delicti*, the sort of

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3. In order to sustain a conviction on appeal, the reviewing court must look at the evidence in the light most favorable to the prosecution and presume every fact that the jury could reasonably deduce from that evidence in deciding whether there was sufficient evidence to convict defendant beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) While this standard may not be exactly the same as the "prima facie" standard of *corpus delicti,* the tests are very similar.

evidence not present in the instant case.

In a more recent case showing the application of this principle, *People v. Pearson* (2012) 53 Cal 4th 306, defendant and two of his companions were convicted of murdering a woman by beating her to death. Defendant also was convicted of personally using a deadly weapon, a wooden stake, pursuant to Penal Code sections 667.61, 12022 and 12022.3. This Court affirmed the murder conviction but overturned the true findings of the deadly weapon allegation. (*Id* at p. 318-319.)

The pertinent facts of *Pearson* showed that Pearson and his companions beat, kicked, raped and stomped a female victim to death on a street in Long Beach. In addition, a wooden stake was used to sexually penetrate the victim. In his testimony and his statement to the police, Pearson admitted his participation in the attack on the victim, but attributed the attack with the wooden stake to his companions. (*People v. Pearson, supra,* at p. 319.) While the victim's DNA was found on Pearson's boots and pants, and the foot prints at the scene were similar to Pearson's boots, no physical evidence connected him to the use of the stake, which was never recovered. (*Ibid.*)

This Court held that "even viewing the trial evidence in the light most favorable to the prosecution and presuming every fact that the jury

could reasonably deduce from that evidence (citation omitted), we find nothing from which a reasonable trier of fact could have found beyond a reasonable doubt that defendant personally wielded the stake in the attack of Siglar." (*People v. Pearson, supra,* 53 Cal.4th at p. 319.) This Court rejected the attorney general's argument that the jury could infer Pearson's personal use of the stake from other violent acts committed by him against the victim. (*Ibid.*) The Court stated that to do so "would go beyond deduction to speculation." (*Ibid.*)

The *Pearson* case fully supports appellant's argument. The fact that a crime of violence was committed against Ms. Rosa does not create an inference that she was the victim of an attempted robbery or robbery any more than a violent crime against Pearson's victim created the inference that he personally used the stake. As stated above, there was nothing about the condition of the crime scene from which an inference could be drawn that anyone either robbed Ms. Rosa or attempted to do so. There were valuable items at the scene that were not taken. Further, there were no items on the ground beside the car from which it could be inferred an attempt to rob was interrupted by the victim or any other person.

Respondent's contention that the jury must be presumed to have followed CALJIC 2.72 does not support its argument. The question before

this Court is one of law, not of fact to be decided by the jury. The prosecution failed to present sufficient evidence to sustain appellant's conviction under the *corpus delicti* rule.

II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION UNDER THE ONLY THEORY OF MURDER ADVANCED BY THE PROSECUTION, HENCE, APPELLANT'S CONVICTION ON THE MURDER COUNT VIOLATED HIS RIGHT TO DUE PROCESS, A FAIR TRIAL, A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Based upon the controlling law of *People v. Weaver* (2001) 26 Cal.4th 876, 929-930 and *People v. Miller* (1951) 37 Cal.2d 801, 806, as well as Penal Code section 190.41, appellant concedes that respondent's reply is correct as to this Argument.

III. APPELLANT'S STATEMENTS AS TO HIS INVOLVEMENT IN THE SHOOTING OF MS. ROSA WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL, DUE PROCESS OF LAW, AND A FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

Maria Rosa was killed on March 28, 2006. Appellant was subsequently arrested on other charges. (AOB at pp. 3-4.) On August 16, 2006, both appellant and his co-defendant Flint were ordered transported to

the Los Angeles County Jail from the state prisons where they were serving sentences for crimes unrelated to the instant offense. (4 CT 716; AOB at p. 8.) According to the prosecution, the reason for the transportation orders was to secure both defendants presence for a live line-up. (3 RT 716; AOB at pp. 53-54.) Neither appellant nor Flint were ever told they were going to be charged with the Rosa murder during their stay at the jail. (3 RT 716 et seq.)

However, well prior to August 16, 2006, the police had more than enough evidence to arrest appellant for the murder of Ms. Rosa. The true purpose in transporting appellant and his co-defendant was to unconstitutionally elicit incriminating statements from them by employing a "sting operation" in which undercover officers posed as prison inmates. Those officers accompanied appellant and Flint to the Los Angeles County Jail on a California Department of Corrections bus, with one of them literally chained to each defendant. During the transportation process and the stay at the jail, the undercover officers did everything in their power to get appellant and his co-defendant, both unrepresented by counsel, to talk about their involvement in the charged offense. (AOB pp. 15 et seq.)

By intentionally delaying appellant's arrest until after the sting operation, the authorities purposely sought to obtain highly incriminating

statements from appellant, prior to his formal arrest. (AOB at pp. 53-54.)

The United States Supreme Court in *Maine v. Moulton* (1985) 475 U.S. 159, 163 made it clear that the right to assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments is indispensable and fundamental to our system of criminal justice. (*Id.* at p. 168; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) Without the right to assistance of counsel, the "fundamental human rights of life and liberty" cannot be ensured and justice cannot be done. (*Gideon, supra,* 372 U.S. at p. 343.)

Generally, the right to counsel does not attach until a defendant is arrested or at the time he first appears before a judicial officer and is told of the formal accusation against him, and has restrictions imposed on his liberty. (*Rothgery v. Gillespie County, Texas* (2008) 554 U.S. 191, 194.) However, as stated in *United States v. Wade* (1967) 388 U.S. 218, 224, the right to counsel need not be limited to any particular moment in the prosecution but may attach "where results may well settle the accused's fate and reduce trial to a mere formality." This includes whether the prosecution is "formal or informal, in court or out, where counsel's absence may derogate from the accused's right to a fair trial." (*Id.* at p. 226.) As stated in *Powell v. Alabama* (1964) 287 U.S. 45, 60-65, the purpose of the right to counsel provisions of the Bill of Rights was a recognition by the Founding

Fathers that if a defendant was forced to stand alone against the State, even at a very early stage of a prosecution, the defendant's case may well be predetermined for guilt.

In his concurring opinion in *United States v. Gouveia* (1984) 467 U.S. 180, 193, Justice Stevens, joined by Justice Brennan, recognized the will of the promulgators of the Constitution as set forth in *Powell* and *Wade.* Justice Stevens made clear that the law should not foreclose the possibility that the right to counsel will, if appropriate, attach prior to the commencement of any formal proceedings. (*Ibid.*) Thus, the two Justices acknowledged that "extension of the right to counsel to events before the trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered part of the trial itself." (*Id.* at p. 196; *United States v. Ash* (1973) 413 U.S. 300, 310.) According to Justice Stevens, the test that should be used to determine whether the right to counsel should attach is "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." (*Gouveia* at p. 196, *Ash* at p. 313.)

In the instant case, appellant was faced with a "changing pattern" of investigation that involved the use of undercover state agents to elicit statements from an "uncharged" accused, despite the fact that the State had

more than enough evidence to charge him prior to this scheme. This was done intentionally in order to circumvent the accused's right to counsel. The State deliberately followed their predetermined scheme to deprive appellant, who "for all practical purposes, already been charged with murder," of his right to counsel prior to extensive questioning by the State's agents. (See *United States v. Gouveia, supra,* 467 U.S. at p. 194; *Escobedo v. Illinois* (1964) 378 U.S. 478, 486.)

There can be no doubt that appellant was more than just a "person of interest" to the police. By the time the August 16, 2006 operation began, the authorities had focused on appellant and Flint as the only persons that could have committed the alleged robbery. However, instead of arresting appellant, which would have caused counsel to be appointed, the authorities took full advantage of the fact that appellant was already incarcerated, albeit for another crime, in order to effect a scheme which otherwise would have been impossible if appellant had already not been in custody.

Further, under the Fifth and Fourteenth Amendments to the United States Constitution, due process is violated when the delay in charging a defendant was undertaken to gain a tactical advantage over the accused. (*United States v. Lovasco* (1977) 431 U.S. 783, 795.) The same is true under California law. A defendant seeking to dismiss charges on due

process grounds must demonstrate prejudice arising from the delay in bringing the charges. (*People v. Caitlin* (2001) 26 Cal.4th 81, 107; *People v. Nelson* (2008) 43 Cal.4th 1242, 1251.) As stated in *People v. Nelson, supra,* 43 Cal.4th at p. 1251, the defendant must show some evidence of prejudice, which, will shift the burden to the prosecution to justify the delay. Once a justification is given, the reviewing court must balance the harm against defendant against the reason for the delay. (*Ibid.*)

In the instant case, denial of appellant's Sixth Amendment right to counsel and his Fifth and Fourteenth Amendment due process right against delay in bringing charges, and right against self-incrimination worked in tandem. There was no question that the prosecution sought to delay appellant's prosecution. This delay allowed the authorities to subject him to a wide-ranging sting operation in which many undercover officers extracted inculpatory statements from him without the benefit of counsel. The prejudice was manifest in the inculpatory statements appellant made that he never would have uttered had he been arrested and advised of this right to counsel.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent contends that appellant's Sixth Amendment right to have counsel present during police questioning attaches only upon the

commencement of formal judicial proceedings on the charges. (RB at p. 33; *Kirby v. Illinois* (1972) 406 U.S. 682, 688-690.) According to respondent, in California, formal judicial proceedings invariably commence only upon the filing of the complaint. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1198-1199.) In the instant case, the Los Angeles District Attorney did not file the complaint until after the undercover operation was completed. (RB at p. 34.) Thus, according to respondent, *Massiah* does not apply.

Respondent asserts that "appellant's claim that prosecutorial delay in charging him somehow triggered his right to counsel or violated his due process rights is to no avail," and that "no court should second guess the prosecutor's decision regarding whether sufficient evidence exists to warrant bringing charges." (RB at p. 34) Respondent additionally stated "the only alleged prejudice from the delay was that law enforcement was able to bolster its investigation by tricking appellant into incriminating himself." (*Ibid.*)

Respondent argues that appellant has failed to establish as a matter of law there was substantial evidence to require the filing of an information before the time of the undercover operation, or that the prosecution improperly delayed the filing of charges without justification. (RB at pp.

34-35.) Moreover, the due process clause does not protect against minimal delays in the filing of charges necessitated by the need to investigate thoroughly suspected crimes. (RB at p. 35.) Thus, any purported error in eliciting the incriminating statements was harmless beyond a reasonable doubt given the overwhelming evidence in support of the convictions. (RB at p. 35; *People v. Bradford* (1997) 15 Cal.4th 1229, 1313.)

C. APPELLANT'S REPLY ARGUMENT

1. *Massiah* Sixth Amendment Violation

The Sixth Amendment provides that "in all prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense." (U.S. Constit. Amend. VI.) Although, respondent argues this right does not attach until "the initiation of adversarial judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" (*Rothgery v. Gillespie County*, *supra,* 554 U.S. at p. 198), the he reason for this rule is not to create a "mere formalism." Rather, it is a recognition of the *usual* point at which "the government has committed itself to prosecute..and the adverse positions of the government and defendant have solidified and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural law." (*Kirby v. Illinois, supra,*

406 U.S. at p. 689.)

While the majority of the case law indicates that right to counsel does not attach until some sort of formal judicial proceeding has been brought, the facts of this case present an exception to the general rule. While application of the *standard rule* regarding attachment of right to counsel, as articulated in *Massiah,* is predicated on a *standard* set of conditions, the facts of appellant's case reflect anything but a standard set of conditions. Indeed, the facts show the state's deliberate effort to circumvent the general rule by purposely delaying appellant's arrest in order to elicit incriminating statements despite having sufficient evidence to bring charges. Usually, defendant's freedom is curtailed by a physical arrest. According to most case law, subject to the restrictions of *Miranda,* the authorities are free to question defendant at this point. However, within a very short time of the arrest, defendant must be taken before some sort of judicial official, whether it be for arraignment on a complaint, information or indictment, where he is assigned counsel or given an opportunity to obtain counsel on his own. (Penal Code section 825.) It is at this point that the authorities are no longer permitted to interrogate defendant without consent of his counsel. (*Massiah v. United States* (1964) 377 U.S. 201, 206-207; *In re Wilson* (1992) 3 Cal.3d 945, 950-951.)

Those are the standard conditions for which the standard rules apply. However, the instant case presents a factual scenario which is far from standard. Well prior to the "sting," Detective Mark Lillienfeld was called into the investigation of Ms. Rosa's murder. (11 RT 2164.) At some point he came aware that "the investigation started to focus on two individuals," appellant and Flint. (*Ibid.*) Accordingly, a plan was devised to get information from these two individuals. (*Ibid.*)

While it is unclear from the record under what circumstances it occurred, somehow, a court order was obtained to facilitate this operation. According to the prosecution's witnesses and their Motion in Opposition filled with the court, under the terms of this Order, the authorities were permitted to bring both appellant and Justin Flint to Los Angeles for some sort of line-up. (3 CT 716; 11 RT 2171-2172.) However, there was no indication that it was ever done, nor was there anything in the record indicating who supposedly viewed this line-up. (*Ibid.*) Thus, the state manipulated the judicial system to facilitate its illegal conduct.

The prosecutor's scheme was not a casual operation. Hours were spent arranging all of the details, teaching the undercover operatives to act like inmates. (11 RT 2167-2168.) Appellant and his co-defendant were literally chained to undercover police officers from the time they left the

prison until their arrival in Los Angeles County. (11 RT 2168.) The transportation bus was populated by sheriff's officers posing as inmates. (11 RT 2169 et seq.) No stone was left unturned to get appellant to believe that he was surrounded by like-minded inmates, free from police questioning, while in reality he was set up to be interrogated by police without his knowledge. (*Ibid.*)

It was this false pretense, coupled with intentional isolation of appellant from which there was no retreat, that created the exception to the rule as to when the right to counsel attaches. Respondent's argument that appellant was essentially a person of interest and the police operation was merely a conventional "sting" operation to gather additional information to aid in the ultimate charging decision does not ring true. (ARB at pp. 33-36.) This was not a situation like those cited by respondent, where a defendant was aware of his arrest and was protected by the provisions of Penal Code section 825, which require that a defendant be brought before a magistrate within a short period of time after arrest. (*Kirby v. Illinois*, supra, 406 U.S. at p. 688-690; *People v. Viray, supra,* 134 CalApp.4th at p. 1198.)

According to the prosecution's own witnesses, upon their arrival at the Los Angeles County holding facility, appellant and Flint were placed in a holding cell in an inmate reception facility (11 RT 2215.) This cell had

already been "bugged" so all statements of appellant, Flint, and the undercover officers were visually and auditorily recorded. (11 T 2177.) Once inside this "bugged" cell, the undercover officers continued in their successful efforts to extract inculpatory statements from appellant. (AOB at pp. 9-13.)

At some point, both appellant and Flint was processed through the reception center and were told they were being charged with Ms. Rosa's murder. (11 RT 2253; RB at p. 10.) On one of the videotape clips, the two inmates are seen and heard talking about being charged with murder. (11 RT 2255-2256; RB at p. 10.) Respondent admitted that appellant and Flint had been processed while in jail and informed of the charges against him, including murder.[4]

Nothing in this process conformed with the standard set of conditions under which the attachment of the right to counsel applies. (AOB at pp. 24-26.) This was clearly not a situation in which appellant was merely a "person of interest" subjected to a standard "sting" operation by the police. Respondent's argument that *Massiah* does not apply because the Los Angeles District Attorney did not file the complaint until after the

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4. It was never indicated in the record where appellant was housed after being processed through the county jail system. However, given standard procedure, it can be assumed that he remained in county custody until his trial.

undercover operation was completed is completely disingenuous. (RB at p. 34.)

It was not only that defendant was effectively under arrest for the murder of Ms. Rosa when he was taken from the state prison, as that alone will not automatically trigger the right to counsel. What distinguished the instant situation was the unconstitutionally duplicitous manner in which the "operation" was conducted, with the primary purpose of preventing appellant's access to counsel. The officer's conduct reflected the very dangers contemplated by the *Massiah* Court; the pernicious intent of the state.

Contrary to respondent's protestations, there is no doubt appellant was being taken to Los Angeles to be formally charged with Ms. Rosa's murder. However, the authorities kept the purpose of the move to the jail a scret from appellant, giving him the impression he was being transported to participate in some sort of live line-up. (3 CT 316.)

As an integral part of the scheme, appellant was not informed of the true reason for his transfer to Los Angeles. In creating this false impression, the authorities prevented appellant from requesting counsel at the actual time of his arrest, which was at the time of his removal from state prison. Although obviously in "custody" while in state prison, a critical part of the

police scheme was to remove appellant from his normal environment, and place him in a situation where he was completely surrounded by undercover law enforcement agents. Thus, the state tricked appellant into incriminating himself. In *this particular case* at that *particular moment*, his case was "foredoomed" by the denial of his right to counsel. (See *Powell v. Alabama, supra,* 287 U.S. at pp. 60-65; AOB at pp. 56-58.)

The conduct of the police in the instant case was exactly the type of "changing pattern of police investigation " referred to by Justices Stevens and Brennan in their concurring opinion in *United States v. Gouveia, supra,* 467 U.S. at p. 193. (AOB at p. 57.) As the Justices reasoned, the test to determine whether the right to counsel should attach is "whether the accused required aid in coping with legal problems or assistance in meeting his adversary. (*Ibid.*)

In the instant case, appellant was misled by police deception regarding his custody, surrounded by undercover agents, and packed off on a "bugged" bus to be placed in a "bugged" holding cell. At that point, appellant was effectively under arrest and the right to counsel attached. During this period of time, these state agents used every subterfuge in their arsenal to trick appellant into incriminating himself.

