IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROYAL CLARK,

Defendant and Appellant.

S045078

(Fresno Co. Superior Court No. 446252-9)

APPELLANT'S OPENING BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
RENDERED IN FRESNO COUNTY SUPERIOR COURT
HONORABLE JOHN E. FITCH, JUDGE PRESIDING

(VOLUME ONE OF TWO)

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C. Even if there could constitutionally be no burden of proof, the trial court erred in failing to instruct the jury to that effect 523

D. 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. 524

E. California's death penalty statute as interpreted by the California Supreme Court forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory and disproportionate imposition of the death penalty 527

F. The prosecution may not rely in the penalty phase on unadjudicated criminal activity; even if it were constitutionally permissible to do so, such criminal activity could not constitutionally serve as a factor in aggravation unless found true by a unanimous jury, beyond a reasonable doubt. 531

G. The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as a barrier to consideration of mitigation by appellant's jury. 534

H. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable and evenhanded administration of the death penalty. 535

LVII THE DENIAL OF PROCEUDRAL SAFEGUARDS AFFORDED NON-CAPITAL DEFENDANTS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS . . 538

LVIII 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 546

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROYAL CLARK,** Defendant and Appellant.	**S045078** (Fresno Co. Superior Court No. 446252-9)

APPELLANT'S OPENING BRIEF

OVERVIEW OF THE CASE[1]

More than a decade ago, during the late evening hours of January 26, 1991, 14-year-old Laurie F. [Laurie], a Fresno, California teenager, was strangled to death. Her best friend and companion, 15-year-old Angie H. was also beaten and strangled, but survived the attack. Angie identified the appellant, Royal Clark [hereafter "Roy"], a friend of Laurie's family with whom Angie was well acquainted, as the person who killed Laurie, and inflicted life-threatening injuries on Angie.

Following protracted criminal proceedings in the Fresno County Superior Court, which spanned nearly four years and included competency,

[1] Citations to the record are included "Statement of the Case" and "Statement of Facts" sections of the brief, which set forth the facts in much greater detail. This section is intended to give the Court a very general, comparatively short overview of a very long, factually and procedurally complex matter.

guilt, sanity and penalty phase trials, Roy was finally convicted of the murder, robbery, and attempted rape of Laurie, and attempted murder, robbery, assault, kidnaping and false imprisonment of Angie. The jury found three special circumstance allegations true (attempted rape-murder, robbery-murder, and witness killing), rejected Roy's defenses of diminished actuality and not guilty by reason of insanity, and imposed a death judgment.

As identity was not contested, Roy's mental state was the paramount issue at competency, guilt, sanity and penalty phase trials. Roy's significant mental health history, recounted for the jury, included head injuries, seizures, prior similar outbursts of apparently unprovoked violence, and several psychiatric hospitalizations, including a year long commitment to Camarillo State Hospital. The defense presented evidence that Roy was suffering from a constellation of mental defects and disorders, including brain damage and seizures, which combined to render him temporarily insane, or at least incapable of forming the mental states necessary to commit the charged offenses and special circumstances.

Roy's trial was plagued with representational problems from the outset. (RT 30-51.) Roy's relationship with his two public defenders became strained before the guilt phase trial had even begun. Pretrial and guilt phase proceedings were interrupted for frequent bench conferences and *in camera* proceedings to determine Roy's intermittent Marsden motions to discharge his court-appointed attorneys, Barbara Hope O'Neill, and Margarita Martinez. Ms. O'Neill and Ms. Martinez conceded that communication had completely broken down due to certain psychiatric problems suffered by Roy that made him distrustful and paranoid, and interfered with effective communication. Roy's requests for substitute counsel were nevertheless denied.

Roy's problems with counsel persisted, and eventually, in the middle of the guilt-phase trial, independent counsel was appointed to represent Roy

at a motion to discharge Ms. O'Neill and Ms. Martinez. Following a Marsden hearing held nearly two months after the commencement of the trial, the trial court denied Roy's motion for substitute counsel and instead took the unprecedented step of appointing a third attorney — Ernest Kinney — to serve the role of "intermediary" between Roy and his female attorneys.

At first, Mr. Kinney was given no responsibility for the defense. His sole function was to facilitate communication between Roy and his female attorneys. Mr. Kinney attended most, but not all court proceedings. However, he did not participate in the examination of witnesses. Nor did he make objections, or participate in unreported side bar conferences at which evidentiary objections were frequently discussed. As the case progressed, however, Mr. Kinney spontaneously began to take a more active role, making objections and arguing.

Developing uncertainty concerning Mr. Kinney's role prompted the deputy district attorney, Dennis Cooper, to write a letter to the trial court expressing concern about the duality of representation. Eventually, Mr. Kinney's closer personal relationship with Roy led him assume an increased guilt-phase role. Roy agreed to take the stand, conditioned upon Mr. Kinney's greater involvement in the case prompting official addition of Mr. Kinney to the defense team, for the limited purposes of presenting Roy's guilt phase testimony, and the testimony of possible defense mental health experts.

By the time of Roy's sanity trial, Mr. Kinney had assumed a leading role in handling psychiatric aspects of the case, nearly co-equal to the role of lead counsel, Barbara O'Neill. But indications of tension surfaced repeatedly over Mr. Kinney's precise role in the case.

In January of 1994, upon the return of "sane" verdicts on all counts, it was revealed to the defense team that prosecutor intended to call as a penalty phase witness Anthony James Scott, a client of the Fresno County Public

defender formerly represented by Roy's second chair counsel, Ms. Martinez. A conflict was declared, and protracted litigation, including contempt proceedings, ensued before the Court of Appeal and this Court, to determine the public defender's right to withdraw from Roy's case on the ground of conflict of interest.

The public defender's efforts to withdraw were eventually rejected by the appellate courts, and deputy public defenders O'Neill and Martinez resumed their roles as counsel. Meanwhile, in June of 1994, prior to commencement of penalty phase proceedings, Roy's lead attorney, Ms. O'Neill, was diagnosed with cancer, and had to be permitted to withdraw as counsel.

Multiple defense motions for mistrial were denied, and Mr. Kinney was appointed to act as lead counsel for the penalty phase, over a multiplicity of objections, including the fact that Ms. O'Neill had been prepared to play the role of lead counsel in the penalty phase, and Mr. Kinney was ill-equipped to replace her due to his involvement in too many other murder cases, and serious health problems of his own which included drug interaction problems involving blood pressure medication, and Lithium he was taking to treat bipolar disorder. In addition, Mr. Kinney had not been present for the entire trial, and Ms. Martinez, who had been present, was too inexperienced to be lead counsel in a capital case.

The penalty phase finally commenced approximately nine months after the conclusion of Roy's sanity phase trial. Just as the proceedings were about to resume, another conflict of interest surfaced for the Public defender. It was belatedly discovered that Venus Farkas — a material guilt phase witness — had suffered a previously undisclosed misdemeanor conviction for welfare fraud. Ms. Farkas had been represented by the Fresno County Public Defender on the charge. Motions for mistrial, and seeking withdrawal of Ms.

Martinez as counsel were denied.

The overall fairness of the proceedings was compromised by other problems as well. During the time in question, the print and broadcast media were dominated by sensational crime stories, including reports about the Polly Klaas kidnaping-murder and the highly publicized murder of Fresno teenager Kimber Reynolds, and contemporaneous news coverage of the ongoing statewide debate over the proposed Three Strikes legislation.

In this milieu, Roy, a Black defendant, was accused of numerous violent crimes, including attempted rape and murder, of two White teenage girls. During jury selection, the prosecutor used peremptory challenges to excuse all but a single Black juror from the jury venire. The defense twice moved for a new jury panel based on the prosecutor's discriminatory use of peremptory challenges to rid the jury of Black jurors, but each time the trial judge made findings — incredibly — that no *prima facie* case of discrimination had been shown. In addition, the trial judge made a series of discriminatory rulings on the parties' for-cause challenges. In this manner, the jury venire was effectively cleansed of all prospective jurors expressing the slightest hesitancy to impose a death judgment. In contrast, numerous panelists expressing emphatic pro-death penalty sentiments were found qualified to serve. Defense counsel expressed dissatisfaction with the jury venire, but their request for additional peremptory challenges was refused.

Despite rampant publicity, including intermittent, potentially prejudicial news stories about Roy's case, the trial court also failed to take meaningful measures to insulate the jury against exposure. Even after a nine-month non-sequestered recess between the sanity and penalty phases, the trial court refused requests by defense counsel to individually *voir dire* jurors to determine whether any had been exposed to prejudicial publicity or other outside influences, and to insure that jurors' memories of the guilt phase were

adequate to proceed with the penalty phase trial.

As the cumulative effect of these and other errors, Roy was deprived of any semblance of a fair trial. For the reasons more fully set forth hereafter, the guilt, sanity and penalty phase verdicts must be reversed, and the matter remanded for a new trial.

STATEMENT OF THE CASE

On January 29, 1991, a first amended felony complaint was filed in the Municipal Court of the Consolidated Fresno Judicial District, charging Royal Clark with related crimes, enhancements, and special circumstance allegations stemming from the January 26, 1991, killing of Laurie F. and the attempted killing on the same date of a second teenage girl, Angie H. The charged offenses included: Count 1: first degree premeditated murder of Laurie with a deadly weapon, i.e., a rope, within the meaning of Pen. Code, § 12022(b); Count 2: robbery of Laurie in violation of Pen. Code, § 211/212.5(b); Count 3: forcible rape of Laurie in violation of Pen. Code, § 261(2); Count 4: attempted murder of Angie in violation of Pen. Code, § 664/187, with enhancements for use of a deadly weapon, a rope, within the meaning of Pen. Code, § 12022(b), and intentional infliction of great bodily injury within the meaning of Pen. Code, § 12022.7; Count 5: kidnaping of Angie in violation of Pen. Code, § 207(a); Count 6: false imprisonment of Angie by violence, menace, fraud or deceit in violation of Pen. Code, § 236; Count 7: robbery of Angie in violation of Pen. Code, § 211/212.5(b). (CT 1-2.)

As special circumstances to the murder count, it was alleged that the murder of Laurie was committed while Roy was engaged in the commission or attempted commission of the crime of robbery within the meaning of Pen. Code, § 190.2(a)(17) and while Roy was engaged in the commission and attempted commission of the crime of rape within the meaning of Pen. Code, § 190.2(a)(17). (CT 1.)

Roy was arraigned on January 30, 1991. The Fresno County Public Defender's Office was appointed counsel.

The preliminary hearing was heard on August 14 and 15, 1991. (CT 100-300.) Following a hearing on September 6, 1991, the trial court granted a motion to add a third special circumstance allegation, charging that the

murder was committed upon the witness to a crime for the purpose of preventing her testimony in a criminal proceeding, within the meaning of Pen. Code, § 190.2(10). (CT 1, 331: Supplemental Reporter's Transcript [SRT] March 19, 1991.) The trial court further permitted amendment of the accusatory pleading to add Count 8, alleging the attempted rape of Laurie, in violation of Pen. Code, § 664/261(2), and Count 9, alleging felonious assault upon Angie, in violation of Pen. Code, § 245(a)(1). (CT 332-333.) Roy was held to answer on all counts, enhancements and special circumstance allegations. (CT 329-333, 336-338.)

An felony information was filed on September 19, 1991, charging Roy with the first degree murder of Laurie (Count 1) with three enumerated special circumstance allegations (Pen. Code, § 187, 190.2(a)(10), (a)(17)), and seven related felonies and enhancements, including: attempted rape of Laurie, in violation of Pen. Code, § 664/261(Count 2); robbery of Laurie in violation of Pen. Code section 211/212.5 (Count 3); felonious assault of Angie in violation of Pen. Code, § 245(a)(1) (Count 4); false imprisonment of Angie in violation of Pen. Code, § 236 (Count 5); robbery of Angie in violation of Pen. Code, § 211/212.5 (Count 6); kidnap of Angie in violation of Pen. Code, § 207(a) (Count 7); and attempted murder of Angie in violation of Pen. Code, § 664/187 (Count 8). (CT 339-343.)

Roy was arraigned on the felony information on September 25, 1991. (CT 347; SRT September 25, 1991.)

On November 15, 1991, a Pen. Code, § 995 motion to dismiss the special circumstance allegations, and Counts 2, 3, and 4 of the information, was filed on Roy's behalf. (CT 348-362.) A hearing of the Pen. Code, § 995 motion was held on January 29, 1991, before the Honorable Ralph Nunez, Judge of the Fresno County Superior Court. (CT 364; 378-441.) The motion was denied as to all counts except Count 3, the alleged forcible rape of Laurie

for which the motion to dismiss was granted. (CT 439.) Roy sought appellate review pursuant to Pen. Code, § 999a, but relief was denied. (Supplemental Clerk's Transcript on Appeal #2 [hereafter SRT2] 1-435.)

Roy's case was assigned for trial to the Honorable John Fitch. (CT 484.)

On June 4, 1993, Roy entered pleas of not guilty and not guilty by reason of insanity, and the trial court appointed three psychiatrists or psychologists to examine him pursuant to Pen. Code, § 1026. (CT 503; RT 38-71.)

On June 10, 1993, the trial court declared a doubt regarding Roy's competency to stand trial. (RT 50-51.) Criminal proceedings were temporarily suspended and a hearing was ordered to determine competency. (RT 30-54; CT 506-508.) Thereafter, a jury was convened to determine Roy's competency to stand trial. (RT I-IV; CT 514-531.) On July 23, 1993, the jury reached a verdict finding Roy competent. (CT 531,568; RT IV: 832-834.)

The guilt-phase trial commenced with selection of the jury on August 31, 1993. (CT 574-575; RT 107 et seq.)

At the conclusion of the People's case-in-chief, a defense motion pursuant to Pen. Code, § 1118.1 was heard and denied. (RT 5607-5653.)

On January 4, 1994, the jury reached a verdict finding Roy guilty of all counts, enhancements and special circumstance allegations. (RT 9404-9440; CT 1086-1094.) A defense motion for trial of the sanity and penalty phases before a different jury was denied. (RT 9460-9464; CT 1095-1096.)

On January 12, 1994, jury trial commenced on Roy's plea of not guilty by reason of insanity. (RT 9469 et seq.; CT 1097-1100.) On January 20, 1994, verdicts finding sane were returned on all counts. (RT 9947-9960; CT 1107-1110.)

After a nine-month mid-trial delay, the penalty phase trial commenced on October 25, 1994. (CT 1480-1482.) On November 29, 1994, the jury returned a verdict imposing a sentence of death. (CT 1518-1519, 1688; RT 12044-12046.)

Roy's motions to reduce the penalty to life without the possibility of parole and for new guilt and penalty phase trials were heard and denied. (CT 1725-1753-1798; RT 12080.) Thereafter, the trial court imposed the death judgment for Count I, the murder of Laurie. (CT 1782, 1793, 1799-1800; RT 12120.) On the remaining counts and enhancements, the trial court imposed unstayed, consecutive determinate sentences totaling 15 years. (CT 1796-1797; RT 12104-12108.)

This automatic appeal followed.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a death judgment, taken pursuant to Pen. Code, § 1239.

STATEMENT OF FACTS

STATEMENT OF FACTS - COMPETENCY TO STAND TRIAL

Events Leading to the Trial Court's Declaration of a Doubt Regarding Roy's Competency

On June 7, 1993, during pretrial proceedings before Judge John E. Fitch, the judge observed Roy to be very withdrawn and depressed and inquired of counsel whether a determination regarding his competency might be necessary. (RT 6-7.) Lead counsel, Barbara O'Neill opined that her client was not currently "1368", but she acknowledged that the competency issue might come up as the trial progressed. (RT 7-9.)[2]

On June 10, 1993, in pretrial proceedings, Roy refused to dress out for court (RT 30), and then became disruptive, and wanted to leave the courtroom, because members of the media were present. (RT 30-37.) At attorney O'Neill's request, the court declared a doubt regarding Roy's competency to stand trial (Pen. Code, § 1368), and suspended further proceedings pending a competency evaluation. (RT 41-51.) Two court-appointed doctors found Roy competent to stand trial. However, at the request of the defense, a jury was convened to determine Roy's competency. (RT 66.)

The Defense Expert

At the competency trial, which was held before Judge Gary R. Kerkorian, Dr. George W. Woods, Jr., a physician board-certified in psychiatry and neurology was the sole witness to testify for the defense. (II RT 22.)

According to the testimony of Dr. Woods, Roy was suffering from

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[2] Competency proceedings were foreshadowed by proceedings in which Roy insisted on pleading not guilty by reason of insanity [NGI] against his attorneys' advice. (May 20, 1993, RT 25-37, RT 41-42 [sealed record]; RT 55-56 [sealed record]; June 4, 1993, RT 57-70.)

Major Depressive Disorder with psychotic features. (II RT 229-230, 234, 243.) He also suffered from auditory hallucinations; he believed he was hearing Laurie F. crying. (II RT 250-251.)

Dr. Woods also found that Roy was suffering from profoundly paranoid delusions that everyone involved in the court proceedings had turned against him. Roy's auditory hallucinations increased when he was around certain people and when he talked about certain things. (II RT 252.) Roy's psychotic symptoms and paranoid ideation directly related to the pending legal proceedings. (II RT 261.) He suffered from paranoid delusions that his attorney was trying to poison his food, and that she was one of the persons responsible for his hearing voices. (II RT 272-273.) Dr. Woods concluded that Roy's untreated psychotic symptoms were so severe that they prevented him from being able to rationally assist his attorneys. (II RT 233-264.) According to Dr. Woods, Roy had not been able to work with his attorneys for about four months because he had developed paranoid thinking about them. (II RT 288.)

Dr. Woods conducted tests to screen for malingering, and he concluded that Roy was not faking his mental illness. (II RT 253-254.) According to Dr. Woods, Roy's refusal to communicate was not a volitional decision; rather it was the result of psychosis which developed when communication occurred. (II RT 289.)

The Prosecution's Experts

Three experts testified for the prosecution: Dr. Charles A. Davis, a physician board-certified in psychiatry and neurology (II RT 399 et seq.); Dr. Frank D. Powell, a licensed psychologist (III RT 556 et seq.); and Dr. Richard Bruce King, a licensed psychologist (III RT 633 et seq.). Each of these doctors opined that Roy did not suffer from any disease or defect rendering him incapable of cooperating with his attorneys, or incompetent to

stand trial. (II RT 399-449; III RT 556-575; III RT 633-655.)

Other Prosecution Witnesses

Numerous lay witnesses testified over a multiplicity of defense objections.

Court reporter Rudy Garcia read an excerpt from a transcript of proceedings on June 4, 1993, when Roy entered an NGI plea against his attorneys' advice. (III RT 622-628.)

Jean Schoonmaker, the custodian of health records at the Fresno County Jail, testified that Roy was weighed on July 1, 1992, and weighed 198 pounds.[3] He was weighed again on July 14, 1993 and weighed 204 and-a-half pounds. (III RT 721-724.) No weights were recorded for January, May or June of 1993. (III RT 726.) In rebuttal to the testimony of Jean Schoonmaker, it was stipulated that Roy had been weighed with his clothing on that morning and weighed 196 and one-fourth pounds. (RT 771-772.)

A number of lay witnesses described their observations of Roy at the Fresno County Jail. (III RT 519-521, 695-697.) Several correctional officers, including Leonard Edward Nichols, Simon Dominguez, Lawrence Joseph Albert, Sr., and Richard Egbuziem, and a recreation supervisor, Charlotte Elaine Tilkes, testified that they had observed no symptoms of depression or other mental health problems in Roy. According to these witnesses, Roy routinely ate evening meals without expressing any fear of poisoning. He regularly used recreational facilities and socialized with other inmates and correctional staff. He did not complain of auditory hallucinations, did not appear depressed or agitated, or short of energy, and did not suffer from any unusual weight loss associated with depression. Nor did Roy refuse visits from his attorneys. (See III RT 672-747.)

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[3] The evidence was offered to rebut testimony by the defense expert, Dr. Woods, that was suffering from depression, as evidenced, among other symptoms by a loss of appetite for the last seven months, resulting in a weight loss of about 15 pounds. (II RT 247.)

Judge Fitch's regularly assigned bailiff, Randall Haw was called as a witness by the state and testified regarding his observations of Roy during court proceedings. (IV RT 761, et seq.) On June 7, 1993, Mr. Haw was the bailiff who brought Roy to the courtroom for pretrial proceedings. Haw engaged Roy in small talk about his family and children. At that time, Roy was responsive and appropriate. (IV RT 761-766.) At the conclusion of the court day, during pretrial proceedings, Roy related to Mr. Haw that he did not want to come to court again. He threatened to behave disruptively if media or family members of Laurie and Angie were in the courtroom, and complained that he wanted to plead guilty but his attorneys would not let him. (IV RT 766-768.) Roy did not mention hearing voices or having a fear of being poisoned. (IV RT 768.)

On July 23, 1993, the jury returned a verdict finding Roy competent to stand trial. (IV RT 832-835.)

STATEMENT OF FACTS - THE GUILT PHASE TRIAL

The Prosecution's Case-in-Chief

Roy's Prior Relationship with the Laurie and Angie

Roy's relationship Laurie's family predated the crimes by several years.

At the time of the crimes, Roy shared a home with Donna Kellogg (Kellogg), the mother of three, including two children fathered by Roy. (RT 3560, 4897-4899.) Kellogg was also pregnant with Roy's third child, who was born before the trial. (RT 4898-4899.)[4]

Kellogg was the niece of Venus Farkas (Mrs. Farkas), the mother of Laurie. Mrs. Farkas and Laurie's father, William Sr. [Mr. Farkas] had known Roy, through Kellogg, for a number of years. Roy often visited the Farkas home and he was accepted as a member of the family. He frequently watched

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[4] At the time of trial, Roy's children by Kellogg were ages two, four and five. (RT 4919.)

football with the Farkas family. (RT 3357, 3560-3562, 3633-3634.) Sometimes Roy played basketball and video games with Laurie's younger brother, William Jr., and occasionally he took William fishing. On occasion, Roy had driven Laurie home from school. Sometimes Laurie babysat for the children of Roy and Donna Kellogg. (RT 3563, 3580-3589, 3641.)

In the year preceding January 1992, various members of Laurie's family noticed that Roy was paying a lot of attention to Laurie. Roy invited Laurie to go places, and he taught her how to drive. (RT 3563, 3617-3618, 3629, 5301-5304.) Roy had asked Laurie and 16-year-old sister, Angelique, whether they were virgins, and he had occasionally commented about the fit of the girls' clothing. Once, Roy had asked Laurie whether she would ever consider having a relationship with a more experienced boyfriend. (RT 3611-3614.)

Fifteen-year-old Angie was Laurie's best friend. (RT 4953-4954.) Angie frequently spent time at Laurie's house, where she became acquainted with Roy. Occasionally, Roy had shown up unexpectedly and given Angie and Laurie a ride home from school. (RT 4956-4958.)

Roy's Visit to Laurie's Residence on January 26, 1991

On Saturday, January 26, 1991, Roy telephoned the Farkas residence and asked whether he could stop by to show Laurie's younger brother, William, Jr., a new video game. (RT 3642.) He arrived 45 minutes to an hour later, and played Nintendo in the living room for awhile with William, Jr. (RT 3619, 3642.) At the time, Angie and Laurie were there, helping Laurie's sister, Angelique, dress for a formal dance. (RT 3559, 4962.) After Angelique left for the dance, Laurie and Angie decided to go see a movie. (RT 4963.)

At some point, Roy stopped playing video games with William, and approached Laurie. Angie overheard bits of a conversation between Roy and Laurie which seemed to include discussion of "cruising," the movies, and a

meeting at Wendy's. (RT 4963-4965.) Roy stopped talking when Angie approached, saying "there were big mouths in the room," but this reference to "big mouths" could have referred to Angie, or Laurie's cousins, Tabatha and Cynthia, who were also present. (RT 4967, 5306-5310.)

After Roy left the room, Angie asked Laurie what she and Roy had been talking about. Laurie said something about meeting Roy at Wendy's. (RT 4968.) Angie told Laurie there was no Wendy's near the Festival Theater, and Laurie responded, "Oh, well." (RT 4966, 4968.)

At about 8:15 p.m., Laurie's father dropped Angie and Laurie off in front of the Festival Theater. (RT 3634.) Laurie had seven dollars in her possession, which she had earned by babysitting for the family across the street. (RT 3583.) Angie had ten dollars, which her mother had given her to pay for the movie. (RT 3540.)

Once the girls had gone, Roy left, which seemed unusual to Mrs. Farkas; Roy normally stayed around longer to talk and play cards. (RT 3564-3565, 3584.)

The girls were supposed to call Mr. Farkas for a ride home when the movie was over, but they never called. (RT 3635-3636.) At about midnight, Mr. Farkas drove around the vicinity of the theater looking for the girls, but did not find them. (RT 3566-3567.)

The Discovery of Laurie's Body

On January 27, 1991, at about 1:00 or 1:30 a.m., as Gilbert Garcia was driving home from work on Avenue 9 near Road 35 in Madera County, he noticed something at the side of the road. He stopped and found a young girl, later identified as Laurie. There was a rope around the girl's neck; she was cold to the touch and had no pulse. Garcia immediately went to a convenience store and used a phone to notify the Madera County Sheriff. (RT 3656-3662.)

When Garcia was about an eighth of a mile from the location of the

body, he had noticed a car make a left-hand turn from Avenue 9 on to northbound Road 35. (RT 3686.) The car was a small, light-colored import vehicle; it was on the west side of the road, the same side as the body. (RT 3663-3666.)

Madera County Sheriff's deputies arrived at the scene, and at about 4 a.m., Laurie's body was taken to Jay's Chapel, an on-call funeral home. (RT 3693-3703, 3709.)

The Autopsy Examination and the Cause of Laurie's Death

An autopsy examination of Laurie's body was conducted at Jay's Chapel, by pathologist Jerry Nelson. (RT5330-5333) The cause of Laurie's death was determined to be asphyxia due to ligature strangulation, caused by the rope found around Laurie's neck. (RT 5337-5339, 5356, 5400.)

The pathologist observed transverse lines which suggested the ligature was possibly applied and released several times, during a struggle or more than one episode of strangulation. (RT 5344-5345.) There were a number of abrasions on the left side of the neck that could have been caused by Laurie trying to ward off the tightening of the ligature. (RT 5344-5345.) Dr. Nelson concluded that Laurie was conscious during strangulation and acting in a defensive manner to try to remove the ligature. (RT 5348.)

The pathologist observed a recent abrasion measuring two-and-a-half inches in length on the spine area of Laurie's right hip, which appeared to have been inflicted on the same day as her death. (RT 5348-5349.) There were greenstick[5] fractures with minimal hemorrhaging to several of Laurie's ribs. (RT 5359-5360.) These fractures probably occurred shortly before the time of death, and were produced by forcible application of, or being dropped on, a

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[5] A greenstick fracture occurs in a person who is young and still has pliability in their bones, when the bone fractures on one side but not completely. (RT 5360.)

smooth contoured object with no sharp points. (RT 5360-5361, 5393, 5396.)

There were multiple, variable sized areas of hemorrhage on the undersurface of Laurie's scalp, and directly on the surface of the skull. (RT 5363.) The larger hemorrhage areas could have been caused either by multiple blows to the head not sufficiently hard to fracture the skull, or by the head hitting something. (RT 5363.) Smaller areas of hemorrhage could have been caused by anoxia and elevated pressure within the arterial system. (RT 5363.) The hemorrhages to the scalp were caused before death. (RT 5371.)

A sanitary pad was in place on Laurie and there was blood in the vagina, indicating she has having her menstrual period. (RT 5349.) Dr. Nelson observed nothing at all consistent with a sexual assault to the vaginal areas. (RT 5394.) There was no penetration into the vagina and the hymenal ring was intact and tight. There were no abrasions that even suggested sexual assault on the exterior genitalia. (RT 5395.)

The Discovery of Angie H.

Angie was found by Joel Suarez as he was driving south on Chateau Fresno at about 3 a.m. on January 27th. While approaching the intersection of Chateau Fresno and Muscat, Suarez saw the lights of a car go on. The car, a mustard colored, small compact like a Datsun sped away from the location in the direction of Suarez. Suarez continued driving south on Chateau Fresno about 300 yards and noticed a body partially in the road at about the location where the car lights had gone on. (RT 3798-3804, 3819.)

Mr. Suarez made a U-turn, and drove by the body again, noticing some movement of the foot. Suarez drove to a friend's house to notify the police. (RT 3807.) He returned, and found Angie, still there, lying down. Mr. Suarez parked and waited for officers to arrive. (RT 3808-3809.)

Fresno Police Officer Todd Frazier was dispatched to Chateau Fresno at about 3:18 a.m. on February 27, 1991. He notified the dispatcher that

location was in the jurisdiction of the sheriff's department, but he decided to respond anyway, to try to locate the girl, because no sheriff's units were available. (RT 3852-3853.)

When Officer Frazier arrived at the location, it was dark, and the area was cloaked in extremely dense fog. (RT 3866.) He located Angie with the aid of Mr. Suarez, who flashed his high beams off and on. (RT 3854-3855, 3865.) Officer Frazier asked Angie what her name was but she had difficulty speaking. She sounded like she had laryngitis and her responses were difficult to understand. The officer asked Angie if she had been beaten, and asked if she knew who had done it, and Angie shook her head up and down in response to both questions, signaling "yes." Frazier asked her if she had been raped, and Angie shook her head back and forth, indicating "no." (RT 3859-3862.)

Deputy Sheriff John Friend arrived at Chateau Fresno near Muscat at about 3:35 a.m., and found Officer Frazier already on the scene. Deputy Friend also attempted to communicate with Angie but met with no success. An ambulance arrived and Angie was rushed to the Valley Medical Center. (RT 3888-3891.)