In *Escobedo v. Illinois, supra,* 378 U.S. at p. 490-491, the Court held

that when an investigation is no longer a general inquiry into an unsolved crime, but has begun to focus upon a particular suspect, the suspect has been taken into police custody, If the police elicit incriminating statements, and fail to warn the suspect of his right to remain silent, he has been denied assistance of counsel in violation of the Sixth Amendment made obligatory upon the states by the Fourteenth Amendment. No statement elicited by the police under such circumstances may be used against him at trial. The *Escobedo* Court held that under the circumstances of that case, the fact that defendant was never formally arraigned or indicted made no difference to the attachment to his right of counsel. (*Escobedo, supra,* 378 U.S. at p. 485.)

In the instant case, the same results should obtain. While appellant never requested counsel, it was because the government deceived him and hid from him the fact that he was in legal peril. As soon as he was placed on the transportation bus, his isolation from anyone other than those who sought his incrimination made it impossible for him to even be aware of his dire situation. Thus, *Escobedo* controls this case. Like the defendant in *Escobedo,* the authorities deliberately made sure that appellant would never seek counsel.

This situation is usually seen when determining custodial status for

the purpose of the custody requirement of *Miranda*. When a person is an inmate, it is clear that he or she is not free to leave such a custodial setting. However, when there is a change in custodial setting within the framework of a defendant's ordinary inmate status, the court must analyze the facts to determine whether the additional degree of restraint imposed on defendant, in such circumstances, forced him to participate in the interview. (*People v. Macklem* (2007) 149 Cal.App.4th 674, 695.) The key factor to be considered is whether a reasonable person in the position of the inmate feels that he or she was at liberty to terminate the interrogation. (*Stansbury v. California* (1994) 511 U.S. 318, 325; *People v. Ochoa, supra,* 19 Cal.4th at p. 401-402; see *Howes v. Fields* (2012) 132 S.Ct. 1181, 1184.) In this case, appellant had no idea he was being interrogated.

While the above cases discuss the coercive aspects of increased custody in a prison setting in the *Miranda* context, they also make it clear that, in certain instances, a change in the degree of custody, even while in prison, can give rise to a situation where defendant's freedom is curtailed, in a manner analogous to the *Miranda* context. The state's deceptive conduct essentially placed defendant appellant under arrest for the murder of Ms. Rosa. Thus, the right of counsel attached at the time appellant was placed on the bus and taken to Los Angeles.

2. Speedy Trial

Appellant respectfully relies upon his Argument as more fully set forth in his Opening Brief.

3. Prejudice and Harmless Error

Error is structural, and thus subject to automatic reversal, in cases where the error affects the framework within which the trial proceeded, rather than simply an error in the trial process itself. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; Cal. Const. Article 6 section 13.) These type of structural errors include a complete denial of counsel. (*People v. Mil* (2012) 53 Cal.4th 400, 410; *Neder v. United States* (1999) 527 U.S. 1, 8.) As the error in this case involved denial of counsel, due to the state's purposeful deception in interrogating appellant without his knowledge or consent, the error was structural and not subject to the harmless analysis. (See *Neder, supra,* at p. 8; see also *United States v. Davila* (2013) 133 S.Ct. 2139.)

Even if the harmless error standard does apply in this case, *Chapman v. California* (1967) 386 U.S. 18 is instructive regarding the state's burden to show harmlessness where an error of constitutional dimension occurs. The relevant facts are set forth in the opinion of this Court *People v. Teale* (1963) 63 Cal.2d 178, 183-185, which ultimately led to the High Court's ruling in *Chapman v. California* that demonstrates just how difficult the

United States Supreme Court sought to make it for the state to prove harmless error beyond a reasonable doubt. On October 18, 1962, Chapman and Teale were seen standing outside of a bar, where the victim Adcox was a bartender. Later that morning, Adcox's body was found a different location. He had been killed by three .22 caliber bullets to the head. The evidence showed that six days before the killing, Chapman had purchased a .22 caliber pistol. Very close to the body, the police recovered a check signed by Chapman. In addition, blood in defendant's car was the same type as Adcox. Also found in defendant's car were fibers from Adcox's shoes and Adcox's hairs. In addition, evidence was admitted that Teale stated that he and defendant Chapman killed Adcox. In addition, Chapman had given a false alibi to the police concerning her location at the time of the killing.

Neither defendant testified. During his summation, the prosecutor urged the jury to find both defendants guilty, in part because of their failure to testify. Using the *Watson* standard[5], this Court held that due to the very strong case against defendants, the prosecutor's error of commenting upon their failure to testify was harmless. (*People v. Teale* (1962) 63 Cal.2d 178, 197.) Chapman ultimately sought relief in the United States Supreme Court.

The High Court's holding in *Chapman, supra,* 386 U.S. at p. 24 then

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5. Until the High Court decided *Chapman v. California, Watson* was the universal standard for harmless error in California.

proceeded to change the standard of harmless error as it pertained to constitutional error. In reversing Chapman's conviction, the United States Supreme Court held that where constitutional error is alleged, the state is required to prove the error was harmless beyond a reasonable doubt. In spite of overwhelming evidence of defendant's guilt, the High Court found that the State's improper comment on defendant's failure to testify was constitutional error and the state failed to prove it was harmless beyond a reasonable doubt. (*Ibid.*)

In *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, the Court clarified the standard, reasoning that "this inquiry, in other words, is not whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but whether the guilty verdict actually rendered in the trial was surely unattributable to the error." As stated by this Court, in cases of constitutional error, it is the government's burden to show the guilty verdict "was surely unattributable to the error." (*People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

Recently, in *People v. Jackson* (2014) 58 Cal.4th 724, Justice Liu, in his separate and concurring and dissenting opinion, reviewed the current state of the *Chapman* standard for harmless error as it has been applied by this Court. He stated that the standard required before federal constitutional

error can be said to be harmless "has long been understood to indicate the very high level of probability required by the Constitution to deprive an individual of life or liberty." (*Id.* at p. 792; *Victor v. Nebraska* (1994) 511 U.S. 1, 14.) As Justice Liu stated, while the standard of "beyond a reasonable doubt" is not one of absolute certainty, it is intended to be "very stringent: it is not satisfied so long there is a doubt based upon reason." (*People v. Jackson, supra,* 58 Cal.4th at p. 792; *Jackson v. Virginia* (1979) 443 U.S. 307, 317.)

Justice Liu observed, "The stringency of this standard reflects not only its protective function but also its amenability to principled application." (*People v. Jackson, supra,* 58 Cal.4th at p. 792.) Accordingly, Justice Liu opined that under *Chapman,* a reviewing court "need not calibrate its certitude to some vaguely specified probability, instead the court must be convinced that the error was harmless to the *maximal level of certainty within the realm of reason*, a level that admits no reasonable doubt." (*Ibid* emphasis in original text.)

Obviously, the burden falls upon the party who benefitted by the error, the prosecution. (*Chapman, supra,* 386 U.S. at 24.) Therefore, as stated by Justice Liu "it is not defendant's burden to show that the error *did* have adverse effects; it is the state's burden to show that the error *did not*

have adverse effects." (*Jackson, supra,* at p. 793 (emphasis in original text).) Because it may be difficult to determine whether a particular error contributed to the jury's verdict given the counterfactual nature of the inquiry, "the allocation of the burden proving harmlessness can be outcome determinative in some cases" (*Gamache v. California* (2010) 131 S. Ct 591, 593.)

Justice Liu also discussed the United States Supreme Court's opinion in *Riggins v. Nevada* (1992) 504 U.S. 127, 138, in which the Court reversed a capital conviction because defendant was unconstitutionally forced to take anti-psychotic drugs during the course of his trial. In *Riggins*, the United States Supreme Court made no finding that the medication actually affected the defendant's outward appearance, testimony, ability to follow the proceedings, or communication with counsel. Rather, it was enough that such effects were "clearly possible," and it was the state's burden to show that the error did not have such adverse effects.

The constitutional error committed in this case resulted in the admission of highly probative evidence in the form of his statements. These illegally obtained statements directly inculpated appellant in Ms. Rosa's felony murder. The impact of these statements upon the jury was great.

Under the above law, the state did not prove that the constitutional error in this case was harmless. Thus, appellant is entitled to a reversal of the judgment against him

IV. THE TRIAL COURT'S ERROR IN DENYING COUNSEL'S MOTION TO CONTINUE THE TRIAL VIOLATED APPELLANT'S RIGHT TO COUNSEL, DUE PROCESS OF LAW, FAIR TRIAL, AND A FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

On February 8, 2008, defense counsel Trotter filed a Motion to Continue asking that the trial be continued to June 16, 2008, as day 0 of 30. (III CT 711.) She filed a sealed Declaration in support of her Motion. (Supplemental CT III, pp. 16-17.) In that Declaration, Ms. Trotter indicated that is spite of working diligently with her co-counsel, she was not prepared to present an adequate defense by the trial date of March 19, 2008. (*Id.* at p. 1.) Ms. Trotter further stated that she had not heard from her DNA expert about discovery sent to him and had been able unable to obtain the services of mental health professionals in time to use them in mitigation. In addition, she stated that there were other witnesses that needed to be located and interviewed. (*Id* at p. 2; AOB at pp. 65-66.) Counsel further informed the

court that if the Motion to Continue was granted, appellant stated he would represent himself. (*Ibid.*) However, Ms. Trotter felt compelled to proceed with the Motion. (*Ibid.*)

The trial court denied the Motion, indicating that it could not continue to find good cause over appellant's objection, even though it believed that counsel were acting in good faith and doing an effective job for their client. (2 RT 324; AOB at pp. 67-68.)

In his Opening Brief, appellant argued that the court's denial of the Motion was based upon the mistaken notion that it could not grant the continuance because of appellant's opposition. Appellant cited to *Townsend v. Superior Court of Los Angeles County* (1975) 15 Cal.3d 774, 781-782, which stated that Penal Code section 1382, subd. 2 (the statutory right to be tried within 60 days) was not a "fundamental right, and may be waived by counsel as part of the overall trial strategy" and that appellant's rights under section 1382 are creatures of statute and are "merely supplementary" to appellant's right to a fair trial. (AOB at p. 69.) Therefore, any concern of the trial court that appellant had a fundamental right to be tried within 60 days, and thus had veto power over the decision of trial counsel, is not supported by law. (AOB at p. 70.) The chief concern of the court should have been appellant's right to effective counsel, not his rights under section

1382. (AOB at p. 70.)

B. RESPONDENT'S ARGUMENT

Respondent argued that a grant or denial of a motion to continue the trial rests within the broad discretion of the trial court, and that abuse occurs "only when the court acts arbitrarily, capriciously, or outside the bounds of reasons." (RB at pp. 36-37; *People v. Doolin* (2009) 45 Cal.4th 390, 450.) According to respondent, no such abuse occurred in the instant case. (RB at p. 37.)

Respondent argued that continuances in criminal cases may only be granted on an affirmative showing of good cause. (RB at p. 37; Penal Code section 1050, subd (e).) "Motions to continue the trial of a criminal case are disfavored and will be denied unless the moving party, under Penal Code section 1050, presents affirmative proof in open court that the ends of justice requires a continuance." (RB at p. 37; Cal. Rules of Court, rule 4.113.) Respondent maintained that while the trial court should not deny a continuance that would unfairly deprive a defendant of his right to prepare a defense, it is "not required to indulge every eve-of-trial defense request for additional time where diligence and good cause are not clearly demonstrated." (RB at p. 37; *People v. Courts* (1985) 37 Cal.3d 784, 791.)

Respondent argued that the trial court "appropriately evaluated the

usefulness of a continuance in light of the arguments presented by defense counsel and was correct in denying the motion." (RB at p. 38; *People v. Beeler* (1995) 9 Cal.4th 953, 1003. "To demonstrate the usefulness of a continuance a party must show the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time." (*Ibid.*)

Respondent contended that the usefulness of the exculpatory evidence appellant sought to investigate was speculative. (RB at p. 38.) Because counsel failed to how how the possible testimony of the requested mental health expert was material to the penalty phase, (RB at p. 39), respondent claimed that trial counsel's assertion about needing to contact additional penalty phase witnesses was "vague" and did not meet the requirements for the granting of a continuance. (RB at p. 39; *Owens v. Superior Court* (1980) 28 Cal.3d 238, 250- 251; *People Jenkins* (2000) 22 Cal.4th 900, 1038.)

Respondent concluded that in denying the request the trial court "weighed the deficiencies in appellant's request against the five months counsel sought for the continuance, as well as appellant's objection to counsel's request to waive time, and his threat to represent himself if the court granted the request." (RB at p. 39.) Thus, appellant was not entitled to

the continuance and therefore cannot show any prejudice due to the denial. (RB at p. 41.)

C. APPELLANT'S REPLY ARGUMENT

1. The Trial Court Employed the Wrong Legal Standard in Its Denial of Counsel's Motion to Continue, Therefore, the Court Abused Its Discretion

Respondent's argument that the trial court was within its "broad discretion" under Penal Code section 1050 ignored the appellant's fundamental argument. Respondent's argument was directed to a scenario where the trial court applied Penal Code section 1050 to a fact-based request for a continuance and ruled against granting it. In such a case, an abuse of discretion occurs only when the court acts arbitrarily, capriciously , or outside the bounds of reason. (RB at p. 37; *People v. Doolin, supra,* 45 Cal.4th at p.450.)

However, this was not the situation in the instant case. Appellant properly argued that the court's denial of the Motion for Continuance was based upon a *mistake in law,* in that the trial court believed it could not grant the continuance because of appellant's continued opposition to waiving time and, further, appellant's right to a speedy trial pursuant to section 1382 superceded his counsel's need to be adequately prepared for

trial.

Thus, respondent's entire argument rested upon a factual situation that did not exist. It was never suggested by the prosecutor that counsel did not need the additional time requested to adequately prepare to present a constitutionally effective defense. (2 RT 322.) Nor did the court ever suggest that counsel did not make an adequate factual showing that such a continuance was necessary. In fact, the court specifically endorsed the efforts of counsel, stating to appellant that his counsel were trying to the best job possible for him and they needed the additional time requested. (2 RT 321; AOB at p. 66-67.)

At no time did the trial court indicate any doubt that the granting of the continuance was necessary to assure appellant a fair trial. On the contrary, the court told counsel that "I'd love to be able to accommodate you but I am restrained." (2 RT 324; AOB at p. 68.)

The trial court's action in failing to grant the continuance was not a result of an exercise of the court's discretion. It was the result of the trial court's mistaken belief of law that it did not have the discretion to grant such a continuance over appellant's objection. Therefore, respondent's entire argument fails and appellant is entitled to relief.

The law is clear and unambiguous. "The abuse of discretion is not a

unified standard; the deference it calls for varies according to the aspect of the court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.) Therefore, "[t]he question is whether the trial court's actions are consistent with the substantive law, and, if so, whether the application of the law to the facts of the case is within the range of discretion conferred upon the trial court." (*Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 973.)

However, "when the trial court's order involves the interpretation and application of a constitutional provision, statute, or case law, questions of law are raised and those questions are subject to de novo (independent) review on appeal." (*Prigmore v. City of Reading* (2012) 211 Cal.App.4th 1322, 1333-1334.) In addition, it is settled that "a disposition that rests on an error of law constitutes an abuse of discretion" in and of itself. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.

2. Trial Counsel's Legitimate Request for Additional Time to Prepare Appellant's Case for Trial Takes Constitutional Precedence Over Appellant's Refusal to Waive Time Under Penal Code Section 1382

This Court has held on many occasions that counsel can waive defendant's statutory speedy trial rights so long as counsel is acting competently, and counsel's request for a continuance constitutes good cause to delay trial, even when defendant is objecting pursuant to section 1382. (*People v. Harrison* (2005) 35 Cal.4th 208, 225; *People v. Memro* (1995) 11 Cal.4th 786, 852-853 citing to *People v. Wright* (1990) 52 Cal.3d 367, 389.)

As stated in his Opening Brief (AOB pp. 69-70), this Court in *Townsend v. Superior Court of Los Angeles County, supra,* 15 Cal.3d at pp. 781-782, made it unmistakably clear that a defendant's rights under section 1382 are not fundamental constitutional rights and must stand in an inferior position to defendant's right to competent counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Because it is counsel who is in the best position to determine what is in the best interest of appellant's defense, it is counsel's right to bring a motion to continue even if his client objects to a continuance. While a criminal defendant has certain rights that allow him to exercise personal veto power over his

counsel, he does not have the right to prejudice counsel's strategy by objecting to counsel's request for additional time.