Angie H.'s Injuries

On arrival at the hospital, among other injuries observed, Angie's face and neck were swollen and tender, and tiny purplish red marks called petechiae – capillaries that bleed -- were visible on her face. (RT 5232-5233.) An abrasion encircled approximately half to two thirds of her neck, including the front. (RT 5239.) The doctors concluded with a reasonable medical certainty that Angie had been strangled by a ligature. (RT 5246, 5274-5282, 5379, 5381.) Sufficient pressure had been applied to produce unconsciousness but not irreversible brain death. (RT 5383-5386.) It appeared as if strangulation had been accomplished by someone standing

behind Angie, pulling the ligature against the front of her neck. (RT 5383.)

At the time Angie was admitted to the hospital, she was suffering from post-concussion syndrome, which includes symptoms of drowsiness and falling asleep. (RT 3545-3547, 5230-5231, 5263-5264.) Angie was possibly suffering from transient global amnesia, which could have been produced either by strangulation or by being thrown from a moving vehicle.[6] (RT 5285-5291.)

Angie remained in the hospital for three days, and then was released. (RT 5270.)

Angie H.'s Account of the Crimes

At the time of the trial, Angie's recall of what occurred on January 26th and 27th, 1991, included the following.

Laurie and Angie were dropped off at the Festival Theater and went inside to see what time the movie started. They were late, so they decided to get something to eat, and wait for the next show. (RT 4969.) The girls left the theater and walked south on Blackstone Boulevard. They went into a music store to look around.[7] After they left the store, Roy pulled up in his car, and the girls climbed in. (RT 4970-4972.)

First, Roy stopped at McDonald's so Laurie and Angie could buy something to eat. (RT 4975-4976.) Roy asked Laurie to buy him something to eat too but she responded, "Buy yourself something to eat. You've got your own money." (RT 4976.) Roy said he did not have any money. (RT 5138.)

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[6] A notation on Angie's Emergency Room record (People's Exhibit 74) contained an entry "thrown from a car." The emergency room physician, Dr. Ann Fischer, could not recall whether Angie told her she was thrown from a car. (RT5254-5257.)

[7] John Pimentel, a Fresno Highschool student working at the Wherehouse that night, corroborated this aspect of Angie's testimony. (See, RT 3644-3654.)

Angie used $1.12 of the $10 she had to pay for a milk shake. She put $8.88 in change in her left pocket. (RT 4977.) Laurie used a portion of her $7 to buy a milk shake and a large order of french fries, and put her change in the right jean pocket. (RT 4978.)

The trio returned to Roy's car and drove passed a group of Gulf War demonstrators on Blackstone Boulevard. Laurie mentioned the need to be back at the movie theater to call her mother by 10:00 o'clock. (RT 4981.) Roy said he knew of a place where his friends were "kicking back and partying," and then drove around Roeding Park. (RT 4980.)

Nobody was at Roeding Park, so Roy suggested that they go to a different location where there would be more people. (RT 4985.) Laurie said she wanted to return to the movie theater. (RT 4985.) Roy said he needed to talk to someone, which would not take very long, and the girls acquiesced. (RT 4985-4986.)

Roy drove around, making a brief stop at a gas station. (RT 4986-4987.) He then turned left into Lost Lake Park, and drove up a long winding road that led to a dead-end. The girls saw that nobody else was there, and asked to be taken back to the movie theater. (RT 4988-4989.) Roy said he needed to use the bathroom. (RT 4989.) He pulled up next to a restroom building and went in, while the girls waited in the car. Laurie began driving Roy's car around in the area of the restroom. (RT 4990-4991, 4993.)

Roy started yelling for the girls to bring him something to use as toilet paper. The girls continued driving around, which upset Roy. He yelled at them to stop "messing" with his car, and bring him his keys. (RT 4996-5000.) Finally, the girls located some paper towels in the back seat of the car. (RT 4997.) Laurie entered the bathroom, and immediately Angie heard Laurie scream, "Roy, stop." (RT 5002.) Laurie also yelled Angie's name, and "Roy, leave me alone." (RT 5002.)

Angie started to walk toward the restroom and heard scuffling noises. (RT 5003.) She took off her shoe with the intent of using it to defend herself, and went inside the building. (RT 5004.) Inside, she saw Laurie lying face down on the floor with her feet toward the door. Roy was sitting in front of Laurie on the back of his legs, with Laurie's head between his legs. Angie told Roy to leave Laurie alone. (RT 5005.)

Angie grabbed Laurie's foot and started to pull her out of the restroom. Roy jumped up, knocked Angie to the ground and started choking her with his hands. (RT 5006.) As Angie lay on the ground, Roy slammed her head into the ground with his knee. (RT 5007.) Roy then let go of her and walked out of the bathroom. (RT 5008.)

Angie, whose nose was bleeding, crawled over to Laurie, who was on the floor, and appeared unconscious. Angie shook Laurie to wake her up. Laurie asked Angie if she was alright, and started to cry. (RT 5008-5011.)

Roy re-entered the bathroom with a small flashlight and began looking around. (RT 5018.) He filled an empty gas container with water from the urinal and poured it on the floor. (RT 5026.) Laurie offered to tell the girls' parents they had been involved in a fight at the movie theater, but Roy said, "No, I don't trust you. You'll tell like you did last time." (RT 5025-5028.)

Roy used a rope to tie Angie's hands behind her back. (RT 5029-5030.) He then pulled Laurie aside and tried to kiss her, but she kept resisting. (RT 5030-5031.) Angie heard Laurie say, "I can't, I can't. I'm on the rag," meaning she was menstruating. (RT 5031.)

Roy asked Angie if this was true, then, when Angie confirmed that it was true, acted upset and walked out of the bathroom. He returned, saying he needed to find something with which to clean Angie. (RT 5033-5034.) He said he was going to find clean water, and take Laurie with him, and Angie suggested that he use the urinal water in the restroom, so Laurie would not

have to leave. (RT 5035.) Laurie clung to Angie and said she did not want to go, but Roy became more upset and insisted. (RT 5036.)

Roy took Laurie with him, leaving Angie tied to the toilet. Angie could hear voices, and water running in the opposite bathroom. She heard Laurie scream, "Roy don't. Leave me alone." She also heard scuffling noises, crying noises and the sounds of gasping for air. (RT 5037-5040.)

Fearful, Angie pretended to be passed out, and when Roy called her name, she did not answer. Roy entered the bathroom again and announced that Laurie had run away and he was going to go look for her. (RT 5041-5043.) Angie heard the sounds of the car door shutting, walking, and Roy shouting and calling out.

Roy returned to the bathroom. He informed Angie that he could not find Laurie, and he intended to leave her there. (RT 5043-5044.) He wiped the blood off of Angie's face and untied her from the toilet, leaving her hands tied behind her back. (RT 5081-5082.) He then put Angie in the back seat of car and covered her with Laurie's jacket to hide her from sight. (RT 5081-5084.)

Roy asked Angie if she would have sex with him. She told him no, she was waiting for someone special. Roy said, "See, both of you don't trust me." He started the car and drove toward the exit of Lost Lake. (RT 5085.)

Roy told Angie he wanted to stop and call Laurie's mother, but did not have any change. (RT 5086-5087.) Angie said she had some change in her pocket and Roy then removed the change and some dollar bills from Angie's pants pocket. Roy stopped at a pay phone near the exit leading to Friant Road. He left the paper currency in the car, and went to the phone with some change, and started to make a call. He put a coin in the phone and started dialing, but hung up without completing a call. (RT 5087-5088.)

Roy returned to the car and explained he did not know what to say to

Laurie's mother. He indicated he would take Angie to Laurie's house. When he missed the turn-off to Laurie's house, he said he was not going to take Angie to Laurie's house because he did not know what to say to Laurie's mother. Roy said he had decided to take Angie to Donna's house to get her cleaned up. (RT 5089-5090.) Roy then missed the turn-off to Donna's house. (RT 5091.) When Angie noticed and mentioned this, Roy said they were going to Selma, where Donna lived with her mother. (RT 5091-5092.)

Roy eventually got off the freeway and drove around in a residential area. He informed Angie he had decided not to take her to the Kellogg's house because Donna would "kick him out." Instead, he said he would take Angie to Laurie's house. Roy got back on Highway 99, stopped at a gas station, and instructed Angie to stay low so nobody would see her. (RT 5093-5094.) Roy left the car briefly at the gas station, taking the paper money with him. He returned to the car and drove south until Angie mentioned that they were traveling in the same direction they had gone before. Roy then turned around and drove north on the freeway. (RT 5095-5096.)

Roy passed the Ashland exit again, and told Angie he was going to go back and look for Laurie. Roy exited the freeway and began driving around in the vicinity of Chateau Fresno. While they were driving, Angie succeeded in untying her own hands. (RT 5097-5098.)

Eventually, Roy admitted that he was lost. He pulled the car over briefly and said he was going to look for a map, but resumed driving because he thought another car was following him. (RT 5099.) Roy pulled over again, and looked for a map inside the car, but did not find one.

Roy then told Angie there was a map in the trunk of the car. Angie emerged from the car, leaving the rope from her hands between the front seats. At Roy's request, she held his cigarette lighter up so he could look for a map in the trunk. While Angie was holding the lighter, Roy came up from behind

and started choking her with a rope. (RT 5100-5104, 5130-5131.) That was the last thing Angie recalled before the ambulance ride and waking up in the hospital. (RT 5132-5133.)[8] The last time Angie had looked at car clock before blacking out, it was after 2 a.m. (RT 5137.)

Roy's Arrest

Roy was immediately the focus of suspicion. Early in the morning on January 27, 1991, Mr. Farkas relayed a phone message to Roy through a third party, asking Roy to call him to give him his address. Roy returned the call, unaware that he was a suspect. He spoke with Mr. Farkas as though nothing had happened, and asked whether there was still going to be a Superbowl party at the Farkas residence that day. (RT 3638-3640, 3902-3905.)

At about noon on January 27, 1991, Detective Melinda Ybarra, of the Fresno County Sheriff and her partner, Detective John Souza, went to Roy's residence at 2353 South Jackson. Roy was standing in the driveway with a small child. Minor superficial scratches were visible on the right side of his face. In the garage of the residence was a faded orange Datsun sedan. The vehicle was unoccupied; the engine was running and the hood was up. (RT 3906, 3916-3917, 3931, 3930.)

Roy was wearing a black long sleeved shirt, black pants and white tennis shoes with black trim. (RT 5317.) He was taken into custody, and the Datsun was impounded. (RT 3907, 3913.)

Before the Datsun was towed away, Donna Kellogg approached Detective Souza with a request to remove a plastic garbage bag from the vehicle. Ms. Kellogg explained that she was about to do laundry, and the bag contained clothing that belonged to the children. (RT 3937.) Ms. Kellogg

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[8] At the preliminary examination, Angie testified that the last thing she recalled was holding the lighter by Roy's trunk. At trial, she testified that being strangled at the roadside was something she remembered later. (RT 5179-5180.)

was allowed to remove the children's clothing from the laundry. Additional items in the bag, including clothing that belonged to Roy, were kept by police and towed with the car. (RT 3938, 3989.)

Detectives found an electrical cord, wiring and plastic insulation on the floorboard behind the driver's seat of the car. (RT 3921.) On the electrical cord, detectives observed a very small spot which appeared to be a dried droplet of blood. (RT 3921-3922.)

Detectives Souza and Ybarra took Roy to the Fresno County Sheriff's Department for questioning. Roy was advised that the investigation involved Angie and Laurie, and he admitted that he knew them. Roy was also informed of the murder charge, but he had no reaction and asked no questions concerning the identity of the person he allegedly murdered. (RT 3938-3940.)[9]

Detective Souza collected from Roy all of the clothing he was wearing when arrested, including his shoes, white boxer shorts, black gym shorts, and outside trousers. (RT 3959-3961.) At the time of arrest, Roy had eight cents in his clothing. Roy's wallet was found in the living room of the Jackson Street residence and contained no money. (RT 5599-5600.)

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[9] Testimony that Roy had no reaction to the detectives' statements after he was advised of his Miranda rights was stricken on motion of the defense. A motion for mistrial was denied. (RT 3943-3944, 3950-3952, 3958.)

The Crime Scene and Forensic Evidence[10]

A pair of Nike brand men's shoes, seized from Roy's residence pursuant to a search warrant (RT 3909-3914, 3919-3920, 3929), shared class characteristics of shoe tracks found at the Chateau Fresno and Lost Lake crime scenes. (RT 3963-3964, 3988, 3998-3999, 4021, 4000-4001, 4022-4024, 4027-4029, 4050, 4062-4081.)

Tire marks found near Chateau Fresno shared class characteristics with the right front, and right and left rear tires of Roy's Datsun, although no independent characteristics were observed allowing for positive identification. (RT 3998-3999, 4021, 4094-4108.) Several of the tire prints observed at Lost Lake shared class characteristics with front and rear tires from Roy's car. (RT 4095-4100, 4109-4110.) The Datsun's tire tread patterns did not match tire tracks observed at the Madera County location where Laurie's body was found. (RT 4250-4252.)

Pine needle samples collected from the Lost Lake Park area and the Madera County crime scene were compared with pine needles found in the trunk of Roy's Datsun. All of the pine needles were the same length, and had the same number of leaves per fascicle, making them indistinguishable to a lay observer. (RT 3739, 3744, 3753, 3756-3758, 3762, 4306-4307, 4338-4340, 4396-4397, 4401.)

Soil samples collected from the Madera and Lost Lake locations were compared with soil samples taken from Laurie's black denim jeans, from carpeting in the trunk of Roy's car, and from the seat cover on the passenger

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[10] There was a large quantum of expert testimony in this case regarding the crime scene and forensic evidence. Expert testimony was for the most part detailed and highly technical. Since Roy's identity as the perpetrator was not at issue at the trial, appellant has omitted much of the technical or scientific detail found in testimony. Much chain of custody evidence has also been omitted from the Statement of Facts.

side of the car. (RT 3782-3785, 4322-4325.) Based on density gradient testing, soil samples collected from the Lost Lake area were found to be indistinguishable from the soil removed from Laurie's jeans. (RT 4311, 4333.) No other matches were made. (RT 4308-4333.)

Hair samples taken from Laurie and Angie were compared with a number of hairs collected from the passenger compartment and trunk of Roy's Datsun. (RT 3962, 4192-4205, 4253-4259, 4269-4270, 4300-4306, 4403-4409.) Head hairs found in the passenger compartment were generally consistent with Laurie and/or Angie, but not Roy. (RT 4410-4412.)

One pubic hair collected from the carpet in the Datsun's trunk was consistent with Roy, but not Angie or Laurie. (RT 4412.) Two head hairs from the trunk were consistent with Laurie's head hair, and could not have come from Roy or Angie. (RT 4403-4409.)

Serological analyses and comparisons were performed on evidence collected from the crime scene as well as from stains on Roy's and Laurie and Angie' clothing. (See generally, RT 4518-5549 [testimony of Andrea DeBondt].)[11] Several of the smears or stains observed on the interior of Laurie's white paisley print turtleneck were consistent with Angie's blood type in PGM and/or GC testing. Results were inconclusive for the remaining stains from the interior of the blouse. (RT 4604-4608.) A blood or mucous stain on the front of Laurie's jeans was also consistent with Angie's blood type. (RT 4622-4627.)

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[11] To analyze blood, urine and mucous stains and samples, serologist Andrea DeBondt used a number of blood typing systems, including the ABO and Lewis systems. In some instances, blood typing of a piece of evidence was positive in one system, but inconclusive in another. Because Roy's identity as the perpetrator was not contested, appellant has provided only a bare bones description of the general conclusions reached by the serologist as to the identity of the donor, rather than the detailed scientific analysis found in testimony.

Stains on the exterior front and back of Laurie's blouse were generally the same type as either Angie's or Laurie's blood. (RT 4612.) Testing on stains on Laurie's bra was either inconclusive, or consistent with Laurie. (RT 4636-4647, 4823.)

Serological testing was also conducted on the stained area on the back of Laurie's blue jacket, found with Angie at the Chateau Fresno crime scene. (RT 3893, 5019, 5024, 5084; People's Exhibit 21). The stain was generally consistent in one system with Angie's blood type. (RT 4745.)

It could not be determined when, or in what manner any of these stains on clothing were applied. (RT 4757, 4824-4826.)

Blood splatter samples collected by investigators from the cement men's room floor at Lost Lake Park were analyzed and found to be conclusively positive for Angie. Roy and Laurie were eliminated as donors. (RT 4003, 4005, 4656-4658.)

Tests of samples of possible urine and blood from the women's restroom at Lost Lake were either inconclusive, or consistent in some systems for both Laurie and Angie. Roy was eliminated as a donor. (RT 4003-4004, 4005, 4658-4659, 4724.)

A possible blood sample collected from the road surface at the location of Angie's body, in Chateau Fresno, was positive for Angie. (RT 3997, 3999-4000, 4020, 4659-4660.)

Several pieces of stained tissue were found at the Lost Lake crime scene to the east of the men's room. (RT 4004, 4047, 4049.) The stains were consistent with Angie's blood type. Roy and Laurie were eliminated as donors. (RT 4671-4674.)

Stains from carpet pieces cut from Roy's car trunk were also subjected to serological testing. One stain was positive for human blood, consistent with Laurie's blood type. Roy and Angie were eliminated as donors. (RT

4290-4294, 4295 4676-4677, 4733.)

Serological testing was also performed on articles of clothing taken from Roy's trunk. A pair of black drawstring sweat pants (People's Exhibit 45), found inside-out, were inverted and found to have an apparent blood stain on the right knee. The stain was positive for human blood consistent with Angie but inconsistent with Roy and Laurie. (RT 4686-4689, 4694.)

On the reverse side of the sweat pants, there was a stain in the upper back quandrant, three-and-a-half inches long and three quarters of an inch wide. Testing on this stain was positive in four systems with the blood of Angie. (RT 4696.) A second area of staining about one-and-a-half inches long and a half-inch wide, was positive in five systems with the blood of Angie. (RT 4696-4697.) The results ruled out Roy or Laurie. (RT 4733.)

P-30 is a protein having a molecular weight of about 30,000, that is produced in the prostate gland and is present in semen. (RT 5544.) On March 15, 1991 (RT 5549), criminalist Andrea DeBondt conducted tests on a pair of white boxer shorts worn by Roy at the time of his arrest. (People's Exhibit 59B.) The shorts contained a three-inch diameter stain, off-white to pale yellow in color on the left front area, which was positive for the presence of P-30, or semen. (RT 5545-5547.)

DeBondt also did tests on the spot for ABO antigenic activity using Lewis antigen typing and PGM subtyping. Her results were inconclusive. (RT 5547-5548.) There was no way to determine the age of the stain. (RT 5549.)

Urologist Gary Storey, M.D. gave expert testimony regarding the significance of the semen stain on the boxer shorts. He testified as follows. Semen is the material expressed from the penis at the time of ejaculation. It consists of fluid from the prostate gland and sperm from the testicles. Sperm constitutes about four percent of the volume of fluid released from the body

by muscular contraction. Sexual arousal is necessary to produce ejaculation except in experimental situations, such as electrical stimulation. (RT 5539-5543.)

Based on the size of and results of chemical analysis for the enzyme P-30 performed on a three-inch diameter pale yellow stain on Roy's boxer shorts, Dr. Storey opined that the stain was the result of ejaculation produced by sexual arousal. (RT 5543.) Sexual arousal could have been produced by masturbation. (RT 5543.)

Roy's Relationship with Donna Kellogg

Kellogg last had sexual relations with Roy a "couple" of weeks prior to January 26, 1991. (RT 4909, 4916.)

Roy's Lack of Income From Employment

In January of 1991, Kellogg had an income of approximately $700 per month. Roy had no independent source of income. (RT 4906.)

The Defense

Roy's Account of the Crimes

According to Roy's testimony, in the evening on Saturday, January 26, 1991, Roy left home at about 7:00 p.m. (RT 6742.) He made several brief stops, then went to Laurie's house to play video games with Laurie's younger brother. (RT 6745, 5807-5808, 6750-6753.) At some point that evening, Roy asked Laurie if the she and Angie wanted to meet him later and go cruising. (RT 5809-5810, 6753.) Laurie mentioned the girls' plans to go to the movies, but they did not agree to meet at any particular time or place. (RT 5813, 6755, 6777.)

Roy left Laurie's house and went to the bowling alley on Blackstone Boulevard. (RT 5814, 5820, 6764.) At the bowling alley, he played an arcade game, and spent no more than one dollar of five dollars in change he had

obtained from Donna Kellogg earlier that day. (RT 5815, 6744.) He left the bowling alley, intending to go home.

Roy saw Laurie and Angie as he was driving home on Blackstone Boulevard. He pulled his car over, and the girls got in. (RT 5820-5823, 6770-6771, 6779.) They stopped briefly at McDonald's so Laurie and Angie could buy something to eat. (RT 5849-5856, 6783-6787.) Afterward, they cruised past some anti-war protestors on Blackstone; Angie and Laurie yelled out the window at protestors and Roy honked his horn. (RT 5859-5860.) After this, they drove through Roeding Park, looking for parties. (RT 5863-5867, 6789.) After stopping for a few dollars worth of gas, Roy suggested going to Lost Lake to look for some friends. (RT 5870-5872, 6793-6794.) Inside Lost Lake Park, Roy stopped at a restroom facility to use the toilet, entering on the men's side. There was no toilet paper inside so he called out, asking one of the girls to bring him a "wipe." (RT 5886-5888, 6799.) Roy could hear Laurie and Angie laughing and giggling and driving his car around in the vicinity of the restroom. (RT 5888-5889.) This made him feel angry and helpless. (RT 6055, 6802.) He yelled at them to stop driving and to bring him his keys. (RT 5889, 6803.) Roy became upset and very, very angry. (RT 5891-5892.)

Laurie walked into the restroom with a smirk on her face. Roy exploded in anger, choking her with both hands, and hitting her. Laurie was knocked unconscious. (RT 5895, 5898, 6805-6809, 6822, 6826.)

When Angie entered, Roy lunged, and started hitting her with his fists. (RT 5892-5894.) After that, everything went blank. (RT 5895.)

Roy had only a piecemeal memory of what occurred after he lunged at Angie. He had no memory of killing Laurie, but knew he must have done so. (RT 5897-5899.)

Roy made no attempt to rape either of the girls that night. (RT 5898-

5919.) He did not take any money out of Laurie's pocket he did not kill Laurie for money. (RT 5919.) Nor did he kill Laurie to prevent her from reporting the attack on Angie. (RT 5921.)

On the evening of January 26th, it was cold outside. Roy was wearing dirty white briefs, black cotton gym shorts with nothing written on them, a pair of blue 501 Levis, and a pair of black sweat pants, which he slept in. (RT 5907-5909, 5912.) Roy woke up at home at about 9 a.m., on Super Bowl Sunday. He had a funny feeling, which he shook off, but had no memory of what had happened the night before. (RT 5903-5906, 6834-6835.) He changed his clothes because Kellogg was gathering dirty clothes to do the wash. (RT 5910-5913, 6860-6861.) At the time of his arrest, Roy was wearing the boxers, Raiders shorts and blue jeans. His undershorts were dirty because he had worn them a few times before. (RT 5913-5914.)

At 11 a.m., or so, on January 27th, Roy talked to Laurie's father on the telephone, about the planned Super Bowl party. Roy was not aware that he had killed Laurie and had no difficulty talking to her father. His sketchy memory of the evening's events returned later, over time. (RT 5916-5918, 6863, 6866, 6987.)

At the time of his arrest, Roy still did not recall what had occurred the previous night. (RT 5925-5927.)

Presumably as foundation for the testimony of defense psychological and psychiatric experts, at the guilt phase of the trial, Roy testified at some length about his life, his history of seizures and other mental health problems, and the several mental hospital commitments which had preceded his crimes.

Prior to the charged crimes, Roy had a lengthy and significant prior history of mental health problems, which included seizures that began following a blow to the forehead with a baseball bat at age ten, several attempted suicides, and at least three psychiatric hospitalizations, including a

year-long commitment to Camarillo State Hospital. Roy's psychiatric history also included several other explosive acts of violence against women, including his mother and sister, and several assaults upon a prior girlfriend.

Roy's parents divorced when he was only three. For most of his life, he lived with his mother, who suffered from memory lapses. Clark's mother, Daisy Clark, used to pin identification tags on Roy and his siblings when she took them places in public, to insure the children would be returned home if she experienced a blackout. (RT 5710-5763.)

When Roy was about 10 years old, he was accidentally knocked unconscious with a baseball bat. (RT 5714, 6674-6678, 6919-6921.) At age 13 or 14, Roy began experiencing seizures. Roy he would awaken and find everyone around him and his clothes wet with urine. (RT 5977, 6035, 6720-6722.)

Roy began having serious mental problems at age 14, when he suffered his first mental hospital commitment to Los Angeles County - University of Southern California [LAC-USC] Medical Center. His commitment followed an incident in October of 1976, during which Roy became angry and locked family members out of the house. Pursued into the home by his mother and brother, Roy threw a bottle and struck his brother in the head, then brandished a knife at his mother. He jumped out of a second story window in an effort to escape. When finally apprehended, Roy invited the police to shoot him. Following this incident, Roy was committed to the hospital for several weeks. (RT 5716-5725, 5950-5965, 6069, 6094, 6153-6156; Supplemental Clerk's Transcript on Appeal #1 [SCT #1], Vol. 2, p. 435-495; People's Exhibit 84; Defense Exhibit 213, 217.)

Roy was committed to LAC-USC for the second time, in December of 1977, at age 15. This commitment followed another incident, during which Roy became angry at his mother. In a failed suicide attempt, Roy locked the

doors and windows of his house, and lit some sheets which were being used as curtains on fire. Roy spent approximately 12 days at LAC-USC hospital. During this commitment, Roy complained of auditory hallucinations, and felt suicidal. (RT 5991-5997, 6012-6218, 6187-6193, 6930; SC #1, Vol. 2, p. 496-552, 536.)

Following his release from LAC-USC, Roy failed to follow through with recommended outpatient psychiatric treatment because he did not believe he was sick. He suffered a third mental hospital commitment only a month later, in January of 1978. On this occasion, Roy was being teased and called names by his younger sister and several of her friends. In a rage, Roy locked the girls in the bedroom, by removing the door knob from the door. Roy poured gasoline on the bedroom door and set the room on fire. (RT 5730-5753, 6024-6037, 6225-6227, 6236; SCT #1, Vol. 2, 553-563.)

Roy was arrested and taken to Juvenile Hall. He feigned a suicide attempt in order to get himself transferred to LAC-USC Hospital. (RT 6018-6020, 6238.) Thereafter, Roy was voluntarily committed to a program for teenagers at Camarillo State Hospital. (RT 6022-6023, 6251; SCT #1, Vol. 3, 645; People's Exhibit 85.)

While in Camarillo, on one occasion Roy tried unsuccessfully to hang himself with a sheet. (RT 5738, 5938, 6484-6487.) The program was supposed to take only six months to complete. After eleven months, Roy was finally discharged, although he had not yet successfully completed all six levels of the program. (RT 6033-6034.)

In 1980, Roy moved to Texas, where he was arrested for robbery. Roy spent several weeks in Rusk State Hospital in Texas. On June 17, 1981, Roy pleaded guilty to robbery and was sentenced to serve a term in Texas prison. (RT 5755, 6039, 6555-6559; see also SCT #1, Vol. 4, 1016, Vol. 5, 1253-1255.)

Upon his release from Texas prison in 1983, at age 21, Roy stayed in runaway shelters until he got a job fighting fires and building trails for the California Conservation Corp. (RT 5756-5757.)

In 1984, Roy relocated to Los Angeles. There, he continued to have problems, suffering arrests and/or convictions for an assortment of offenses, including burglary, joy riding, and robbery, and battery stemming from an incident of domestic violence involving his younger girlfriend. (See, RT 5759-5782, 6599-6622.)

Mr. Clark was charged with robbing a man while he was asleep in his car. (SCT #1, p. 1022.) He pleaded guilty and received a two-year prison sentence. (SCT #1, pp. 1038-1042.) Following his release from a California prison in 1986, after serving time for robbery, Roy met Donna Kellogg. (RT 5765-5769.) The couple moved to Fresno, where they lived as man and wife, and had several children. (RT 5766-5771, 5945.)

Roy also spent part of his time in Long Beach, where he played semi-professional football for the Los Angeles Mustangs, for about three seasons. (RT 5771-5772, 6699-6700.)

Several stressful events had occurred in Roy's life shortly before January 26, 1991.

In mid-1989, Roy's brother Ezra was shot in the stomach with a shotgun and died. Roy was very close to Ezra, and his death was very traumatic for him. (RT 5773-5776, 6707.) Not long after Ezra died, Roy's older brother, Larry, was stabbed to death. (RT 5775.)

Sometime in late 1990, Roy had received an invitation to tryout for the San Diego Charges. Before the tryouts were held, Roy suffered a football career-ending injury. He tore the ligaments in his right shoulder while playing basketball. (RT 5771-5775, 6699-6707.)

Roy's memory blackout on January 26, 1991, was reminiscent of the

blackouts experienced by Roy on other occasions, including instances of explosive conduct as a teenager, which had precipitated his prior mental hospitalizations. (RT 5905.)

In anticipation of impeachment, Roy testified on direct examination regarding his criminal history, which included two felony robbery convictions, one in Texas and one in California, and several instances of misdemeanor misconduct, including a prior burglary and several acts of joyriding or automobile theft.

Testimony by Roy's Medical and Psychological Experts

Roy presented the testimony of several expert witnesses, including a neuropsychologist [R.K. McKinzey, Ph.D.], a neurologist [Sateesh Apte, M.D.], and a psychologist [Paul S.D. Berg, Ph.D.], in support of a defenses of diminished actuality and unconsciousness.

Dr. McKinzey conducted neuropsychological testing on Roy and concluded that he was suffering from brain dysfunction in the frontal and temporal lobes, primarily situated in the left frontal lobe, with lighter damage to the right frontal lobe. (RT 6328-6329.) Frontal lobe damage can cause individuals to exhibit poor judgment, poor control of impulses and emotions, unreliability and immaturity. (RT 6334.) A person with frontal lobe damage can also suffer from organic personality syndrome [OPS], a condition associated with extremely poor social judgment, and recurrent outbursts of aggression and rage. (RT 6335.) Roy likely "flies off the handle" or goes into rages because he has damage to the part of the brain that handles control of emotions and temper. (RT 6336.)

After reviewing his own test results, and results of testing conducted by neurologist Sateesh Apte [below], Dr. McKinzey postulated that Roy likely suffered a brain injury when he was struck in the head by a baseball bat as a child. The doctor hypothesized that the bat had struck Roy's left eyebrow at

an angle, which caused a "coup contra coup" injury, causing some damage to the back of the brain and a tearing in the middle. (RT 7227-7228.) Roy's brain injury, particularly the frontal lobe damage, was causing Roy's problems with attention, concentration, self-control, multiple-tracking, abstraction, planning, impulse control, social control, affective control, and organization of sequences. (RT 7228-7229.)

At the recommendation of Dr. McKinzey, quantitative electroencephalograph ["QEEG"] and "brainmapping" tests were administered on Roy by Dr. Sateesh Apte. (RT 6337-6340, 7041; Defendant's Exhibits 231-238 [topographical brainmapping charts].) QEEG testing is capable of detecting functional abnormalities in the brain which can be missed in other types of neuropsychological testing. This is because, over time, persons who have suffered brain damage learn techniques for compensating which can make brain damage appear less severe. (RT 7075, 7127.)

The QEEG testing performed by Dr. Apte showed much more severe brain damage to the frontal and temporal lobes than was detected in neuropsychological testing. (RT 7060-7082, 7123-7127, 7713, 7773.) Because the temporal lobes control the most primitive emotions, including fear and rage, persons with damage to the temporal lobes can experience problems controlling these emotions. In addition, temporal lobe damage may cause impairment to memory indexing; the subject may not be able to keep a chain of events in sequential order in his memory. (RT 7064-7065.)

There is also a correlation between damage to the frontal lobe and seizures. During QEEG testing, Dr. Apte found evidence of seizure diathesis, i.e., electrical evidence of a vulnerability to seizures. (RT 7067-7072, 7731.)

From QEEG testing, Dr. Apte concluded that Roy was suffering from moderate to severe frontal and temporal lobe damage with impaired functioning, and trauma was the likely cause. (RT 7093-7095, 7797.)

Dr. Apte also opined that Roy sometimes suffers from complex partial seizures. Such seizures can be triggered by sleep deprivation, flickering lights, over-excitation of the brain, or rage coupled with hyperventilation. (RT 7096-7102.) During such seizures, a person may perform normal acts, including hitting, choking, throwing, or pushing someone, but have no memory, because the part of the brain that records and stores events is having the seizure. (RT 7102-7108, 7778.)

Complex partial seizures are completely unpredictable. One may experience multiple seizures in a year, and then not experience another seizure for many years. (RT 7105-7106.)

A person who suffers a complex partial seizure may suffer from anterograde or retrograde amnesia for periods before and after the seizure. If a person awakens in the morning with a "funny feeling" but no memory of what has occurred, this is consistent with having a "postictal"[12] lapse of memory.

During a complex partial seizure, a person cannot engage in premeditation or planning activity. Nor can a person engage in reasoning, or consider the consequences of his or her conduct. A person having a seizure does not have "knowledge." Conduct during a seizure is generally sudden, precipitous, provoked, or automatic. (RT 7102-7103, 7783-7784.)

Psychologist Paul S.D. Berg conducted a comprehensive evaluation of Roy, which included, without limitation, clinical interviews, psychological neuropsychological and neurological test results, and a review of Roy's social history, including records from his commitments to LAC-USC and Camarillo State Hospital. (RT 6353-6387.) Dr. Berg immediately suspected neurological damage. (RT 6375.)

Among other observations, Dr. Berg noted that Roy had been

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[12] Postictal means "after the seizure." (RT 7111.)

committed to Camarillo, a hospital for extremely disturbed people. Roy's commitment period of six months was doubled, meaning the doctors must have concluded he was twice as sick as they initially thought. At Camarillo, in a highly structured environment, on medication, Roy still had trouble controlling himself. Roy was housed in Unit 59, a heavily monitored, semi-isolated section used to segregate people who do not interact well with others. At Camarillo, there was no attempt to diagnose Roy's problems using neurological or neuropsychological testing. Consequently, Roy was mentally ill when he entered Camarillo State Hospital, and he was still mentally ill when discharged. (RT 6388-6407.)

Roy was prescribed Chlorpromazine and Thorazine, which are contraindicated for seizures because they make it easier for a seizure to occur. (RT 7278, 7118.)

According to Dr. Berg, Roy suffers from a mental disorder -- OPS -- which interfered with his ability to form intent, and which had a significant impact on his mental processes on the night of January 26, 1991. (RT 5458, 6456.) At time of the crimes he was suffering from a brain damage-induced rage reaction. He was explosive, impulsive, and out of control. (RT 6447-6449, 7301.) In addition, Roy was very likely experiencing a seizure, and lost consciousness while he was beating Angie (RT 6456, 7529-7530, 7628.) There was no thinking, considering, or judging, just action and explosion. (RT 6458.)

Roy's memory problems, his prior patterns of bizarre explosive behavior with women, results of psychological, neuropsychological and neurological testing, including MMPI testing conducted by the District Attorney's expert, Dr. Michael J. Thackrey, are consistent with diagnoses of both OPS and personality disorder NOS [not otherwise specified]. (RT 7275-7664.)

Roy's experts found no indication that Roy was malingering or trying to fake his illness. (RT 6325 [Dr. McKinzey]; 6372, 6467-6468 [Dr. Berg].)

The District Attorney's Rebuttal

The Testimony of Medical and Mental Health Experts

The District Attorney presented the testimony of a number of medical and mental health experts who disputed the opinions and conclusions of Roy's experts.

Dr. Douglas Goodin, and Dr. Harvey Edmonds, neurologists, disagreed with Dr. Apte's interpretation of the results of Roy's EEG and QEEG testing. Dr. Goodin characterized the QEEG results as "normal" and saw no indications in brainmapping that Roy suffered from epilepsy or seizures. (RT 7882-7947, 8454-8455.) Dr. Goodin and Dr. Edmonds concluded that artifacts on the Dr. Apte's strip charts were caused by eye and muscle movements, not brain dysfunction or epileptic activity. (RT 7901-7913, 7953, 8454-8481 [Dr. Goodin], 8110-8118 [Dr. Edmonds].)

Dr. Goodin and Dr. Edmonds testified that QEEG testing was not commonly accepted as a reliable instrument for clinical diagnosis, to distinguish between normal and abnormal brains. Furthermore, both doctors opined that Roy could not have been experiencing an epileptic seizure, and still performed all of the goal-directed behaviors involved in his crimes. (RT 7914-7953 [Dr. Goodin]; 8105-8106, 8120 [Dr. Edmonds].)

Neuropsychologist, Bradley A. Schuyler , and neurologist, Harvey Edmonds, each disputed defense experts' opinion that Roy suffered serious brain damage when he was struck in the head by a baseball bat. (RT 7962-7975 [Dr. Schuyler], 8108-8109 [Dr. Edmonds].) Dr. Schuyler opined that, at most, only mild dysfunction would likely result from such an injury.

Psychologist, Michael J. Thackrey, and psychiatrist James R. Missett, as well as Dr. Schuyler, questioned defense experts' opinions that Roy was suffering from a rage reaction produced by OPS at the time of his crimes.

According to these doctors, people who suffer from OPS do not necessarily suffer from amnesia during rage reactions. These doctors opined that Roy could not have been suffering from a rage reaction, because rage reactions associated with OPS last only a brief time, unless the subject is continuously provoked. Roy was not significantly provoked after he attacked Angie and left the Lost Lake Park bathroom. (RT 7976-7991 [Dr. Schuyler], 8209-8222 [Dr. Thackrey], 8285-8289 [Dr. Missett].)

The District Attorney's experts disputed defense experts' opinions that Roy was likely suffering from a protracted, complex partial seizure at the time of his crimes. (RT 8033-9041[Dr. Schuyler], 8094-8107 [Dr. Edmonds], 8250-8256 [Dr. Thackrey], 8302-8307 [Dr. Missett].) Experts generally indicated that a temporal lobe seizure of the violent type would produce perpetual, violent, disoriented, noninteractive, non-goal directed behavior. A person coming out of a seizure would be too disoriented to perform behaviors like going in and out of a bathroom, tying up the victim, and cleaning up blood. Roy's behavior on the night of the crimes was not typical seizure or postictal behavior. (RT 8036 [Dr. Schuyler], 8106-8107 [Dr. Edmonds], 8250-8255 [Dr. Thackrey], 8302-8307, 8371 [Dr. Missett].)

Dr. Edmonds testified that a comprehensive world-wide study of incidents of aggression associated with psychomotor seizures found no documented incidents involving consecutive series of purposeful movements. (RT 8101-8103.)

Prosecution experts generally questioned the significance and reliability of the Luria-Nebraska tests administered by Roy's neuropsychologist, Dr. McKinzey to detect brain dysfunction. (RT 8119-8120 [Dr. Edmonds], 8208-8209 [Dr. Thackrey]. Using other assessment devices, Dr. Schuyler concluded that Roy did not suffer any significant deficits in cognitive abilities or reasoning, and showed no signs of neurological impairment. (RT 7993-

8020.) Dr. Thackrey and Dr. Missett found strong indications Roy suffered from anti-social personality disorder rather than OPS. (RT 8201-8206, 8241, 8256-8258 [Dr. Thackrey], 8293-8301 [Dr. Missett].)

Other Rebuttal Testimony

Several lay witnesses, including Donna Kellogg, Tina Edmonds, and Michael Hall, testified in rebuttal.

Donna Kellogg denied that Roy gave her any clothing to launder when he arose on the morning of January 27, 1991. (RT 8735.)

Michael Hall described an incident during the summer of 1989 or 1990, when Roy said he was going over to Laurie's house because she "wanted" him. Mr. Hall told Roy he was "crazy", pointing out that Laurie was only 14 years old, but Roy responded that he did not care. (RT 8849-8852.)

Neither Ms. Edmonds, Ms. Kellogg, or Mr. Hall had ever seen Roy behave violently or aggressively when provoked. (RT 8736-8740 [Kellogg]; 8783-8785, 8817 [Edmonds]; 8839-8841 [Hall].) Furthermore, during the time Roy lived with Ms. Kellogg and her sister, he never mentioned suffering from seizures or memory lapses, or revealed that he was taking medication for seizures. (RT 8749-8750 [Kellogg]; 8782-8783 [Edmonds].)

Ms. Kellogg and Ms. Edmonds expressed a lack of awareness that Roy had suffered any injury that prevented him from playing football. (RT 8746-8748 [Kellogg]; 8778-8780, 8832 [Edmonds]. Mr. Hall knew Roy had suffered an injury, but testified that Roy regularly played basketball, and was healthy enough to attend the Raider's annual "walk on" tryout in the winter of 1990, had he wanted to do so. (RT 8847-8848.)

Ms. Edmonds saw no sign that Roy suffered significant grief following the death his younger brother, Ezra. Mr. Hall testified that Roy was initially upset, but seemed back to normal three weeks after Ezra's death. (RT 8821-8823 [Edmonds]; 8843-8845 [Hall].)

To support the testimony of the state's experts that Roy suffered from antisocial personality disorder, rebuttal witnesses also testified generally that Roy usually slept late, fished, bowled, and played basketball, and exhibited no interest in seeking employment. (RT 8776-8777 [Edmonds]; 8834-8838, 8846-8847 [Hall].)

Defense Rebuttal Testimony

Dr. Paul Berg testified, to critique the findings and conclusions of the state's medical and mental health experts. (RT 8989-9025.)

Dr. Berg testified that amnesia was not one of the listed criteria for organic personality syndrome. He indicated, however, that the literature documents cases of persons with organic personality disorder who suffer from amnesia. He indicated that Dr. Missett was apparently not aware of those cases. (RT 8990-8992.)

Dr. Berg discredited Dr. Missett's assumption that Angie was a more reliable witness than Royal Clark. Dr. Berg noted that Dr. Missett had not read Angie's preliminary hearing testimony. Had Dr. Missett done so, he would have known that at the preliminary hearing, Angie had denied having any memory of events after Roy stopped the car and looked in the trunk. Yet at the trial, she was able to remember significantly more. Dr. Berg opined that Angie was not a dispassionate witness, that her memory had likely been affected by her beliefs about what went on, and that her testimony was therefore no more reliable than Roy's testimony. (RT 8993-8994.)

In rebuttal, Dr. Berg also disputed the opinions of prosecution experts that a blow with a baseball bat could not have caused a severe head trauma. According to Dr. Berg, even a mild head trauma could cause significant effects. (RT 8995.)

Dr. Berg disputed testimony by the state's experts regarding the absence of irritants sufficient to provoke Roy's outburst of violence.

According to Dr. Berg, the very definition of rage reaction is that the reaction is out of proportion to the stimulus. Roy's extreme reaction to teasing by Angie and Laurie was completely consistent with his history of doing extraordinarily wild and bizarre things in response to teasing. (RT 8995-8997.)

Dr. Berg disputed the assertion that a seizure could not last more a brief period, no more than a minute. According to Dr. Berg, postictal confusion can last for many hours; the literature documents clinical cases in which people have had seizures and behaved in strange and inexplicable ways after the actual seizure itself ends. (RT 8997.)

Dr. Berg minimized the significance of testimony that Donna Kellogg and Tina Edmonds could call Roy disparaging names, or yell at him, and he would not flare up. According to Dr. Berg, Roy did not have frequent seizures, and he did not have violent outbursts with any predictable degree of frequency. (RT 9003-9004.) Dr. Berg described another similar case of "catathymic" homicide, in which a 27-year-old man with a history of violent outbursts and family instability had been doing some repairs and cleaning up for a woman and suddenly took a shotgun and killed her. (RT 9008.)

Dr. Berg testified that Dr. Missett, though a fine psychiatrist, had come into this case at a disadvantage because he did not have an opportunity to talk to Roy, and had reviewed only part of the testimony of Angie and Roy, and LAC-USC records. (RT 9015.) Dr. Berg had the advantage of seeing Roy three times, and spending between 10 and 12 hours with him, compared with Dr. Thackrey, who examined Roy for two or two-and-a-half hours, including MMPI testing, and Dr. Schuyler, who saw Roy for an hour to an hour-and-a-half. (RT 9015-9016.) Dr. Berg opined that Dr. Schuyler, Dr. Thackrey and Dr. Missett had only had "glimpes" into the case, and they had not done the same amount of work as he had. (RT 9020-9021.)

STATEMENT OF FACTS - INSANITY TRIAL

Roy's Evidence of Insanity

Dr. Paul Berg was Roy's sole witness at the trial of his not guilty by reason of insanity plea. (RT 9523, et seq.)

Based on clinical interviews, Roy's history, including hospital records, and testing performed by Dr. McKinzey and Dr. Apte, Dr. Berg was of the opinion that Roy was legally sane up to the time when he attacked Angie, and suffered a memory blackout. At this point, he crossed the line and qualified as legally insane; he did not appreciate the nature and quality of his acts and was unable to distinguish right from wrong. (RT 9523-9529, 9551.)

When Roy killed Laurie, and attempted to kill Angie, he was unconscious, and he did not appreciate the nature and quality of his acts and could not distinguish right from wrong. (RT 9550-9555, 9562.) Even if Roy were conscious, his rage reaction was so enormous that he could not have known and appreciated what he was doing, or the difference between right and wrong. (RT 9575.) Roy's brain damage caused the rage reaction which produced an epileptic seizure. (RT 9548.)

Roy's sanity had returned by the time he arrived home. (RT 9551.)

The District Attorney's Evidence of Sanity

Psychiatrist James Missett and psychologist Mark Brooks testified for the prosecution, and disputed Dr. Berg's opinion that Roy was legally insane at the time of the offenses.

Both experts found no indication that Roy was legally insane at the time of the crimes. Both found a lack of evidence that Roy was suffering from a mental disease or disorder, or that he was psychotic, or unconscious at the time of his offenses. In the opinion of Dr. Missett and Dr. Brooks, during the crimes, Roy was aware of the nature and illegality of his actions, and the possible consequences. (RT 9643-9658 [Dr. Missett], 9729-9736, 9770-9771

[Dr. Brooks].)

The jury reached verdicts finding Roy sane at the time he committed all offenses against both victims. (RT 9947-9960.)

STATEMENT OF FACTS - PENALTY TRIAL

The Prosecution's Evidence

1980 Texas Aggravated Robbery

On November 25, 1980, at 4 a.m. Earl Bradley was working as a railroad conductor for the Southern Pacific Railroad, making rounds as the train traveled between Obi and Uvalde, Texas. He went through the lounge car and saw a single, elderly gentleman there. Fifteen minutes later, Bradley returned to the lounge car and found the same man slumped in his chair with his throat slit. (RT 10980-10996.) The man said, "A black man cut my throat and took my wallet." (RT 11015.) There were a total of four Black men on the train at that time, including employees. (RT 11032.)

Bradley checked the commode in the lounge car, found it empty and locked it. In the next car, Bradley found the commode locked. The brakeman used his key to unlock the bathroom, and a young Black man, later identified as Roy, stepped out. (RT 11017-11042.) Roy had two spots that looked like blood on his shoes. (RT 11020.) No money was found on Roy, or in the restroom. (RT 11041-11041.)

Records establishing Roy's plea of guilty to aggravated robbery, and imposition of a five-year prison term were admitted in evidence. (RT 11095-11097; Exhibit 101; SCT #1, 1250-1260.)

1982 Prison Incident

Edward Manual Salazar, Jr. served a prison term in Texas for a rape he committed at age seventeen. While in prison in Brazoria, Texas, in 1982, he became acquainted with Roy, who was in the general prison population there. Salazar was in a work group, learning to fit cast iron fittings; Roy was instructing Salazar. Roy told Salazar to get a cup of cold water and pour it into a pot full of hot lead. Another inmate warned Salazar the lead might blow up in his face. Salazar became angry and threw the fittings and water aside and started to stand up. Roy struck him on the head with a ball peen hammer, knocking him to the ground and splitting the skin on his scalp. (RT 11110-11123.)[13]

A few days before this incident, Roy had cut in front of Salazar in the chow line. Salazar had his hand on a rail, and Roy knocked his hand off the rail and shoved him back. Roy said, "We'll deal with this later, mother fucker." (RT 1113-1115, 11134-11137.) This incident made Salazar angry. (RT 11135-11136.)

1985 California Robbery

On July 27, 1985, Manual Gutierrez was on his way home from a night club in Long Beach California, in his 1877 black Cadillac Seville. He felt tired and dizzy from drinking, and pulled of on a side street to rest. Guitierrez awoke and found a man poking an object that felt like a knife against his neck. A second man was in the back seat of the car. The men wrestled Guitierrez to the ground outside the car, got in the car and drove away, taking Gutierrez's wallet and a gold chain, which they yanked from his neck. (RT 11155-

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[13] Under cross-examination, Salazar was shown a copy of a disciplinary report which indicated that Salazar had approached Roy, who was laughing, and hit him first, starting the fight, but he denied that the report accurately described the incident. (RT 11128-11132; SCT #1, p. 1361; Defendant's Exhibit 263.)

11165.)

Gutierrez identified Roy as the man who had held something sharp against his neck. (RT 11169-11170.)

A Penal Code, § 959b prison packet was introduced into evidence, establishing Roy's conviction of robbery and sentence to two years in prison by the Los Angeles County Superior Court. (RT11189-11202; SCT #1, 1261-1265; People's Exhibit 103.)

The 1985 Assault on Carrie Parks

On February 25, 1985, Long Beach undercover detective Michael Dugan was dispatched to a Long Beach residence, where he contacted a 16-year-old female, Carrie Parks. Parks had a fat lip, a lump over her right eye and an abrasion to her arm. Dugan took a report and a complaint or warrant was issued for Roy. (RT 11228-11234.)[14]

The 1981 Assault on David Atwood

At the time of trial, David Atwood was serving a sentence in Texas prison for a 1991 conviction of the crime of unauthorized use of a vehicle. (RT 11237.)

In September of 1981, Atwood was serving a sentence in prison in Brazoria, Texas. Roy was also an inmate there. Atwood was sitting in his cell, rolling a cigarette, when Roy demanded one, calling Atwood, "White boy." When Atwood refused to give Roy a cigarette, Roy became verbally abusive and threatening. Later that day, when Atwood left his cell, Roy punched him and knocked him to the floor. A scuffle ensued between Roy and Atwood, which was broken up by jail security personnel. (RT 11238-11275.)

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[14] During his testimony, Roy talked about several incidents in which he scuffled with his girlfriend, Theresa, aka, Carrie Parks. (See RT 5777-5782, 6608-6622.)

The Defense Evidence

The Testimony of Psychologist Gretchen White

Gretchen White conducted an evaluation of Roy which included, without limitation, interviews with Roy, family members, former wives, acquaintances and friends. Roy's father, Bobby Clark, refused to speak with Dr. White or Roy's investigator. (RT 11314-11328.) However, Bobby Clark warned an investigative assistant that Roy's mother, Daisy Clark, could become violent – on one occasion she had picked up a butcher knife and stabbed him in the arm. (RT 11329-11331.)

Ms. White testified to the facts of Roy's life, leading up to his arrest for capital murder.

Roy was primarily raised in Los Angeles by his mother, Daisy. He lived in a ghetto surrounded by a frightening, violent, destructive subculture. Homicide statistics involving Black males were very high. Roy lived in one neighborhood from about age 3 to age 10. Afterward, the family moved to an even worse neighborhood, where Daisy was mugged getting of the bus on several occasions. (RT 11333-11335.)

Daisy was assaulted by a group of youths when Roy's sister, Kim, was in elementary school. Roy was constantly frightened. His sister was involved in the gangs. Roy's brother, Ezra, became involved with guns and drugs, possibly in connection with gangs. (RT 11336.)

Roy was pressured to join gangs, but instead joined the Explorer Scouts, learned to play the trombone, and joined the ROTC. (RT 11336-11337.)

From an early age, Roy would run away with Ezra, and sometimes with his older brother Larry. The three boys would go to the San Francisco Bay Area to the home of Shirley, the mother of Roy's younger siblings, Ricky and Richelle. Daisy Clark would come get the boys or send money to bring them

back home. When the boys were at Shirley's house, they behaved well. (RT 11339-11340.)

At home with Daisy, the children lived in poverty. Daisy worked full time to support five children, and the children were often left unattended. (RT 11340-11341.) Daisy was an ineffective parent. She was inappropriately harsh on some occasions, inappropriately indulgent on others. (RT 11342.) Daisy slapped and hit the children harshly, using electrical cords. (RT 11392.) She had a "Jeckyl and Hyde" personality. (RT 11396.) Sometimes, Daisy locked the children out of the house, leaving them exposed in a dangerous neighborhood while she was at work. (RT 11342.)

Roy started having hospital admissions for psychological problems by the age 13 or 14. Dr. White would have expected the treatment emphasis to be on family dynamics, but instead Roy's individual pathology was treated. (RT 11345-11346.)

Being raised in a destructive and dangerous environment by an ineffective parent who could not protect Roy had a profound effect on his psychological development, including his development of rage reactions, impulse control, and self-esteem. (RT 11347.)

Roy's brother Larry was about 18 months older. His sister Kim was about 13 months younger. Brother Ezra was several years younger, born in 1965. Roy was particularly close to Ezra. They ran away together and played basketball together. At one point, they shared an apartment. Ezra was more like the older brother in the relationship. (RT 11350-11351.)

Larry was a homosexual and transvestite, which Roy viewed as appalling. Larry was also of borderline intelligence, with significant learning problems. (RT 11351.) When Roy locked up his sister Kim and set the door on fire, one significant factor was Kim and her friend calling Roy a "faggot," which had special meaning because of Roy's brother. (RT 11352.)

In 1989, Ezra was shot wit a shotgun and died. Ezra's death profoundly affected Roy. In April of 1990, only 10 or 11 months later, Larry was stabbed to death. Both brothers had engaged in violent behavior themselves. Ezra had a shotgun in his possession and cocaine metabolites in his blood. Larry was dressed as a woman and had picked up a younger man and taken him to his house. When the man found out Larry was a man rather than a women, he tried to run away. Larry stabbed the man, and the man killed Larry.

Kim also was involved in gang activities. Considering Daisy's violent episodes, the violence in the family may not have been entirely coincidental. (RT 11366-11369.) Persons who view their environment as a dangerous place may overcompensate for feelings of helpless and fragility. (RT 11371.)

When Ezra died, Daisy Clark bought a double plot at the cemetery. Roy believed the second plot was for him, and he would be buried next to Ezra. When Larry died, Roy became enraged because he was afraid Daisy was going to bury Larry in the plot with Ezra. (RT 11369-11370.)

Roy was not a regular drug user. He experimented with drugs but he was frightened of losing control while intoxicated. (RT 11373-11374.)

Being teased was often the triggering event for Roy's violent acts. Roy had a poor sense of self-esteem, and an ineffective parent who left him at the mercy of his brothers and sisters. (RT 11376-11377.)

Roy also suffered from dissociative amnestic disorder, formerly called psychogenic amnesia. This disorder causes a person to forget or not be able to recall personal information after a traumatic or psychological event. (RT 11380-11381.)

During her evaluation, Dr. White reviewed hospital records for Daisy Clark. (RT 11385.) In January 1991, Daisy became disoriented and did not know where she was. Co-workers saw her in the bathroom, acting silly; Daisy

urinated in her hands. Paramedics were summoned. Daisy was suffering from retrograde amnesia. The diagnosis was a possible transient ischemic attack. (RT 11386-11387.) Daisy also had a tendency to faint, pass out or lose awareness of consciousness for periods when under stress. On Halloween in 1973, she fainted three times. (RT 11388.) When the children were young, Daisy pinned personal information on the childrens' clothing in case she could not respond. (RT 11390.) Daisy had many vehicle accidents, and seemed to make decisions which were not in her best interest. (RT 11391.)

Roy's father also observed Larry to suffer from a similar problem. He would get "spacey" and seem not to know what was happening. (RT 11389.)

Roy could have been a productive member of society had he been raised by his father. His twin siblings by Shirley and Bobby Clark, Ricky and Richelle, are doing well. Richelle is employed by an insurance company. She does not abuse substances and has never been arrested. (RT 11407.)

Ricky was a successful college football player. He is a Jehovah's Witness and works in a temporary position as a counselor. He has no substance abuse problems, no arrests and no problems. (RT 11408.)

In contrast, Kim, who was raised by Daisy, has been involved in substance abuse problems and criminal activity. She is a violent gang member and she is currently on probation for writing forged checks. (RT 11409.)

Ricky and Richelle were not raised in poverty like Roy and his siblings, and they did not live in a dangerous ghetto. Their father, Bobby Clark, did not live with them, but he had involvement with these children. (RT 11416-11417.) Roy wanted to be a part of his father's family, but his father did not want Ricky and Richelle associating with Roy, Larry, Kim and Ezra. (RT 11423-11424.)

Roy is immature, and associates with people younger than himself, partly due to his lack of fathering and poor self-esteem. His befriending of the

victims, Laurie and Angie, was consistent with this behavior. (RT 11424-11416.)

Dr. White acknowledged that Roy suffered from anti-social personality disorder, but she opined that the disorder impaired his functioning and had been shaped by genetic and environmental factors. (RT 11688-11728.)

When Dr. White first started meeting with Roy, he could not believe he had killed someone he loved as much as Laurie. He suffered from hallucinations of Laurie's voice, crying or sobbing. Roy's attorney, Barbara O'Neill, was concerned that Roy might be suicidal. (RT 11736-11737.)

The Testimony of Roy's Family Members

Testimony by family members generally described Roy's personal, mental health, and family history prior to the crimes, and underscored the very different lives experienced by Roy's half-siblings, Richelle, Ricky, Debbie and June Clark, who were not raised by Roy's natural mother, Daisy.[15]

Roy's sister, Richelle Clark, also testified that Roy's mother was suffering to the same extent as the victims' families. Richelle described an incident which had occurred the morning of her testimony, in which Daisy had talked to Roy on the telephone and become so hysterical that paramedics had to be summoned. (RT 11620-11622.)

Richelle identified photographs of Roy's three children with Donna Kellogg, Jewels, age two, Ezra, age four, and Roy, Jr., age five, and testified that it would be much harder for the children if Roy were executed. (RT

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[15] There was testimony by Richelle Lynn Clark, Roy's half-sister (RT 11593 et seq.), Shirley Mae Fomai, the mother of Roy's half-siblings (RT 11627 et seq.), Jesse Sampson, Roy's uncle (RT 11647 et seq.), Latelle Barton, Roy's aunt (RT 11668 et seq.), Tina Edmonds, the sister of Donna Kellogg (RT 11771), and Daisy Clark, Roy's mother (RT 11775, et seq.).

11624-11625; RT 4919.)[16]

Shirley Mae Fomai, the mother of Roy's half-siblings, described how Roy was neglected by his natural father. She also described an incident when she encountered Roy's mother, who tried to scratch her eyes out. (RT 11630-11643.)

Tina Edmonds, sister of Donna Kellogg, testified that she was opposed to the death penalty in all cases, including Roy's case. (RT 11771-11774.)

Roy's mother, Daisy, described her blackouts, and instances in which she had been beaten, raped, or threatened with shooting by Roy's father, Bobby Clark, often in the presence of the children. (RT 11775-11818.) She begged the jury not to kill her son and asked the jury to spare Roy's life for the sake of his young daughter, Danielle, who was present at in the courtroom. (RT 11813, 10977, 11757, 11784-11785, 11818.)

On November 29, 1994, the jury returned a verdict finding that the aggravating factors substantially outweighed the mitigating factors, and imposing a sentence of death. (CT 1518-1519, 1688; RT 12044-12046.)

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[16] Roy has a total of five children. He had three children by Donna Kellogg, including Roy Jr., Ezra and Jewels, who was born on February 22, 1991, shortly after Roy's arrest. (RT 5777.) Much earlier, in 1980, Roy had fathered a daughter, Erika, with a woman named Tina Beamon (RT 11326), and in 1983 or 1984, he fathered a daughter, Danielle, with a woman named Belinda Jones. (RT 9704-9705.) At the time of the trial, Roy's mother, Daisy, had custody of Danielle, who attended some of the trial proceedings. (RT 10977, 10978, 11326, 11391, 11757, 11784, 11818.)