This Court has held that even though the trial court has discretion to grant or deny a request for continuance, the trial court cannot exercise its discretion over continuances so as to deprive a defendant or his attorneys a reasonable opportunity to prepare a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 73.) As stated in *People v. Fontana* (1982) 139 Cal.App.3d 326, 333 "[p]ut plainly, when a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion [Citation omitted.] By denying a continuance to allow counsel to become prepared in the instant case, [defendant's] right to the effective assistance of counsel...[was] denied..." (*Ibid.*)

3. Except for Certain Basic Constitutional Rights that Can Only Be Waived By a Defendant, Personally, Trial Counsel Controls Defense Strategy, Which Includes Investigation and Preparation of the Case

Part of the reason for counsel's request for continuance was to obtain additional time to present a penalty phase defense, including the presentation of one or more mental health experts. The trial court disagreed with counsel's argument that the case law indicated that it was counsel's province as to what sort of mitigating case to present. (2 RT 323.) In doing

so, the court cited to the Stanley "Tookie" Williams case over which it presided. (*Ibid.*) In addition, the court stated its major concern was that it could not keep finding good cause to continue over appellant's objection, especially when a five month continuance would be necessary. (*Ibid.*)

The trial court was wrong about the law. *People v. Stanley Williams* (1988) 44 Cal.3d 1127 never suggested that a defendant could dictate the course of a criminal defense to his counsel. *Williams* was limited to a very particular factual situation which addressed under what circumstances it would be considered reversible error when defense counsel acquiesced to his client's request not to put on any mitigation evidence in a death penalty case. (*Id* at p. 1149-1153.) In reality, the law in California is clear that, in general, an attorney representing a criminal defendant has the power to control the defense, except that he may not exercise this power so as to deprive defendant of certain fundamental rights. (*People v. Robles* (1970) 2 Cal.3d 205, 214.) As stated above, the right to be tried in the 60 day period set forth by section 1382 is not one of these fundamental rights.

Specifically, in a death penalty case, counsel is in no way compelled to accept his client's wishes that no mitigation evidence be presented in the penalty phase. (*People v. Deere* (1985) 41 Cal.3d 353, 364 and *People v, Burgener* (1986) 41Cal.3d 505, 542-543.) There is no case law that even

suggests that appellant's threat to represent himself should be a factor in this legal equation. Defendant's cannot be granted power over their counsel by dint of threatening to fire them. Otherwise, the right to a competent defense means only that which an unschooled defendant wishes it to mean at any given time during a trial.

4. Trial Counsel Not Only Had the Constitutional Right to Receive a Continuance, She Had a Constitutional Duty to Make Such a Request

Counsel had more than just the right to bring such a motion for continuance: she had a constitutional duty to do so. As long held by the United States Supreme Court, the Sixth Amendment right to counsel has the purpose of assuring a criminal defendant the fundamental right to a fair trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 684; *Gideon v. Wainwright,* 372 U.S. at p. 343.)

> [a] fair trial is one in which evidence subject to fair adversarial testing is presented to the tribunal for the resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled. (*Strickland, supra,* 466 U.S. at p. 685, citing to *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 275-276.)

For this reason, the High Court has long recognized that the right to

counsel means the right to *effective* assistance of counsel. (*Strickland, supra,* at p. 686.)

The right to effective counsel has been held to be a fundamental right of criminal defendants. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 374.) "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was unfair and the verdict rendered suspect." (*Ibid.*) Therefore, the ineffective assistance of counsel is a violation of the Sixth Amendment to the United States Constitution, as well as the due process guarantees of the Fifth and Fourteenth Amendments. (*Strickland, supra,* at pp. 684-684.) As stated by *Strickland,* at p. 686. "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." A defendant has a right to counsel that "meets at least a minimal standard of competence." (*Strickland* at 685, 687; *Hinton v. Alabama* (2014) 134 S.Ct. 1081, 1088.) As stated in *Hinton*, under *Strickland* the first determination must be whether "counsel's assistance was reasonable considering all of the circumstances." (*Hinton, supra,* 134 S.Ct. at p. 1088.)

In this case, it was undisputed that trial counsel needed additional

time to prepare both a defense to the prosecution's DNA case, and to prepare a mitigation case for the penalty phase. Counsel specifically stated that she had been unable to obtain the services of the proper mental health experts and that there were other witnesses that needed to be interviewed and located for the penalty phase. (AOB at p. 66, Supplemental CT III, pp. 16-17.) The trial court recognized the validity of counsel's representations, yet it denied counsel the opportunity to present such a defense.

As stated in Appellant's Opening Brief (AOB at pp. 71-72.), in *Williams v. Taylor* (2000) 529 U.S. 362, 393, the United States Supreme Court made it clear that trial counsel in a capital case *must* "explore all avenues of defense," which means conducting a "diligent investigation into his client's troubling background and unique personal circumstances." (*Id.* at p. 415.) This was exactly what counsel attempted to do, yet she was prevented from doing so by the trial court's denial.

5. The Authorities Cited by Respondent in Its Reply Brief Were Not Applicable to this Case

As stated above, none of the cases cited by respondent address the factual scenario presented in this case. Respondent's reliance on *People v. Jackson* (2009) 45 Cal. 4th 662 (RB at pp. 36-37) to support the proposition that the trial court was within its discretion was misplaced. (RB 36-37.)

However, the controlling facts of *Jackson* are instructive on the issue of the court's discretion to grant a continuance.

On June 22, 2002, the United States Supreme Court in *Atkins v. Virginia* (2002) 536 U.S. 304, 321, held that executing a mentally-ill, retarded defendant is prohibited by the Constitution. (*Id.* at p. 676.) Two days later, defendant Jackson filed a motion to continue the penalty trial due to the *Atkins* decision. He asserted that California had not made it clear what constituted mental retardation under the law and that he needed a sixty-day continuance, because he could not be ready for trial until he investigated "the adaptive functioning factors that are mentioned in the *Atkins v. Virginia* opinion." (*Id.* at pp. 677.)

At the hearing on the motion , the trial court indicated it was not inclined to continue the case because it was unclear what counsel hoped to learn in the 60 day period requested. (*People v. Jackson, supra,* 45 Cal.4th at p. 677.) The trial court refused to continue the case based upon what the California Legislature may decide to do *vis a vis* establishing the *Atkins* standards for California. (*Ibid.*) It stated that it may take the Legislature months to make this decision and, as such, a continuance cannot be justified. The court told counsel that he should be prepared to put on whatever ever case he had regarding his client's retardation because the

legal standards would not be resolved at the trial level. (*Ibid.*)

This Court held that there was no abuse of discretion by the trial court simply because the Legislature had not yet developed any detailed standard as to how to apply *Atkins*. This Court pointed out that it was not until the year after the trial that the Legislature enacted Penal Code section 1376, which defined "mentally retarded" and established procedures for determining that a defendant was retarded for the purposes of *Atkins*. (*People v. Jackson, supra,* 45 Cal.4th 678.)

Jackson has no applicability to the instant case. Neither does *People v. Strozier* (1993) 20 Cal.App. 4th 55, also cited by respondent. (RB at p. 37.) In *Strozier*, trial counsel asked for a series of continuances based upon the representation that the defense was having difficulties in subpoenaing three witnesses. The matter was opposed by the prosecutor, who stated that counsel had previously announced he was ready. He noted that appellant had been threatening respondent's witnesses, including one witness who had recently recently beaten up. (*Id.* at p. 59.) The trial court agreed to a continuance to the end of the week on the condition that counsel would be ready for trial at that time. (*Ibid.*) Counsel refused the court's offer, indicating that if the continuance was not granted, he would be "incompetent" to represent defendant, and the court would have to appoint

another attorney. (*Ibid.*) As counsel would not go forward, another attorney was appointed and the trial went forward two weeks later. (*Ibid.*)

The court of appeal indicated that the trial court was within its discretion to refuse to grant the continuance. It cited to *People v. Crovedi,* (1966) 65 Cal.2d 199, 207, which held "there are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." In the case of *Jackson,* the court of appeal held that there was nothing in the record to suggest why trial counsel was not able to subpoena the witnesses in question prior to the trial, nor why counsel honestly believed an additional two weeks would allow for such service.

In *People v. Doolin, supra,* 45 Cal.4th at p. 450, also cited by respondent (RB at p. 37), the trial court denied a request for a 48 day continuance by defense counsel to "retest" DNA evidence, in the hope that it would eliminate his client as a suspect in the murder or attempted murders of four prostitutes. This Court upheld the trial court's denial of the request, stating that defendant had long been on notice of the existence of the DNA evidence. In addition, this Court stated that such retesting would not have revealed any exculpatory evidence, as defendant only had sex

with one of the victims, using a condom during intercourse. Therefore, even if he was excluded as one of the donors, this would have had little or no evidentiary impact.

People v. Froehlig (1991) 1 Cal.App. 4th 260 (RB at p. 37) is also so completely distinguishable from this case as to be unavailing. There, defense counsel requested a continuance because a defense witness appeared in jail attire and needed time to change out. The trial court denied the request. The court of appeal affirmed, finding the request had nothing to do with trial preparation, that trial counsel should have been aware this was going to happen, and that a timely request to change out would have cured the situation. (*Id.* at pp. 265-266.)

The difference between all of these cases and the instant case is evident. In all of these cases, the prosecutor opposed the motion for a continuance and the trial court legitimately found that the continuance was not warranted. This did not happen in the instant case. Instead the trial court made clear that it believed the reasons for the continuance given by counsel, for both the guilt and penalty phase cases, were legitimate and meritorious. The trial court never indicated, or even hinted, that counsel was in someway remiss in not proceeding at a faster pace. Further, it never indicated that it did not believe that the additional time sought for

preparation would not yield information potentially important, if not critical, to the defense. By stating "I'd love to accommodate you.." the court made clear that it fully ascribed to the reasons given for the continuance. The court's error was that it misunderstood *the law*. As stated above, this was an abuse of discretion.

6. Specific Constitutional Prejudice Vis a Vis the Penalty Phase

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution guarantee a capital defendant the right to introduce a wide range of evidence that has a tendency to mitigate a sentence of death. The jury must be allowed to consider all relevant evidence proffered by a defendant to show he is deserving of a sentence less than death.

A California jury has great discretion in determining a capital defendant's fate. The individual juror is instructed to place any moral weight they choose on any aspect of the circumstances of the crime or the character of the defendant. As long as the evidence is relevant to the circumstances of the offense or character of defendant, the court may not limit the defendant's presentation of relevant evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 1015; California Penal Code section 190.3.))

Due the trial court's error in forcing counsel to proceed to the penalty phase unprepared, the penalty phase in appellant's death judgment

violated the above-referenced provisions of the United States Constitution. The trial court denied appellant the opportunity to present his case by unconstitutionally forcing counsel to proceed to trial before she was ready.

The Eighth and Fourteenth Amendments to the Constitution require that the sentencing jury in a capital case be allowed to consider any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence of less than death." (*People v. Frye, supra,* 18 Cal.4th at p. 1015 citing to *Lockett v. Ohio* (1978) 438 U.S. 586, 604 fn omitted; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) This constitutional mandate contemplates the introduction of a "broad range of evidence mitigating imposition of the death penalty." (*People v. Frye, supra*, 18 Cal.4th at 1015-16.)

The purpose of this constitutional mandate is to guarantee the reliability of the sentencing decision by assuring that a wide range of factors and evidence be taken into account by the sentencer. (*Lockett v. Ohio, supra,* 438 U.S. at 602-604.) As stated by the High Court, "(T)he jury must be allowed to consider on the basis of all relevant evidence not only why a sentence of death should be imposed but also why it should not

be imposed." (*Jurek v. Texas* (1976) 428 US 262, 271.)

Relevant mitigating evidence is evidence "which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440.) The case law makes it clear that admissibility should not be conditioned upon the evidence having some objectively measured great weight in mitigation; it is sufficient that the evidence has a tendency in reason to show that the defendant is not as morally culpable for the offense as the other evidence may suggest. (*People v. Frye*, *supra*, 18 Cal.4th at pp. 1016-1017; *People v. Easley* (1983) 34 Cal.3d 858, 876, fn 10.)

This broad scope of relevancy is seen in the pivotal United States Supreme Court case of *Skipper v. South Carolina*, *supra,* 476 U.S. at pp. 3-5. In *Skipper,* the trial court prevented the jury from hearing evidence from two of defendant's jailers that defendant had made a good adjustment to jail in the months prior to sentence. The United States Supreme Court reversed the judgment of death. The Court held that this evidence was indeed mitigating in that inferences could be drawn from it that might serve "as a basis for a sentence less than death." (*Id.* at pp. 5-6.) The reversal came in spite of the fact that there was other mitigating evidence

presented to the jury, including evidence of defendant's adjustment in prison.

The *Skipper* Court specifically rejected any attempt to base the admissibility of mitigating evidence on its relative importance in the scheme of the sentencing determination. Instead, it cited to its decision in *Eddings v. Oklahoma*: the sentencer must not be precluded "from considering as a mitigating factor *any* (emphasis added) aspect of defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4 citing to Eddings *v. Oklahoma*, *supra,* 455 U.S. at p. 110.) This mitigation need not have any direct connection to the crime, itself, but needs only to demonstrate that a defendant may deserve a sentence of less that death. (*Id.* at p. 4.)

Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284.) Preventing the jury from fully hearing and considering the mitigating evidence deprived appellant of the individual sentencing to which he was entitled. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

In addition to the above case law, California statutory law makes clear that a defendant must be allowed to offer into evidence "any other circumstance which extenuates the gravity of the crime ... and any sympathetic or other aspect of defendant's character or record that the defendant offers as the basis for a sentence less than death." (Penal Code section 190.3(k).

By refusing appellant the time to hire appropriate mental health experts, and to otherwise prepare for the penalty phase, the trial court violated appellant's Eighth and Fourteenth Amendment right to a reliable penalty determination, due process, and a fair trial. As stated by this Court in *Jennings v. Superior Court of Contra Costa County* (1967) 66 Cal.2d 867, 875-876 "a reasonable opportunity to prepare for trial is as fundamental as is the right to counsel." As such, the denial of this continuance also intruded upon appellant's right to effective assistance of counsel, under the Sixth and Fourteenth Amendments to the United States Constitution. (See e.g. *Morris v. Slappy* (1983) 461 U.S. 1, 11.)

7. Summary

Appellant's right to place before the sentencer relevant evidence in mitigation (*Mills v. Maryland* (1988) 486 U.S. 367, 373; *Eddings v. Oklahoma, supra,* 455 U.S. at p. 121) was violated by the trial court. The

court's denial of the Motion for Continuance was a deprivation of appellant's right to counsel, reasonable access to the courts, a defense, effective assistance of counsel, a fair penalty determination, and due process of law guaranteed by the Fifth, Sixth , Eighth, and Fourteenth Amendments to the United States Constitution.

This sort of error is not subject to standard harmless error analysis. The entire structural error analysis and, alternatively, the harmless error analysis for constitutional error found in this Opening Brief, Argument III, C, 3, *supra,* is applicable to this argument.

In addition, the trial court's failure to allow for a continuance prevented trial counsel from doing a full investigation in to the DNA found at the scene of the crime. This DNA evidence placed appellant at the scene and served to implicate him.

V. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PURSUANT TO THE UNITED STATES SUPREME COURT'S DECISION IN *CRAWFORD V. WASHINGTON*

A. SUMMARY OF APPELLANT'S ARGUMENT

As part of the investigation of this case, Juli Watkins, a criminalist with the Los Angeles County Sheriff's Office, was assigned to do DNA testing on the handle bars of the BMX bicycle left at the scene of the crime. (10 RT 2114-2115.) The first testing she did suffered from contamination that made the test results unusable. (10 RT 2119; AOB at p. 77.)

Ms. Watkins informed her supervisor that she could not do a retest for another week. (10 RT 2120.) Due to Ms. Watkins' unavailability to do a second round of tests, the case was assigned to Kari Yoshida, another Senior Criminalist, who, based upon her knowledge of the case was asked to do a second sample. (10 RT 2120-2121.) According to Ms. Watkins, all of the DNA analysts followed the same protocol. (*Ibid.*)

Ms. Watkins testified at appellant's trial that Ms. Yoshida performed this second set of testing using swabs from various location on the bicycle, including the handlebars. (10 RT 2121.) She also testified that

reports were made on this second round of testing, which both she and Ms. Yoshida signed. (*Ibid.*) The prosecutor asked Ms. Watkins whether Ms. Yoshida did a full analysis on the second sample. (10 RT 2122.) Appellant's trial counsel objected on the grounds that Ms. Watkins' testifying as to Ms. Yoshida's results was hearsay and that Ms. Watkins knew nothing about Ms. Yoshida's background. (10 RT 2123.) The trial court overruled the objection, ruling that California law allows one expert to testify as to the report of another. (*Ibid.*) Ms. Watkins proceeded to testify as to Ms. Yoshida's qualifications to perform DNA analysis. (10 RT 2123-2125.) Ms. Watkins testified that Ms. Yoshida's sampling of the left handle bar grip yielded a mixture of DNA with a major and minor contributor. (10 RT 2123-2127.) Ms. Watkins testified that Ms. Yoshida compared this mixed sample with a reference sample of appellant's DNA and this testing yielded the result that appellant could not be excluded as a contributor to the major portion of the latent DNA sample lifted from the bike handle bars. (10 RT 2127-2132.)

Ms. Watkins also testified that, using a conservative estimate, the results Ms. Yoshida obtained indicated a one in a billion chance that a random person would share the same DNA typing as was deposited on the handle bar. (10 RT 2131.)

Appellant argued that, pursuant to the triad of federal cases, *Crawford v. Washington* (2004) 541 U.S. 36, 52, *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 317-318, and *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, that the forensic laboratory reports and results of Ms. Yoshida's testing were testimonial, hence inadmissible unless Ms. Yoshida herself testified to them. (AOB at pp. 79-82.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued that the admission of Julie Watkin's testimony regarding the DNA analysis did not violate the Confrontation Clause. (RB at p. 42.) Respondent cited to *People v. Geier* (2007) 41 Cal.4th 555, 605-607 arguing that laboratory reports and notes are not testimonial statements, hereby were admissible through a third party as long as state hearsay law was followed. (AOB at pp. 44.)

Respondent also cited to the plurality opinion of *Williams v. Illinois* (2012) 132 S.Ct. 221, in which a plurality of four justices held that "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which the opinion rests are not offered for the truth and thus fall outside of the scope of the Confrontation Clause." (*Id* at p. 2228; RB at p. 47.)

Respondent also cited to three cases post-*Williams* decided by this

Court: *People v. Lopez* (2012) 55 Cal.4th 569, *People v. Dungo* (2012) 55 Cal.4th 608, and *People v. Rutterschmidt* (2012) 55 Cal.4th 650. (RB at p. 48) for the proposition that the confrontation clause does not forbid the results of technical reports whose contents were testified to by someone other than the person who conducted the analysis. (RB at p. 48.)

Respondent also cited to several lower court cases to support its position. (RB at pp. 50-54.)

C. APPELLANT'S REPLY ARGUMENT

Crawford, a case involving the improper admission of a hearsay statement by petitioner's wife, explained that the Sixth Amendment confrontation right pertained to those who give "testimony," defined as " a solemn declaration or affirmation for the purpose of proving some fact." (*Crawford v. Washington, supra,* 541 U.S. at p. 51.) *Crawford* offered several definitions of statements that would be testimonial in nature, such as statements contained in affidavits, despositions, confessions, prior testimony, and statements that were made under circumstances which would lead an objective witness to believe that the statement would be for use at a later trial. (*Id.* at pp. 51-52.) However, *Crawford* never settled on a single definition of "testimonial." (*Ibid.*)

Five years after *Crawford,* the United States Supreme Court decided

Melendez-Diaz v. Massachusetts, supra, 541 U.S. 305, the first case in what might be deemed the extension of *Crawford* to forensic testing. This case dealt with the testimonial nature of a sworn certificate of a cocaine analysis done by a analyst not present at trial. (*Id. at* p. 308.) The High Court ruled that such certificates were "within the core class of testimonial statements" making them inadmissible under *Crawford* in that (1) they were a solemn declaration or affirmation made for the purpose of establishing or proving some fact, (2) they were functionally identical to live in-court testimony and (3) they were made under circumstances which would lead an objective witness to reasonably believe it would be available for use at a later trial. (*Id* at p. 311.)

The next *"Crawford"* case decided by the Supreme Court also involved a forensic application. *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, was a driving while intoxicated case in which the trial court allowed the admission of a "certificate of analyst" from Curtis Caylor that stated the correctness of his lab reports conclusion that defendant had an illegally high percentage of alcohol in this blood. Caylor did not testify. Instead a fellow analyst was called to testify about the results. While familiar with the lab's testing procedure, the witness neither participated in nor observed the testing done by Caylor.

Bullcoming held that the admission at trial of Caylor's laboratory report violated defendant's right to confront and cross examine Caylor. (*Bullcoming, supra,* 131 S.Ct. at p. 2710.) The Court stated while the certificate in *Bullcoming* was not sworn to and notarized, as the one in *Melendez* was, Caylor's statement was "formalized" in a signed document and the document made reference to court rules that would allow for its admission. (*Id.* at p. 2717.) Further, the Court held that the lab reports were testimonial because their purpose was to serve as evidence in a police investigation.

The last "forensic" *Crawford* case decided by the United States Supreme Court was *Williams v. Illinois* (2012) 132 S.Ct. 221, a case heavily relied upon by respondent. *Williams* was a legally complex case that represents the last word from the High Court on the issue of testimonial evidence. The factual situation in *Williams* was somewhat similar to the instant case. Illinois State Police forensic biologist Sandra Lambatos testified that a DNA profile, derived from semen on a vaginal swab of the rape victim produced by an independent Maryland lab, matched a DNA profile derived from defendant's blood, produced by the Illinois State Police Laboratory.

Justice Alito wrote the four justice plurality opinion for the Court,

which decided on two alternative grounds that Lambatos's testimony did not violate Williams' federal Constitutional right to confrontation of the person who performed the Maryland testing. The first was that the report was not admitted for its truth, but rather for the limited purpose of explaining Lambatos's independent conclusion that the defendant's DNA matched the male DNA on the swab. (*Williams, supra,* 132 S.Ct. at p. 2228.) Alternatively, the plurality held there was no confrontation rights violation because the Maryland laboratory's report was prepared for the primary purpose of finding a dangerous rapist who was still at large and "not for the primary purpose of accusing a *targeted* individual." (*Id.* at p. 2243.) The fifth vote that won the day for the State of Illinois came from Justice Thomas, who agreed with the plurality's conclusion that Lambatos's expert testimony did not offend the confrontation right "for a completely different reason," that being the Maryland laboratory report on which Lambatos relied "lacked the solemnity of an affidavit or deposition." Therefore, it was not "testimonial." (*Id* at 2260; *Dungo*, *supra,* 55 Cal.4th 619.)

Therefore, five justices[6] specifically repudiated the concept that the report was not hearsay because it was not admitted for the truth. (*Williams*

[6] The dissent plus Justice Thomas

v. Illinois, supra, 132 S.Ct. 2264 et seq [dissent of Justice Kagan joined by Justices Ginsberg, Scalia, and Sotomayor].) Further, the alternative analysis of the *Williams* plurality, that the report failed to satisfy the primary purpose test, also was rejected by a majority of the nine justices. It was only Justice Thomas's vote, on the grounds that the report lacked formality, that allowed the *Williams* Court to come down on the side of the state. (*Ibid.*) The Kagan dissent called the plurality's not-for-the-truth rationale as "a simple abdication to state law labels," stating "No wonder why five Justices rejected it." (*Id.* at p. 2272.) It further rejected the plurality's opinion that the Cellmark report was not testimonial. As Justice Kagan succinctly inquired "[h]ave we not already decided this case?", referring to the Court's decision in *Bullcoming v. New Mexico*, referenced above. Justice Kagan rightfully saw no difference between the relevant facts of *Bullcoming* and *Williams.* (*Id.* at p. 2267.)

Justice Kagan also made clear that the plurality's test of needing a targeted individual to satisfy the primary purpose test does not bear the weight of logic and that "it is anybody's guess" where such as test "came from." (*Williams, supra,* 132 S.Ct. at p. 2273.) As Justice Kagan stated "..it makes not a whit of difference whether at the time of the laboratory test, the police already have a suspect." (*Ibid.*)This is equally true in the

instant case where there was no other conceivable purpose for Ms. Yates to do the testing except to facilitate the prosecution of the proper suspect.

Williams left open the question regarding the relation between scientific testing and the confrontation clause. While the *Williams* decision was binding on Mr. Williams, it had no such precedential effect on any other case, as no five justices could agree whether the Maryland report was testimonial or not. Thus, any reliance on *Williams* by respondent is misplaced.

Following *Williams*, this Court decided *People v. Dungo* (2012) 55 Cal.4th 608. The facts of *Dungo* differed from the facts of *Melendez-Diaz* and *Bullcoming* in that they did not deal with forensic testing done by persons other than the witness, but rather, the use of an attending pathologist's notes by a testifying pathologist who was not present at the autopsy. (*Id.* at pp. 612-615.) This Court ruled that because the hearsay in question involved only statements describing the attending pathologist's anatomical and physiological observations of the conditions of the body, they lacked the "solemn declaration or affirmation for the purpose of proving some fact" required by *Crawford* and its progeny to make a statement "testimonial" for the purposes of the confrontation clause. (*Id.* at p. 617; *Crawford v. Washington, supra,* 541 U.S. at p. 59.)

Dungo held that, in addition to the lack of formality, the statements of the attending pathologist were not testimonial because they were not made under circumstances which would lead an objective witness to reasonably believe that would be available for later use at trial. (*See Crawford v. Washington, supra,* 541 U.S. at pp. 51-52; *People v. Dungo, supra,* 55 Cal.4th at pp. 619-620.) This Court held that autopsies were statutorily mandated and were employed for any number of other reasons besides the prosecution of a criminal defendant. The "primary purpose" of the autopsy report was simply "an official explanation of an unusual death, and such official records are ordinarily non-testimonial." (*Dungo, supra,* at p. 621.)

There were additional concurring opinions in *Dungo*, as well as a compelling dissent from Justice Corrigan, in which Justice Liu concurred. (*Dungo, supra,* 55 Cal.4th at p. 633.) Justice Corrigan stated that, under *Crawford,* she agreed with the majority that there are two very important factors in determining whether a statement was testimonial: (1) the degree of formality or solemnity of the statement, and (2) the primary purpose for which the statement is made. However, applying those two factors, she concluded that the anatomical observations in the autopsy report were testimonial. (*Id.* at pp. 633-634.)

Justice Corrigan found the recorded observations in the autopsy report were sufficiently formal, noting *Melendez-Diaz* made clear that certified forensic reports are sufficiently formal and *Bullcoming* made clear that unsworn certificates are sufficiently formal as well. (*Dungo, supra,* 55 Cal.4th at p. 634.) However, Justice Corrigan made clear that the High Court never decided whether uncertified reports are sufficiently formal and this remains an open question. (*Ibid.*) Referring to *Williams v. Illinois,* Justice Corrigan made it clear that five justices specifically repudiated the concept that the report was not hearsay because it was not admitted for the truth. (*Id.* at 635.) She also made clear that the alternative analysis of the *Williams* plurality (that the report failed to satisfy the primary purpose test) also was rejected by a majority of the justices. (*Ibid.*)[7]

As Justice Corrigan accurately stated: "[t]he question remains: For the purposes of the Sixth Amendment confrontation clause, can a statement in an uncertified document be formal enough to qualify as testimonial?" (*People v. Dungo, supra,* 55 Cal.4th at p. 636.) That is certainly the question in the instant case.

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7. Justice Thomas took a very narrow view of what a "testimonial " statement is, almost limiting the definition to police interrogation. Thankfully, his opinion has no precedential value.

Discussing the degree of solemnity or formality necessary to invoke the confrontation clause, Justice Corrigan stated that the autopsy report in the *Dungo* case "comport(s) closely with the Court's description of 'testimonial' in *Bullcoming* in that in both cases the document in questions was 'formalized in a signed document, and headed as a "report." (*Dungo, supra,* 55 Cal.4th at p. 641; *Bullcoming, supra,* 131 S.Ct. at p. 2717.) The autopsy report was signed and dated, as with the laboratory report of *Bullcoming.* (Ibid.) Further, it is clear that the autopsy report was an official report in compliance with the Government Code. For these reasons, Justice Corrigan felt that the report met the formality test.

Regarding the "primary purpose" test, the *Dungo* dissent noted that all of the Justices in *Williams* acknowledged its importance, although the various formulations were expressed in different ways. (*Dungo, supra,* 55 Cal 4th at pp. 641-642.) Justice Alito's plurality opinion concluded that even if the Cellmark report had been introduced for the truth asserted, it was not testimonial in that it was not prepared for "the primary purpose of accusing a targeted individual." This formulation garnered four votes. (*Ibid.*)

Judge Thomas rejected the plurality definition, stating that for a statement to be considered testimonial, "the declarant must primarily

intend to establish some fact with the understanding that his statement may be used in a criminal prosecution." (*Williams, supra,* 132 S.Ct. at p. 2261.) This definition chosen by Justice Thomas appears to be somewhat less stringent than that of the plurality in that it does not require a specific target subject. The test employed by the dissent, led by Justice Kagan, rejected the plurality's "primary purpose" definition, rejecting the idea that the purpose must be to accuse a specific target individual. In doing so, the dissent aligned themselves more with Justice Thomas stating that to make a statement "testimonial" for Sixth Amendment purposes, the inquiry is "whether a statement was made for the primary purpose of establishing 'past events relevant to later criminal prosecution'- in other words, for the purpose of providing evidence."(*Dungo* at p. 642; *Williams* at p. 2273-2274; *Davis, supra,* 547 U.S. at p. 822.)

The *Dungo* dissent continued by stating that while the High Court failed to articulate any reasoning carrying a majority of the Court, *Williams* was the first time all nine justices agreed that "primary purpose" was part of the "testimonial" analysis. (*Dungo, supra,* 55 Cal.4th at 643.) Justice Corrigan then reached the conclusion that the *Williams* "dissent" definition and Justice Thomas's definition to be largely the same and squarely based on *Davis* which stated

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to prove past events relevant to a criminal prosecution. (*Davis v. Washington* (2006) 547 U.S. 813, 822 .)[8]

Having acknowledged this, Justice Corrigan stated *"[i]n view of the binding precedent of the high court, I suggest that the appropriate inquiry is whether, viewed objectively, a sufficient formal statement was made for the primary purpose of establishing or proving past facts for possible use in a criminal trial."* (*Dungo, supra,* 55 Cal.4th at 644, Emphasis provided by appellant.)

Appellant urges this Court to use Justice Corrigan's reasoning in deciding the law on this particular factual scenario. Respondent's reliance on *Dungo, Lopez,* and *Rutterschmidt* to argue that the testing of Ms. Yoshida was "non-testimonial," and outside the ambit of the confrontation clause, is mistaken. However, those factual scenarios are easily distinguishable from those in the instant case. In *People v. Lopez, supra,*

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8. As stated earlier, cases like *Crawford* and *Davis* dealt with police interrogations or verbal statements by witnesses. These are relatively easy to analyze, using this standard. It is when cases such as *Melendez-Diaz, Bullcoming, Dungo,* and *Williams*, which deal with forensic reports, that far more confusion arises.

55 Cal.4th at p. 574, the "non-testimonial" document in question that was admitted by the trial court was a blood alcohol content report obtained directly from an analyzer machine. Similarly, in *People v. Rutterschmidtt, supra,* 55 Cal.4th at p. 655, the "non-testimonial" evidence admitted by the trial through a third party was the result of a laboratory drug analysis.

However, in the instant case, Ms. Yoshida's testing went far beyond the mere recording of observations. It involved a formal process that resulted in the creation of complex microbiological samples and profiles. There can be no question that, unlike in *Dungo*, this work was done for the "primary purpose" of prosecuting an eventual defendant for the death of Maria Rosa. In fact, there could be no other purpose.

Therefore, in spite of respondent's arguments to the contrary, there is no reasoning in *Crawford, Melendez-Diaz, Bullcoming,* or any subsequent cases of this Court that supports its position.

Respondent was incorrect when it claimed that both federal and state court precedent favors its argument. The reality is that *Williams* has left the law in a state of flux. Appellant therefore urges this Court to adopt the reasoning of *Melendez-Diaz* and *Bullcomimg, supra,* and hold that the Confrontation Clause applies to Ms. Yoshida's report.

VI. BY DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED PURSUANT TO THE ILLEGALLY ISSUED WIRETAP ORDER, THE TRIAL COURT DENIED APPELLANT'S RIGHTS AGAINST ILLEGAL SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS STATE LAW

A. SUMMARY OF APPELLANT'S ARGUMENT

On October 2, 2007, appellant filed a Motion to Suppress Wiretap Evidence obtained pursuant to an Order issued by Judge Larry Fidler on August 10, 2006. (Clerk's Supplemental III Confidential Transcript pp. 1-10.) As stated in appellant's Motion, the controlling statute is the California Wiretap Statute (Penal Code section 629.50 et seq.) This statute was promulgated to make sure that the statutory authority be used with restraint and only where the circumstances warrant the interception of wire and oral communication. (*United States v. Giordano* (1974) 416 U.S. 505, 515-516.)

One of the aspects of the statute that provided such restraint was section 629.50 (a), which stated in pertinent part that only a "...district attorney or person designated to act as the district attorney in the district attorney's absence" can make application for a wiretap. In his Motion, appellant argued that there was no proof that the elected district attorney of

Los Angeles County, Steven Cooley, was actually absent from his position when his Chief Deputy, John Spillane, made the application. (II CT 401.) Therefore, trial counsel moved that all of the evidence obtained through the wiretap Order be suppressed.[9]

In its opposition to the Motion (III CT 686), respondent argued that there is no provision in section 629.50 that requires proof of the District Attorney's absence. (III CT 689.) In addition, respondent argued that the statute in question recognized "the numerous and varied duties of a District Attorney and allows for another to take on the wiretap application responsibilities." (*Ibid.*) Respondent attached to its opposition the first page of the Order authorizing the wiretap which, in part, stated "Chief Deputy John K. Spillane is 'the person designated to act as district attorney in the district attorney's absence," pursuant to Penal Code section 629.50 (a)." (III CT 694.)

The trial court denied the motion without comment as to any issue regarding Mr. Cooley's absence or Mr. Spillane's authority. (2 RT 281-283.)

In his Opening Brief, appellant cited to *United States v. Perez-*

9.In addition to the issue argued herein, appellant's Motion argued that Chief Batts of the Long Beach Police Department also acted in violation of section 629.50 (a). That issue is not being argued in this AOB.

Valencia (9th Cir 2013) 727 F.3d 852, which held that the California statute was validly constructed, and it was proper for a designated substitute for the district attorney to seek such an Order in the district attorney's absence.[10] (*Perez-Valencia, supra,* at p. 855.) The *Perez-Valencia* court held that it did not believe that it was the will of Congress to suspend all wiretap activity during the absence or disability of the official specifically named in section 2216(2). (*Ibid.*)

However, in so holding, the *Perez-Valencia* court also held that "the attorney designated to act in the district attorney's absence- as section 629.50 specifies- must be acting in the district attorney's absence not just as an assistant district attorney duly designated with the limited authority to apply for the wiretap order, but as the assistant district attorney duly designated to act for *all* purposes as the district attorney of the political subdivision in question." (*Perez –Valencia, supra,* 727 F3d at p. 855 emphasis provided by court.)