ARGUMENTS

ARGUMENT SECTION 1

ARGUMENTS PERTAINING TO THE INSUFFICIENCY OF THE EVIDENCE

Prosecutors were determined to seek the death penalty for Roy. However, California's death penalty statute, even as amended to apply the death penalty to nearly any murder, did not provide for the death penalty in this case. The prosecutors bootstrapped the case into one in which they could seek death by charging multiple special circumstances clearly unsupported by the evidence. Unfortunately, in this highly inflammatory case involving a Black man and attacks upon two White teenage girls, the jury ignored the evidence and returned true findings of all special circumstance allegations. Careful analysis reveals that there was simply not sufficient evidence to support any of the three special circumstances charged and found true here.

I THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE ROBBERY CONVICTIONS (COUNTS 3 & 6)

According to the well-settled state and federal constitutional standards appellant is entitled to reversal of the robbery convictions if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. (Jackson v. Virginia (1979) 443 U.S. 307, 319, 324; People v. Marshall (1997) 15 Cal.4th 1, 34.) The supporting evidence must also inspire confidence and be of solid value. (Ibid.)

Robbery is defined by the Penal Code as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Appellant's jury was so instructed. (CT 992.) Consistent with California law, the jury also received instructions listing the elements of

robbery, including: (1) that the victim had possession of property of some value, however slight; (2) that the property was taken from the victim's person, or from her immediate presence; (3) that the property was taken against the will of the victim; (4) that the taking was accomplished by force, violence, fear or intimidation; and (5) that the property was taken with the specific intent to deprive the victim of property, which specific intent must occur before or during the application of force or fear. (People v. Marshall, supra, 15 Cal.3d at p. 34.)

There was insufficient evidence introduced to support the conviction of robbery of either victim. (See Counts 3 & 6; CT 805, 807.) To begin with, the teenage victims possessed little money -- hardly enough to furnish a motive for robbery. Angie had ten dollars on her person; Laurie had only seven dollars. (RT 3540, 3583.) The victims had even less money after they stopped at McDonald's for food. Angie spent $1.12 on a milk shake and french fries, putting $8.88 in change in her pocket. (RT 4977.) Laurie rebuffed Roy's request to buy him some food, bought herself french fries only and pocketed her meager change. (RT 4976.)

Roy had only slightly less money than the victims: five dollars in paper money and coins which he had obtained from Donna Kellogg. (RT 6744.) In addition, there was also no evidence that Roy had more money than this by time of his arrest. Roy had only eight cents on his person and no money in his wallet or car when he was taken into custody. (RT 5599-5600, 3920-3923.)

The robbery convictions are inconsistent with the evidence as a whole and the prosecutor's theory of the case. The state sought to show that Roy had an inappropriate sexual interest in Laurie which predated the crimes. According to the state's argument, Roy knew of the girls' movie plans and sought them out. With sexual motives in mind, he invited them to go cruising and took them to a remote park, where he tried to rape Laurie. When Angie

interfered, Roy beat and restrained her, then murdered Laurie and attempted to murder Angie to eliminate potential witnesses to his assaultive conduct. (RT 9051-9060.)

Despite the theoretical inconsistency, the deputy district attorney argued -- successfully -- that Roy was guilty of robbing Laurie because, in essence, the change from her pants pocket was missing and she had ended up dead. (RT 9063.) Robbery convictions cannot be sustained on such a theory. (People v. Marshall, supra, 15 Cal.4th at p. 34.)

There was no credible, solid evidence of a taking from Laurie, much less a taking by force or fear. When Laurie's body was discovered, she was still wearing her jewelry, a watch and five rings, dispelling the inference that she was killed for her property or money. (RT 3583, 3713.) Furthermore, even though a small amount of currency was missing, it is possible the money fell from her pocket during the struggle with Roy, as did an assortment of other items which included earrings and soda pop pull tabs. (RT 5019.)

It is also possible, although there is no evidence to suggest it, that Roy took the victim's few dollars and change as an afterthought to the killing. However, if Roy's intent arose after the use of force against Laurie, the taking at most would constitute a theft, not robbery. (People v. Green (1980) 27 Cal.3d 1, 52; People v. Marshall, supra, 15 Cal.4th at p. 34; see also People v. Kelly (1992) 1 Cal.4th 495, 530-531.)

At some point during the drive, Angie noticed that Laurie's purse still lay in the back seat of Roy's car. (RT 5135.) However, the evidence as a whole suggests the purse was left in the car by Laurie when she exited to enter the Lost Lake restroom. The evidence does not give rise to an inference that force was exerted to obtain the purse, or that the contents of the purse furnished a motive for the killing. (People v. Marshall, supra, 15 Cal.4th at p. 34.)

In the case of Angie, there was a "taking," but not by force or fear, and not with the requisite specific intent. Roy took some money from Angie's person, but he did so *by invitation* during a stop at a pay telephone. Angie testified that Roy expressed the desire to call Laurie's mother, but stated he did not have money to do so. Angie, whose hands were tied, volunteered that she had some change in her pocket. She had a strong motivation to want to assist Roy in making a phone call to Laurie's parents. Roy removed the money from Angie's pocket and took the coins with him to the pay phone, leaving the paper money in his car. He started dialing but hung up without completing the call and continued driving. (RT 5087-5088.)

The prosecutor argued that a robbery had been committed on the theory that Angie had offered her money to Roy as a direct product of the force and fear which had been applied earlier. (RT 9076.) He suggested that Angie had made the offer of her change "in the hopes that somehow, some way she'd be discovered or someone would find out what's going on . . ." once Roy made a phone call. (RT 9077.) The record does indeed support the inference that Angie offered Roy money in the hope that a phone call to Laurie's mother might bring about the end of her ordeal.

However, a victim's offer of money to secure release from unlawful imprisonment does not convert the conduct to a robbery. To constitute robbery, the wrongful intent and the act of force and fear "'must concur in the sense that the act must be motivated by the intent.'" (People v. Marshall, supra, at p. 34; quoting People v. Green (1980) 27 Cal.3d 1, 53.) Roy did not beat Angie or bind her with the concurrent intent of taking anything of value. (Compare, People v. McPeters (1992) 2 Cal.4th 1148, 1183.) Accordingly, no robbery was committed when Roy accepted Angie's offer of money to place a phone call to Laurie's mother.

Accordingly, neither conviction of robbery is supported by evidence

sufficient to pass constitutional muster. (People v. Marshall, supra, 15 Cal.3d at p. 35.)

II THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO PROVE THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING.

The same constitutionally-based standard of review applies when an appellate court considers the sufficiency of evidence to support a special circumstance finding as applies when evaluating the sufficiency of evidence to support the robbery conviction itself. (Turner v. Calderon (9th Cir. 2002) 281 F.3d 851, 882; Lewis v. Jeffers (1990) 497 U.S. 764, 781-782.)

A robbery-murder special circumstance finding may only be found true if the murder was committed while the defendant was engaged in the commission of a robbery. (People v. Marshall, supra, 15 Cal.4th at p. 41.) Because the evidence is insufficient to prove that Roy killed Laurie during the commission of a robbery, this special circumstance finding (see CT 804) must be reversed.

Reversal would be necessary, moreover, even if there were *sufficient* evidence to prove a robbery against Laurie or Angie. A special circumstance of robbery-murder is not established by a mere taking committed in the course of a murder. (People v. Fields (1983) 35 Cal.3d 329, 365, fn. 15.) The murder must itself be committed during the commission of a robbery. (People v. Marshall, supra, 15 Cal.4th at p. 41.) Furthermore, the robbery must not be "merely incidental to the commission of the murder." (People v. Green, supra, 27 Cal.3d at p. 61; People v. Thompson (1980) 27 Cal.3d 303, 323.) The accused's primary goal must be to steal, not to kill.[17] If the intent to rob

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[17] In this case, the jury was given instructions on robbery-murder and attempted rape-murder which included: "To find the special circumstances, referred to in these instructions as murder in the commission of attempted rape or in the commission of robbery is true, it must be proved that [¶] 1. The murder was committed while the defendant was engaged in the attempted commission of rape of Laurie [F.] or while the defendant was engaged in the commission of a robbery of Laurie [F.]. [¶] 2. The murder was committed in

is formed after or during the course of the killing, the robbery will not support the finding of a special circumstance for the application of the death penalty. (Phillips v. Woodford (9th Cir. 2001) 267 F.3d 966, 983.)

Furthermore, in Williams v. Calderon (9th Cir. 1995) 52 F.3d 1465, 1476, the federal circuit court held that the independent felonious purpose element is "not mere state law nicety" but is an essential element of the charge without which the felony-murder special circumstance "would run afoul of the [Eighth Amendment] . . . ." (Accord: People v. Green, supra, 27 Cal.3d at pp. 59-63.)

In this case, the prosecutor's theory was that Roy intended to rape Laurie, and later formed the intent to kill her. Any taking of property from Laurie was purely incidental to the killing, and therefore as a matter of federal constitutional law, cannot be relied upon to support a robbery-murder special circumstance finding. (People v. Marshall, supra, 15 Cal.4th at p. 41; compare: People v. Garrison (1989) 47 Cal.3d 746, 791.) The special-circumstance finding must therefore be reversed.

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order to carry out or advance the commission of the crime of attempted rape or the robbery or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted rape or robbery was merely incidental to the commission of the murder." (CT 974.)

III THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE CONVICTION OF ATTEMPTED RAPE (COUNT 2).

The standard of review governing the sufficiency of evidence to support a conviction has already been set forth in Argument I, ante, and need not be reiterated here. (Jackson v. Virginia, supra, 443 U.S. at p. 319; People v. Marshall, supra, 15 Cal.4th at p. 34.)

Roy was convicted of the attempted forcible rape of Laurie (CT 339-343; Count II.) Forcible rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against the person's will by means of force or violence. (Pen. Code, § 261, subd. (a)(2); People v. Marshall, supra, 15 Cal.4th at p. 36.) An attempt to commit a crime occurs when the perpetrator, with specific intent to commit the crime, performs a direct but ineffectual act towards its commission. (Pen. Code, § 21a; People v. Dillon (1983) 34 Cal.3d 441, 452-453; People v. Marshall, supra.

A triad of cases oft-cited by this Court illustrate why Roy's conviction of an attempted rape of Laurie cannot be sustained.

In a venerable but still followed case, People v. Craig (1957) 49 Cal.2d 313, this Court reviewed a first degree murder conviction prosecuted on theories of first degree premeditated murder, and felony-murder on a theory that the murder had been committed during a rape or rape attempt.

In Craig, several days before the murder, the defendant made statements to someone indicating he wished he were married because he "'would like to have a little loving.'" (People v. Craig, supra, 49 Cal.3d at p. 315.) The evening before the victim's body was found, the defendant went to a bar and asked a woman to dance with him. The woman's refusal elicited a torrent of abusive language from the defendant, who threatened that she "would find herself picking herself up off the sidewalk." (Ibid.) Later, in the

early morning hours, the defendant was seen leaving the area of the bar with the victim. (Id. at p. 316.)

The body of the victim was found abandoned in a service station where it had apparently been dragged 20-25 feet. The victim was clad in a raincoat over a nightgown or slip and panties. The raincoat had been ripped open. The nightgown and panties had been torn open so that the front part of the body was exposed. The victim was lying on her back with her legs slightly apart. She had suffered multiple contusions and lacerations of the face, both breasts, and the area around her breasts as well as other injuries suggesting she had been dragged across the asphalt. (Id. at p. 316.)

The victim in Craig could have died of injuries to the brain, lungs or liver, but death was probably caused by strangulation. (People v. Craig, supra, 49 Cal.2d at p. 316.)

After the killing, the defendant's hands were swollen and bloody, but there were no blood smears on the fly, back or top of the defendant's shorts or levis. There was no evidence of a sexual attack on the body of the decedent. No evidence of spermatazoa was found on either the clothing of the decedent or the defendant. (People v. Craig, supra, 49 Cal.2d at p. 317.)

On these facts, this Court held that there was insufficient evidence to prove the defendant guilt of first degree murder on a theory of rape or attempted rape-murder. The Court rejected the state's argument that the torn clothing, the position of the victim's legs, the defendant's abusive conduct toward the woman who would not dance with him, and statements about wanting some "loving", were sufficient to show that he raped or attempted to rape the victim. (People v. Craig, supra, 49 Cal.2d at p. 318.) The Court noted that the torn clothing and position of the victim's legs lost any significance in light of evidence the body had been dragged 20 to 25 feet. Moreover, the Court found that the defendant's obnoxious behavior in the bar,

and statements about his need for a "little loving" amounted to nothing more than an expression of desire for feminine companionship. (People v. Craig, supra, at p. 319.)

In the second case, People v. Granados (1957) 49 Cal.2d 490, this Court considered the sufficiency of evidence to support a conviction of first degree felony-murder based on the theory that the defendant had murdered his 13 year-old step-daughter during the perpetration or attempted perpetration of a violation of Pen. Code, § 288, the commission of a lewd and lascivious act upon a child under 14 years of age. (Id. at p. 496.) In Granados, there was evidence that the defendant had asked the decedent prior to the time of the killing whether she was a virgin. When the victim was found, she was lying on her bedroom floor. Her skirt was pulled up, exposing her private parts, and there were blood stains on the walls, floor, and head. A machete covered with blood was found lying in a corner of the living room behind the heater. There were no lacerations or contusions on the victim's private parts, and a microscopic examination disclosed no spermatozoa. (People v. Granados, supra, at p. 497.)

This Court held that the evidence was insufficient as a matter of law to prove that the defendant had violated or attempted to violate Pen. Code, § 288. Hence, the first degree murder conviction could not be affirmed on a theory of felony-murder.

In the last case of the three, People v. Anderson (1968) 70 Cal.2d 15, as in Granados, this Court again considered the sufficiency of evidence to support a first degree murder conviction on theories of premeditation, and a murder committed during an attempt to violate Pen. Code, § 288. The defendant, a cab driver, was living with a woman and her three children, including the 10-year-old victim. The victim was left home alone with the defendant. Later, the nude body of the victim was found on the floor near her

bed, hidden under some boxes. Her torn and bloodstained dress had been ripped from her, and her clothes, including her panties out of which the crotch had been ripped, were found in various rooms of the house. The defendant's blood-spotted shorts were found on a chair in the living room, and a knife and defendant's socks, with blood encrusted on the soles, in the master bedroom. (Id. at p. 21.)

The victim had suffered post-mortem rectal and vaginal wounds. (Id. at p. 24.) This Court found the evidence insufficient to support a conviction of first degree murder on the theory that the murder had been committed during the perpetration or attempted perpetration of an act punishable under Pen. Code, § 288. The prosecution's argument – that the lacerations, the clothing of the victim, the absence of blood on anything except the defendant's socks and undershorts was sufficient to support the inference that the defendant was nearly nude and ripped off the victim's clothing to commit a lewd act, and to satisfy his sexual desires – was rejected. (People v. Anderson, supra, 70 Cal.2d at p. 34-35.)

In Roy's case, forensic evidence that a rape or attempted rape had occurred was entirely lacking. The victim died of strangulation, and there was no physical evidence consistent with sexual assault observed on the victim's body, including the internal and external genitalia. (RT 5394.) The deceased victim still had a sanitary napkin strapped inside her panties. (RT 3759.)

The victims themselves were the likely source of blood stains observed on the victim's outer clothing and bra. (RT 4530-4535; 4604-4612, 4627-4640, 4744-4745.) Items of clothing seized from the dirty laundry in the trunk of Roy's car were positive for blood consistent with Angie, but inconsistent with Laurie's blood type.

There was expert testimony that a pair of white boxer shorts, worn by Roy at the time of his *arrest*, was positive for the presence of semen. (RT

5545-5547.) Expert opinion testimony was also introduced that the stain was the result of ejaculation produced by sexual arousal. (RT 5543.) The expert witness could not, however, rule out the possibility that ejaculation had been produced by masturbation. (RT 5543.) Furthermore, there was no testimony regarding when the stain might have been made, and it was not possible to determine through serological analysis the age of the stain, or even whether it had been produced by Roy. (RT 5547-5549.) Furthermore, Roy testified that he was *not* wearing the same dirty white boxer shorts tested by the serologist at the time of the crimes. (RT 5907-5913, 6860-6861.)

Given inconclusive forensic evidence of a sexual assault or even an attempt, the prosecution in this case was forced to rely on circumstantial evidence of the same type which was found insufficient to establish either completed or attempted sexual assaults on the victims in the Granados, Craig, and Anderson cases. For example, from evidence that Roy had not had sex with his live-in girlfriend for two weeks, the jury was expected to draw the inference that Roy wanted or needed sexual gratification. There was also testimony that Roy had previously demonstrated a sexual interest in Laurie or her sister, Angelique, by commenting on their clothing, and asking questions about their prior sexual experiences, or by picking Laurie up from school. (RT 3613-3614.)

The condition of Laurie's clothing was also used to infer that a sexual assault had occurred. Her shirt was partially disturbed, and the bra underneath was pushed up over the breasts. (RT 3711-3719, 3739.) However, there was evidence of scuffle, and Laurie's body was found in the roadway far from the restroom in which the original attack occurred. Sand, paint transfer and pine needles were found on her clothing, suggesting she had been dragged. Hence, as in Craig, the condition of her clothing had little probative value to prove an attempted rape.

Angie's testimony establishes little more than Roy's sexual interest in the girls and violent assaults. In the case of Angie, the only evidence of sexual interest was the verbal invitation to have sex that was declined. Overall, as in the Granados, Craig and Anderson cases, the evidence still falls short of proving an essential element of an attempted rape – an act by Roy directed at forcing Laurie to engage in an act of *sexual intercourse* against her will.

According to Angie, Laurie entered the restroom at Roy's request to bring him toilet paper, and while she was inside Roy did something unseen which caused Laurie to scream out. A scuffle ensued inside the pitch-dark restroom, and Laurie ended up unconscious, face down on the restroom floor with her belongings scattered across the floor. (RT 4995-5011.) When Angie entered the restroom and tried to drag Laurie out by her feet, she was knocked down and choked, and then restrained with ropes. (RT 5006-5030.) At this point, Roy attempted to kiss Laurie, who had regained consciousness, but she resisted, telling him she was menstruating. (RT 5031.) Roy immediately desisted after confirming that this was the truth. Subsequently, after Roy left the restroom with Laurie, Angie heard Laurie scream, "Roy don't. Leave me alone." Then she heard scuffling. (RT 5037-5040.) She never saw Laurie again.

Roy then made sexual overtures toward *Angie*. He put her in his car and asked her if she would have sex with him. She said no, she was waiting for someone special. Roy again desisted; he started the car without attempting to engage in any forced sexual activity. (RT 5081-5085.)

More recent cases make it clear that Granados, Craig and Anderson cases are still good law. (People v. Johnson (1993) 6 Cal.4th 1, 41 [hereafter, Johnson].) These decades-old cases are not merely rooted in different attitudes toward women and rape in earlier times. This is most vividly

illustrated by this Court's decision in People v. Johnson, supra, which relies on Granados, Craig and Anderson to hold that circumstantial evidence indicating some sort of sexual motive or activity is not enough to sustain a conviction for murder in the course of an attempted rape, nonconsensual sexual intercourse by force or fear. In Johnson, the defendant admitted having sex with one victim, Castro, and made the damaging admission to police that "'rape is hard to prove because it [the inquiry] is if she gave up the pussy or didn't she.'" (Johnson, supra, 6 Cal.4th at p. 39.) There was some physical evidence that the second victim, Holmes, may have been sexually assaulted in the course of her murder. She was wearing a sweatshirt and bra, and nothing from the waist down. A pair of pantyhose was found on the floor of the bedroom, and Holmes had been severely beaten. Yet there was no evidence introduced to indicate any sexual trauma, seminal traces, or other evidence of penetration, forced or otherwise. An attempted-rape felony-murder instruction was given.

This Court discussed, compared and contrasted the facts presented in Johnson with the facts presented in Anderson and Craig, but ultimately concluded the cases "would appear to be controlling . . . ." (People v. Johnson, supra, 6 Cal.4th at p. 41.)

Another more recent capital case, People v. Raley (1992) 2 Cal.4th 870, is in accord. Raley is remarkably similar to this case, in that it involves the a murder and attempted murder of two young female victims, one of whom survived and testified.

In Raley, the charge was attempted oral copulation of the deceased victim as well as capital murder and attempted murder. Felony oral copulation is defined by Pen. Code, § 288a as "'the act of copulating the mouth of one person with the sexual organ . . . of another . . .' if "'the act is accomplished against the victim's will by means of force, violence, duress, menace or fear

of immediate and unlawful bodily injury . . . .'" (Id. at p. 890.) The language of Pen. Code, § 288a closely parallels the language of Pen. Code, § 261(a)(2), which defines forcible rape.

In Raley, the surviving victim – Laurie – testified that the defendant told her and the deceased victim -- Jeanine -- he would not let them out of the safe where he had confined them unless they took off their clothes. He said the two young victims would have to "'fool around'" with him for five minutes, then he would let them go.

According to Laurie's testimony, the defendant in Raley handcuffed both girls and took Jeanine away. Laurie heard a scream. Fifteen minutes later, the defendant returned with Jeanine, who appeared cold and frightened. Defendant's jacket was off and his pants were dusty.

Mr. Raley then took the surviving victim, Laurie, to another room, armed with a knife, and instructed her to kiss him. He directed her to unzip his pants and orally copulate him. She touched her mouth to his penis and gagged, upon which he forced her to manipulate his penis with her hands until he ejaculated. (People v. Raley, supra, 2 Cal.4th at p. 890.)

Just prior to her death, Jeanine made statements to her rescuers stating that she "did not want anyone to know she had been raped," explaining through tears that she "'hadn't really been raped. That he made them take off their clothes and fooled around with them.'" (Ibid.)

Reversing the conviction for an attempted forcible oral copulation against Jeanine, this Court stated:

> "There is clear and substantial evidence of a forcible sexual attack of some kind on Jeanine and of a forcible oral copulation on Laurie. However, there is no evidence of the particular nature of the sexual assault on Jeanine, apart from an inference that because defendant committed a forcible oral copulation against Laurie, he may have attempted to do the same thing against her companion. Respondent argues that defendant told the young women they would have to 'fool

around' with him, and that he committed an act of forcible oral copulation against Laurie. From this evidence respondent infers that to defendant, 'fool around' meant oral copulation. Finally, respondent would have us infer that when Jeanine told her rescuer defendant had made the women 'fool around' with him, the term must have meant the same to her as respondent would have us infer it meant to defendant."

"We find these layers of inference far too speculative to support the conviction of this count. Oral copulation was not the only sexual activity defendant had in mind with his second victim; 'fooling around' seemed to mean several things to him. It is also speculative to conclude that Jeanine would use the term in the same restricted sense respondent claims defendant intended to convey. 'A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . ... A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence"'"

(People v. Raley, supra, 2 Cal.4th at p. 890-891; citing People v. Morris (1988) 46 Cal.3d 1, 21.)

The parallels between Raley and this case are readily apparent. Here too, the testimony of the surviving victim, Angie, describes forcible sexual overtures directed toward Laurie, but nothing more. Roy attempted to kiss Laurie against her will; this much is true. Inside the restroom, outside Angie's view, Roy apparently used violent force against Laurie, but there is no evidence that force was applied to accomplish a sexual act of any sort, much less an act of sexual intercourse, rather than to kiss or caress her, or to engage in some other conduct.

Even assuming Roy wanted to have intercourse with Laurie, there is no evidence he tried to do so, and he was clearly deterred from pursuing this method of sexual gratification by discovery that she was menstruating. After that, there were no witnesses to the violence that occurred outside the

restroom. Consequently, the jury must have relied on "suspicion, imagination, speculation, supposition, surmise, conjecture and guess work" (People v. Raley, supra, 2 Cal.4th at p. 891) to arrive at the conclusion that Roy tried to have intercourse with Laurie, rather than that he pulled out a rope and began to strangle her.

The fact that Roy later asked the surviving victim to have "sex" with him, by asking "would you like to do it?" (RT 5085) does not, any more than it did in the Raley case, suffice to prove that intercourse was the activity Roy had in mind when he assaulted Laurie. (People v. Raley, supra, 2 Cal.4th at pp. 890-891.) Moreover, the fact that Roy – who had a long term intimate sexual relationship with Donna Kellogg – may have been sufficiently sexually aroused at an unknown time to ejaculate into a pair of undershorts does not have any tendency in reason to show that a forcible act of intercourse was attempted against Laurie on the night in question.

Accordingly, the evidence presented at Roy's trial does not meet federal constitutional standards of sufficiency to prove the crime of attempted rape. (Compare: People v. Hart (1999) 20 Cal.4th 546, 610.)

IV THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO PROVE THE ATTEMPTED RAPE-MURDER SPECIAL CIRCUMSTANCE FINDING.

Assuming the evidence is insufficient to support the conviction of attempted rape, the attempted rape felony-murder special circumstance finding must also be reversed on insufficiency grounds. If there was no attempted rape, it follows that Laurie was not killed while Roy was engaged in the commission of an attempted rape. (Cf. People v. Marshall, supra, 15 Cal.4th at p. 37.)

However, for identical reasons discussed in Argument I, A, above, even if the evidence as a whole is sufficient to prove that Roy used for or fear in an attempt to make Laurie engage in an act of intercourse against her will, it does not follow that the special-circumstance finding must be affirmed. The state had the burden of proving, beyond a reasonable doubt, that the murder itself was committed while Roy was "engaged in" in the course of an attempted rape. (People v. Guzman (1988) 45 Cal.3d 915, 951.)

There was insufficient evidence presented to establish the requisite concurrence of wrongful intent to have intercourse and the act of killing. (People v. Green, supra, 27 Cal.3d at p. 53; People v. Marshall, supra, 15 Cal.4th at p.34.) If there was any attempt to engage in an act of intercourse (a fact not conceded), it must have been in the bathroom, before Roy was informed that the victim was menstruating. After that, there is no evidence of any further attempt to have intercourse with Laurie. Hence, the murder may arguably have been committed while Roy was engaged in the commission of some other offense or attempted offense, but there is no credible evidence of solid value that it was committed while Roy still engaged in ineffectual acts which had the purpose of accomplishing an act of intercourse, or preventing Laurie from reporting the attempt. (Cf. People v. Guzman, supra, 45 Cal.3d

915, 952.)

Accordingly, the death judgment runs afoul of the Eighth Amendment to the extent the sentence is based upon the jury's finding of an attempted rape special circumstance finding. (Williams v. Calderon, supra, 52 F.3d at p. 1476; People v. Green, supra, 27 Cal.3d at pp. 59-63.)

V THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S FINDING THAT APPELLANT KILLED LAURIE TO PREVENT HER TESTIMONY IN A CRIMINAL PROCEEDING.

The jury found true as a special circumstance that Laurie "was a witness to a crime, prior to, and separate from the killing and that Laurie [F.] was intentionally killed for the purpose of preventing her from testifying in a criminal proceeding . . . ." (CT 804; Pen. Code, § 190.2(a)(10).) The evidence offered to support this finding fails to meet federal constitutional standards governing the sufficiency of evidence relied upon to impose the ultimate penalty of death. (Jackson v. Virginia, supra, 443 U.S. 307, 319; Lewis v. Jeffers, supra, 497 U.S. at pp. 781-782; Turner v. Calderon, supra, 281 F.3d at p. 882; Williams v. Calderon, supra, 52 F.3d 1465.)

Under California law, a witness-murder special circumstance finding must be reversed if the killing was committed "'during the commission, or attempted commission of the crime to which [the person killed] was a witness.'" (People v. Silva (1988) 45 Cal.3d 604, 631.) This rule has been consistently construed by this Court to prevent application of the witness-killing special circumstance to impose the death penalty when the murder was a part of the "same continuous criminal transaction" as the crime or crimes which were witnessed. (Ibid.; see also People v. Benson (1990) 52 Cal.3d 754, 785; People v. Beardslee (1991) 53 Cal.3d 68, 95.)

In Silva, for example, a series of crimes culminating in two murders was committed against male and female victims over a period of several days. The defendants hijacked the victims' car, shot the victims' dog, and with help from a cohort, chained the male victim to a tree by the neck and took his wallet, containing $200 in cash. Later, the male victim was shot, and his body was cut up in pieces and buried. (Ibid.)

Meanwhile, over a period of time in while held in captivity, the second victim, a female, was raped multiple times by several perpetrators and forced at gunpoint to commit an act of oral copulation upon another. Five days after the initial abduction, the female victim was finally taken to a remote location and shot in the head. (Id. at p. 616-618.)

In Silva, this Court reversed the witness-murder special circumstance finding based on the "continuous transaction" rule. (People v. Silva, supra, 45 Cal.3d at p. 631.) In so doing, the Court rejected the *identical* argument advanced by the prosecuting attorney in this case – that the crimes against one victim had been "witnessed" by the other murdered victim. (RT 9066-9069.)

> "Here, the Attorney General argues that Kevin 'witnessed' the robbery of Laura. But again, the robbery of Laura was part of the same continuous criminal transaction which included the kidnaping of Laura and Kevin and the robbery of Kevin. Lacking evidence that the murder was not simply part of the same continuous criminal transaction, we must set aside the witness-murder special circumstance finding."

(Silva at p. 631.)

People v. Benson, supra, 52 Cal.3d 754, is a similar case in point. In Benson, the defendant murdered a mother, and more than two days later, murdered her children. This Court likewise found that the murder of the mother and those of the children were "integral parts of a single continuous criminal transaction against the entire family." (Id. at p. 785.) The witness-killing special circumstance findings were held invalid on this basis. (Accord: People v. Beardslee, supra, 53 Cal.3d at pp. 81-83, 95.)