In *Perez-Valencia*, the court remanded the case to the District Court to determine whether the assistant district attorney who applied for the Order was designated to act for all purposes as the district attorney in the

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10. In *Perez-Valencia,* the record indicated that the elected district attorney was out of his office from March 29-March 31, 2010, to attend to an ill family member who had just undergone surgery for a serious health condition.

absence of "the principle prosecuting attorney." (*Perez-Valencia, supra,* 727 F.3d at p. 855-856.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Firstly, respondent argued that "this Court is not bound by decisions of the lower federal courts even on federal questions." (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn.3; RB at p. 55.) Respondent contends that appellant failed to demonstrate that the application in question violated the relevant statutory requirements. (RB at p. 55.) Respondent further argued that the statute in question contains no requirement that the prosecutor affirmatively prove compliance with its terms. (RB at pp. 56-57.)

C. APPELLANT'S REPLY ARGUMENT

Appellant is aware that this Court is not bound by lower court federal decisions. Nevertheless, *United States v. Perez-Valencia, supra,* 727 F.3d 852 is the only published case that has addressed this issue.[11]

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11. After the remand to the district court for additional fact-finding, the Ninth Circuit Court of Appeals reheard the case and issued another opinion, based upon the subsequent findings of the district court. (*United States v. Perez-Valencia* (2014) 744 F.3d 600.) In this subsequent opinion, the Ninth Circuit, relying upon the district court referee's report, found that the duly elected district attorney was absent for all purposes and his designee was designated acting district attorney for all purposes.

Further, it is a very thoughtful exegesis of a matter of first impression by a highly respected circuit court that, while not "binding," is worthy of this Court's serious consideration. In addition, this Court has made clear that California courts must look to federal law in determining the legality of state wiretaps and the California statute must comport with the requirements of the federal wiretap statute, 18 U.S.C.A. 2510-2525 (*People v. Otto* (1992) 2 Cal.4th 1088, 1097; *People v. Leon* (2007) 40 Cal.4th 376, 384.)

Respondent advanced the dubious argument that an appellant is responsible for shouldering the burden of proof in showing that the district attorney's office followed *their own* internal procedures. What respondent failed to recognize is that this Court has held that "[i]n general California law prohibits wiretapping," creating a rebuttable presumption of illegality. (*People v. Leon, supra,* 40 Cal.4th at p.383, quoting *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1195.) Further, as stated by the court of appeal in *People v. Jackson* (2008) 129 Cal.App. 4th, 129, 144 "California's wiretap law subjects the authorization of electronic surveillance to a much higher degree of scrutiny than a conventional search warrant." This is because of the overriding need to protect the privacy of wire and oral communications. (*Id.* at p. 147.)

This Court has made it very clear that in order for any state statute to authorize wiretaps, the state wiretap law must meet at least the minimum protective conditions of the federal wiretap statute, 18 U.S.C.A. 2510-2525. (*People v. Leon, supra,* 40 Cal.4th at p. 384.) One of these requirements is that the state statute "delineate(s) on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. (*Ibid; Halpin v. Superior Court* (1972) 6 Cal.3d 885, 898.)

This is why Penal Code section 629.50 (a) requires that only the "district attorney, or person designated to act as district attorney in the district attorney's absence" may make an application for a wiretap. This strict limitation was not by happenstance. In recognizing the danger of a proliferation of wiretaps, and the need to comply with 18 U.S.C.A. 2510 et seq, the Legislature clearly recognized its responsibility to the public and the need to comply with federal law. Consequently, state law forbids any county official other than *the* chief law enforcement official in the county from seeking a wiretap warrant.

Section 629.50 (a) is unambiguous in its wording and logic. Wiretapping in California is highly disfavored (*People v. Leon, supra,* 40 Cal. 4th at p. 383) because there is an inherent in it there is a very real

threat to the freedom and well-being of the people of California if the authority is abused. Hence, only that county official directly elected by the people is permitted to make application for wiretaps.

This is not to say that in the absence of the District Attorney no wiretaps are permissible. However, the wording of the statute demands that the application must be made by the person serving as the District Attorney' designee in his or her absence from his or her duties. Simply appointing a deputy to serve the wiretap function because the District Attorney is too occupied to attend to this duty defeats the entire purpose of the statutory restrictions. That was the entire point of *Perez-Valencia.*

Respondent cited to *People v. Zepeda*, *supra,* 87 Cal.App.4th 1183, 1204, in support of its position that the trial court's ruling that the wiretap process followed the law is entitled to great deference by the reviewing court. This case is unavailing for several reasons. First, in *Zepeda*, the issue was whether the authorities complied with section 629.52, the subsection that required a showing that wiretapping was necessary because less intrusive forms of investigation have proven inadequate. The trial court in *Zepeda* was presented an extensive affidavit as to why the wiretap was necessary before reaching its decision, giving the reviewing court a basis upon which to base that deference. (*Id.* at p. 1196-1204.) There was

no question in *Zepeda* as to the law, only as to how the law applied to particular facts.

In the instant case, the question is interpretation of the law itself, that is, what is meant by the "absence" of the District Attorney and the nature of the "designation" of his or her replacement in that "absence." These are legal questions, which are reviewed *de novo* by the reviewing court. "When the trial court's order involves the interpretation and application of a constitutional provision, statute, or case law, questions of law are raised and those questions are subject to de novo (independent) review on appeal." (*Prigmore v. City of Reading*, *supra,* 211 Cal.App.4th at p. 1333-1334.) In addition, it is settled that "a disposition that rests on an error of law constitutes an abuse of discretion" in and of itself. (*In re Charlisse C.*, *supra,* 45 Cal.4th at p. 159.) Therefore, no "deference" is owed the trial court's holding, a holding made without explanation.

Respondent argued that California law does not require suppression of wiretap applications for "minor technical violations of statutory procedures." (RB at p. 58 citing to *People v. Jackson* (2005) 129 Cal.App.4th 129, 151.) Once again, respondent cites to a case that has nothing to do with the issue before the Court. *Jackson* speaks to the question of the difference in wording between the California and federal

wiretap statutes and its effect on whether the California Legislature contemplated whether a harmless error rule should apply to challenges to the propriety of a wiretap application. (*Ibid.*)

At no point has any California court even hinted that application for a search warrant by an official other than ones authorized by the wiretap statute can be harmless. Such an error is fatal to the warrant, as the statute plainly states that only certain people have the authority to even apply to the court for its issuance. This is a jurisdiction prerequisite.

Further, respondent argued that appellant had the burden to prove that the district attorney's absence the absence and the appointment of his temporary replacement was improper because the California wiretap statute did not specifically require such proof. (RB at pp. 56-57.) This argument flies in the face of logic and common sense. The issue is not whether the wiretap law specifically states the nature of the proof required to demonstrate to the court that the executive was not in defiance of the legislation. The issue is whether the executive *was* in violation of law.

In this particular instance, that burden must fall to the prosecution because "determining the incidence of the burden of proof...is merely a question of policy and fairness based upon the experience in the different situations." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 120.) Regarding

the assignment of the burden of proof, "the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable results in terms of public policy in the absence of proof of the particular fact, and the probability of the existence of the fact" (*Latkins v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661. However, "[w]here the evidence necessary to establish a fact essential to the claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim." (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188; see *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35.)

Consistent with these well-settled principles, it is clear that the burden must fall to the prosecution in this particular instance. The facts controlling the issue in question lie "particularly with the knowledge and competence" of the District Attorney's Office of Los Angeles County. Only that office would know the reason for the district attorney's absence and the appointment of his temporary replacement. The wording of the statute suggests that it is the prosecution that should bear the burden of providing that information when properly challenged, as it was in the

instant case.

Therefore, it was respondent who failed to meet its burden and, thus, appellant is entitled to relief. The warrant was defective, therefore, all the evidence obtained from the execution of the defective warrant must be suppressed. (AOB at p. 87; *United States v. States v. Giordano, supra,* 416 U.S. 505 at p. 527; *People v. Jackson, supra,* 129 Cal.App.4th at p. 149.) These illegal wiretaps led to the information garnered from Jessica Rowan and Celia Gonzalez that was absolutely critical to the state's case. (See Argument VII, *infra,*) Moreover, there is no "good faith" exception to wiretap warrants, pursuant to *United States v. Leon* (1984) 468 U.S. 897, 915. (*Jackson, supra,* 129 Cal.App.4th at pp. 155-156.) Thus, respondent's contentions must be rejected.

VII. THE TRIAL COURT'S ERROR IN ALLOWING AND PARTICIPATING IN COERCION OF TWO CRITICAL WITNESSES VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW, CONFRONTATION OF WITNESSES, AND A FULL AND FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS STATE LAW

A. SUMMARY OF APPELLANT'S ARGUMENT

1. Prosecutorial Misconduct

As indicated in the Statement of Facts, Jessica Rowan, appellant's

girlfriend, and Celina Gonzalez, his sister, were both called as prosecution witnesses. According to the prosecution, both had allegedly heard appellant make several inculpatory statements regarding the shooting of Ms. Rosa and were aware of his involvement as early the last few days of March, 2006. As such, their testimony was critical to the prosecution.

On September 10, 2006, Long Beach Police detectives O'Dowd and McMahon interviewed Jessica Rowan about the crime. (10 RT 1944-1945; 10 RT 1948.) Ms. Rowan told the detectives she knew that appellant could not have committed the murder because he had been with her, in bed, when the murder occurred. (10 RT 1946.) Unbeknownst to Ms. Rowan, her telephone conversations with Ms. Gonzalez had been intercepted pursuant to the illegal August 10, 2006 wiretap order. (See Argument VII, *supra.*) In these conversations, the two discussed constructing the alibi for appellant that Ms. Rowan recited during the interview. Based on the intercepted communications and Ms. Rowan's statements of September 10, 2006, both Ms. Rowan and Ms. Gonzalez were arrested on September 27, 2006, and charged with conspiracy to obstruct justice. (10 RT 1932; 10 RT 1952.) Ms. Rowan was jailed until January 25, 2007, pending trial.

On that date she "pled open" to the charge, meaning she entered a

guilty plea without a promised or indicated sentence. Under the terms of her plea bargain, the trial judge would determine if she testified truthfully at appellant's trial, and that judge's assessment of the "truth" of her testimony would determine the sentence she would receive in her case, which ranged from a non-custodial sentence to three years in state prison. (*Ibid.*) Prior to accepting this plea agreement, Ms. Rowan gave an additional statement to the police as to her knowledge of appellant's involvement in the charged crime. (10 RT 1992.) Pursuant to this plea bargain, Ms. Rowan testified at the trial. (10 RT 1934; 1972.)

Celina Gonzalez entered into a similar plea agreement, pleading guilty to conspiring with Jessica Rowan to obstruct justice. (10 RT 2024.) Like Ms. Rowan, before entering into the plea agreement, Ms. Gonzalez gave an additional statement to the police about her knowledge of Mr. Gonzalez's involvement in the charged crimes. (10 RT 2038-2039.)

The prosecutor conducted his direct examination of these witnesses almost entirely through blatantly suggestive leading questions, that essentially substituted for testimony. This improper tactic was exacerbated by the prosecutor's threats to these witnesses that unless they gave an affirmative response to his questions, they would be sentenced to prison pursuant to the plea bargain. Under this dual barrage of suggestive, leading

questions, and witness intimidation, the testimony of these witnesses was rendered completely unreliable, depriving appellant due process of law, effective assistance of counsel, and a fair determination of guilt, death eligibility and penalty pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and analogous state law. (AOB at pp. 109-110.)

The prosecutor's threats forced these witnesses to testify in conformity with the state's case or risk imprisonment. Considering how many different versions of the story they told the police, it is impossible to know if they were testifying to the truth or simply saying what they thought the prosecutor wanted them to say. Instead of conducting a proper direct examination and then impeaching each of them in a manner permitted by the law, the prosecutor used leading questions, threats, and coercion to elicit the testimony he needed to make his case. This questioning telegraphed to Ms. Rowan what she was supposed to "remember" about the events in order to fulfill her part of the plea bargain. All she had to do was answer "yes" and she was safe. Through his questions, the prosecutor essentially put words in the frightened and intimidated witness's mouth, essentially testifying for her and rendering her "testimony" unreliable. The same was true as to Ms. Gonzalez. (AOB pp. 109-125.)

2. Judicial Misconduct

The denial of these rights did not end with the trial court's sustaining the prosecutor's efforts to directly intimidate and coerce these already frightened witnesses into rote agreement with everything the prosecutor said. The trial court's direct support of the prosecutor's tactics greatly exacerbated this prejudicial error. It is a fundamental constitutional principle that a defendant's right to a fair trial depends on being tried before an impartial judge. (See *Tunney v. Ohio* (1927) 273 U.S. 510, 523.) Impartiality requires that in conducting the trial, the judge should not become an advocate for either party. (*People v. Ringed* (1961) 55 Cal.2d 236, 241.) The failure of a trial judge to conduct the proceedings in an impartial manner can prejudice the defense by denying a defendant's right to a fair and impartial trial under both the federal and state constitutionhimself in an impartial manner can so seriously prejudice the defense that it denies a defendant's right to a fair and impartial trial under both the federal and state constitutions. (*Powell v. Alabama, supra,* 287 U.S. 45.)

Here, appellant was denied these fundamental constitutional rights. The judge fully participated in the trial as would an advocate, using the inherent power of her office to intimidate the witnesses into "cooperating"

with the prosecution by making clear they risked prison if they did not answer the prosecutor's leading questions in the way he clearly suggested. (AOB at p. 126.)

The trial court also took it upon itself to pass judgment on Ms. Rowan's credibility. It decided that Ms. Rowan was not suffering from a natural memory, despite after having given multiple statements in the two years prior to trial. Whenever Ms. Rowan did not immediately give the prosecutor the answer he desired, the court assumed Ms. Rowan was lying. The same was true with Ms. Gonzalez.

On several occasions, the trial court clearly signaled to these two vulnerable and frightened witnesses that it did not believe their testimony that they would face prison if they did not testify according to the prosecution's wishes. (AOB at pp. 125 et seq.) The court went so far as to instruct Ms. Rowan's appointed counsel to take his client into a room and tell her to stop being such a "difficult witness," because she was not fully "cooperating" with the prosecutor. The court clearly defined "cooperation" as answering "yes" to any leading question the prosecution put to her. The court specifically stated to counsel

> Mr. Ross, I just want you to talk to your client and let her know that she is supposed to be telling the truth and volunteering answers without the prosecutor having to

> constantly remind her of what her statements have been in the past. I'm beginning to find lack of cooperation with this witness, which would violate her agreement. I'm getting very concerned and I don't like it. So if you would talk to her your client and tell her what she is facing unless she cooperates properly and answers questions that she knows with respect to a truthful answer. (10 RT 1060-1061.)

The Court's attitude toward Ms. Gonzalez was virtually identical. It insisted that Ms. Gonzalez was lying and that its actions were not done to intimidate, but rather to convince Ms. Gonzalez to "tell the truth." (10 RT 2032.) This was despite the fact that Ms. Gonzalez's own counsel, as an officer of the court, informed the judge that her witness was trying her best to remember events that occurred well over a year before the trial. (10 RT 2033.) In addition, Ms. Gonzalez also testified on cross-examination she never had an opportunity to review any statement she gave, making it even more unlikely she would remember exactly what she said at the time. (10 RT 2040-2041.)

The court exceeded its authority by acting upon its biased conclusion that these witnesses were lying, coercing their testimony by threatening them with imprisonment if they didn't testify in conformity with the state's case.

3. Summary and Prejudice

Ms. Rowan and Ms. Gonzalez were the two most critical witnesses for the prosecution in that they had spoken to appellant soon after the shooting. However, due to the confluence of errors discussed above, neither of these witnesses actually testified. Rather, subjected to threats by both the prosecutor and the trial court, they simply answered "yes" to a series of suggestive questions which effectively allowed the prosecutor to testify for them.

This error prejudicially deprived appellant of his right to due process of law, a fair determination of guilt, death eligibility and penalty, and the effective assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as analogous state law.

A trial court error of constitutional magnitude requires the prosecution to prove the error was harmless beyond a reasonable doubt. (*Chapman v. Californian , supra,* 386 U.S. at p. 24.) The prosecutor cannot meet this burden.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent did not dispute appellant's recitation of the facts.

However, it argued that appellant's claim was without merit "because the methods employed by the prosecution and the court were permissible given Rowan's and Gonzalez's deliberately evasive and uncooperative behavior while testifying." (RB at p. 60.) Respondent contends that "[a]lthough appellant characterizes the court's permitting the prosecution to ask leading questions of Rowan and Gonzalez and reminding both of the obligation to testify truthfully as coercing testimony favorable to the prosecution, the trial court did not err." (RB at p. 62.)

According to respondent "the trial court acted within its discretion when it permitted the prosecution to ask Rowan and Gonzalez leading questions because both claimed a lack of memory and were hostile. The hostility of both witnesses was obvious given that Rowan was appellant's girlfriend and the mother of his children (citation omitted) and Gonzalez was his sister (citation omitted)." (RB at p. 63.) "[T]heir bias in favor of appellant was evidenced by the fact that they previously lied to the police and concocted a false alibi for him (citation omitted)." (*Ibid.*)

Respondent added that a "review of (these witnesses') testimony shows that the two failed to give complete and truthful answers to the prosecutor's initial questions and, instead required the prosecutor to ask multiple leading questions to elicit the sought after information." (RB at p.

63.) In this vein, respondent also stated that "[t]his Court has recognized the deference owed to the trial court's determination on the question of whether a witness's purported lack of memory was a deliberate evasion." (RB at p. 64.)

Respondent also argued that "[a]ppellant's contention that the prosecution and the court impermissibly threatened and coerced Rowan and Celina by reminding them to tell the truth and cautioning them about the consequences of committing perjury is equally without merit." (RB at 64.) Respondent contends the court and the prosecution were entitled to remind the witnesses that they were under oath and the consequences of perjury. (*Ibid.*) Its support of its argument, respondent added "the (trial) court did not engage in any of the types of gratuitous criticism, snide comments, and sarcasm regarding witnesses either in front of or in the absence of the jury that this Court has held inappropriate." (*Ibid.*)

Regarding the legality of the immunity agreements between the prosecutor and the two aforementioned witnesses, respondent argued that appellant's reliance on *People v. Medina* (1974) 41 Cal.App.3d 438 was unavailing in that the *Medina* court forbade only an immunity agreement by which the witness was not required to materially change his testimony from police interviews. (RB at pp. 64-65.) Citing to *People v. Garrison*

(1989) 47 Cal.3d 746, 771, respondent distinguished the current case from *Medina*, arguing that no such agreement was made in the instant case. (*Ibid.*)

Respondent argued that appellant's reliance on *United States v. Juan* (9th Cir. 2013) 704 F.3d 1137 was also misplaced. First, it argued that this Court was not bound by decisions of the lower federal courts, even on constitutional questions. (RB at p. 65.) Secondly, it argued that *Juan* only held that the prosecutor could not interfere with the testimony of his own witness if he communicates to the witness a threat over and above what the record indicates is necessary to obtain the witness's cooperation. (*Ibid.*) However, *Juan* did not speak to the conduct complained of here, where both the district attorney and the court repeatedly warned the witnesses that they might face imprisonment if they did not testify "truthfully."

Respondent concluded that even if the prosecutor and/or the trial court erred regarding the examination of these two witnesses, the error was harmless:

> Had Rowan and Celina provided testimony favorable to appellant, the prosecutor would have produced compelling evidence from law enforcement officers who interviewed them and overheard the wiretapped calls to impeach them. (Citation omitted). Moreover, the prosecution presented

> substantial evidence of guilt outside the testimony of these two hostile witnesses. (RB at p. 66.)

C. APPELLANT'S REPLY ARGUMENT

Respondent's argument that the "methods employed by the prosecution and the court were permissible given Rowan's and Gonzalez's deliberately evasive and uncooperative behavior while testifying."(RB at pp. 62.) This argument, while true in some instances of witness recalcitrance, lacks credibility in the instant case. There was an assumption of "hostility" that simply did not exist. Respondent asks this Court to assume that witnesses were hostile because they were appellant's girlfriend and sister, respectively. However, logically, it was just as likely these witnesses were predisposed *toward* the prosecution because their freedom depended upon giving the prosecutor the answers he wanted.

The trial court and respondent disregarded the fact that witnesses who had given the police multiple versions of the same incident over a two year period would not necessarily remember the exact version the prosecutor wanted them to relate. Both the prosecutor and trial court assumed that what the witnesses told them at the time of the plea bargain was the whole "truth." However, the reality was that by the time the law enforcement extracted the final statements from these witnesses, they had

placed thm in such fear of incarceration they would say anything the authorities wished them to say.

Respondent's citation to *People v. Williams* (1997) 16 Cal.4th 635, 672 to justify the type of suggestive leading questions used in the instant case is unavailing. The facts of *Williams* are so distinguishable from those of the instant case so as to render the case of no precedential value in the context of appellant's case. In *Williams,* the prosecutor was conducting a direct examination of Ida Moore, a witness who testified that at the direction of the capital defendant she drove him and two companions to a house in Los Angeles. (*Id.* at p.670.) Upon arriving at the house, defendant and one of his companions, Mr. Cox, got out of the car and walked up to the house. Ms. Moore was left in the car with defendant's other companion, Mr. Burns. Ms. Moore than asked Mr. Burns what defendant and Cox were going to do. (*Ibid.*) Ms. Moore answered that Burns said "they were going to shoot it up, they were going to scare the people to make sure they give them the money." (*Ibid.*)

The prosecutor then asked Ms. Moore "[w]as there anything said about shooting them up." (*Williams, supra,* 16 Cal.4th at p. 670.) Defense counsel moved to "strike that as leading," but the trial court overruled the objection. The judge then asked the witness "[w]hat did the man say to you

in the van." The witness responded by reiterating that Mr. Burns said that they were going to "shoot it up, just scare them."

Later in the trial the prosecutor asked another occupant of the van, Delisa Brown, whether she heard defendant or his companions say something in the back of the van. (*Williams, supra,* 16 Cal.4th at p. 670.) Ms. Brown answered that she did not remember. The prosecutor then asked "Do you recall something being said about killing somebody?" Defense objected to the question as leading, and the court overruled the objection, stating that the witness "may answer that yes or no." (*Id.* at p. 671.) The witness then stated, "yes I think so," and the prosecutor asked "what did you hear them say?" The witness replied, "to kill everyone in the house." (*Ibid.*) In response to the prosecutor's non-leading direct, the witness stated she did not know which of the three men in question made that statement. (*Ibid.*)

The prosecutor relied upon the testimony of these two witnesses when he argued to the jury that defendant had the intent to kill everyone in the house. On appeal, defendant contended that the trial court committed reversible error by permitting the "impermissible leading questions," to which defense counsel objected. (*People v. Williams, supra,* 16 Cal.4th at p. 671.)

This Court rejected that contention, giving perhaps the best explanation of what is a leading question and what makes them improper:

> A question may be leading because of its form, but often the mere form of the question does not indicate whether it is leading. The question which contains a phrase like "did he not" is obviously and invariably leading but almost any other type of question may be leading or not depending upon the content and context...The whole issue is whether an ordinary man would get the impression that this questioner desired one answer rather than another. The form of a question, or a previous question may indicate the desire, but the most important circumstance for consideration is the extent of the particularity of the question itself. (*People v. Williams, supra,* 16 Cal.4th at p. 672.)

This Court also suggested that a question is leading if it "instructed the witness how to answer on material points or puts into his mouth words to be echoed back, or plainly suggests the answer which the party wishes to get from him." (*Williams*, *supra,* 16 Cal.4th at p. 672.) This Court then quoted from Justice Bernard Jefferson's treatise which states "[w]hen the danger [of false suggestion] is present, leading questions should be prohibited, when it is absent, leading questions should be allowed." (Citations omitted) (*Ibid.*)

This Court held that the question to Ms. Brown, while perhaps leading to some degree, was asked to stimulate or revive the witness's recollection. (Citations admitted.) The prosecutor had asked Ms. Brown if

she heard someone "say something in the back of the van?" Ms. Brown replied that she did not remember, which prompted the question "[d]o you recall something being said about killing somebody?" Ms. Brown replied, "Yes , I think so." The prosecutor then asked what she heard, a non-leading question, to which the witness responded "to kill everybody in the house."

Regarding Ms. Moore's answer, the Court essentially acknowledged that the question may have been improper under certain circumstances. However, it also held that this testimony was "merely cumulative" to the testimony of Ms. Brown, hence, harmless under any standard. (*People v. Williams, supra,* 16 Cal.4th at p. 673.)

There is nothing in *Williams* that supports respondent's position that the conduct of the prosecutor and the court was proper under the circumstances of the instant case. *Williams* discussed a situation in which the prosecutor asked a single "leading " question to each of the two witnesses. These questions were a very small fraction of direct examinations, which were conducted in a proper non-leading format. Unlike in the instant case, there was nothing at all threatening or coercive about the prosecutor's examination. Further, there was no interference from the court at all.

As set forth in Appellant's Opening Brief, leading questions that "instruct the witness how to answer on material points, or puts words in his mouth words to be echoed back, ...or plainly suggests the answer which the party wishes to get from him," should be forbidden. (AOB at pp. 112-113; *People v. Williams, supra,* 16 Cal.4th at p. 672.) As demonstrated throughout Argument VII of Appellant's Opening Brief, the prosecutor repeatedly "put words" in the mouth of both witnesses, effectively testifying in their stead.

Respondent's reliance on *People v. Spain* (1984) 154 Cal.App.3d 845 is misplaced. *Spain* was quoted in appellant's opening brief to stand for the following proposition

> The danger in allowing a question that suggests to the witness the answer that the examining party desires (citation excluded) is to the truth seeking function of the trial. Allowing the examiner to put answers in the witness's mouth raises the possibility of collusion (citation omitted), as well as the possibility that the witness will acquiesce in a false suggestion (citation omitted.) This danger is substantially reduced, however, when it is an adverse witness under cross-examination. The purpose of the cross-examination is to sift his testimony and weaken its force, in short, to discredit his direct testimony. Thus, not only the presumable bias of the witness for the opponents' cause, but also his sense of reluctance to become the instrument of his own discrediting, deprive him of any inclination to accept the cross-examiner's suggestions unless the truth forces him to do so. (*Id* at pp. 852-853; AOB 112.)

Once again, the central point of a case cited by respondent clearly favors appellant's position. In no way does *Spain* allow for the type of coercive questioning and judicial interference seen in the instant case. *Spain* involved the form of cross-examination questions to be used by defense counsel when the witness was a person who would naturally be favoring defendant. The court of appeal upheld the trial court's holding that because the prosecution witness naturally favored defendant, the defense could not cross examine said witness through leading questions. (See also *People v. Grey* (1972) 23 Cal.App.3d 456, also cited by respondent; RB at p. 62.)

Respondent also cited *People v. Bliss* (1919) 41 Cal.App. 65, 71 in arguing that the circumstances in the instant case that revealed witnesses' hostility was uniquely and properly within the realm of the trial court. Thus, the use of leading questions was within its sound discretion. (RB at p. 63.)

However, what particularly distinguishes this case from *Bliss* and similar cases cited by respondent is that in the instant case both the prosecutor and trial court simply assumed that the witnesses were hostile and evasive. Indeed, as stated in the AOB (Argument VII, section B), the use of leading questions began almost immediately, long before any indicia of evasion emerged. The trial court was so convinced that witness

"intended" to be difficult, it would not even listen to defense objection to the form of questioning. (AOB at pp. 93-94.)

Respondent further cited to *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 690, fn2 for the proposition that this Court "has recognized the deference owed to the trial court's determination on the question of whether a witness' purported lack of memory was a deliberate evasion." (RB at p. 64.) In reality, *Jones* had nothing to do with the evasiveness of a witness. It spoke to the fitness determination as to a juvenile defendant. What the concurring opinion actually did was to restate the general abuse of discretion standard indicating that because the trial court is better situated than any appeal court to judge the demeanor and credibility of a witness, the reviewing court will not upset the trial court's finding of fact as long as there was "substantial evidence" to uphold it. (See gen *People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)Here, the trial court simply assumed "hostility."

Respondent's cited to *Webb v. Texas* (1972) 409 U.S. 95 to stand for the proposition that the trial judge and prosecutor are permitted to remind a witness that perjury was a crime for which he or she could be punished. However, *Webb* fully supports appellant's argument. Appellant cited to *Webb* in his opening brief for the proposition that undue

interference by the trial court with a witness called by the defense can violate a defendant's right to due process of law. (AOB at pp. 129-130.) In *Webb*, the defendant called single witness, a current parolee, to the stand. Before any questions could be asked, the trial court not only admonished the witness about his right against self-incrimination, but told him that if he took the stand and lied the court would personally see to it that the he would be indicted for perjury. The trial court added that when the witness got convicted for perjury, his sentence would be added to the time he would do for violating his parole based on the perjury conviction. (*Webb, supra,* 409 U.S. at pp. 95-96.) The witness ultimately refused to testify. (*Ibid.*)

The High Court condemned this sort of judicial intervention. "[I]n the circumstances of this case, we conclude that the judge's threatening remarks, directed only at a single witness for the defense, effectively drove the witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." (*Webb v. Texas, supra,* 409 U.S. at p. 98; AOB at p. 130.) As such, *Webb* does not support respondent's argument that the court and prosecution were permitted to remind witnesses that they were under oath and subject to a charge of perjury if they lied. (RB at p. 64.)

Respondent attempts to discredit appellant's reliance on *United States v. Juan, supra,* 704 F.3d 1137 also fails. (RB at pp. 65-66.) The argument that this Court is not bound by decisions of the lower federal court is irrelevant because appellant never argued to the contrary. Respondent contends that *Juan* does not further appellant's argument because the Ninth Circuit "only held that a prosecutor could impermissibly interfere with the testimony of his own witness if he communicates to the witness a threat over and above what the record indicates is necessary. (Citation omitted) It made no finding regarding the permissibility of the prosecutor's conduct and, more importantly, it acknowledged that warning a witness about the possibility and consequences of perjury may be warranted." (RB at p. 65.)

Again, respondent misreads appellant's reliance on *United States v. Juan, supra.* Appellant never suggested that this Court was "bound by" *Juan.* Rather, *Juan* was cited to support appellant's contention that the rationale of *Webb v. Texas, supra,* 409 U.S. at 98, regarding the court's intimidation of a defense witness, to intimidation of the prosecutor's own witness. While the trial court's actions in this case did not "drive" a possible witness off the stand, as in *Webb*, it committed an analogous and equally damaging error, similar to that committed by the prosecutor in

Juan, supra. (AOB at p. 120.) It used its authority to threaten a witness into giving the particular testimony suggested by the prosecutor's leading questions. This intercession by the court clearly placed it outside its impartial role as neutral arbiter of the law voice of law and into the role of an advocate. It is not the job of the court to judge the credibility of a witness, let alone to take upon itself the task of getting the witness to testify as to what the court feels was the "real truth." Regardless of what the court *personally* believes, it may not translate that personal belief into action. Neither is it the court's function to enforce plea bargains in this manner.[12]

Respondent cites to *People v. Strum* (2006) 37 Cal.4th 1218, 1240, apparently to suggest that, in order for the trial court to violate appellant's due process rights in this case it has to be shown that the trial judge "engage(d) in any of the types of gratuitous criticism, snide comments, and sarcasm regarding witnesses either in front of or in the absence of the jury that this Court has found inappropriate." (RB at p. 64.)

There is nothing in the law that limits the trial court's misconduct to the type of conduct exhibited by the *Strum* trial judge in order to establish

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12. Ms. Rowan also testified for the prosecution in the penalty phase. She was subjected to the same type of judicial coercion as discussed in this Argument. (14 RT 2745-2752.)

that appellant's due process rights have been violated. In his Opening Brief, appellant cited to *People v. Medina*, *supra,* 41Cal.App.3d 438 to support his position that the actions of the prosecutor and trial court deprived him of his right to a fair trial, due process of law and effective assistance of counsel. In *Medina* the court of appeal held that a defendant is denied a fair trial if the prosecutor's case depends largely upon accomplice testimony, and the accomplice is placed, either by the prosecutor or the court, under a strong compulsion to testify in a particular fashion by promises of immunity which are subject to the condition that the accomplices would not materially or substantially change their testimony from tape recorded statements that they gave the police on prior occasion. (*Id.* at pp.454-456.)

In his Reply Brief , Respondent argued that appellant's reliance on *People v. Medina*, *supra,* 41 Cal.App.3d 438 was misplaced. (RB at p. 65.) Respondent stated that in *Medina* the court found constitutionally impermissible an immunity agreement by which the witness was required not to change materially or substantially his testimony from statements given in other police interviews. Respondent argued that the facts of *Medina* are materially distinguishable because no such agreement was presented. (RB at p. 65.) It further argued, that "unless the bargain is

expressly contingent on the witness sticking to a particular version, constitutional principles are not violated." (RB at p. 65). Respondent urged that as the plea agreement signed by Ms. Rowan and Ms. Gonzalez only required them to tell the truth, appellant's citation to *Medina* was unavailing. (*Ibid.*) Respondent further stated that the two witnesses were not subject to any express contingency and instead were simply required to testify truthfully as are all witnesses. (*Ibid.*)

Respondent cites to *People v. Allen* (1986) 42 Cal.3d 1222,1251-1252, which held that an agreement requiring the witness testify fully and truthfully is valid. Respondent completely misses the point with this counter-argument. Appellant's core argument was that the specific combination of suggestive questioning, prosecutorial coercion, and judicial intemperance and interference so tainted the testimony of Ms. Rowan and Ms. Gonzalez that appellant was deprived of due process of law, a fair trial, and effective assistance of counsel. However, by questioning appellant's reliance on *Medina* and citing to *Allen*, respondent has responded to an argument that appellant never made, and does not make now. Appellant never argued or even suggested that the plea bargains in the instant case were in and of themselves illegal. It was the conduct of both the DA and the court in the way they used the agreements to

intimidate and coerce these witnesses that was constitutionally improper.[13]

The facts of *Allen* have nothing at all in common with those of the instant case. In *Allen*, there was no indication of the use of coercive, leading questions by the prosecutor, nor judicial interference in favor of the prosecution. *Allen* dealt only with the legitimacy of a witness's plea bargain "to tell the truth." As such *Allen* has no applicability in this case.[14]

Further, respondent's citation to *People v. Bryant* (1984) 157 Cal.App. 3d 582 (RB at p. 64) to stand for the proposition that the court and prosecutor were allowed to remind a witness of the consequences of perjury is not only unavailing to respondent, but actually strongly supports appellant's argument. In *Bryant,* a violation of probation case, the court of appeal actually reversed the revocation of defendant's probation because of conduct very similar to that seen in the instant case. In *Bryant,* Lynn Harris was driving a car in which defendant was a passenger. Due to erratic

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13. In fact, in its opening brief, appellant specifically distinguished the facts of *Medina* from those of the instant case. *Medina* was cited because the reason for the reversal in *Medina* was the immunity agreement created in the witness's mind an apprehension that to do anything but follow the script would invite punishment. The conduct of the prosecutor and court in the instant case created the same apprehension as did the plea bargain in *Medina*. (AOB at pp. 123-124.)