California legislators, in their quest to expand death penalty eligibility, acknowledged -- and bemoaned -- the fact that "[k]illing a crime victim at the time of the initial crime in order to prevent him or her from testifying was -- and is – not a special circumstance." (See, California Committee Analysis; Statenet; [Copyright 1998 by State Net (R)]; Assembly Committee on Public

Safety Analysis of Senate Bill No. 1878 [As Proposed to be Amended in Committee]; Date of Hearing; June 23, 1998.)

In Roy's case, the series of crimes committed against Laurie and Angie were even more a part of the "same continuous criminal transaction" than were the crimes committed against multiple victims in Silva and Benson, in which this Court held the witness-killing special circumstance did not apply. In Silva, multiple crimes were committed against the victims over a period of *five days*. In Roy's case, the crime spree lasted approximately *five hours* – from sometime after 9:00 p.m. in the evening until just after 2 a.m. the following morning. (RT 4985, 5137.)

Moreover, Laurie was no more a "witness" to the crimes committed against Angie than was one victim "witness" to the other's death in the Silva case. To the contrary, in this case the first person assaulted was the murder victim herself – Laurie. Laurie became a "witness" only in the sense that she saw Roy assault and tie up Angie, after Angie tried to intervene on Laurie's behalf. It would be difficult to imagine two more transactionally intertwined crimes than those relied upon to establish Laurie's status as a murdered "witness." This is the classic case in which the "continuous transaction" rule prevents reliance on a witness-killing special circumstance finding to impose the death penalty.

To hold otherwise would run afoul of the Eighth Amendment. Death penalty statutes must genuinely narrow the class of persons eligible for the death penalty. (Spaziano v. Florida (1984) 468 U.S. 447, 460; Zant v. Stephens (1983) 462 U.S. 862, 877.) If there were no "continuous transaction" rule, death-eligibility on a theory of witness-killing would automatically be triggered in any case where the murder victim, prior to death, observed criminal acts of any kind committed against another person. The potential class of death-eligible defendants would be so broad that juries and

prosecutors would have free rein to pursue their personal predilection to impose death, resulting in disparate treatment for equally culpable offenders. (Kolender v. Larsen (1983) 461 U.S. 352, 358; Smith v. Goguen (1974) 415 U.S. 566, 575.)

Furthermore, this is not what the Legislature intended. Rather, the intent of the Legislature is to comply with the mandate of Gregg v. Georgia (1976) 428 U.S. 153, and Furman v. Georgia (1972) 408 U.S. 238, to avoid unconstitutionally arbitrary imposition of the death penalty. (People v. Green, supra, 27 Cal.3d at p. 61.)

Accordingly, reversal of the witness-killing special circumstance finding is not only mandated according the laws of California; it is also compelled as a matter of constitutional necessity.

VI IF ANY SINGLE CONVICTION OR SPECIAL CIRCUMSTANCE FINDING IS REVERSED, THE DEATH JUDGMENT MUST BE REVERSED.

If any one of the special circumstance findings, or the underlying convictions of robbery and attempted rape are reversed, the death judgment must be reversed.

"The awesome severity of death makes it qualitatively different from all other sanctions." (Satterwhite v. Texas (1988) 486 U.S. 249, 262, citing Lockett v. Ohio (1978) 438 U.S. 586, 605 (plurality opinion).) For this reason, the United States Supreme Court "has emphasized the greater need for reliability in capital cases, and has required that 'capital proceedings be policed at all stages by an especially vigilant concern for the accuracy of factfinding.'" (Satterwhite at p. 263; citing Strickland v. Washington (1984) 466 U.S. 668, 704 [Brennan, J., concurring in part and dissenting in part].) This Court, too, has been mindful of the qualitative difference between the death penalty and any other sentence of imprisonment, however long, and the corresponding need for greater reliability in the determination that death is the appropriate punishment in a specific case." (People v. Horton (1995) 11 Cal.4th 1068, 1134.)

In this case, the jury was instructed, inter alia: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed." (CT 1614.) Instructions were also given in accordance with Pen. Code, § 190.3, that the jury "shall" take into account the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ." (Pen. Code, § 190.3(a).) The jury was also told: "In weighing the various circumstances you determine under the relevant

evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. . . To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 1651-1652.) Assuming as we must, that the jury followed the court's instructions (People v. Welch (1999) 20 Cal.4th 701, 773), Roy's convictions of other crimes, including robberies and an attempted-rape involving teenage victims, as well as the existence of three separate special circumstance findings, necessarily weighed in the jury's death determination.

The reliability of the death judgment would be severely undermined by allowing it to stand despite reversal of either robbery count, or the attempted-rape count, or one or more of the three special circumstance findings.

ARGUMENT SECTION 2

ARGUMENTS REGARDING THE BREAKDOWN OF THE ATTORNEY-CLIENT RELATIONSHIP, INTERRUPTIONS IN THE CONTINUITY OF COUNSEL; AND THE PUBLIC DEFENDER'S CONFLICTS OF INTEREST, CAUSING VIOLATION OF APPELLANT'S RIGHT TO EFFECTIVE COUNSEL, TO DUE PROCESS, TO CONFRONTATION AND CROSS-EXAMINATION, AND A RELIABLE DEATH JUDGMENT.

THE INTERRELATED FACTS

The Breakdown of the Attorney-Client Relationship With The Public Defenders

The guilt-phase trial commenced with selection of the jury on August 31, 1993. (CT 574-575; RT 107 et seq.) On September 29, 1993, while *voir dire* was still in progress, Roy twice made motions seeking discharge of deputy public defender Barbara O'Neill (O'Neill), and for substitution of counsel pursuant to People v. Marsden (1970) 2 Cal.3d 118 [hereafter referred to as a "Marsden motion"].

At a first *in camera* proceeding, outside the prosecutor's presence, Roy was given an opportunity to articulate the reasons for his dissatisfaction with lead counsel O'Neill. In relevant part, Roy revealed that he felt Ms. O'Neill was pressuring him to plead guilty in exchange for a sentence of life without the possibility of parole, even though he preferred to die rather than spend life in prison without parole. Roy lacked confidence that his attorneys were fighting for his best interests. (RT 2848-2863.) He was also afraid that the case was running into the Thanksgiving and Christmas holidays, and which would make the jurors upset. (RT 2849-2850.)

Roy complained of a lack of communication with counsel. He claimed he was unaware of what witnesses were going to be called in his defense at the guilt phase; he was only aware of witnesses for the penalty phase trial.

(RT 2848.) He was afraid counsel would not fight to prove that the special circumstance allegations were not true. (RT 2853.)

At the hearing, Ms. O'Neill confirmed that she was concerned about the case and had urged her client to offer to plead guilty for life without parole. (RT 2850-2851.) She also indicated that there were few guilt-phase witnesses because the defense guilt phase strategy was to prove Roy innocent of first degree premeditated murder, and to defeat the special circumstance allegations, not to convince a jury Roy was not there. (RT 2854.) O'Neill also revealed that she had been trying without success for two and a half years to convince Roy to testify, but he had absolutely refused. (RT 2855.) Roy agreed that this was true. (RT 2855.)

Ms. O'Neill opined that part of the communication problem was attributable to Roy's history of mental illness. She characterized Roy as "paranoid" and related to the Court that he had told some of the doctors who testified at the Pen. Code, § 1368 trial that she [O'Neill] was trying to poison him. (RT 2856.) When questioned by the Court, Roy admitted he had made such statements, at the time believing they were true. (RT 2856, 2859.) Ms. O'Neill assured the court that the defense team would do all it could for Roy. (RT 2857.)

The Court denied the motion for new counsel, and deferred a request by Roy to hire private counsel until such time as Roy indicated he had the money to do so. (RT 2863.)

At a second *in camera* hearing that same date, Roy was given another opportunity to voice reasons for his dissatisfaction with attorney O'Neill. (RT 3022-3043 [Sealed].)

Roy expressed concern that because Ms. O'Neill had daughters about the same age as the victims, she would not work hard to defend him. (RT 3032.) Ms. O'Neill denied this would affect her professional judgment. (RT

3031-3032.)

Roy again complained about the lack of communication with counsel. Ms. O'Neill asserted that she had visited Roy in jail approximately 70 times over a three year period, and had spent many hours communicating. (RT 3034.) On some occasions, she averred, they communicated well. On others, Roy felt paranoid, and believed counsel was working for the district attorney. (RT 3035.)

Roy also complained that his attorney was in disagreement with his plea of not guilty by reason of insanity. (RT 3022.) Ms. O'Neill agreed that this was the case, explaining that the numerous examining psychiatrists had not found Roy insane. (RT 3029-3030.) She said that of eight experts who had examined Roy so far, none had found him insane, and only one had found him incompetent to stand trial based upon his delusions about defense counsel. (RT 3030.) Ms. O'Neill was making further efforts to find an expert who could testify for Roy on the insanity issue. (RT 3030, 3033-3034.)

Roy claimed that Ms. O'Neill had made statements to the press, published in an article on September 1, 1993, referring to him as "sick" and causing "bad publicity." (RT 3023.) Ms. O'Neill could not recall the article. (RT 3032.)

Roy also complained he suffered from sleep problems and nightmares due to his distrust of Ms. O'Neill. (RT 3024.)

At the conclusion of the hearing, the Court denied the motion to discharge counsel. (RT 3042-3043.)

While jury selection was still in progress, on October 8, 1993, Roy again advised the court in confidential proceedings that he wished to make another motion to discharge counsel. (RT 3341-3348 [Sealed record].) This time, Roy demanded the appointment of independent counsel to assist him in bringing his Marsden motion. The motion was denied. (RT 3341-3346.)

Later that day following an exhibit conference, a second *in camera* proceeding was held to deal with Roy's request for independent counsel to assist with a motion to discharge counsel. (RT 3466-3493.) Roy moved to discharge both Ms. O'Neill and Ms. Martinez, urging that he could not communicate with Ms. O'Neill, and that Ms. Martinez did not know what was going on and was not sufficiently qualified to serve as capital counsel. (RT 3466-3467.) Roy cited counsels' failure to discuss defense strategies with him and asserted that Ms. O'Neill either argued or just walked away from him, ignoring what he had to say. (RT 3468.) Ms. Martinez was questioned about the allegations and generally denied any lack of communication or preparedness. (RT 3471-3474.) Roy angrily insisted he did not want the two women for his attorneys. (RT 3474-3476.)

Ms. O'Neill advised the court that the problems of communication were attributable to Roy's paranoia. (RT 3476.) Ms. O'Neill revealed to the Court that Roy had "a problem with women," which Roy admitted. (RT 3479.) Ms. O'Neill explained to the court that Roy's treating psychologist, Dr. Seymour, had written a letter warning Ms. O'Neill and Ms. Martinez that there was some danger posed by the dynamics of two women lawyers being in control of Roy's case. (RT 3481.) Dr. Seymour had compared the dynamics of Roy having two women attorneys with the dynamics which resulted in Roy's commitment to Camarillo State Hospital when he was 15 years old; that commitment occurred after Roy's sister and a girlfriend were teasing him; Roy locked the girls in a bedroom and set it on fire. (RT 3481-3482.) An analogy was also drawn with the dynamics of the situation which led to the crimes against Angie and Laurie; the crimes occurred after the two girls began teasing Roy while he was in the restroom. (RT 3482.)

Ms. O'Neill said the breakdown in communication had started after she and Ms. Martinez had "heavily leaned" on Roy to offer a plea of guilty for life

without parole. (RT 3483.) Ms. O'Neill asserted that Roy knew everything there was to know about defense strategy and had categorically refused to testify, despite the efforts of counsel and the treating psychologist to convince him to do so. (RT 3485-3486.) Ms. O'Neill further stated that Roy was upset with her and was completely unwilling to discuss the penalty phase. (RT 3489.)

The trial court denied the motion to discharge counsel. (RT 3492.)

On October 12, 1993, Roy renewed his motion to discharge his deputy public defenders. He also demanded independent counsel to represent him for purposes of the motion. (RT 3497-3670 [Sealed record.].)

At this hearing, Ms. O'Neill advised the trial court that she and Ms. Martinez had seen Roy for an hour the previous Monday and had not communicated very well. Ms. O'Neill acknowledged that she would have taken steps to have a male attorney assist her or take over the case, had she realized earlier that Roy had difficulties communicating with women. (RT 3499-3500.)

Later that day, after opening statements and testimony by several state's witnesses, the matter of Roy's Marsden motion was again taken up *in camera.* The Court granted Roy's request to appoint independent counsel to investigate whether his Marsden motion had any merit. (RT 3575-3670, 3669-3670.) Trial resumed with the examination of witnesses while efforts were being made to find counsel for this purpose.

On October 13, 1993, in the midst of the ongoing trial, someone from Barker & Associates made an appearance to accept the firm's appointment as counsel for the Marsden motion. (RT 3777-3778.)

On October 14, 1993, and again on October 15, 1993, Roy objected to continuing with the trial, until he had a chance to consult with independent counsel regarding pending Marsden proceedings. The court refused to

interrupt the proceedings. (RT 3884-3886, 4037-4040.)

Later during proceedings on October 15, 1993, Roy was handcuffed at his own request to keep him from "go[ing] off on [his] attorneys and hurt[ing] them." (RT 4091-4092.)

On October 19, 1993, a hearing was finally held on a written "Motion to Relieve Court-appointed Counsel" (CT 655-658), filed on Roy's behalf by attorneys Richard Ciummo and David Rugendorf of Barker & Associates. (RT 4359-4517 [Sealed record.].) The motion to relieve counsel, argued by Mr. Ciummo, was based on Roy's complaints as relayed to Mr. Rugendorf, discussions with Roy's investigator, Mr. Buechler, and the treating psychologist. The grounds asserted included a total breakdown of communication with counsel, and Roy's psychological problems dealing with women attorneys. Specific complaints included that Roy felt left out and physically distanced from his attorneys because he was not aware what was going on at sidebar conferences, and his input was not being sought on matters like jury excusals. (RT 4362). Roy had received only one attorney visit since mid-August, on October 11, 1993 (RT 4363), and remained ignorant of defense strategy to defend against the special circumstance allegations. (RT 4363.)

Asked to address Roy's complaints, Ms. O'Neill stated that her relationship with Roy had deteriorated significantly in the past eight months. She reiterated her opinion that Roy was "extremely paranoid," citing as an example his transitory belief that she had poisoned his food at the jail. (RT 4372.) Ms. O'Neill indicated that Roy's treating physician, Dr. Seymour, felt Roy would be better off with male attorneys because he could communicate with men better. (RT 4374, 4378.) Ms. O'Neill characterized Roy as "mentally ill," not a "stable young man," and someone with "tremendous dislike for women." (RT 4374.) She indicated that one of the Pen. Code, §

1368 doctors who examined Roy had concluded he was incompetent because of his paranoia about women, and inability to communicate his women attorneys. (RT 4380.)

Ms. O'Neill suggested appointing a third, male attorney to interview Roy daily for several weeks, to see if he would communicate. (RT 4383.)

Regarding the alleged failure to visit Roy, Ms. O'Neill admitted that she had made few visits because Roy was refusing to furnish significant information during visits. (RT 4386.)

Trial proceedings resumed on October 19th, until interrupted by a second *in camera* hearing to address Roy's motion to discharge counsel. At this time, the court asked Ms. O'Neill and Ms. Martinez to explore the possibility of replacing Ms. Martinez with a male public defender. (RT 4516-4517.) At another *in camera* hearing on October 20, 1993, at which Ciummo and Rugendorf did not appear, Ms. O'Neill reported that the public defender did not intend to furnish Roy with a male attorney. (RT 4589, 4591.)

The court then offered to consider the possibility, if financially feasible, of appointing a third male attorney for purposes of performing as an "intermediary" between Roy and his female attorneys. (RT 4592.) The Marsden proceedings were adjourned, and the trial testimony resumed with Ms. O'Neill and Ms. Martinez acting as counsel.

The Appointment of a Male Intermediary Attorney

Later, another *in camera* hearing was held to discuss the status of Roy's representation. (RT 4703-4708 [Sealed record].) The trial court found that attorneys O'Neill and Martinez were competent, that they were making every effort to communicate with Roy, and that Roy's inability to communicate was "contrived." (RT 4704.) The court refused to discharge counsel, but indicated a willingness to consider appointing a third attorney – a male – to make communication easier. (RT 4704.)

Trial resumed with Ms. O'Neill and Ms. Martinez acting as counsel for the taking of testimony on October 21, 1995. (RT 4786 [Sealed record].)

On October 25, 1993, outside the presence of the jury, the court announced that Ernest Kinney had accepted appointment as "special counsel" with no responsibility for the defense, except to facilitate communications between Roy and counsel of record. The court notified the parties that Mr. Kinney would not have to be present 100 percent of the time. (RT 4786, 4790.)

The Evolving Role of Ernest Kinney During the Trial

Initially, the trial proceeded with Ms. O'Neill acting as lead counsel. Mr. Kinney's role remained limited to facilitating communication between Roy and his female attorneys. Mr. Kinney did not participate in legal proceedings in any way, and did not join in bench or sidebar conferences. (See, e.g., Engrossed Settled Statement on Appeal; SCT #7 (Vol. 1 of 1), p. 186-195 [settling unreported bench conferences held between October 25, 1993 and November 8, 1993].)

As the trial progressed, Mr. Kinney assumed a more active role, occasionally interjecting objections to evidence and offering argument. (See, e.g., RT 5204, 5411-5412, 5447-5449.) On November 1, 1993, Mr. Kinney's increasing participation prompted the trial court to admonish Mr. Kinney that

his responsibility was limited, and he should pass his insights on to lead counsel in notes rather than objecting. (RT 5464.) Mr. Kinney asked the court for permission to act as "regular" counsel, along with the other attorneys. (RT 5464.)

On November 1, 1993, while the guilt phase trial was still under way, Mr. Kinney made a request to the court to be elevated to the status of attorney of record, so he could actively participate in the psychiatric aspects of the case. (RT 5521.) Without waiting for a ruling from the court, Mr. Kinney then assumed a lead role in contesting a motion filed by district attorney to exclude psychiatric testimony regarding diminished capacity. (CT 673-687; RT 5521-5535.)

On November 1, 1993, the trial prosecutor, D.D.A. Dennis Cooper, filed written objections in letter form, objecting to the dual representation of Roy by two separate defense teams, and requesting the trial court to "take a position" on whether the public defender or Mr. Kinney was the "'the defense lawyer.'" (SCT2 1849-1850.) The prosecutor's letter stated, inter alia:

> "Yesterday, November 1, 1993, the plaintiff learned that the defense attorneys and the liason attorney apparently are really functioning as two separate defense teams with apparently divergent defense tactics. For example, one team is planning to call the defendant as a witness and one team is not. Also, one team is calling a psychologist and another team is not."
>
> " . . . .
>
> "The plaintiff vehemently objects to the defendant having the benefit of two different defense teams. Due process does not require this and the plaintiff is placed at a disadvantage. Additionally, this arrangement results in a clear issue on appeal. Who is the defense lawyer? Who may the defendant complain about on appeal? Who is in charge of the defendant's defense? There is no incentive for any of the defense lawyers to object because a deficient record on this point serves defendant's interest on appeal. The lawyer in charge should be making the tactical decisions, but who is in

charge? If it is O'Neill/Martinez then why is Kinney doing what they opted not to do. . . . (SCT2 1849-1850.)

At an *in camera* proceeding on November 8, 1993, while the guilt-phase trial was still in progress, Mr. Kinney was accorded official status as attorney of record. (RT 4479-5583 [Sealed record].) On the same date, the trial court responded to the district attorney's objections to Mr. Kinney participation as counsel. The court indicated for the record that Mr. Kinney would be a member of the defense team, but Ms. O'Neill would remain the lead attorney. It was ordered that all tactics of any significance would have to be cleared through Ms. O'Neill. (RT 5573-5574.)

The Public Defender's First Declaration of a Conflict of Interest:

On January 13, 1994, in the midst of the sanity trial, it was very belatedly revealed to defense counsel[18] that the prosecutor intended to call another public defender client, James Anthony Scott, as a witness in aggravation at the penalty phase. (RT 9977.)[19] Defense counsel notified the court that the public defender would have to declare a conflict if Scott were to be called as a witness at any phase of the trial because Roy's second-chair counsel, Margarita Martinez, had been Scott's lawyer on October 15, 1992, when the incident occurred about which testimony was to be given. Counsel also advised the court that Mr. Scott was currently being represented by the

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[18] In May, 1993, Roy's counsel filed a "Motion to Compel Specific Notice of Aggravation [Penal Code Section 190.3]", seeking disclosure of a list of uncharged prior bad acts which the District Attorney intended to present at the penalty phase, and a list of all witnesses who would be called to establish such acts. (CT 490-492; RT 5/20/93 25; 5/24/93: 47, 53.) The District Attorney was ordered to produce the requested discovery no later than May 28, 1993. (RT 5/24/03: 52.)

[19] The record reflects that on October 15, 1992, while capital charges were pending, Roy was in an altercation in the county jail, to which Scott was a witness. (CT 1159.)

public defender's office in connection with an alleged probation violation stemming from the same conviction in which Ms. Martinez was his attorney. (RT 9977-9981; SCT2 1312.)[20]

The district attorney responded that Scott would not be used as a witness. Ms. O'Neill informed the court that her office would still have to declare a conflict if any evidence were to be presented regarding an altercation in the jail on October 15, 1992, involving Mr. Scott and Roy, even if Mr. Scott did not testify. (RT 10004-10005.) The district attorney promised not to use the jailhouse altercation as aggravating evidence in his case-in-chief, but declined to make any commitment not to present evidence of the incident in rebuttal, should it become necessary. (RT 10040.)

On January 24, 1994, Assistant Public Defender Charles Dreiling filed a written declaration of conflict of interest on behalf of the public defender. In court, Dreiling was asked to disclose the grounds for the conflict *in camera*, but declined. (RT 10042-10067; CT 1112; 1121-1122, 1132-1133.) At the hearing, the Court notified Mr. Kinney of his intention to appoint him lead counsel, if the public defender withdrew from the case. (RT 10053.) Mr.

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[20] In the Court of Appeal's decision filed on March 21, 1994, addressing contempt proceedings against Assistant Public Defender Charles Dreiling stemming from the declaration of a conflict (see infra) the Court of Appeal interpreted O'Neill's remarks on January 20, 1994, as representation to the Court that Martinez had represented Scott in connection with criminal charges brought stemming from the jailhouse incident on October 15, 1992. (See CT 1174, fn. 10.) At oral argument, counsel for Mr. Dreiling, Mr. Shinaver, apparently asserted that Ms. Martinez did not represent Mr. Scott in proceedings involving the October 15, 1992, incident, but rather, on other unrelated criminal charges. (Id.) After the decision was filed, a letter was later filed on behalf of the assistant public defender, correcting the record to make it clear that Martinez had represented Scott in an unrelated criminal proceeding in the same time frame. She had not represented him in connection with charges stemming from the jailhouse incident on October 15, 1992. (SCT2 1312.)

Kinney objected; he was already engaged in *voir dire* in another death penalty case, and had missed most of the guilt phase trial. (RT 10054.) Mr. Kinney also informed the Court that he had assumed a leading role at the sanity trial, but was not prepared to do so at the penalty trial. That was to be the public defender's role. (RT 10055.)

On January 25, 1994, the Court relieved Ms. O'Neill and Ms. Martinez as counsel. Over objection, Mr. Kinney was appointed chief trial attorney for Roy. Assistant Public Defender Charles Dreiling was found in direct contempt for willfully refusing to obey the court's order to reveal, *in camera*, the facts underlying for the conflict. (RT 10070-10093; CT 1121-1122, 1128-1131, 1134-1135, 1274-1277.)

Mr. Kinney reiterated earlier concerns that he was unprepared to handle the penalty phase, and was presently too preoccupied with another murder case slated to start on February 28, 1994, to assume responsibility for Roy's case. (RT 10084.) Mr. Kinney was also conflicted by yet another client's trial, scheduled to commence on May 1, 1994. (RT 10086-10087.)

On January 27, 1994, the Court reversed its earlier decision, and vacated the order discharging the public defender's office. (RT 10097-10119; CT 1123-1127, 1136-1137.) The public defender's office sought appellate court review of the order holding Mr. Dreiling in contempt for refusing to reveal the facts underlying the public defender's conflict of interest. (SCT2 631-654 [CA No. F020982; In re Charles Dreiling on Habeas Corpus.].) On January 28, 1994, the Court of Appeal summarily denied the public defender's petition for writs of prohibition, mandate and habeas corpus. (CT 1138, 1287; [F020982: In re Charles Dreiling].)

On January 31, 1994, the public defender sought reconsideration by the trial court of its contempt order. At this hearing, Mr. Dreiling indicated that a conflict of interest existed because confidential communications had

occurred between public defender investigators and both clients, Roy and Mr. Scott. (RT 10131-10214; CT 1139.) In proceedings outside the district attorney's presence, Mr. Dreiling's attorney, Franz Criego, argued that the public defender's failure to call Mr. Scott as a defense witness would deprive Roy of favorable testimony at the penalty phase. (RT 10166; see also RT 10187.) Mr. Criego averred that Mr. Scott's value as a defense penalty phase witness had not been discovered until after the January 20, 1993, court hearing. (RT 10169.) The Court denied reconsideration, but granted Mr. Dreiling a three-day stay to permit filing of another writ. (RT 10173-10183.)

On February 1, 1994, the Court ordered Mr. Dreiling to order Ms. Martinez and Ms. O'Neill to resume active representation of Roy. Mr. Dreiling refused, and the Court held him in direct contempt. (RT 10197-10211; CT 1140-1149, 1143-1149, 1280-1286.) The public defender filed several writ petitions in the Court of Appeal, seeking relief from the trial court's contempt orders against Mr. Dreiling. (SCT2 736-995: People v. Royal Clark/Dreiling v. Superior Court, F021011; SCT2 1315-1388.) A stay was issued, but both of the public defender's writs to the Court of Appeal were eventually denied. (SCT2 1075-1076; CT 1150-1153, 1289-1291.)

On February 15, 1994, the public defender sought this Court's review of the contempt orders against Mr. Dreiling. (SCT2 1258 et seq. [In re Charles Dreiling on Habeas Corpus, CA Nos. F021011, F021025; Supreme Ct. No. S037983].) The petition to this Court was supported by a confidential declaration, not previously submitted in trial court and Court of Appeal proceedings. (See, CT 1164; SCT2 1301-1304.)

The confidential declaration asserted that confidential attorney-client privileged information had been received by the public defender's office from Mr. Scott *after* late notification by the district attorney that Scott would be a witness in aggravation in connection with the October 15, 1992 jailhouse

altercation. Roy's attorneys believed Mr. Scott might be in a position to offer mitigating evidence regarding Roy's adjustment in jail, based on Scott's confidential disclosures. (SCT2 27.) Mr. Scott's value as a mitigation witness was recognized belatedly, on January 21, 1994, when Ms. O'Neill and Ms. Martinez had met to discuss the conflict situation with other attorneys in their office, including a Certified Criminal Law Specialist, and consulted the State Bar Ethics Hotline to solicit its opinion regarding the existence of an actual conflict of interest. (SCT2 1302-1304.) As the result of these consultations, they concluded that there was an actual conflict and Roy would be better represented by counsel other than the public defender.

An *"IN BANK"* order staying execution of the February contempt order against Mr. Dreiling was issued by this Court, pending further review. (CT 1292.)

On February 24, 1994, this Court issued an order directing the Superior Court to show cause before the Court of Appeal why the contempt order dated February 2, 1994, should not be set aside, and why the public defender should not be permitted to declare a conflict of interest and be relieved as counsel in Roy's case. (SCT2 1150 [S037983]; CT 1293.)

Following a hearing on March 16, 1994 (SCT21726), the Court of Appeal issued a written decision filed March 21, 1994, in which it denied the petitions for writ of habeas corpus and dissolved all orders staying enforcement of Mr. Dreiling's contempt adjudications by the trial court. (SCT2 1158-1181, 1296-1319.) Dreiling was denied habeas corpus relief and all orders staying enforcement of the contempt citations were vacated. (CT 1169-1181.)[21]

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[21] The public defender requested modification of the Court of Appeal's judgment based in part on the Court of Appeal's factually erroneous assumption that Ms. Martinez had represented Scott in connection with criminal charges stemming from the October 15, 1992, altercation at the jail,

On March 17, 1994, the public defender withdrew as counsel for James Anthony Scott. (SCT2 1732.)

On March 25, 1994, the public defender's office conceded that a conflict of interest no longer existed. It did so in light of the district attorney's representation to the Court of Appeal that Mr. Scott would *not* be called as a witness, nor would any evidence be presented regarding an incident at the jail in October of 1992. (RT 10246-10247.) This meant that defense attorneys would be free to argue their case as if the October 15, 1992, altercation with Mr. Scott had not occurred. (RT 10254, 10271.) The contempt orders against

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and therefore she knew or should have known of the potential conflict prior to the commencement of Roy's trial, in 1993. (CT 1312.) On March 25, 1994, the Court of Appeal denied the public defender's request for modification of its earlier judgment. (CT 1214, 1320.) The Court's order states in relevant part: "In its opinion, this court did not hold that Ms. Martinez in fact represented Scott in connection with the October 15th incident. Rather, that opinion merely noted that Ms. O'Neill's description of the representation of Scott was sufficiently ambiguous to create an inference that representation involved that incident. (Opinion, fns. 1, 10.)" (SCT2 1314.) The referenced footnote no. 1 states: "See footnote 10, post. [¶] Information was given to this court during briefing and oral argument which was not before the trial court. Significant portions of that information are noted in the footnotes in this opinion. Even if it had been submitted in a reliable form of evidence, such evidence cannot be used by an appellate court to establish an abuse of discretion by a lower court sitting as a trier of facts. Instead, this court is constrained to draw all reasonable inferences and to resolve all ambiguities to support the result reached by the trier of fact." (CT 1160.) In the body of its decision, the Court of Appeal states, inter alia: "There is a reasonable inference from the record that Roy's present attorney -- Ms. Martinez -- represented Scott in proceedings involving the October 15th incident." The referenced opinion footnote no. 10 follows this statement and says: "At oral argument, Mr. Shinaver asserted that Ms. Martinez did not represent Scott regarding the October 15th incident. This is contrary to Ms. O'Neill's representations at the January 20th hearing which are quoted in the first portion of this opinion. The trial court could properly rely on the record before it. Thus, Mr. Shinaver's representations to this court may not be used to detract from the implied findings of the trial court." (CT 1174.)

Mr. Dreiling were purged, and Ms. O'Neill was reappointed to serve as lead counsel. Over objections that he was engaged in another capital case and unable to prepare (RT 10264-10268), Mr. Kinney was appointed to act as second chair. (RT 10289.) Ms. Martinez was removed as counsel to avoid any appearance of a conflict of interest caused by her prior representation of Mr. Scott. (RT 10249; CT 1185.)

Roy, represented by Mr. Kinney at an *in camera* hearing, made a Marsden motion to discharge all counsel and for the appointment of substitute attorneys. He requested a new jury based on the delays, and lack of continuity of counsel during the trial. The Court denied the motion to discharge Mr. Kinney and Ms. O'Neill, and denied the motion for a new jury. After that motion was denied, Roy alternatively requested the reappointment of Ms. Martinez as counsel on the ground that she had been present since the beginning of the trial. (RT 10279-10288.)

At the urging of Mr. Cooper (RT 10324-10325), and Roy (RT 10332), the trial court reversed its previous decision to relieve deputy public defender Martinez and ordered her to resume acting as co-counsel on Roy's case. (RT 10332-10333; CT 1186.) Ms. Martinez was reappointed over the objection of the public defender's office that this would cause administrative problems; Ms. Martinez had already been assigned a heavy calendar of felony cases. (RT 10329.)

On May 25, 1994, after several more continuances of the case, motions for mistrial based on the *de facto* granting of a Marsden motion effectuated by the appointment of a "facilitator" counsel and the long delay between sanity and penalty phase trials were filed on Roy's behalf by Mr. Kinney. (CT 1244-1261.

The Withdrawal of Ms. O'Neill Due to Illness and Appointment of Ernest Kinney as Lead Counsel, Over His Objection

On June 7, 1994, it was disclosed that Ms. O'Neill had been diagnosed with a serious medical condition -- cancer -- which would prevent her from working on Roy's case until mid-September, or possibly longer. (CT 1372, 1391; RT 10373-10378.) A few days later, Mr. Kinney submitted a letter to the trial court indicating he would be unable to assume the role of lead counsel in Roy's case. Among reasons cited, Mr. Kinney indicated he had been absent for most of the guilt phase trial, and had not been continually present; that he was suffering from high blood pressure and was adjusting to new blood pressure medication; and that Mr. Kinney's son had recently been admitted to the hospital, causing him a constant source of concern. Mr. Kinney urged the court to declare a mistrial, or alternatively, to appoint Ms. Martinez as lead counsel. (CT 1392; SCT2 1941-1942.)

On June 14, 1994, a confidential letter motion for mistrial was filed by attorney O'Neill, notifying the Court that she had been diagnosed with cancer and would be unable to work for two to three months. (SCT2 1890.) The letter was followed several days later by a formal motion for mistrial. (CT 1385-1393.) Mr. Kinney then submitted to the trial court a letter from his physician, advising the court that he would be medically disabled from trying cases until at least August 1, 1994, because he was suffering from uncontrolled hypertension. (SCT2 1943.)[22]

On June 17, 1994, a hearing was held before Judge Fitch on all pending motions, with Mr. Kinney and Ms. Martinez appearing as counsel.

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[22] The letter states: "Mr. Kinney has been on medication for hypertension for less than one month. His blood pressure is not yet under control. Due to drug interactions, titration of his medication dosage over the next six to eight weeks will require extra caution. He should avoid being involved in trials at least until August 1st, 1994. (SCT2 1943.)

(CT 1425-1426; RT 10379.)[23] Mr. Kinney argued vociferously that he could not serve as lead counsel due to his involvement in the Malarkey case,[24] serious health problems, and his absence during the first part of the trial. Mr. Kinney explained that he already suffered from Bipolar Disorder,[25] and had

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[23] Roy personally objected to hearing the motions without Ms. O'Neill present. (RT 10406.)

[24] Mr. Kinney was the lawyer for John Malarkey, the defendant in another high-profile Fresno murder case. The Malarkey case was still pending when O'Neill became ill and withdrew from Roy's case. (See, *"Coleman retrial in 4 slayings delayed"*; The Fresno Bee; June 1, 1995; Pg. B3; [discussing Kinney's involvement in the Alex Coleman, Jr. and John Malarkey murder trials].) After Roy's case had concluded, Malarkey pleaded guilty pursuant to a plea bargain for a favorable sentence of 25 years, 4 months in prison. The police believed that Malarkey and his sister, Lanelle Malarkey Denn, were involved in the killings of seven people on May 16, 1993, at a Fresno nightclub. (*"Deal nets Malarkey 25 years"*; The Fresno Bee; April 20, 1996; Pg. A1.)

[25] The Diagnostic and Statistical Manual of Mental Disorders (4th Edition-Text Revision) Published by the American Psychiatric Association (2000) [hereafter DSM-IV TR], includes Bipolar I and Bipolar II Disorders. Bipolar I Disorder describes the diagnostic features of the disorder as follows: "The essential feature of Bipolar I Disorder is a clinical course that is characterized by the occurrence of one or more Manic Episodes (see p. 357) or Mixed Episodes (see p. 362). Often individuals have also had one or more Major Depressive Episodes (see p. 349)." (DSM-IV TR, p. 382.) "The essential feature of a Major Depressive Episode is a period of at least two weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities. . . .The individual must also experience at least four additional symptoms drawn from a list that includes changes in appetite or weight, sleep, and psychomotor activity; decreased energy; feelings of worthlessness or guilt; difficulty thinking, concentrating or making decisions; or recurrent thoughts of death or suicidal ideation, plans or attempts." (DSM-IV TR p. 349.) "A Manic Episode is defined by a distinct period during which there is an abnormally and persistently elevated, expansive, or irritable mood." (DSM-IV TR, p. 357.) "A Mixed Episode is characterized by a period of time (lasting at least 1 week) in which the criteria are met for a Manic Episode and for Major Depressive Episode nearly every day." (DSM-IV TR, p. 362.) Bipolar Disorder is a "recurrent" disorder. More than 90%

experienced a surge in his blood pressure about six weeks earlier. Mr. Kinney was taking medication for both conditions. The new blood pressure medication had required a lowering of Mr. Kinney's Bipolar Disorder medication -- Lithium -- and he was having problems adjusting. He been ordered not to be involved in any trials due to the health risks, including a stroke. (RT 10418-10421.)

Mr. Kinney asked, in the event the mistrial motions were denied, that the case be continued several months to permit participation by Ms. O'Neill. (RT 10435.)

Over Mr. Kinney's and Roy's personal objections, Ms. O'Neill was relieved as counsel. (RT 10465, 10478.) The Court found Ms. Martinez unqualified to act as lead counsel and appointed Mr. Kinney to serve as first chair, deferring for future consideration the status of Mr. Kinney's health. (RT 10477.) Over the district attorney's objection that Ms. Martinez, not Mr. Kinney, should be lead counsel, Ms. Martinez was directed to act as second chair counsel. (RT 10379-10497; CT 1425-1426.)[26]

All of the defense motions for mistrial were denied. (RT 10403-10412; CT 1425-1426.)

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of persons who have a single Manic Episode go on to have future episodes. Roughly 60%-70% of Manic Episodes occur immediately before or after a Major Depressive Episode. (DSM-IV TR, p. 386.) Persons who suffer from Bipolar Disorder may also experience symptoms, including grandiosity, persecutory delusions, irritability, agitation and catatonia. (DSM-IV TR, p. 387.) (See, also Bipolar II Disorder; DSM-IV TR, p. 392 et seq.)

[26] At the district attorney's insistence, Judge Fitch asked Martinez to state for the record why she lacked the qualifications to serve as lead counsel. Martinez explained that she had always acted as second chair to O'Neill. O'Neill had made all strategy decisions. Martinez had never tried a capital case, a murder case, or even an attempted murder case. Her experience was limited to about 10 felony trials. (RT10448-10450.)

On July 29, 1994, a status conference was held at which Mr. Kinney reported that his blood pressure was still high, but not quite as "volitile." Mr. Kinney did not foresee additional delays in the trial beyond the October trial date, due to medical problems. (RT 10503-10504.)

At another status hearing on September 23, 1994, Mr. Kinney projected that he would not be able to try Roy's case until the trial of Terrell Reed, concluded in mid-October. (RT 10508.) Roy waived time and the case was set for trial on October 25, 1994, for resumption of proceedings before the jury. (RT 10509-10510.)

The Conflict of Interest Stemming from the Public Defender's Representation of Venus Farkas in a Welfare Fraud Case

On October 12, 1994, the public defender declared a conflict of interest based on its prior representation of Venus Farkas, the deceased victim's mother, in a prior unrelated criminal case. (CT 1437-1457.) At a hearing on October 19, 1994, Ms. Martinez announced she had just learned that Venus Farkas, who testified at the guilt phase, had been convicted of welfare fraud during the time Roy's case was pending. The public defender had represented Mrs. Farkas, who was on probation until July, 1994. (RT 10544-10550.)

Over Roy's objection, Ms. Martinez and Mr. Kinney were ordered to proceed with pre-penalty phase "Phillips" hearings pending resolution of the conflict issue. (RT 10551.)

On October 21, 1994, a hearing was held to address the public defender's declaration of a conflict and a motion for new trial based on the prosecutor's alleged knowing and wilful failure to disclose a material witness's welfare fraud conviction prior to trial. (CT 1467-1473; RT 10763 et seq.)

The trial court found that the district attorney had no obligation to turn over misdemeanor information pursuant to Pen. Code, § 1054.1 prior to trial.

(RT 10924.) The court also found that the district attorney, having requested CLETS information from an authorized representative of his office, was not obliged to go to other parts of his office seeking criminal conviction information. (RT 10925.) The court found by a preponderance of evidence that there was no suppression of evidence by D.D.A. Cooper of the welfare fraud conviction of Venus Farkas. (RT 10925. The motion for new trial and for mistrial was denied. (RT 10926.)

The court further found that there was no conflict of interest with the public defender, even in the event defense counsel should call Mrs. Farkas to the stand in the penalty phase for purposes of impeachment. (RT 10943.)

The Penalty Phase Trial

The penalty phase trial commenced on October 25, 1994, over Ms. Martinez's objection, which was not joined by Mr. Kinney. (CT 1480-1482.)

The motion for a 30-day continuance was made by Ms. Martinez on the ground that Mr. Kinney was unprepared. Ms. Martinez argued that Mr. Kinney had not had adequate time to prepare due to his involvement in the Reed case, that he had not had an opportunity to read numerous materials she felt he should read to prepare, and further, that it "scare[d]" her that Mr. Kinney was still getting names of witnesses wrong. (RT 10964.)[27] Ms. Martinez also complained that Mr. Kinney, as lead counsel, had not spent a single day consulting with her. Furthermore, he had given her no direction or input and he had been unable to focus on anything other than the Reed case. (RT 10965.) The motion to continue was denied. (CT 1480; RT 10962-

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[27] It appears that less than a week had passed since the conclusion of the Terrell Reed case, in which Kinney was counsel. According to the record, the Reed case had concluded "last week Thursday morning." (RT 10965.) An article in the Fresno Bee on October 21, 1994, reported that the Terrell Jerome Reed case concluded with an acquittal on the prior "Thursday." ("*Defendant thanks jury for acquittal.*" The Fresno Bee, October 21, 1994; Metro Section, Pg. B1")

10965.)

In the midst of the penalty phase trial, on November 3, 1994, Mr. Kinney's blood pressure problems resurfaced. (RT 11476-11477.) On November 7, 1994, Mr. Kinney submitted to the court a letter from his physician which indicated he would not be able to proceed with the trial until November 16th. (RT 11495.)

At this time, Mr. Kinney renewed his earlier motions for mistrial based on his absence during the first part of the trial. He also indicated his "manic phase" [of his Bipolar Disorder] had been curbed, but he was feeling depressed and exhausted. (RT 11497-11498.) The motion for mistrial was denied. (RT 11498.) The court delayed the case for a week to accommodate Mr. Kinney's health problems. (RT 11496.)

On November 10, 1994, Mr. Kinney filed a petition for writ of prohibition and a request for a stay of trial proceedings in the Court of Appeal. (SCT2 1777- 2511.) The petition sought a mistrial on numerous grounds, including the nine to ten-month delay between sanity and penalty phases, the lack of individual jury polling, the *de facto* granting of a Marsden motion in the appointment of Mr. Kinney as liason counsel, and Mr. Kinney's inability to properly cross-examine witnesses due to his absence for a substantial portion of guilt phase proceedings. The appellate court denied the petition for writ of mandate and/or prohibition without a hearing on November 14, 1994. (F022665; SCT2 2511.) Mr. Kinney then unsuccessfully sought review of the Court of Appeal's denial of relief in a petition filed in this Court. (S043273; SCT2 1513, 2522-3253.)

The penalty phase resumed on November 16th, after the recess.

Following Mr. Cooper's closing penalty phase argument, Mr. Kinney renewed his motion for mistrial on the ground that his absence during substantial portions of the guilt phase was a hindrance to responding to the

prosecution's argument. Mistrial was again denied. (RT 11929; CT 1505.)

VII THE GUILT, SANITY AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY DENIED APPELLANT'S MARSDEN MOTIONS ON THE MERITS AFTER COUNSEL REVEALED HIS MENTAL HEALTH PROBLEMS, WHICH CONTRIBUTED TO ROY'S PARANOIA AND SUSPICION OF HIS PUBLIC DEFENDERS.

The right to counsel is fundamental. "The right of one charged with crime to counsel may not be deemed fundamental in some countries, but it is in ours." (Gideon v. Wainwright (1963) 372 U.S. 335, 344.) "[L]awyers in criminal courts are necessities, not luxuries." (Ibid.)

An indigent criminal defendant is not entitled to appointed counsel of his choice. (Brown v. Craven (9th Cir. 1970) 424 F.2d 1166, 1170; Lacy v. Lewis (C.D. Cal. 2000) 123 F.Supp.2d 533, 550.) Nevertheless, "to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (Brown v. Craven, supra, 424 F.2d at p. 1170; Hudson v. Rushen (9th Cir. 1982) 686 F.2d 826, 829.)

As a matter of both federal and California constitutional law, when a defendant requests substitution of his court-appointed attorney, summary denial of the motion without further inquiry violates the Sixth Amendment. (People v. Marsden (1970) 2 Cal.3d 118, 123-124; Hudson v. Rushen, supra, 686 F.2d at p. 829; Brown v. Terhune (N.D. Cal. 2001) 158 F.Supp.2d 1050, 1064.) A trial court must furnish the complaining defendant an opportunity to state reasons why the court should discharge one trial attorney and substitute another. (Ibid.)

"The decision to allow a substitution of attorney is within the discretion

of the trial judge unless defendant has made a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." (People v. Crandell (1989) 46 Cal.3d 833, 859; accord: Brown v. Terhune, supra, 158 F.Supp.2d at p. 1064.) Constitutionally inadequate representation can occur where the appointed attorney is not providing adequate representation or where there is an irreconcilable conflict between the defendant and his counsel such that ineffective representation is likely to result. (People v. Crandell, supra, 46 Cal.3d at p. 854; Hudson v. Rushen, supra, 686 F.2d at p. 829.) If the relationship between a lawyer and client completely collapses, the refusal to substitute new counsel violates [the] Sixth Amendment right to effective assistance of counsel. (United States v. Moore (9th Cir. 1998) 159 F.2d 1154, 1158; Brown v. Craven, supra, 424 F.2d at p. 1170.) Confidence in the trial proceedings is thereby undermined and it is reversible error. (Ibid.)

Roy sought to discharge his deputy public defenders and have them replaced with substitute counsel on September 29, 1993, and again on October 8, 1993. On both dates, the Court held several *in camera* proceedings, then denied Roy's motions on the merits.

On both dates, lead counsel O'Neill shared with the Court the fact that Roy had a history of mental illness which was contributing to the breakdown in communication. Ms. O'Neill told the Court, and Roy admitted, that Roy had harbored a belief that Ms. O'Neill was trying to poison him. (RT 2856.) Ms. O'Neill also advised the Court that at least one psychiatric expert had found Roy incompetent to stand trial because of his delusions about defense counsel. (RT 3030.)

At the October 8th Marsden hearing Ms. O'Neill also revealed that Roy's treating psychologist, Dr. Seymour, had written a letter warning the two female attorneys that, because of Roy's mental problems involving women, there was a danger posed by having his case controlled by two female

attorneys. (RT 3481.) Roy, too, complained to the Court that he was having sleep problems and nightmares due to his distrust of his attorneys. (RT 3024.) According to Ms. O'Neill, Roy was so upset with counsel that he was categorically refusing to testify at the penalty phase, and he would not even discuss the penalty phase trial with his lawyers. (RT 3485-3489.)

Prior to the September 29th and October 8th Marsden motions, there had already been evidence of a breakdown developing in the attorney-client relationship. In May of 1993, before Judge Ralph Nunez, Roy disregarded his lead attorney's advice and entered a plea of not guilty by reason of insanity. The plea was permitted over Ms. O'Neill's strenuous objection that the defense was not viable. (May 20, 1993, RT 25-37; RT 41-42, 55-70.)

On appeal from the denial of a Marsden motion, a reviewing court "focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters . . . ." (People v. Douglas (1990) 50 Cal.3d 468, 542; accord: People v. Berryman (1993) 6 Cal.4th 1048, 1070.) Roy's Sixth Amendment right to counsel was violated by the trial court's refusal to grant the Marsden motions brought on September 29th and October 8th, 1993. The record as it existed at that time demonstrates that a "'fundamental dispute'" had arisen between Roy and his female attorneys which "'no amount of discussion . . . could resolve . . . .'" (People v. Stankewitz (1980) 32 Cal.3d 80, 94 [Stankewitz I].) Yet, due to the nature of Roy's mental problems, and apparent fixation on his distrust of the two female attorneys, it was possible, even likely that Roy would be willing and able to rationally assist a male attorney if one were appointed by the court or provided by the Fresno County Public Defender. (Ibid.)

The fact that many months earlier, in May of 1993, a jury had found Roy legally competent to stand trial does not demand a different result. At the competency trial, Roy was presumed mentally competent. In that proceeding, the jury had to be convinced by a preponderance of the evidence that Roy was

mentally incompetent to stand trial. (Evid. Code, § 1369.) The trial court, ruling on Roy's multiple Marsden motions, was bound by no such presumption.

Furthermore, completely different policy considerations govern a trial court's decision to grant or deny a Marsden motion. The jury's sole concern in a competency trial is whether the defendant "as a result of mental disorder or developmental disability . . . is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367). Hence, in a competency trial, the jury's concern is with the defendant's mental competency to cooperate. In ruling on a Marsden motion, the trial court acts as the guarantor of a defendant's Sixth Amendment right to the effective assistance of counsel, also embodied in the California Constitution, Article I, section 15. That right is denied when there is an irreconcilable breakdown in the attorney-client relationship, whether or not a defendant is legally competent to stand trial.

Because the penalty of death is qualitatively different than a sentence of imprisonment, even life imprisonment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (Woodson v. North Carolina (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed. 944; accord: Ring v. Arizona (2002) 122 S.Ct. 2428, 2441.) Effective counsel is therefore even more critical in a death penalty case to effectuate the demands of the Eighth Amendment, and Article I, section 17 of the California Constitution.

In People v. Stankewitz (1990) 51 Cal.3d 72 [Stankewitz II], this Court approved of the trial court's decision replace the trial attorney, where the defendant harbored delusions of a conspiracy between the district attorney and public defender. (Id. at p. 88.) Roy, too, harbored paranoid beliefs about his lead deputy public defender, and he had a psychiatric history marked by explosive conduct involving female figures which was made it difficult for

Roy to entrust the defense of his life to Ms. O'Neill and Ms. Martinez.

As in Stankewitz I, forcing Roy to proceed to trial with his two women attorneys led to a "defense debacle". (32 Cal.3d at p. 96.) When the trial court denied the motion to replace counsel, Roy was "left with counsel whom Roy was unable to rationally assist," according to his treating physician, Dr. Seymour, and the testimony of at least one of the doctors who testified at the competency hearing. Accordingly, Roy was denied his state and federal constitutional rights to the effective assistance of counsel and a reliable death determination. (U.S. Const. Amendments VI, VIII; Cal. Const., Art. I, § 15, § 17.)

VIII THE GUILT, SANITY AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY (1) PROCEEDED WITH THE TRIAL DESPITE THE COURT'S EXPRESSED DOUBT CONCERNING WHETHER THERE HAD BEEN AN IRRECONCILABLE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP, AND (2) APPOINTED A DIFFERENT ATTORNEY TO REPRESENT APPELLANT FOR PURPOSES OF THE MARSDEN HEARING.

A. It was error to continue taking testimony while Roy's Marsden motions were pending.

On October 12, 1993, before commencement of the evidentiary phase of the trial, Roy renewed his Marsden motion to discharge his deputy public defenders. He requested that the Court appoint an independent attorney to represent him for purposes of the motion. (RT 3497-3670.) At this time, Ms. O'Neill advised the Court that ability to communicate Roy was poor, and in hindsight, she wished she had taken steps much earlier to have a male attorney assist her or take over the case. (RT 3499-3500.) In effect, she agreed that the relationship had broken down.

Rather than grant the Marsden motion, the Court agreed to appoint an independent attorney to represent Roy for purposes of Marsden hearings, and set the wheels in motion to obtain counsel. (RT 3575-3670, 3669-3670.) The Court did not, however, interrupt the progress of the trial. Guilt phase proceedings resumed for several days, during which efforts were made to secure Marsden counsel and set the matter for further hearings. It was not until October 19, 1993, that a hearing was finally held on a written motion to

relieve the court-appointed attorneys, where Roy was represented by Richard Ciummo and David Rugendorf of the law firm of Barker & Associates. (RT 4359-4517; CT 655-658.)

Between October 12 and October 19, 1993, opening statements were made, and testimony was received from more than two dozen witnesses, including: a number of witnesses who established chain of custody for physical evidence (Tim McClain, William Lehman, Kenneth Lee Rowe, Guy Patterson, Jack Duty, Walter Rubc, Brenda Grainer); both victims' mothers (Elizabeth Dame and Venus Farkas); Laurie's sister, brother, and father (Angelique and William Jr., and William Edward, Sr.); a record store employee (John Pimentel); the man who found Laurie's body (Gilbert Garcia); the deputy sheriff who first came upon Laurie's body (Patrick Majeski); several tire track identification specialists (James Angus, Sherry Creger); a Sheriff's homicide detective who investigated the scene where Laurie's body was found (Louie Beard); the man who found Angie (Joel Suarez), the funeral director who handled the body of Laurie (Mark Peruch); the Fresno Police Officer who responded to the area where Angie was found (Todd Frazier); the deputy sheriff who first contacted Angie (John Friend), the sheriffs deputies who interrogated and arrested Roy (Melinda Ybarra and John Souza); Roy's girlfriend (Donna Kellogg); a detective who investigated the Lost Lake restroom crime scene (William Brian Stones); the nurse who collected blood and saliva from Roy (Linda Bethell); and a Sheriff's Department criminalist (Allen Boudreau). (RT 3510-4355.)

It was error for the trial court to continue taking testimony prior to resolution of Roy's assertion of the right to substitute counsel. It is well settled that the merits of a Marsden motion must "be resolved on the merits before the case goes forward." (Schell v. Witek (9th Cir. 2000) 218 F.3d 1017,

1025.) Here, witnesses continued testifying for several days, despite the pendency of Roy's motion to relieve his court-appointed attorneys.

B. It was error to appoint an independent attorney to represent Roy for purposes of the Marsden motions.

It was also error for the trial court to grant Roy's request for independent counsel to represent him in his quest to discharge his public defenders. This Court has repeatedly held that there is no authority "supporting the appointment of simultaneous and independent, but potentially rival, attorneys to represent [a] defendant." (People v. Smith (1993) 6 Cal.4th 684, 695.) Rather, the trial court should "appoint substitute counsel when a proper showing has been made at any stage." (Ibid.; accord: People v. Barnett (1998) 17 Cal.4th 1044, 1112; People v. Hines (1997) 15 Cal.4th 997, 1024.) "Appointment of independent counsel to assist a defendant in making a Marsden motion is likely to cause unnecessary delay, and may damage the attorney-client relationship in those cases in which the trial court ultimately concludes the motion should be denied." (People v. Hines, supra, 15 Cal.3d at p. 1025.)

In this case, the court's conduct was particularly egregious. No delay resulted because the trial proceedings continued while Roy was, in effect, simultaneously represented by wholly independent, rival attorneys. From October 13th, until October 19th, Ciummo and Rugendorf sought to collect evidence and information showing that the relationship between Roy and his female deputy public defenders had completely, irreconcilably broken down. Simultaneously, *over Roy's repeated objections* (RT 3884-3886, 4038-4039), Ms. O'Neill and Ms. Martinez continued to conduct business as usual before the jury. Roy became so frustrated at one point that he asked the trial court to have him handcuffed because he was afraid he would "go off on [his] attorneys and hurt them." (RT 4091-4092.)

Accordingly, the trial court's actions in response to the October 12th Marsden motion compounded the court's errors, denying the earlier Marsden motions. A serious violation of Roy's right to the effective assistance of counsel resulted. (U.S. Const. Amendment VI; Cal. Const., Art. I, § 15.)

IX THE GUILT, SANITY AND PENALTY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY DENIED THE OCTOBER 12, 1993, MARSDEN MOTION.

In the written Marsden motion filed by Ciummo and Rugendorf, and at the October 19th hearing, Roy's specific complaints included that the communication between Roy and his attorneys was inadequate, he felt physically distanced from counsel because he was left out of sidebar conferences, and his input was not sought on matters like jury excusals.

The record supports Roy's claim that he was consistently being excluded from bench conferences. During the competency trial, which preceded the guilt phase trial, the record includes 17 bench conferences or sidebars where the record shows that Roy was absent and incapable of hearing what occurred. (I RT 8-9: 23-24; RT I 39:3-4;; I RT 62:21-22; I RT 126: 25-26; I RT 155:21-22; I RT 200: 18-19; II RT 214: 6-7; II RT 407:23-24; II RT 436: 12-13; II RT 503: 15-16; III RT 602: 26-1; III RT 631: 25-26; III RT 640: 3-4; III RT 724:24-25; III RT 734:3-4; IV RT 771:19-20; IV RT 773:6-7; SCT #7, pp. 151-158 [Engrossed Settled Statement on Appeal].)

After the guilt-phase trial started, the court continued its practice of holding a substantial number of conferences out of Roy's earshot, either at the bench, or outside the courtroom in the hallway. The record establishes that approximately 48 such conferences occurred prior to October 19, 1993, the date Roy's Marsden motion was finally heard. (See, RT 759:2; RT 1058:26; RT 1058:26; RT 1109:19; RT 2157:13-14; RT 2188:26; RT 2270:24; RT 2649:9-10; RT 2714:1-2; RT 2805:5-6; RT 2905:8-9; RT 3007:23-24; RT 3107:13-14; RT 3145:5-6; RT 3177:6-7; RT 3196:26-1; 3225:16-17; RT

3230:25-26; RT 3234:18-19; RT 3263:22-23; RT 3270:14; RT 3318:4-5; RT 3331:19-20; RT 2249:19-20; RT 3364:11-12; RT 3509:7-8; RT 3556:22-23; RT 3596:25-26; RT 3611:3-4; RT 3681:18-19; RT 3756:10-11; RT 3867:7-8; RT 3872:27-28; RT 3926:22-23; RT 3974:11-12; RT 3999:8-9; RT 3999:8-9; RT 4067:14-15; RT 4096:10-11; RT 4113:16-17; RT 4116:25-26; RT 4144:16-17; RT 4174:8-9; RT 4188: 19-20; RT 4205:5-6; RT 4210:19-20; RT 4237:21-22; RT 4272:16-17; RT 4341:8-9; SCT #7, pp. 158-179.)

The Marsden motion filed on Roy's behalf also alleged that the deputy public defenders had only visited Roy at the jail one time since mid-August, and that Roy was being kept ignorant of defense strategy and tactics, particularly as to the alleged special circumstance allegations, and whether experts would be testifying on his behalf at the trial. Roy felt Ms. O'Neill argued with him, ignored him and walked away when he spoke. He did not feel that Ms. Martinez was a satisfactory vehicle for communicating with lead counsel, because Ms. Martinez did not have answers to Roy's questions. Counsel appointed for purposes of the Marsden motion also reiterated the allegations made previously, that Roy's psychologist, Dr. Seymour, had indicated that Roy had psychological problems communicating with his female attorneys. (CT 655-658; RT 4359-4363,)

Responding to these complaints at the October 19th hearing, Ms. O'Neill acknowledged that her relationship with Roy had deteriorated over the past eight months; she admitted she had made few jail visits for this reason. She expressed the belief that Roy was "extremely paranoid", citing his recent belief that she was trying to poison him as an example. O'Neill also repeated concerns that psychiatrist George Woods, who evaluated Roy's competency to stand trial, felt that Roy could not cooperate with his female public defenders. She reiterated that Dr. Seymour had advised her that Roy would

be better served by male attorneys. Ms. O'Neill expressed the belief that Roy was a mentally ill, unstable young man with a "tremendous dislike for women." She expressed fear that without a male attorney with whom he could cooperate, Roy would receive the maximum penalty. (RT 4374-4387.)

After the Fresno County Public Defender refused the court's invitation to substitute a male public defender for Ms. Martinez, the court denied Roy's Marsden motion on the merits, stating that Roy's inability to communicate was "contrived." (RT 4703-4704.) The denial of the motion was clearly erroneous.