14. Respondent also cited to this Court's decision in *People v. Garrison , supra,* 47 Cal.3d at p. 771. As was the case with *People v. Allen*, the facts of *Garrison* do not refer to the type of judicial or prosecutorial conduct seen in the instant case.

driving, the police pulled over Mr. Harris to investigate. During that investigation, the police observed defendant trying to hide a bottle which was ultimately discovered to contain a controlled substance. (*Id.* at p. 587.)

Defendant's testimony conflicted with that of the arresting officer. (*Bryant, supra,* 157 Cal.App.3d at p. 587) After testifying, defendant called Mr. Harris to the stand. (*Id.* at p. 588.) Before Mr. Harris was able to answer a single question, the prosecutor informed the court, in Mr. Harris's presence, that he was prosecuting Mr. Harris for perjury because he lied at a prior proceeding about these same set of facts. (*Ibid.*) The prosecutor further stated that he had no objections to the testimony, as he believed ultimately it would help the state's case. However, he felt it only "fair" that the court be advised of this fact. (*Id.* at pp. 588-589)

The trial court responded by stating that it would discuss this matter with Mr. Harris before his testimony. (*Bryant, supra,* 157 CalApp.3d at p. 589.) However, Harris was sworn in without being addressed by the court. (*Ibid.*) After Mr. Harris was sworn in, the prosecutor immediately stated that he wanted to inform Mr. Harris that if he testified in the same way he did at the prior hearing, he would be charged with another count of perjury. (*Ibid.*) Thereupon, Mr. Harris, in response, decided not to testify on behalf of defendant and defendant probation was ultimately violated. (*Id.* at pp.

90-91.)

The court of appeal found that the prosecution's statement was "couched in the form of a threat" and "went far beyond reminding the witness of the duty to tell the truth or advising him of the consequences of perjured testimony." The court of appeal found that the prosecutor's threat to prosecute "in fact revealed his expectation that the witness's testimony would be perjurious if favorable to appellant, as was his preliminary hearing testimony," much as was the expectation of both the prosecutor and trial court in the instant case. (*Ibid.*)

The court of appeal rejected respondent's contention that the prosecutor was "merely reminding the court of its duty to inform the witness of his Fifth Amendment privilege not to testify." (*People v. Bryant, supra,* 157 Cal.App.3d at p. 590.) Citing to this Court's decision in *Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 36-37, the court of appeal stated that regardless of the motivations of the prosecutor, the implications of what he said turned a willing witness into one who then refused to testify. The court of appeal also held that prosecutor's statements were intimidating, and it was only after these statements that Mr. Harris refused to testify. (*People v. Bryant, supra,* 157 Cal.App.3d at p. 590.)

The *Bryant* court cited to *Webb v. Texas, supra,* 409 U.S. at pp. 95-

96, stating that, in effect, the prosecutor's threatening behavior "drove" Mr. Harris off the stand, in violation of defendant's Sixth Amendment Rights to present a defense. (*Bryant, supra,* 157 Cal.App.3d at p. 590.) The court found that a criminal defendant's constitutional right to call witnesses necessarily mandates that these witnesses "be free to testify without fear of government retaliation." (*Id at p. 592; United States v. Blackwell* (D.C. Cir. 1982) 694 F.2d 1325, 1334.) As stated by the *Bryant* court, one way to interpret this mandate is that any admonition to the witness that is threatening and employs coercive language indicating the court's or prosecution's expectation of perjury is forbidden. (*Bryant* at p. 592; *United States v. Harlan* (9th Cir. 1976) 539 F.2d 679, 681 cert den *Harlin v. United States* (1976) 429 U.S. 942.)

The *Bryant* court concluded that defendant's loss of Mr. Harris's testimony was a violation of defendant's due process rights under the Fourteenth Amendment and that his inability to present a defense were "so basic to a fair trial that their infraction can never be treated as harmless error." (*Bryant, supra*, 157 Cal.App.3d at p. 594; *Chapman v.* California (1967) 386 U.S. 18, 23.)

While the error in the instant case may not be structural, it is certainly of a constitutional dimension, thereby requiring the respondent to

prove beyond a reasonable doubt the error committed by the prosecutor and trial court was harmless beyond a reasonable doubt. (See Argument III, *supra.*) As these two witnesses were critical to the prosecutor's case, the errors that hopelessly tainted their testimony and cannot be held to be harmless. (Argument III, C, *supra.*)

In the instant case, the misconduct of both the prosecutor and court unconstitutionally compelled the two witnesses to allow the district attorney to answer for them through his suggestive leading questions. Respondent's argument that such an error would be harmless because any testimony favorable to appellant was impeachable (RB at p. 96) is simply too speculative to considered. It assumes that the jury would invariably agree with the prosecutor's position regardless of what the testimony of these two witnesses would have been absent the coercion.

VIII. THE COURT'S RESTRICTION OF APPELLANT'S COUNSEL'S CROSS EXAMINATION OF JESSICA ROWAN AND CELINA GONZALEZ VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND RIGHT TO A FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATED CONSTITUTION AND ANALOGOUS STATE LAW

A. SUMMARY OF APPELLANT'S ARGUMENT

As stated in Argument VII, the direct testimony of Jessica Rowan and Celina Gonzalez was rendered completely unreliable by the use of blatantly suggestive, leading questions accompanied by the prosecutor's and trial court's intimidation of these witnesses.

In addition, the trial court refused to allow appellant to cross-examine these witnesses about their motivation for acquiescing to the plea agreement. The trial court sustained the prosecutor's objections to questions that would have revealed that the witnesses "testified" as they did because they were personally afraid that not agreeing with the prosecutor would result in their incarceration.[15] The court ruled that such questions were "argumentative." They were nothing of the kind. These

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15. The relevant Reporter's Transcript citations for the cross-examination of Ms. Rowan are found at AOB pp. 136-138.) That for Ms. Gonzalez are found at AOB at pp. 138-140.)

suppressed questions were critical to ascertain the biases of the witnesses whose testimony was most relevant and critical to appellant's case. Denying counsel the right to inquire into that issue was prejudicial error.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued that the trial court "did not abuse its discretion when it restricted counsel's cross-examination because counsel engaged in argumentative questioning in an effort to argue to the jury that Rowan and Gonzalez were crafting their testimony in the interest of pleasing the prosecution rather than being truthful." (RB at p. 66.) Respondent defined an argumentative question as "a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer." (RB at p. 70; *People v. Chatman* (2006) 38 Cal.4th 344, 384.)

Respondent cited to several cases to support its contention that the trial court "retains broad discretion to limit cross-examination of issues of a witness's credibility" (RB at p. 68.) It further argued that a limitation on cross-examination does not violate the confrontation clause "unless prohibited cross-examination might have produced a 'significantly different impression' of [the witness's] credibility" (*Ibid; People v. Belmontes* (1988) 45 Cal.3d 744, 780, quoting *Delaware v. Arsdale* (1986)

475 U.S. 673, 680.)

Finally, respondent argued that appellant's counsel was not restricted from inquiring about the witness's potential bias in that it allowed appellant's counsel to ask whether their testimony was tainted by the fear she would receive three years in prison as a result of violating her plea agreement. (RB at p. 70.)

C. APPELLANT'S REPLY ARGUMENT

"Under the Sixth Amendment to the United States Constitution, a defendant has the constitutional right to confront witnesses against him and to cross-examine his accusers. A criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of the witness, and thereby to expose facts from which the jury could appropriately draw inferences relating to the reliability of the witnesses." (*Delaware v. Van Arsdall, supra,* 475 U.S. at pp. 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 318.)

Respondent's position that counsel's attempt to question the two witnesses on their desire to please the district attorney was both argumentative and cumulative fails on its face. As stated in the opening brief, their testimony was hopelessly and prejudicially tainted first by the

actions of the prosecution, and then by the trial court's bias and aggressive interference.

The court allowed the prosecutor's use of blatantly suggestive leading questions. In addition, the court allowed the prosecutor to repeatedly threaten the witnesses with prison if they failed to answer in the way that was clearly suggested by the questions themselves. The combination of obvious suggestion supported by multiple threats from the prosecutor, assured that the only relevant "testimony" rendered by these witnesses originated directly from the prosecutor's mouth.

Respondent's claim that the trial court correctly denied defense counsel's attempt to show that these witnesses were trying to please the prosecutor has no basis in either logic or law. In fact, perhaps the most critical aspect of discrediting the testimony of the witnesses was to show that the reason why they meekly ratified the completely suggestive and leading questions by the prosecutor was to *personally please* this person who had such control over their future.

While respondent would like this Court to believe that it was sufficient for these witnesses to say they were concerned about how their testimony would affect their respective plea bargains, this position ignores the reality of what happened in court. As stated in Argument VII of

Appellant's Opening Brief, the prosecutor's attacks on these witnesses were of an *ad hominem* character. They were delivered personally and were personally threatening to these two young women. It was not the *form* of the questions that necessarily made the direct examination of the two witnesses unconstitutional. It was the entire *strategy* of extremely suggestive questioning compounded by threats of incarceration if the witnesses did not parrot back what the prosecutor told them to say.

To accomplish his ends, the prosecutor clearly created for himself the starring role in the unconstitutional drama that produced the objectionable testimony. The prosecutor set himself up as the arbiter of what "the truth" was and what was not. He recruited an all-too-willing trial court to support his status as the gatekeeper of the alternative doors; one leading to freedom and the other to prison and, in the case of Ms. Rowan, separation from her children. While the prosecutor actively pursued this role at trial, respondent now argues that counsel's questions to the witnesses whether they had motive to please the person who controlled their future were too "argumentative" to be allowed.

The cases cited by respondent to support this dubious proposition have no relevance to the instant case. Respondent cites to *In re Ryan N.* (2001) 92 Cal.App.4th 1359 for the proposition that the trial court need

not allow every conceivable form of cross-examination "as long as the cross-examiner has the opportunity to place the witness in his or her proper light.." and if such an opportunity is made available "...the trial court may permissibly limit cross-examination to prevent undue harrassment, expenditure of time, or confusion of issues. (*Id.* at p. 1386; RB 68-69.)

In *Ryan N,* defendant was charged willfully and deliberately aiding in an attempted suicide in violation of Penal Code section 401.1. (*In re Ryan N., supra,* 92 Cal.App.4th at p. 1366.) The gist of the accusation was that defendant assisted Christine T. in planning her suicide, and helping her to ingest an overdose of sleep-inducing medication that he provided to her, which resulted in her hospitalization. (*Id.* at pp. 1367.) Christine originally blamed her suicide attempt on her hatred of her parents, but by the time of trial, she placed the blame on defendant's encouragement and undue influence. (*Id.* at pp. 1366-1367.)

The chief witness against defendant was Christine, who related defendant's role in her attempted suicide. (*Ibid.*) On cross-examination, defendant's counsel was allowed to fully delve into Christine's inconsistent statements and attack her credibility. (*Id.* at p. 1368.)

However, the trial court did not allow defense counsel to go into extensive detail about Christine's relationship with her parents and their

reaction to her suicide attempt. (*In re Ryan N., supra,* 92 Cal. App.4th at p.1387.) The court of appeal upheld the trial court's limitation on the questioning, stating that these questions were "only peripherally related to the issues." The court stated that the trial court allowed numerous other questions designed to probe the issues of Christine's credibility, bias and motive." (*Ibid.*) The court cited to *Davis v. Alaska,* which holds that the trial court may limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (*Davis v. Alaska, supra,* 415 U.S. at p. 318; *In re Ryan N., supra,* 92 Cal.App.4th at p. 1386.)

The questions posed to Ms. Rowan and Ms. Gonzalez were neither harassing, time-consuming, nor confusing. They required simple yes or no answers and went directly to the heart of the issue: whether the witnesses were simply parroting back what the prosecutor wanted them to because they were afraid of his personal judgment. The trial court liberally and unconstitutionally allowed the prosecutor to conduct the greatest part of his direct examination of these witnesses through time consuming, coercive, suggestive, leading questions. (Argument VII, *supra.*) However, appellant's trial counsel was denied the right to ask these few simple, highly relevant questions.

Respondent's citation to this Court's decisions in *People v. Fudge*

(1994) 7 Cal.4th 1075, 1102, *People v. Reeder* (1978) 82 Cal.App.3d 543, 553, and *People v. Babbit* (1988) 45 Cal.3d 660, 684 fail to support its argument. These cases simply state the axiom that the Sixth Amendment right to adequate cross-examination does not mean that state evidentiary rules should be discarded in order to maximize the degree of cross-examination. Nothing of that nature occurred in this case. The same can be said about respondent's citations to *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 679, *Delaware v. Fensterer* (1885) 475 U.S. 15, 20, and *United States v. Guthrie* (9th Cir 1991) 931 F2.d 564, 568-569 (RB at pp. 68-69) which speak in legal generalities about restrictions on cross-examination and address factual situations totally dissimilar to this case.

Furthermore, the cases cited by respondent often dealt with the trial court forbidding defense counsel from pursuing an entire line of cross-examination that had the potential of straying off the path of the issue in question, thereby creating confusion in the jury's mind. (See *People v. Belmontes, supra,* 45 Cal.3d 744, 780; RB at p. 68.) In the instant case, there was no "line of questioning," let along one that would take excessive time and create far more confusion than enlightenment. Counsel's questions went to the very essence of the witnesses reason for testifying they way they did and could have been answered by a simple "yes" or "no"

Respondent also cited to *People v. Chatman, supra,* 38 Cal.4th at p. 384 to support its argument that counsel's questioning was argumentative. Once again, the facts of *Chatman* are so fundamentally different from the instant case that it has no applicability. In *Chatman,* the prosecutor repeatedly asked a defendant why he thought certain witnesses would have said inculpatory things and why these witnesses would all lie just to get him convicted. (*Id.* at pp. 377-379) This Court referred to this type of questioning as "were they lying" type of questions." (*Ibid.*) This Court concluded that these questions may very well be arguments in the guise of questions, and directed trial courts to "carefully scrutinize these questions" to ascertain whether they were in fact really arguments, and to disallow them if they were. (*Id.* at p. 384.) No such questions were asked in this case.

Respondent also claimed that appellant's counsel was not restricted from asking about Ms. Rowan's potential bias in that counsel was allowed to ask whether her testimony was tainted by the fact she would receive three years in prison (RB at p. 70.) That was not what happened. The questions finally allowed by the court follow:

> Counsel: Is your testimony here today given in such a way that you feel will cause you not to get three years in prison?
> Ms. Rowan: Yes.

Counsel: Okay. So you are concerned about what you say here today may affect you in terms of getting three years in state prison, isn't that right.

Ms. Rowan: Yes.

(10 RT 1971-1972.)

The above exchange improperly gave the impression to the jury that the witness testified the way she did because she knew she needed to tell the truth. The proposed questioning of appellant's counsel would have revealed she testified the way she did to please the prosecutor. This is a major difference. The trial court also erred in its refusal to allow similar cross-examination of Ms. Gonzalez. (10 RT 2043-2044.) Once again, the trial court withheld from the jury relevant evidence that went directly to the motivations of critical prosecution witnesses. (AOB at p. 143.) The United States Supreme Court has recognized that "exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska, supra,* 415 U.S. at p. 316.

As these errors were of constitutional magnitude, the respondent must prove that its error was harmless beyond a reasonable doubt. For the reasons stated in both the Opening Brief and this Reply Brief, respondent cannot possibly meet this burden. (See ARB, III, C, 3, *supra* for full discussion of prejudice and harmless error.)

IX. THE TRIAL COURT'S ERROR IN ALLOWING THE JURY TO CONSIDER IRRELEVANT YET HIGHLY PREJUDICIAL VIDEO TAPED "CLIPS" DEPRIVED APPELLANT OF DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

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

X. THE TRIAL COURT'S ERROR IN ALLOWING ORAL TESTIMONY AS TO THE CONTENTS OF VARIOUS VIDEO-TAPE "CLIPS" VIOLATED BOTH CALIFORNIA'S "SECONDARY EVIDENCE RULE" AND APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his argument as fully stated in Argument X of his opening Brief.

XI. THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A FAIR ADJUDICATION OF PENALTY PURSUANT TO THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION BY ALLOWING THE JURY TO HEAR APPELLANT'S STATEMENTS ABOUT PARTICIPATION IN 190.3 (b) CRIMINAL ACTIVITY EVEN THOUGH THERE WAS NO *CORPUS DELICTI* AS TO SAID ACTS

A. SUMMARY OF APPELLANT'S ARGUMENT

Prior to the commencement of testimony in the penalty phase, the prosecutor proffered several more "clips" (see Argument IX and X) that it claimed were relevant to the penalty phase. (13 RT 2500.) The first of these penalty phase "clips" consisted of statements that appellant made concerning his participation in some otherwise unspecified car jacking involving a Mercedes. ("Clip 1" (People's Exhibit 78), 13 RT 2502, Court Exhibit "H" at pp. 278.) Over objection of counsel, the trial court ruled that this evidence was admissible as an unadjudicated act of violence under Penal Code section 190.3 (b). (13 RT 2505-2506.)

The prosecutor similarly proffered "clip 3". (13 RT 2507-2511; Court's Exhibit "H" at p. 300.) This clip consisted of appellant telling an uncover officer that he had been involved in 27 armed robberies when he was a juvenile. (*Ibid.*) Counsel objected on the ground that there was no "foundation " to these robberies. (13 RT 2507.) The court responded to this

by deleting the number of robberies from the clip (13 RT 2509-2511), but admitting the rest of the clip.

In his Opening Brief, appellant conceded that the crime described in clip 1 could, under the right circumstances, qualify as an admissible (b) factor offense. However, in this case it did not qualify because of this Court's holding in *People v. Alvarez* , *supra,* 43 Cal.4th at pp. 296-297, which stated the *corpus delicti* rule, fully discussed in this AOB, Argument I, applies to the use of (b) factor crimes. *Alvarez* made clear that only when the corpus delicti on the factor (b) crime is established, can a defendant's statements related thereto be considered by the jury. (*Ibid.*)

Regarding clip 3, while appellant admitted to several robberies, none of these admissions necessarily referred to any of the robberies that were testified to later in the penalty phase. (13 RT 2565 et seq; 13 RT 2572 et seq; 13 RT 2578 et seq; 13 RT 2619 et seq; 13 RT 2624 et seq; 13 RT 2633 et seq.)

Therefore, under the same logic and law cited regarding "clip" 1, clip 3 was improperly admitted into evidence, as it only demonstrated appellant's propensity to commit robberies, in general.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued that to the extent appellant is challenging the admissibility of these video clips under the *corpus delicti* rule, rather than based on the sufficiency of the evidence, he has forfeited this claim by failing to object on this basis in the trial court. (RB at p. 82.)

Alternatively, respondent argued that there was independent evidence, apart from appellant's statements, to satisfy the *corpus delicti* requirements. Specifically, respondent claimed that appellant's statements in "Clip # 1" clearly made reference to the March 8, 2006 carjacking of Mr. Ouanounian introduced at the penalty phase." (RB at p. 81-83.)

Regarding "Clip # 3", appellant argued that although appellant's admissions on that "clip" did not specify the dates and locations of the robberies, the testimony of the victims of the robberies and appellant's other admissions to law enforcement provided all of the remaining details to prove the offenses. (RB at p. 83.)

C. APPELLANT'S REPLY ARGUMENT

Firstly, respondent is incorrect that appellant never objected on the ground of failure to meet the *corpus delicti* requirement. This was done quite specifically on 13 RT 2511.

Regarding "Clip # 3", appellant fully argued the doctrine of *corpus delicti* in Argument I of the his Opening Brief and this Brief. As stated in the Opening Brief (AOB, Argument XI), this "clip" shows appellant bragging to people he believed to be criminals that he committed 27 robberies as a juvenile. Appellant gave no details as to any of these supposed crimes, and no information was given to make the determination whether they were actually committed or the product of appellant's imagination employed to impress his companions.

No person may be convicted of any crime absent evidence of the *crime in question* that is independent of his out of court utterances. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1180; *People v. Powers-Mochello, supra,* 189 Cal.App. 4th at p. 408 (emphasis provided by appellant.) As there is no information given as to which "crimes" appellant was referring in "Clip 3", it is impossible to find that there was any connection between appellant's statements and the crimes proffered by the prosecutor. The prosecutor simply put on a series of robberies that may have been committed by almost anyone, and claimed, without further evidence, that these were the crimes referred to by appellant in the clip in question.[16]

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16. In two of the incidents there was unobjected to hearsay testimony by the police that a victim identified appellant as being involved. (13 RT 2656; 13 RT 2662.) However, there was not even that for the majority of these incidents.

XII. BY ALLOWING THE ADMISSION OF IMPROPER VICTIM IMPACT EVIDENCE, THE TRIAL COURT DEPRIVED APPELLANT OF HIS RIGHT TO A RELIABLE DETERMINATION OF PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

Over appellant's objection, the trial court admitted into evidence a videotape, People's Exhibit 85, as "victim impact" evidence pursuant to *Payne v. Tennessee* (1991) 501 U.S. 808, 827 and *People v. Edwards* (1991) 54 Cal.3d 787.

In his Opening Brief, appellant argued that Exhibit 85, an eight minute professionally produced video presentation, was produced to elicit an constitutionally impermissible level of emotional response from the jury. It consisted of a series of friends and relatives, often barely in control of their emotions, being filmed primarily in a cemetery while eulogizing Ms. Rosa. (AOB at pp 168-169.) There was highly sentimental piano music playing in the background. When these friends and family members were not being filmed in the cemetery on the verge of tears, their voices were used as voice-overs to a series of photos of Ms. Rosa at all phases of her life, including her infancy. These photos include several shots of Ms. Rosa with various infants and children, with various individuals solemnly

intoning how Ms. Rosa always wanted to adopt a baby. There was even a photo with Ms. Rosa and a person portraying Santa Claus. It ended with an unidentified elderly woman standing in the same cemetery, on the verge of emotional collapse, telling the intended audience, the jury, that now there was nowhere for her to go when she had problems because Ms. Rosa was dead. (AOB at p. 169.)

This videotape was not an amateur production generally extolling the virtues of the victim. It was very professional, and well-choreographed to inject the to penalty phase with the greatest degree of emotionality as possible and to introduce an overstated degree of pathos that oral testimony could not possibly achieve. It indubitably swayed the jury with its overstated naked emotionalism. It was also unconstitutional in that it "divert(ed) the jury's attention from its proper role and invit(ed) an irrational, purely subjective response." (*Payne, supra,* 501 U.S. at p. 825.) (AOB at p. 169.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Relying primarily on *People v. Kelly* (2007) 42 Cal.4th 763, 794-799, respondent argued that People Exhibit 85 was properly admitted in that the trial court acted within its discretion when it admitted the videotape. (RB at p. 84.) Respondent countered appellant's argument that the

videotape unduly preyed upon the emotions of the jury, arguing that the videotape was relatively brief, unemotional, and relatively undramatic. (RB at p. 87.) Respondent characterized the voice overs of Ms. Rosa's family and friends as being not "overly emotional." (*Ibid.*)

Respondent further argued that the videotape served only to "humanize" the victim, "as victim impact evidence is designed to do." (RB at p. 87, citing to *People v. Kelly, supra,* 42 Cal.4th at p. 797.)

Respondent concluded its argument by stating that even if the admission of this exhibit was error, the error was clearly harmless. (RB at p. 88.)

C. APPELLANT'S REPLY ARGUMENT

Appellant and respondent characterize Exhibit 85 in almost diametrically opposed ways. As the exhibit is available for the court's inspection, it is pointless to argue in this Brief which characterization is more accurate.

However, both appellant and respondent are in agreement that *People v. Kelly, supra,* 42 Cal.4th at pp. 794-799 is the most on-point case regarding this issue. In addition, the trial court relied upon *Kelly* in reaching its decision that Exhibit 85 was admissible evidence. (14 RT 2789-2794.)

Therefore, a more detailed analysis of *Kelly* is in order.

Kelly also spoke to a fact situation involving the admission of a videotape produced for presentation at the penalty phase. (*Kelly, supra,* 42 Cal.4th at p. 794.) That videotape also portrayed the life of the victim, a nineteen year old girl, Sara. (*Ibid.*)

The *Kelly* Court began by citing to its own decision in *People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057, which stated "[u]nless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as circumstance of the crime under section 190.3,1 factor (a)." (*Kelly, supra,* 42 Cal.4th at p. 794.) *Kelly* then proceeds to discuss the factors that the trial court should consider when making its determination as to the rationality, or lack thereof, of the jury's response.

This Court began with reference to an out-of-state case, *Salazar v. State* (Tex.Crim App.2002) 90 S.W. 3d 330, 335-336, reminding the trial courts that "the punishment phase of a criminal trial is not a memorial service for the victim. (*Kelly, supra,* 42 Cal.4th at p. 795.) This Court also cited to *Salazar* which stated, "[w]hat may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Ibid.* Citing to *Salazar, supra,*

90 S.W. at p. 336.)

Kelly also cited to *People v. Prince* (2007) 40 Cal.4th 1179, one of the first "videotape" cases decided by this Court. (*People v. Kelly, supra,* 42 Cal.4th at pp. 795-796.)

> Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotape or filmed tribute to t]he victim. Particularly, if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents...In order to combat this *strong possibility* (emphasis provided by appellant), courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion. (*People v. Prince, supra,* 40 Cal.4th at p. 1289.)

The Kelly Court then analyzed the *Prince* decision, indicating that the tape was admissible because, among other factors, there were no images of the victim as a young child, there was no maudlin or "stirring" music accompanying the videotape, and the setting of videotape was neutral, if not outright bland (a television studio). The entire tape essentially consisted of an interview of the victim, totally unrelated to any crime, by a local reporter who was questioning the victim about her artistic abilities. (*People v. Kelly,*

supra, 42 Cal.4th at 796.) In fact, the *Kelly* Court observed that if not for the victim's subsequent murder, the videotape could be described as "dry." (*Ibid.*) In addition, in *Prince*, the trial judge carefully monitored the reaction of the jurors during the presentation of the videotape. (*People v. Prince, supra,* 40 Cal.4th at pp. 1288-1291.)

Regarding the videotape admitted in *Kelly,* this Court noted that the videotape consisted of a "montage" of still photographs and video clips of the 19 year old victim's (Sara's) life. The tape was narrated in a "calm" fashion by the victim's mother. Any musical accompaniment was "soft" music by an artist named Enya. Sara briefly sang a song. (*Kelly, supra,* 42 Cal.4th at p. 796.)

In addition, as this Court stated, the videotape in question concern(ed) Sara's life, not her death. It showed scenes of her doing activities she loved to do, including horseback riding, swimming and spending time with her friends. As this Court indicated "[t]he closest it comes to referring to her death is the mother's saying near the end, without noticeable emotion that she does not want to dwell on this 'terrible crime.'" (*Kelly, supra,* 42 Cal.4th at p. 797.)

The *Kelly* Court also made clear that it was a factor in the tapes admissibility that only Sara's mother testified as a victim-impact witness,

hence, the videotape did not represent "repetitive" evidence. (*Kelly, supra,* 42 Cal.4th at p. 797.)

In the instant case, there were five victim-impact witnesses presented by the prosecution, all of whom, to one extent or another, dwelt upon the emotional impact of Ms. Rosa's death. (15 RT 2950-3030.) Even if Exhibit 85 was not otherwise objectionable, the videotape would be cumulative of this other victim impact evidence, especially since persons who appeared in the videotape also testified before the jury. However, the exhibit was otherwise objectionable. This objectionable exhibit was not a montage of what made Ms. Rosa a unique person; it was, in effect, the "memorial service " discouraged by this Court in *Kelly.* (*People v. Kelly, supra,* 42 Cal.4th at 795.)

The videotape was a eulogy, with the individuals delivering that eulogy near, or in, tears. It added nothing at all to the live victim-impact testimony except pathos: a pathos encouraged by a sad musical score and the backdrop of a cemetery. Respondent argued that the death-oriented setting and score of the tape was barely noticeable. Obviously, this Court must judge this for itself. However, it is indisputable that much of the tape *was* shot in a cemetery, which was completely unnecessary for the legitimate purpose of demonstrating to the jury the uniqueness of the

victim's life. (*People v. Kelly, supra,* 42 Cal.4th at p. 794; see *Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

It is appellant's contention that there are other aspects of this videotape that served only to encourage the jury to place emotion over logic. Showing a series of photos of with Ms. Rosa with various infants and children, as well as a photo of her with Santa Claus, revealed nothing of Ms. Rosa's individuality as a person or how her death caused a loss to the greater community. Rather, it only amplified the raw emotionality of the victim impact presentation by interjecting images of cute children, images totally irrelevant to Ms. Rosa's uniqueness as a human being. Further, the introduction of Santa Claus into the mix could only be for the purpose of steering the jury away from any sort of rational determination of penalty toward a highly emotional approach.

Regarding respondent's claim that the admission of the videotape was "clearly" harmless (RB at p. 88), the error was one in which appellant's federal constitutional rights were violated. Therefore, the any error must be shown to be harmless beyond a reasonable doubt. Argument III section C 3 of this Reply Brief fully discusses the standard and application of the law of harmless error beyond a reasonable doubt.

Under that standard and application, there is nothing at all "clear"

about the harmlessness of the error. Respondent emphasized that the aggravating nature of the penalty evidence was "overwhelming." (RB at p. 88.) Whether or not that is the case is a matter of perspective. However, there was substantial mitigating evidence introduced that appellant had a very difficult childhood, devoid of any positive male influences and subjected to constant exposure to street gangs. Appellant's father was convicted of murder when appellant was just a baby and was never available for young Frank. (AOB at p. 34.) Further, as a child and teenager, appellant was subjected to the influence of his gangster uncle, Carlos. (*Ibid.*) In addition, when Carlos also was incarcerated in state prison, the main role model in appellant's very young life became an individual who his mother began to live with and who supplied her heroin. (AOB at pp. 34-35.) Appellant was no more than eight years old during this period of time. (AOB at p. 38.)

In addition, throughout his youth, appellant led a very unstable lifestyle. His mother continued to use heroin and live in roach-infested, substandard housing. (AOB at pp. 36-37.) Therefore, it was little wonder that by his early teens, appellant became involved with the Barrio Pobre gang. (AOB at p. 38.)

In spite of his very troubled youth, appellant retained some good

qualities. The mother of his children testified that he treated his children well. (AOB at p. 39.)

Therefore, despite the aggravating evidence of appellant's prior crimes, there was substantial evidence heard by the jury that would have a tendency in reason to mitigate both the instant crime and the aggravating uncharged crimes. The excessive and highly emotional videotape victim impact evidence proffered by the State unfairly and improperly diverted the jury's attention from its duty to fully consider this mitigating evidence. Therefore, it simply cannot be said that it was "clear" that the error committed by the introduction of the videotape could not have possibly tipped the balance of the penalty evidence toward death.

As stated by this Court, in cases of constitutional error, it is the governments burden to show the guilty verdict "was surely unattributable to the error." (*People v. Quartermain, supra,* 16 Cal.4th at p. 621.) Respondent cannot meet this burden.

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

Appellant respectfully relies upon his argument as fully presented in

his Opening Brief, Argument XIII.

XIV. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

Appellant respectfully relies upon his argument as fully presented in his Opening Brief, Argument XIV.

XV. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

Appellant respectfully relies upon his argument as fully presented in his Opening Brief, Argument XV

XVI. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVEN-HANDED ADMINISTRATION OF THE CAPITAL SANCTION

Appellant respectfully relies upon his argument as fully presented in his Opening Brief, Argument XVI.

XVII. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

Appellant respectfully relies upon his argument as fully presented in his Opening Brief, Argument XVII.

XVIII. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his argument as fully presented in his Opening Brief, Argument XVIII.

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

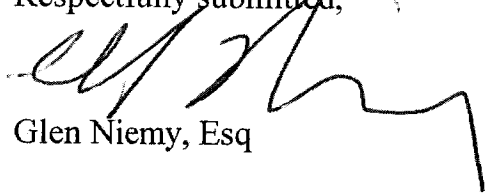
Appellant respectfully relies upon his argument as fully presented in his Opening Brief, Argument XVIII. Appellant emphasizes that the largest part of the inculpatory evidence or presented by the prosecution was the result of violations of appellant's constitutional rights. (See Arguments III, VI, and VII, *supra.* Without such improperly admitted evidence, which

included the statements of appellant, the testimony of Ms. Rowan, the testimony of Ms. Gonzalez, and the DNA evidence tying appellant to the crime scene, there was insufficient evidence to prove the guilt phase case against appellant. Moreover, much of the penalty phase evidence presented by the prosecution to support a verdict of death was admitted as a result of constitutional error by the trial court. (See Argument IX, X, XI, and XIII.)

CONCLUSION

Based upon the errors here, appellant was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution with respect to both the guilt and death judgments. These grievous errors deprived appellant of his right to due process, effective assistance of counsel, right to counsel, right against self-incrimination, to be free from cruel and unusual punishment, fair trial, and a reliable determination of guilt and penalty. By reason of the foregoing, appellant, Frank Gonzalez, respectfully requests that the judgment of conviction on all counts, the special circumstances findings, and the judgment of death be reversed and this matter remanded to the trial court for new trial.

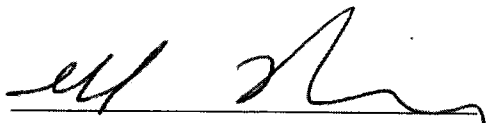
Respectfully submitted,



December 22, 2015 Glen Niemy, Esq

CERTIFICATE OF COMPLIANCE

I, hereby certify that Appellant's Opening Brief was composed in 13 point font, New Times Roman Type and consists of a total of 31,008 words.



Glen Niemy, Esq
Attorney for Appellant
December 22, 2015

DECLARATION OF SERVICE

re: People v. Frank Gonzalez
Superior Court NA071779
Superior Court S163643

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 3375, Portland, ME 04104. On December 23, 2015, I served a copy of the attached **Appellant's Reply Brief** to each of the following by placing the same in an envelop addressed (respectively)

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Each envelop was then on December 23, 2015 , sealed and placed in the United States mail at Portland, Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of the states of California and Maine that the foregoing is true and correct this December 23, 2015, at Portland, ME.

Glen Niemy