There was simply no evidence before Judge Fitch to support a finding that Roy's inability to communicate was contrived. At least one board-certified psychiatrist had rendered the opinion, under oath, that Roy was not malingering or contriving the paranoia and distrust he felt for Ms. O'Neill and Ms. Martinez. (II RT 253-254.) Roy's own attorneys admitted that the relationship had broken down, and were of the opinion that Roy would be better served a male attorney. The court's own actions, appointing two independent male attorneys investigate and present a Marsden motion on Roy's behalf, exacerbated the wedge between Roy and his lawyers by giving the appearance that Roy was receiving the assistance of independent advocates – attorneys Rugendorf and Cuimmo – and then forcing Roy to continue being represented by the attorneys independent counsel had asserted were providing *ineffective* assistance.

This is not a case where the court-appointed attorneys felt that no problem existed, or that newly-appointed counsel would encounter similar difficulties getting the client to cooperate. (See, e.g., People v. Memro (1995) 11 Cal.4th 786, 855 ["Both counsel denied that the relationship with their client was steadily deteriorating . . . .[counsel] . . . warned that he might refuse

to cooperate with future counsel if 'his whims are not answered' and 'they don't go down and hold his hand . . . .'"].) Here, counsel sincerely believed the client had psychiatric issues making full cooperation impossible. The United States Supreme Court recognizes that "trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel." (Cuyler v. Sullivan (1980) 446 U.S. 335, 347.)

This is likewise not a case where the motion for new counsel came so early in the proceedings that the trial court could "reasonably conclude that the defendant had not made sufficient efforts to resolve his differences with [trial counsel] . . . ." (People v. Barnett, supra, 17 Cal.4th at p. 1086; People v. Crandell, supra, 46 Cal.3d at p. 859 ["The lack of communication during a period of several weeks, after three consultations, did not establish inadequate representation."].) Roy worked well with counsel for more than a year. The breakdown began to occur well into the proceedings, and had worsened significantly over a period of eight months. Counsel had been warned that by Roy's psychologist that the relationship carried potential danger. They did not believe the situation would get any better. Under the circumstances known at the time of the motion, evidence was overwhelming that the relationship between Roy and his attorneys was irreconcilably conflicted. (United States v. Moore (9th Cir. 1998) 159 F.3d 1154, 1160.)

In fact, the breakdown in the attorney-client relationship had a far-reaching influence over the defense attorneys' long term strategy. As is more fully discussed in Argument XXXXIX, Roy stubbornly insisted upon pleading not guilty by reason of insanity and going to trial on that issue. The ill-fated defense set the jury up to distrust the psychiatric testimony that was later presented in the penalty phase, and may have blunted the impact of penalty phase evidence by forcing defense counsel to present it prematurely. Tactical

decisions made "in blind deference to a client's wishes," are almost always constitutionally deficient. (Alvord v. Wainwright (1984) 469 U.S. 956, 961 [Dissenting opinion, Marshall, J.].) Consequently, it was prejudicial error to deny the motion for new counsel in this case.

X THE GUILT, SANITY AND PENALTY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY APPOINTED ERNEST KINNEY TO SERVE AS "COMMUNICATOR" BETWEEN APPELLANT AND HIS FEMALE PUBLIC DEFENDERS.

After denying the Marsden motion brought by Roy on October 12th, on October 25, 1993, the trial court took the unprecedented step of appointing Ernest Kinney, a male attorney, to act as "special counsel," with no responsibility for the defense except to facilitate communications between Roy and his female attorneys. (RT 4592, 4704, 4786, 4790.) If the communication between Roy and his attorneys had not broken down, there would have been no need to appoint a third, male attorney to facilitate communication.

While negotiations to engage Mr. Kinney were in process, the guilt-phase testimony continued, with lawyers O'Neill and Martinez serving as Roy's counsel. (RT 4719-4790.) On October 21, 1993, the jury visited the crime scene. Criminalist Andrea DeBondt resumed testifying for the prosecution. (RT 4713-4782.) It was in the middle of DeBondt's testimony that Mr. Kinney was, for the first time, introduced to the jury. (RT 4793.)

Although Mr. Kinney's role was supposed to be limited to helping with attorney-client "communication" – not advocacy – he did not adhere to his job description for long. At first, Mr. Kinney did not participate in bench conferences and sidebars, and he maintained a passive role during trial proceedings. (See SCT #7, pp. 186-195 [Engrossed Settled Statement of Bench Conferences from October 25, 1993-November 8, 1992].) Then, while

surviving victim Angie was testifying for the prosecution, Mr. Kinney asked the court for permission to argue an objection to a photographic exhibit that had not previously been disclosed to the defense. (RT 5204.) The trial court allowed Mr. Kinney to argue. (RT 5204.) Subsequently, Mr. Kinney began spontaneously interjecting objections. (See, RT 5411 ["Also, the age, the – if it's a week old, was this during a dream or – "]; RT 5412 ["Foundation."]; 5447 ["Can I have one point?"]; 5448-5449 [Mr. Kinney makes a lengthy argument regarding the admissibility of the semen stain found on Roy's shorts].)

On November 1, 1993, Mr. Kinney's gradual transformation from "communicator" to attorney came to head. Mr. Kinney independently filed a "Defendant's Answer to Prosecution Motion and Defendant's Right to Psychiatric Testimony in Guilt Phase," arguing Roy's right to introduce evidence of "diminished actuality". (RT 673-687.) D.D.A. Cooper filed a letter with the court complaining that Mr. Kinney and the two public defenders were functioning as separate defense teams, and asking the court to intervene. (SCT #2 1849-1850.) Mr. Kinney moved the court to elevate him to attorney of record status so he could actively participate in the psychiatric aspects of the case, and argued at length to the Court about the effect of statutory limitations on the admissibility of expert psychiatric testimony. (RT 5521-5532.)

While Mr. Kinney's status remained in legal limbo, the trial adjourned for a week to allow Ms. O'Neill and Ms. Martinez time to respond to some untimely disclosures of forensic evidence by the prosecuting attorney. (RT 5475-5535 [Afternoon session on November 1, 2002].)

In the midst of proceedings on November 8th, in an *in camera* proceeding outside the prosecutor's presence, Mr. Kinney was elevated to

counsel of record. (RT 5579-5583.) On the record, Ms. O'Neill was officially designated lead counsel, and Mr. Kinney was, in effect, instructed to seek O'Neill's approval in tactical matters. (RT 5653.)

The mid-trial appointment of a third attorney to facilitate communication between a defendant and court-appointed counsel was an unauthorized procedure and its use was constitutional error in this case. (See, e.g., People v. Wright (1990) 52 Cal.3d 367, 450 [During *voir dire*, the trial court – over defendant's objection – used an unauthorized procedure to select a jury to try his case . . . . [¶]By proceeding as it did in the selection of the jury, the court erred."].) "Unauthorized experiments" are inappropriate in the capital trial setting, where life and death decisions are made. (Lambright v. Stewart (9th Cir. 1999) 191 F.3d 1181, 1187; Dissenting opinion, Reinhardt, J.)

This Court has clearly held that when a Marsden motion is denied, at whatever stage of the proceeding, the defendant is not entitled to another attorney who would act in effect as a watchdog over the first." (People v. Smith, supra, 6 Cal.4th at p. 695.) Appointing independent counsel after denial of a Marsden motion carries just as much risk of harm to the primary attorney-client relationship as does appointing an independent attorney to litigate the motion in the first instance. (Cf. People v. Hines, supra, 15 Cal.4th at p. 1025.)

As is more fully explained elsewhere in this brief (see Arguments VIII - XVI, & XXXXIX), the trial court's novel solution proved to be extremely destructive to already strained relationship between Roy and his female public defenders, and had a lasting impact on the trial. Not surprisingly, Mr. Kinney's establishment of a trusting bond with Roy led him to gradually assume a more and more active role in legal business at hand. When Mr. Kinney asked to be elevated to counsel of record, Ms. O'Neill and Ms.

Martinez assured the Court that Ms. Kinney was a welcome addition to the defense team. (RT 5580.) The record, however, suggests that the two deputy public defenders had little choice in the matter, because Ms. Kinney's involvement as "communicator" had simply accentuated the rift between Roy and the attorneys who were most familiar with the case and who were supposed to be exercising strategic control. This is exemplified by the fact that Roy, trusting Mr. Kinney, had evidently agreed to take the stand, but only if Ms. Kinney was the one to question him. (RT 5582.) It is also exemplified by Roy's conduct on the afternoon of November 8, 1993, when the Court announced its intention to proceed with "Phillips hearings" while Mr. Kinney was absent from the courtroom, appearing in another matter; Roy strenuously objected. (RT 5654-5655.)

Difficulties in the relationship between Mr. Kinney, on one hand, and Ms. O'Neill and Ms. Martinez, on the other, surfaced in later proceedings as well. Mr. Kinney and Ms. O'Neill disagreed on the record regarding the admissibility of Texas Department of Corrections and Camarillo State Hospital records used for impeachment during the testimony of witnesses. (RT 6878.) Much later, after Mr. Kinney had assumed the role of lead counsel following Ms. O'Neill's departure due to a diagnosis of cancer, acrimonious sparring erupted between Mr. Kinney and Ms. Martinez.

The incident occurred during a hearing, when Ms. Martinez expressed disagreement with an argument advanced by Mr. Kinney, that the public defenders had caused the delays in the case. During a tense but short colloquy with the court, the following was said:

> "MS. MARTINEZ: But I disagree with Mr. Kinney when he says, 'Well, I agree that it was the defense who caused the delay.' Again, that's the problem I have with Mr. Kinney, our office, is that obviously Mr. Kinney is a very experienced and

> intelligent man. We can't put a muzzle on Mr. Kinney. Mr. Kinney will do what Mr. Kinney wants to do regardless of how we all try to sit down –
> "THE COURT: I don't know why you're going on this. I started out to make sure that Mr. Kinney's motions were approved and adopted by the chief trial attorney, at that time Barbara O'Neill, and you assured me they were. I'm a little – when you – you're making me nervous when you're maybe going to turn the table on me and now say, 'Mr. Kinney can't be restrained. He's kind of like a wild animal and we can't keep him in a collar.'
> "MS. MARTINEZ: That's also part of the problem with Ms. O'Neill not being here, as being lead counsel. . . ." (RT 10396.)

What is clear is that there was a serious breakdown in communication between Roy and his deputy public defenders, which manifested itself to the Court during jury selection. (See, Arguments VIII & IX.) The Court, rather than acknowledge the breach, engaged in an unauthorized experiment in hopes of avoiding the necessity of a mistrial. Thereafter, attorneys "dropped in" and "dropped out" of the attorney-client relationship, or changed official roles in response to the ever-changing rulings of the Court, the caprices of counsel, or the specific circumstances at the time. (See, Arguments XI - XV.) Although all three attorneys were supposed to be acting as a "team," under the direction of Ms. O'Neill, in reality the three counsel sometimes took different positions on issues or worked toward achieving opposite goals – a problem which prompted a written complaint from the district attorney.

As is more fully explained in Argument XVI, infra, it would be difficult to imagine a criminal case marked by more dramatic disruptions to the integrity and continuity of the attorney-client relationship than this one. The unusual circumstances rendered defense counsel functionally absent at all critical stages of these proceedings; constructive denial of counsel is therefore presumptively prejudicial. (Strickland v. Washington (1984) 466 U.S. 668,

692.) Furthermore, because the errors occurred in the context of a capital case, the death judgment as well as the jury's guilt and sanity phase verdicts was deprived of any semblance of reliability in violation of the Eighth Amendment. For this reason, and the reasons more fully set forth in Argument XVI, the trial court's order appointing Mr. Kinney caused irreparable damage and should be treated as reversible error.

XI THE SANITY AND PENALTY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT MISHANDLED MOTIONS RELATING TO THE PUBLIC DEFENDER'S DECLARATION OF A CONFLICT STEMMING FROM ITS REPRESENTATION OF JAMES ANTHONY SCOTT.

The Sixth Amendment to the United States Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment and Article I, section 15 of the California Constitution guarantee a defendant the right to the assistance of counsel in a criminal case. (Powell v. Alabama (1932) 287 U.S. 45, 68-71; Holloway v. Arkansas (1978) 435 U.S. 475, 481-487; People v. Bonin (1989) 47 Cal.3d 808, 833.) The above constitutional provisions guarantee not just assistance, but effective assistance in a criminal case. (People v. Ledesma (1987) 43 Cal.3d 171, 215; Holloway v. Arkansas, supra, 435 U.S. at p. 481; People v. Chacon (1968) 69 Cal.2d 765, 773-774.)

Included in the right to effective assistance of counsel is a correlative right to representation that is free from conflicts of interest. (Wood v. Georgia (1981) 450 U.S. 261, 271; United States v. Christakis (9th Cir. 2001) 238 F.3d 1164, 1168; Lockhart v. Terhune (9th Cir. 2001) 250 F.3d 1223, 1229.) The assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by representation by one lawyer who simultaneously represents conflicting interests. (Glasser v. United States (1942) 315 U.S. 60, 70; Leverson v. Superior Court (1983) 34 Cal.3d 530, 537.)

The purpose of the right to counsel is to insure fairness in the adversary criminal process. (Wheat v. United States (1988) 486 U.S. 153.) The right

is considered "fundamental"; it is among those rights so basic to a fair trial that their infraction can never be treated as harmless error. (Cuyler v. Sullivan (1980) 446 U.S. 335, 343; Holloway v. Arkansas, supra, 435 U.S. at p. 489.)

A conflict of interest exists in any situation in which an attorney's loyalty to, or efforts on behalf of a client are threatened by his or her responsibilities to another client or third person, or by the attorney's own interests. (People v. Bonin, supra, 47 Cal.3d at p. 474; citing ABA Model Rules of Prof. Conduct (1983) rule 1.7 and Comment thereto.) In a criminal case, a conflict arises when an attorney represents a defendant and currently has, or formerly had an attorney-client relationship with a person who is a witness in that matter. The conflict springs from the attorney's duty to provide effective assistance to the defendant facing trial and his fiduciary obligations to the witness with whom he has had or has a professional relationship. (People v. Bonin, supra, 47 Cal.3d at p. 475; Leverson v. Superior Court (1983) 34 Cal.3d 530, 536-540; United States v. Armedo-Sarmiento (2nd Cir. 1975) 524 F.2d 591, 592.)

An attorney is forbidden to use against a former client any confidential information acquired during the attorney-client relationship. (Galbraith v. State Bar (1933) 218 Cal. 329, 333; Bus. & Prof. Code, § 6068; Rules of Prof. Conduct, rule 4-101; rule 5-102(B).) An attorney has an ethical duty to withdraw, or apply to the court for permission to withdraw, from representation that results in a conflicting obligations to present and former clients. (People v. Bonin, supra, 47 Cal.3d at p. 835; Rules of Prof. Conduct, rule 3-700(2); Rules of Prof. Conduct, rule 3-310.)

The United States Supreme Court defers to the judgment of counsel regarding the existence of a disabling conflict. A defense attorney is in the best position to determine when a conflict exists; he or she has an ethical

obligation to advise the Court of any problem, and his or her declarations to a court are "'virtually made under oath.'" (Mickens v. Taylor (2002) 535 U.S. 162, 167; quoting Holloway v. Arkansas, supra, 435 U.S. at p. 485-486.) Because an attorney's "conflicting obligations to multiple defendants 'effectively seal his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors," reversal is automatic when a trial court improperly requires joint representation over timely objection. (Mickens v. Taylor, supra, 535 U.S. at p. 168; quoting Holloway v. Arkansas, supra, at pp. 489-440.)

A. The trial court properly discharged the public defender.

On January 13, 1994, in the midst of the sanity trial, D.D.A. Cooper for the first time revealed to the defense attorneys that he intended to use James Anthony Scott, a public defender client, as a penalty phase witness. Mr. Scott had been personally represented by Roy's counsel, Ms. Martinez, in an unrelated criminal matter. (RT 9977-9978; SCT2 1312.) The witness was contemporaneously being represented by another deputy public defender on a related probation violation case. (RT 10029.) The Fresno County Public Defender's office maintained personal, confidential files on Mr. Scott, and they represented him on a violent crime. (RT 10006.)

The trial court extracted an agreement by the district attorney not to introduce any evidence regarding the incident to which Scott was a witness. (RT 10035.) This did not sufficiently ameliorate the conflict, however, because the court also made it clear that defense counsel would be unable to present evidence of Roy's lack of future dangerousness without opening the door to introduction of rebuttal evidence, possibly involving evidence of the incident witnessed by Mr. Scott. (RT 10035-10039.)

The public defender's declaration of a conflict of interest was completely proper under the circumstances. A classic case of conflicting loyalties was presented. (People v. Bonin, supra, 47 Cal.3d at p. 474-475; Leverson v. Superior Court, supra, 34 Cal.3d at pp. 536-540.) Ms. Martinez had a former, and continuing attorney-client relationship with Mr. Scott as the result of her representation of him in a criminal matter. This created a conflict for both Ms. Martinez and Ms. O'Neill. A conflict of interest exists "where an attorney, or a member of the attorney's firm or office, represents a criminal defendant after having previously represented a prosecution witness." (People v. Pennington (1991) 228 Cal.App.3d 959, 965.)

"[T]he mere fact that the conflict exists as to defendants in different proceedings is not a sufficiently significant distinction. Separate and distinct proceedings can pose the same problems of constitutional and ethical conflicts of interest." (Uhl v. Municipal Court (1974) 37 Cal.App.3d 526, 535.) A conflict of interest may arise if it would profit one client to attack the credibility of another, even if the clients are not represented in the same criminal case. (Uhl v. Municipal Court supra, at p. 533; see also Leverson v. Superior Court, supra, 34 Cal.3d at p. 538.) "Among the dangers in a successive representation is that the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination for fear of misusing that information." (Sanders v. Ratelle (9th Cir. 1994) 21 F.3d 1446, 1453.) In this case, it was obvious that a problem would arise if the defense attorneys elected to put on penalty phase evidence that Roy posed no future danger, and the prosecutor responded by calling the public defender's client or former client as a rebuttal witness, to testify about a violent altercation in county jail.

The deputy public defenders told the court there was a conflict between

Roy and Mr. Scott, the details of which could not be divulged without breaching the confidences of the existing client. Counsel were not required to make any greater showing of the facts and circumstances giving rise to the conflict. (Aceves v. Superior Court (1996) 51 Cal.App.4th 584, 591.) It was sufficient that there was an affirmative representation by personal appearance or declaration to the effect that the chain of command at the Fresno County Public Defender's Office had reviewed the facts, and concurred with trial counsel that there was a conflict. (Id. at p. 594, fn. 8.) The trial court properly, albeit unhappily, accepted defense counsels' representations, and allowed the public defender to withdraw from Roy's representation. (Id. at p. 596.)

B. The Court erred by reinstating Ms. O'Neill as counsel.

On January 27, 1994, the district attorney and Roy's remaining attorney, Mr. Kinney, objected to order relieving the public defender as counsel. (RT 10054, 10084-10087; CT 1123-1125.) Mr. Kinney made a motion for mistrial based on the fact that Roy would be forced to proceed to the penalty phase trial with an inadequately prepared attorney who had not been present for all of the guilt phase trial. (RT 1099-10101.) The trial court denied a mistrial but vacated its order discharging the public defender. (RT 10097-10119.)

For the same reasons that it was proper to discharge the public defender, it was error to order reinstatement. Counsels' good faith representations to the court, coupled with the evidence in the record and the posture of the trial, were sufficient as a matter of law to establish that the public defender's representation would compromise Roy's constitutional right to counsel free from any conflict of interest affecting counsel's performance.

(Leverson v. Superior Court, supra, 34 Cal.3d at p. 540.)

C. It was error to deny Roy's March 25, 1994, motions to discharge counsel, and to grant a new trial.

The order reinstating the public defender as counsel precipitated a new round of appellate court proceedings challenging the right of the trial court to order Ms. Martinez and Ms. O'Neill to resume active representation. This, in turn, caused lengthy delays. It was not until March 25, 1994, after several months of protracted litigation in the Court of Appeal and this Court, that the conflict issue was finally determined. The conflict of interest issue was laid to rest when the district attorney backed down on a critical issue. D.D.A. Cooper represented during proceedings in the Court of Appeal that (1) Mr. Scott would not be used as a witness for any purpose at the penalty phase trial; (2) no evidence would be introduced regarding the incident in the jail to which Scott was a witness; *and* (3) the defense would be free to argue their case as though the Scott altercation had never happened. (RT 10246-10254, 10271.)

As an additional precaution, because Ms. Martinez had been Mr. Scott's lawyer, she was removed from Roy's case to avoid "the appearance of a conflict of interest." (RT 10249.) A few weeks later, the trial court vacated the order relieving Ms. Martinez as counsel, and, over the assistant public defender's objection, ordered her back on the case. (RT 10324-10333.)

The public defender's concession that the actual conflict had been removed did not ameliorate the prejudice caused by the trial court's improper handling of the conflict of interest issue. For a two-month period, while the "conflict" issue was being litigated, Roy was represented by both Mr, Kinney, who actively opposed the discharge of the public defenders, and Ms. O'Neill,

Ms. Martinez, and Mr. Dreiling, who vehemently opposed being forced to remain on the case.

After Ms. O'Neill, but not Ms. Martinez, was reinstated as counsel, Mr. Kinney, joined by the district attorney, continued to take a position contrary to the public defender's office; he objected that the removal of Ms. Martinez was improper, and objected to his appointment as second-chair counsel. (RT 10264.)[28]

Roy accused the public defender's attorneys of abandonment, and asked for substitution of all counsel, including a replacement for Mr. Kinney. Roy also asked for a new trial based on the long delay in the proceedings caused by the litigation of the conflict issue. (RT 10279-10288.) Following an *in camera* Marsden hearing on March 25, 1994, the Court refused to discharge counsel or to grant Roy a new trial. (RT 10282.)

It was error to deny Roy's March 25, 1994, Marsden motion, and motion for a new trial. By this stage of the proceedings, the relationship between Roy and the public defenders had completely and obviously, collapsed. (United States v. Moore, supra, 159 F.2d at p. 1158; Brown v. Craven, supra, 424 F.2d at p. 1170.)[29] Furthermore, the relationship *between* members of the defense legal team had deteriorated to the point that Mr. Kinney was functioning as independent counsel, taking positions on legal issues which were contrary to the positions asserted by co-counsel from the

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[28] Mr. Kinney warned the trial court on March 25, 1994, that he had "never contemplated" being second counsel in the case, and his appointment would be tantamount to appointing a "potted plant." (RT 10264.) D.D.A. Cooper agreed with Mr. Kinney, objecting that if Ms. O'Neill had no conflict of interest, neither did Ms. Martinez. (RT 10266.)

[29] Roy adopts and incorporates by reference the arguments and authorities set forth in the Appellant's Opening Brief, Argument VII & VIII.

public defender's office. Mr. Kinney and Ms. O'Neill were even under court order not to communicate with one another about information received by public defender employees from James Anthony Scott. (RT 10292-10293.)

The court's action, allowing concurrent representation by independent, rival legal teams was unprecedented and unauthorized, and certain to undermine the attorney-client relationship with respect to all counsel involved. (People v. Smith, supra, 6 Cal.4th at p. 695; People v. Hines, supra, 15 Cal.3d at p. 1025.) Accordingly, even if it was not error to deny Roy's earlier Marsden motions based on Roy's inability to communicate with his deputy public defenders (Arguments VII - IX), it was certainly error to deny the motion to discharge counsel after an interruption in the continuity of counsel spanning several months.

During the period in question, though all counsel were supposed to be representing Roy's best interests, it does not appear that any of the attorneys was actually doing so. Each legal team was, in effect, advancing its own interests. The Court of Appeal in its March 21, 1994 opinion denying Mr. Dreiling's petition for relief from the contempt finding, commented upon discrepancies in the showings made by the public defender regarding the claimed conflict of interest. The appellate court expressed skepticism about the sincerity of the public defender's claim that Mr. Scott was a potential mitigation witness on Roy's behalf, and also found incredible the public defender's assertion that the conflict did not become apparent until the district attorney disclosed Scott's identity as a penalty phase witness. (CT 1169-1173.) The appellate court, denying the writ petition, even questioned how the public defender could have undertaken the representation of Mr. Scott in 1992, when that office was already representing Roy, if a conflict in fact existed. (CT 1173.) The appellate court's opinion clearly implies the belief

that the public defenders were using the conflict as a subterfuge to get themselves removed from the case. If so, Roy played no role in the subterfuge, and he cannot be held accountable for any delays, or for the breakdown in the attorney-client relationship, caused by the public defender's handling or mishandling of the case.

Nor do Mr. Kinney's actions and decisions appear to have been motivated solely by Roy's best interests. During the hiatus, Mr. Kinney consistently opposed the public defender's efforts to withdraw from the case, but not on the merits. Rather, Mr. Kinney's motive for opposing the public defender's withdrawal appears to have been his desire not to burden himself with the duties of lead counsel, or even second-chair counsel, for the penalty phase of Roy's case.

Roy cannot be accused of attempting to manipulate the situation to his advantage. When Mr. Dreiling first announced the conflict on January 24, 1994, Roy objected. (RT 10066.) It was Mr. Drieling who advised the trial court that the conflict of interest involving his office's concurrent representation of Mr. Scott and Roy could *not* be waived by Roy. Thereafter, the court made no attempt to obtain from Roy a waiver of the constitutional right to the assistance of conflict-free counsel, presumably because the public defender had voiced the opinion that the conflict with Mr. Scott could not be waived. (People v. Bonin, supra, 47 Cal.3d at p. 839.)

Roy's March 25th, 1994, Marsden motion, seeking discharge of all three attorneys and a new trial, followed upon two months of legal bickering, during which Ms. O'Neill and Ms. Martinez completely abandoned active involvement in Roy's case and fought reinstatement. Ms. Martinez resumed work on a heavy calendar of other felony cases. (RT 10329.) On April 15, 1995, after her reappointment, Ms. O'Neill advised the court:

> "The defense is, of course, since we have been reappointed three weeks ago, is working on the case. However, the months when this case was in limbo, we were not working on the case. We did not know if we would be proceeding as the attorneys of record or not. And that would have been a waste of time and money, in my opinion, until we were reappointed." (RT 10318.)

During the same period, Mr. Kinney continued to represent Roy, but repeatedly denied having the ability to provide competent representation at the penalty phase trial due to his conflicting obligations in other cases and his absence from most of the guilt-phase trial. (See, RT 10054, 10084-10087, 10264, 10268.)

Under the circumstances, the trial court should have granted Roy's motion to substitute new counsel, and set the matter for a completely new trial. "The significance of continuity of representation has been recognized . . . by the Supreme Court of the United States." (People v. Manson (1976) 61 Cal.App.3d 102, 201, citing Faretta v. California (1975) 422 U.S. 806, 834-835, fn. 46.) The public defender's total withdrawal from the case for several months produced an "irreversible disruption in the structure of the trial process" which could not be repaired by mere reinstatement. (Ibid.) Mistrial is the appropriate remedy when "there has arisen a breakdown in a relationship between the accused and his counsel frustrating the realization of a fair trial." (People v. Manson, supra, 61 Cal.App.3d at p. 202. Legal necessity for a mistrial arises from "physical causes beyond the control of the court, such as the death, illness, or absence of judge or juror, or of the defendant." (People v. McNally (1980) 107 Cal.App.3d 387, 390; accord: People v. Brandon (1995) 40 Cal.App.4th 1172, 1175.)

There are no meaningful distinctions between California's standards and the standards applicable under the federal constitution. (Thomas v.

Municipal Court (9th Cir. 1989) 878 F.2d 285, fn. 2.) "Manifest necessity" for mistrial exists when the relationship between the accused and his counsel has irretrievably broken down after the attachment of jeopardy, frustrating the realization of a fair trial. (Ibid.)

Mistrial was also appropriate because of the protracted delay in the proceedings following the sanity trial. The delays were not the fault of Roy. Even in an ordinary trial, mid-trial "adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and the court's instructions may become diluted or confused." (People v. Santamaria (1991) 229 Cal.App.3d 269, 277-278, citing United States v. Stratton (2nd Cir. 1985) 779 F.2d 820, 832; and People v. Valles (1979) 24 Cal.3d 121, 131, dissenting opinion of Mosk, J.: "[A] fair jury can be achieved only if the jury is insulated from outside communications or influences."].) "Obviously, the longer the separation, the greater the risk." (People v. Santamaria, supra, 229 Cal.App.3d at p. 278.)

By March 25, 1994, there had already been a protracted delay in the proceedings due to circumstances beyond Roy's control. (See, e.g., People .v Gibbs (1986) 177 Cal.App.3d 763, 764.) Under such circumstances, it was error of constitutional dimension and clearly prejudicial for the trial court to deny a mistrial, and resume proceedings as though nothing had occurred, with Ms. O'Neill and Mr. Kinney acting as counsel.

The errors of the court were individually and cumulatively prejudicial. Assuming the public defenders had actual conflicting ethical obligations to a present and former client, they rightfully declared a conflict as soon as D.D.A. Cooper belatedly revealed the identity of a penalty phase witness represented

by Ms. Martinez. (People v. Bonin, supra, 47 Cal.3d at p. 835; Rules of Prof. Conduct, rule 3-700(2); Rules of Prof. Conduct, rule 3-310.) If, instead, the Fresno County Public Defender was merely using its past representation of Mr. Scott as a pretense to withdraw from a difficult and time-consuming capital case, then it had a conflict of interest nonetheless. Obviously, in such circumstances, the public defenders were no longer acting in Roy's best interest; they were simply advancing their own interests at a client's expense.

As is more fully explained in Argument XVI, supra [discussing cumulative error], and Argument XXV, infra [assigning as error the long delay between the sanity and penalty phase trials], the lengthy delays in the proceedings were not caused by Roy, yet they created an unacceptable risk that the jury would forget substantial aspects of the guilt-phase evidence, or be exposed to outside influences, undermining the integrity of the sanity and penalty phase trials. Furthermore, the long bitter fight to decide which of the attorneys would be forced against their will to represent Roy necessarily contributed to the degradation of the attorney-client relationship, resulting in the constructive denial of counsel. (Strickland v. Washington, supra, 466 U.S. at p. 692; Holloway v. Arkansas (1978) 435 U.S. 475, 490.) Because the errors occurred in the context of a capital trial, the reliability of the death judgment was undermined in violation of the Eighth Amendment. (See Argument XVI, infra.)

XII THE DEATH PENALTY MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY DENIED A MISTRIAL, AND APPOINTED MR. KINNEY LEAD COUNSEL OVER OBJECTION, AFTER MS. O'NEILL DEVELOPED CANCER AND WITHDREW FROM THE CASE.

A. Even before Ms. O'Neill fell ill, Mr. Kinney's motions for mistrial, filed May 25, 1994, should have been granted.

On May 25, 1994, more than *four months* after the sanity phase verdicts, the penalty phase trial had still not commenced. On this date, Mr. Kinney filed two motions for mistrial. In the first, Mr. Kinney argued that a mistrial was necessary because the trial court had erred by appointing him as "facilitator" of communication in lieu of granting the Roy's Marsden motions. (CT 1244-1251.) In the second, Mr. Kinney argued legal necessity for a mistrial due to the long delay between sanity and penalty phases. He argued, in essence, that Roy would be prejudiced by continuing with the trial because press coverage during the long delay in the proceedings made it certain the jurors would have been exposed to outside information regarding the case.

Mr. Kinney's motion was supported by copies of a number of newspaper articles which had appeared in the local newspapers, covering the public defender's declaration of conflict, and the contempt proceedings against Mr. Dreiling. (CT 1252-1261.)

The motions for mistrial filed May 25, 1994, were meritorious and should have been immediately granted for the same reasons previously set forth in Arguments V and VI, supra, regarding Roy's motion for mistrial and

for new counsel. The trial court had erred by denying Roy's Marsden motions, when those motions were originally made on September 29, and October 8, 1993. The trial court had erred again on October 12, 1993, by allowing the testimonial phase of the trial begin, while Roy's meritorious motion to discharge his deputy public defenders was still pending. It was equally egregious error to deny the Marsden motion on the merits on October 19, 1993, after Ms. O'Neill and Ms. Martinez effectively conceded that their relationship with Roy had irretrievably broken down.

The mid-trial appointment of Mr. Kinney as "facilitator" was likewise error. The fact that Mr. Kinney's assistance was needed merely underscores the degree to which communication had broken down between Roy and his court-appointed counsel by the time the appointment was made. Injection of Mr. Kinney into the proceedings resulted in the blurring and confusion of counsels' respective roles, and Mr. Kinney's gradual assumption of greater and greater responsibilities as full counsel.

The errors above were compounded by the trial court's mishandling of the declaration of a conflict of interest by the Fresno County Public Defender. Although the conflict with Mr. Scott's interests was eventually litigated to conclusion, resolution did not occur for several months, during which Roy's counsel problems were clearly exacerbated by the public defender's temporary abandonment of the case, and the actions of different sets of counsel who took opposing positions regarding the propriety of the trial court's orders discharging, then reinstating the public defender. On March 25, 1994, when Roy brought motions for mistrial and for the appointment of new counsel, legal necessity already existed to declare a mistrial, and begin the proceedings anew.

By May 25, 1994, when Mr. Kinney filed his motions for mistrial,

jurors had enjoyed a *four-month* recess since the conclusion of the sanity phase trial. Nearly *five months* had passed since the jury had reached its verdicts finding Roy guilty of capital murder. It had been more than *seven months*, since jurors had heard the first guilt-phase witness testify.

Even if it was not error to deny the motion for mistrial on March 25, 1994, by May 25, 1994, when Mr. Kinney moved for mistrial, the length of the recess between guilt and sanity, and penalty phases of the trial had become unacceptably long. There had been an "irreversible disruption in the structure of the trial process" and a "breakdown in the relationship of the accused and his counsel frustrating the realization of a fair trial." (People v. Manson, supra, 61 Cal.App.3d at p. 202.) Furthermore, as is more fully elaborated in Argument XXV, infra [asserting irremediable prejudice as a result of the long delay between the guilt and penalty phases of the trial], the further delay in commencing the guilt phase created an unacceptable risk of prejudice from the possibility that jurors would be exposed to outside influences, or would suffer fading memories due to passage of time. This risk was unacceptably great given that the ultimate penalty of death was a possibility. (People v. Santamaria, supra, 229 Cal.App.3d at p. 227-278; People v. Gibbs, supra, 177 Cal.App.3d at p. 764.)

Accordingly, the Court should have immediately granted Mr. Kinney's motion for mistrial so that continuity of counsel and the integrity of the trial could be assured.

B. It was error to appoint Mr. Kinney to replace Ms. O'Neill as lead counsel, over his objections, and to deny Roy's several subsequent motions for mistrial.

On June 7, 1994, all parties received word that Ms. O'Neill's cancer

would require her withdrawal from Roy's case. (RT 10373-10378.) At hearings held on June 17, 1994, the trial court refused to grant a mistrial, and appointed Mr. Kinney lead counsel despite Mr. Kinney's objections on a multiplicity of grounds. Mr. Kinney objected to his appointment as lead counsel on the ground that he had been absent from much of the guilt phase trial; he had not been present continuously during the remainder of the trial; his son had just been hospitalized and was a source of worry and concern; Mr. Kinney was already engaged as counsel in the John Malarkey murder case; and Mr. Kinney himself was suffering from Bipolar Disorder and hypertension, and was experiencing side effects from the medication prescribed for these conditions, which would disable him from trying cases for several months. (CT 1385-1393, 1425-1426; SCT2 1890, 1941-1943; RT10379, 10420-10446, 10477-10497.)

Over objections by Mr. Kinney and D.D.A. Cooper, who felt Ms. Martinez, not Mr. Kinney, should be appointed lead counsel, Mr. Kinney was ordered to replace Ms. O'Neill as lead counsel, and Ms. Martinez was assigned the role of second chair. (RT 10465, 10477-10497.)

Mr. Kinney renewed his request for a mistrial on November 7, 1994, in the midst of the penalty phase of the trial (RT 11495 et seq.), and again during parties' penalty phase arguments. (RT 11929 et seq.)

On November 7, 1994, after falling ill again, Mr. Kinney, tendered a letter from his physician, stating that due to health problems he could not proceed with Roy's trial until November 16, 1994. (RT 11495.) Mr. Kinney reminded the court of his "bipolar" condition and stated that his doctors had been working so hard to curb his "manic phase" that he had become more "depressed" as well as "exhausted and tired." (RT 11497.)

Mr. Kinney renewed his motion for mistrial, that had been made earlier

based on the delay of four or five months, and argued that it had now been ten months since the sanity phase trial. (RT 11497-11498.) Mr. Kinney complained that his absence from most of the guilt phase was causing him problems in assessing the "credibility and demeanor" of the witnesses. (RT 11498.) The Court again refused to declare a mistrial. (RT 11498.)

As the result of the trial court's refusal to grant a mistrial, Roy was left with a depressed and exhausted lead attorney who had not even been present for the lion's share of the guilt-phase proceedings. Even while assigned the role of "facilitator," Mr. Kinney had not attended all court hearings, and during bench and sidebar conferences he had remained in the courtroom with Roy, and not participated in many substantive legal discussions regarding objections and rulings. (See Engrossed Settled Statement on Appeal: SCT #7 (vol. 1 of 1), p. 186-195 [settling unreported bench conferences held between October 25, 1993 and November 8, 1993].)

As in People v. Manson, supra, 61 Cal.App.3d at p. 198, fn. 97, Mr. Kinney was particularly handicapped in his ability to argue the credibility of witnesses during penalty phase argument because he did not observe the demeanor and character of many of the guilt phase witnesses when they testified. During his penalty phase argument, D.D.A. Cooper urged the jury to consider evidence received during "any part of the trial" including factors relating to Laurie's murder. (RT 11839.) Mr. Cooper argued from guilt-phase evidence that the murder was premeditated, and that it occurred during the course of a robbery and an attempted rape. (RT 11839-11840.) The prosecutor repeatedly emphasized that little new evidence of aggravating factors had been adduced during the penalty phase, and that most evidence supporting findings of aggravating circumstances, other than prior crimes evidence, had already been found true by the jury beyond a reasonable doubt.

(RT 11837-11838 ["you shall consider all of the evidence which has been received during any part of the trial of this case"]; RT 11844 ["a majority of these factors . . . relating to evidence that you have already received and that you've already tested by proof beyond a reasonable doubt"]; RT 11845 ["And because you've already tested the evidence regarding the murder of Laurie [F.] by proof beyond a reasonable doubt, there's no need for you to test that again"].) Mr. Cooper also talked at length, and in great detail, about the facts of the crime as established through the guilt phase evidence. (RT 11900-11919.) The focus of Mr. Cooper's argument on guilt-phase evidence prompted Mr. Kinney to renew his motion for mistrial again.

In somewhat disjointed remarks made outside the jury's presence, Mr. Kinney stated:

> "What I have on the record has nothing to do with Mr. Cooper directly, it has to do with hearing him argue facts and things that I did not get to see in the guilt phase. And I put in motions and writs that it was very difficult as lead attorney to argue cases where I could not see the demeanor, but I never appreciated entirely how much until as I heard him argue things that I had not seen and not the demeanor is totally inappropriate for an attorney to be in that position and I just want to renew my motions for the record based on that that [sic] have previously been made about not being present for the guilt phase and that's what I wanted to put on the record. And he mentioned these things and talked of ropes and talked of things being said, I read some of it, but I didn't get to see the witnesses, and I didn't get to see their demeanor and I think it's a tremendous hindrance. I just want it on the record." (RT 11929.)

The mistral motion was again denied. (RT 11929.)

At the conclusion of the penalty phase, the jury in this case was instructed: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part

of the trial of this case . . . ." (CT 1614.) It must be presumed that the jury followed the Court's instructions. (People v. Welch, supra, 20 Cal.4th at p. 773.)

The denial of a mistrial deprived Roy of the effective assistance of counsel. Included in the Sixth Amendment guarantee of assistance of counsel is the accused's right to have a closing summation made to the jury. (Herring v. New York (1975) 422 U.S. 853; People v. Manson, supra, at p. 198.) A defendant is denied effective representation of the attorney is unable to effectively argue the case. (People v. Manson, supra, at p. 198.) "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may be to the presiding judge." Herring v. New York, supra, 422 U.S. at p. 858; accord: People v. Manson, supra, at p. 198-199.) "An integral part of argument includes fair comment on the credibility of witnesses." (People v. Manson, supra, 61 Cal.App.3d at p. 199, citing People v. Roberts (1966) 65 Cal.2d 514, 520.) "Every trial judge and trial lawyer grasps the value attached to the manner in which testimony is presented." (Ibid.) The record shows that Mr. Kinney was in fact severely handicapped in arguing credibility of witnesses in the penalty phase, by virtue of his absence during most of the guilt-phase witnesses.

Ms. Martinez was present at the guilt and penalty phase trials, but she was not assigned the role of lead counsel because of her lack of qualifying experience. (RT 10448-10450.) Ms. Martinez's training and experience did not qualify her to act as counsel in a death penalty case under the guidelines established by the American Bar Association [ABA], or the National Legal Aid and Defender Association [NLADA]. For example, former ABA

Standards for attorney eligibility required that capital counsel "have prior experience as lead counsel in no fewer than nine trials of serious and complex cases that were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought." Capital counsel "should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials." Lead counsel in a death penalty case must also "have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought." (Compendium of Standards for Indigent Defense Systems Volume III, Standards for Capital Case Representation, Guideline 5.1, Attorney Eligibility.) NLADA Standards are in accord. (Ibid.)[30]

Furthermore, even though Ms. Martinez was present during all evidentiary phases of the proceedings, the continuity of her representation had been interrupted for several months while the public defender's office was litigating its right to withdraw from Roy's case. During the interim period,

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[30] The California Judicial Council only recently adopted minimum qualifications for appointed counsel in capital cases. The minimum qualifications are more stringent than those set by the ABA and NLADA. According to the California Rules of Court, among other qualifications, lead counsel in a death penalty case must have ten years litigation experience in the field of criminal law, prior experience as lead counsel in either at least 10 serious or violent felony jury trials, including at least two murder cases, tried to argument, verdict or final judgment, or at least five serious or violent felony jury trials, including at least three murder cases, tried to argument, verdict or final judgment, and have completed within two years prior to appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California.

she had abandoned her representation of Roy and undertaken representation of numerous other felony cases. In addition, she had been removed from Roy's case, at least temporarily, because of her representation of Mr. Scott, another Public defender client with the potential to be a witness against Roy at the penalty phase trial. Ms. Martinez's reinstatement as counsel created the appearance of a conflict, and possibly an actual conflict, which was not waived by Roy after proper advice of the potential drawbacks, dangers and consequences of her prior representation of Mr. Scott. (People v. Bonin, supra, 47 Cal.3d at p. 837.)

Once Ms. Martinez was relegated to second chair counsel, functioning under the stewardship of Mr. Kinney instead of Ms. O'Neill, tension in the relationship between the remaining two attorneys immediately surfaced. At a hearing on June 17, 1994, at which all pending motions for mistrial were denied, Ms. Martinez disagreed on the record with Mr. Kinney's assertion that Ms. Martinez and Ms. O'Neill had been responsible for the delays in the case. Ms. Martinez inferred that the two deputy public defenders had not be able to "put a muzzle on Mr. Kinney," – that Mr. Kinney was in the habit of doing what he wanted to do despite any effort to engage in joint decision-making. Ms. Martinez's remarks caused the Court to express concern: "I'm a little – when you – you're making me nervous when you're maybe going to turn the table on me now and say, 'Mr. Kinney can't be restrained. He's kind of like a wild animal and we can't keep him in a collar.'" (RT 10396.) Ms. Martinez merely replied that it was a problem with Ms. O'Neill no longer being lead counsel. (RT 10396.)

Immediately prior to commencement of the penalty phase, on October 25, 1994, Ms. Martinez moved for a 30-day continuance because she felt that Mr. Kinney was so unprepared that the was still getting the names of the

witnesses wrong. (RT 10964.) According to Ms. Martinez, Mr. Kinney had not spent a single day consulting with her, had given her no direction or input, and he had been unable to focus on anything but the Reed case. (RT 10965.) Mr. Kinney did not dispute these allegations. Nevertheless, although Mr. Kinney had apparently been engaged in the Terrell Reed case, a special circumstances murder trial, for 37 days (see RT 10916), the motion to continue was not joined by Mr. Kinney and was therefore denied. (CT 1480; RT 10962-10965.)

Ms. Martinez did not act as lead counsel at the penalty phase and she was not qualified for that role. The record makes it quite clear that Ms. Martinez had received insufficient input, advice or supervision from Mr. Kinney to be an effective second-chair counsel during the penalty phase of the trial, much less to supplant the need for a competent first-chair.

Furthermore, Ms. Martinez appears to have exercised little or no control over how the defense was conducted. Indeed, it appears that Roy had two attorneys in theory but not in substance. Mr. Kinney gave both the opening and closing statements to the jury, he cross-examined all prosecution witnesses and conducted the direct-examination of all defense witnesses. Under the circumstances, Ms. Martinez's presence with Ms. O'Neill at the entire guilt phase trial cannot possibly have ameliorated the prejudice caused by Mr. Kinney's absence and lack of participation in much of the guilt phase trial.

While Mr. Kinney's overall effectiveness as counsel, or lack thereof, is more appropriately addressed in the petition for writ of habeas corpus to be filed by the Habeas Corpus Resource Center in conjunction with this appeal (People v. Pope (1979) 23 Cal.3d 412, 426, fn. 17), several incidents during the penalty phase are worthy of mention because they corroborate Mr.

Kinney's own belated complaints to the trial judge that he was too sick and too exhausted to continue with the penalty phase trial.

Retired Texas Ranger Robert Steele was the arresting officer when Roy was accused of robbing the passenger of a train *en route* to Texas. During Mr. Kinney's cross-examination of Mr. Steele, a penalty phase witness for the prosecution, the following colloquy occurred:

> "Q: And after those [Miranda] rights were given, did you question him or did someone else question him?
> "A. At one point I attempted to, yes, sir.
> "Q. And do you know how long you questioned him for?
> "A. A very short time because he said he had nothing to say and that was the end of it.
> "Q. Did he tell you that he did not do the assault and robbery?
> "A. No, sir.

Mr. Kinney refreshed Mr. Steele's recollection with a report written by the witness at the time of the arrest. Afterward, he continued his cross-examination.

> "Q. Does that refresh your memory as to whether he told you he had nothing to do with the assault and the robbery?
> "No, sir. In other words, what I was trying to say there, and I guess I didn't say it, he didn't want to say anything. He would not admit to anything. In other words, he said nothing. In other words, he wouldn't tell me."
> "Q. Does your report sow that you interviewed Mr. Clark –
> "A. Right.
> "Q. – and he would not admit doing the assault and the robbery? That's what it says here?
> "A. Right.
> "Q. And you're saying that there wasn't an interview –
> "A. No. I'm saying there was an interview and he said he had nothing to say.
> "Q. Well, so what it says here is that he did not admit to doing the assault and robbery; is that correct?
> "A. Right. He didn't admit to any of it.
> "Q. Okay. And did he tell you, 'I didn't do – ' do you recall

him saying, 'I did not do that assault and robbery'?
"A. No, sir."

(RT 11078-11080.)

Whatever Mr. Kinney's intent in pursuing this line of cross-examination, the effect was to emphasize that Roy, when faced with the horrifying accusation that he had slit the throat of an elderly train passenger and taken his wallet, he invoked his right against self-incrimination and did not deny the charge. Such questioning would have been misconduct if done by the prosecutor. (Doyle v. Ohio (1976) 426 U.S. 610, 619, fn. 10; People v. Gaines (1980) 103 Cal.App.3d 89, 94-96.) It is nearly inconceivable that Mr. Kinney's cross-examination on this point was *not* very harmful to the defense.

Another similarly troublesome error occurred during Mr. Kinney's cross-examination of penalty phase witness David Atwood. In *in limine* proceedings, defense counsel had successfully moved for the exclusion of testimony by Mr. Atwood that Roy had referred to him as a "White boy" or "White ho [whore]" during confrontations in Texas prison. (RT 10641-10642, 10645-10646, 10731-10737, 10751.) This evidence was excluded based on a finding by the trial court that evidence of Roy's alleged racial epithets would be more prejudicial than probative (Evid. Code, § 352). (RT 10736.) The district attorney and the witness complied with the trial court's ruling, cautiously editing any testimony referring to the "White boy" remark. For no apparent reason on cross-examination, however, Mr. Kinney asked Mr. Atwood about his extrajudicial claims that Roy had prefaced his alleged assaults by calling him, "White boy." (RT 11266-11267.) The racial epithet was then given extra emphasis in questioning by the trial court. (RT 11267.)

At times during penalty phase proceedings, Mr. Kinney also exhibited

inappropriate outbursts of temper. For example, during proceedings to determine whether the prosecutor had deliberately withheld from the defense team the misdemeanor welfare fraud conviction of Venus Farkas, Mr. Kinney got into an argument with the court about the permissible scope of his redirect-examination of Mr. Schiavon. The trial court told Mr. Kinney they would take the matter up at another time, and commented "I assume counsel are officers of the court–." (RT 10844.) Mr. Kinney responded, "Then you'd better get another lawyer. I'll never change that." The court said, "Don't tell me –" and was interrupted by Mr. Kinney again: "Get another lawyer." (RT 10844.) The court let the rude remark pass with just a warning to Mr. Kinney not to be "so blunt." (RT 10844.) However, the incident, like the others, is possibly symptomatic of how Mr. Kinney's fatigue and drug interaction problems, as well as his absence from much of the guilt phase, adversely affected his performance during penalty phase proceedings.

Accordingly, it was error for the trial court to force counsel to go forward after Ms. O'Neill developed cancer, and had to be excused from the case. Likewise, it was error to deny defense counsels' multiple mid-penalty phase motions for mistrial, based on Mr. Kinney's fatigue and poor health, and inability to engage in competent advocacy due to his absence from guilt-phase proceedings. It appears from the record as a whole that Mr. Kinney's absence during the guilt phase as well as his fatigue, drug-interaction problems and lack of preparedness adversely contributed to the penalty phase judgment. (See also, Argument XVI, infra [re cumulative error].)

XIII THE GUILT AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE THE PROSECUTOR VIOLATED HIS DUTY UNDER BRADY V. MARYLAND, TO DISCLOSE MATERIAL EVIDENCE USABLE FOR IMPEACHMENT, THE MISDEMEANOR WELFARE CONVICTION OF MRS. FARKAS, A MATERIAL WITNESS.

It was not until October 19, 1994, nine months after the sanity phase trial, that Ms. Martinez learned that the Fresno County Public Defender had represented Venus Farkas, Laurie's mother, in a welfare fraud case that had been pending during Roy's case. The charges stemmed from the witness's acceptance of welfare benefits for Laurie, after Laurie's death. (RT 10810.)

The trial court refused to permit Ms. Martinez to withdraw from Roy's case, due to the conflict of interest. (RT 10544-10546.) After a contested evidentiary hearing on October 21, 1994, to determine whether the witness's welfare fraud conviction had been wilfully suppressed by the prosecution, the trial court exonerated the deputy district attorney of wrongdoing, and denied a motion for mistrial, and a new trial, brought on Roy's behalf. (RT 10925-10926.) The court also found that no conflict of interest would exist, in the event Mr. Kinney decided to call Venus Farkas as a witness at the penalty phase trial. (RT 10943, 10898.)

At the October 21, 1994, hearing of the motion for mistrial, defense investigator, David Shiavon was called as a witness. Mr. Schiavon testified that he had interviewed Venus Farkas on October 13, 1994, in the presence of Ms. Martinez. Mr. Schiavon, using a ploy to get Mrs. Farkas to disclose information, told the witness he had seen a notation in Mr. Cooper's files indicating she had a conviction for welfare fraud in Clovis, California. Mrs.

Farkas then admitted to Mr. Schiavon that, prior to Roy's preliminary hearing, she had discussed her welfare fraud case with Mr. Cooper. During the discussion, Mr. Cooper had written something down in his notes and assured Mrs. Farkas that the welfare fraud case was of no concern, and it would not be brought out during the proceedings against Roy. (RT 10825-10832.)

Mr. Schiavon returned to the residence of Mrs. Farkas with a subpoena on October 20, 1994. On this date, Mrs. Farkas told Mr. Schiavon that she had spoken with Mr. Cooper, and the deputy district attorney had denied having any notes in his files indicating the existence of a welfare fraud conviction. Mr. Schiavon admitted telling Mrs. Farkas he had made up the statement about seeing notes in Mr. Cooper's file. Mrs. Farkas then told Mr. Schiavon that she had been "railroaded" on the welfare fraud charge, inasmuch as she had reported to some unidentified governmental agency the change in her household. (RT 10836.)

Mrs. Farkas also testified at the hearing of the motion. She denied having any discussion with Mr. Cooper about her welfare fraud conviction, and claimed that to her knowledge, Mr. Cooper had no knowledge of the welfare fraud conviction prior to her testimony. (RT 10800-10821.)[31]

Mr. Kinney attempted to call Ms. Martinez as a defense witness. (RT 10845.) The trial court asked if her testimony was really necessary, in view of her status as Roy's counsel, and Mr. Kinney indicated that Ms. Martinez's testimony was necessary to corroborate Mr. Schiavon's account of the meeting with Ms. Farkas (RT 10846.) Mr. Kinney invited Mr. Cooper to stipulate that

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[31] In the middle of Ms. Farkas's testimony, the Court excused the witness temporarily and admonished Ms. Martinez that she had been exhibiting obvious reactions to the witness's answers, dropping her mouth, rolling her eyes, and shaking her head from side to side. (RT 10805.)

if Ms. Martinez testified, her testimony would corroborate the testimony of Mr. Schiavon. (RT 10846.) Mr. Cooper did not offer to stipulate, instead commenting on the fact that Ms. Martinez was apparently willing to take the stand to testify against a former client. (RT 10847.) Mr. Kinney confirmed that the public defender's office had made a motion to declare a conflict. (RT 10847.) The court then stated: "I don't think we have to go any further. Mr. Cooper didn't indicate he feels he needs to examine her if she's simply going to corroborate the testimony of Mr. Schiavon." (RT 10847.)

Thereafter, Mr. Cooper testified. He denied having any access to documents maintained by the division of the district attorney's office that investigated the welfare fraud charge, including documents concerning the investigation of the welfare fraud committed by Ms. Farkas (RT 10860.) Mr. Cooper used the CLETS computerized system available to the criminal division of his office to access information. (RT 10863-10864.) The prosecutor received a request from the defense for Ms. Farkas's criminal records, and asked the computer operator in his office to run searches for criminal records of all witnesses, including Ms. Farkas, through the CLETS system, which he thought also accessed CI & I records. No records for Venus Farkas were found. (RT 10867-10869.)

Mr. Cooper testified that he first learned of the welfare fraud conviction when Ms. Farkas called him about Mr. Schiavon's visit, several days before. (RT 10858, 10873, 10876-10877, 10889.)

According to the court records, Mrs. Farkas was arraigned on June 16, 1991, and the case was continued to July 17, 1991, to hire private counsel. On July 17, 1991, Mrs. Farkas appeared with counsel from the public defender's

office and entered a plea. (RT 10928.)[32]

A. The misdemeanor welfare fraud conviction would have been admissible for impeachment.

At the time of Roy's trial, acts of moral turpitude by a witness underlying a misdemeanor conviction were clearly usable for purposes of impeachment. (People v. Wheeler (1992) 4 Cal.4th 284, 295-299; People v. Alvarez (1996) 14 Cal.4th 155, fn. 11.) Ms. Farkas's misdemeanor welfare fraud conviction was based on an act of dishonesty and moral turpitude. By her own admission, she wrongfully continued to accept welfare benefits for her daughter, Laurie, knowing Laurie was no longer alive. Had counsel known about the misdemeanor welfare fraud conviction, they could have elicited evidence of the acts underlying Ms. Farkas's conviction to impeach her. (People v. Bell (1998) 61 Cal.App.4th 282, 291 ["[D]efense counsel thoroughly impeached Robinson by disclosing the conduct underlying his welfare fraud conviction."]; see also Lester Kills on Top v. State (Mont. 1995) 273 Mont. 32; 901 P.2d 1368, [prior misdemeanor assault and misdemeanor theft convictions usable for impeachment].)

B. The failure to disclose the prior misdemeanor welfare fraud conviction violated Brady v. Maryland (1963) 373 U.S. 83, and the Due Process Clauses of the State and Federal Constitutions, whether or not Mr. Cooper was personally unaware of the conviction, prior to the guilt-phase trial.

The United States Supreme Court has made it clear that prosecutors

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[32] Roy's guilt phase trial began on October 12, 1993. Mrs. Farkas was the second witness to testify. (RT 3556 et seq.) She was briefly cross-examined by Ms. O'Neill, who asked no questions to elicit any criminal history. (RT 3580 et seq.)

have an obligation to disclose material exculpatory evidence whether the defendant makes a specific request, a general request, or no request at all. (Brady v. Maryland, supra, at p. 87; United States v. Agurs (1976) 427 U.S. 97, 107; In re Brown (1998) 17 Cal.4th 783, 879.) Moreover, the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution. (Ibid.)

A prosecutor's constitutionally mandated duty of disclosure applies equally to evidence usable for witness impeachment. (United States v. Bagley (1985) 473 U.S. 667, 682; Kyles v. Whitley (1995) 514 U.S. 419, 433; In re Brown, supra, 17 Cal.4th at p. 879; People v. Seaton (2001) 26 Cal.4th 598, 648.) Materials usable to impeach a witness fall within the class of information subject to Brady disclosure because impeachment information affects the fairness of a trial. (Strickler v. Greene (1999) 527 U.S. 263, fn. 21; City of Los Angeles v. Superior Court (Brandon) (2002) 29 Cal.4th 1, 16; see, e.g., Singh v. Prunty (9th Cir. 1998) 142 F.3d 1157, 1161; Paradis v. Arave (9th Cir. 1997) 130 F.3d 385, 393; Carriger v. Stewart (9th Cir. 1997) 132 F.3d 463, 470-471; Ballinger v. Kerby (10th Cir. 1993) 3 F.3d 1371, 1376; Jacobs v. Singletary (11th Cir. 1992) 952 F.2d 1282, 1289; In re Pratt (1999) 69 Cal.App.4th 1294, 1316.) "Cross-examination has been described as 'the "greatest legal engine ever invented for the discovery of truth."'" (In re Pratt, supra, 69 Cal.App.4th at p. 1317; citing California v. Green (1970) 399 U.S. 149, 158, quoting 5 Wigmore, Evidence (3d ed. 1940) § 1367.)

To the extent the trial court denied the motion to mistrial based on a finding that the District Attorney had no duty to disclose misdemeanor conviction information, this was error. (RT 10924-10926.) The constitutional obligations imposed by Brady included the duty to disclose information with

the potential to impeach Ms. Farkas's credibility as a prosecution witness.

Furthermore, the trial court's finding by a preponderance of the evidence that there was no willful suppression of impeaching evidence by Mr. Cooper was legally irrelevant, and did not furnish a proper basis for denying the motion for mistrial. (RT 10925.) "'If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.'" (Strickler v. Greene, supra, 527 U.S. at p. 288; citing United States v. Agurs, supra, 427 U.S. at p. 110.)

The scope of a prosecutor's disclosure obligation "extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to others acting on the government's behalf." (Kyles v. Whitley, supra, 514 U.S. at p. 437; In re Brown, supra, 17 Cal.4th at p. 879; City of Los Angeles v. Superior Court (Brandon), supra, 29 Cal.4th at p. 8.) The duty encompasses evidence known only to police investigators and not to the prosecutor; therefore, a prosecutor has a "duty to learn of any favorable evidence known to others acting on the government's behalf . . . ." Kyles v. Whitley, supra, at pp. 437; Strickler v. Greene, supra, 527 U.S. at p. 280.) A prosecutor charged with discovery obligations cannot avoid finding out what the government knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge. (United States v. Osario (1st Cir. 1991) 929 F.2d 753, 761; Crivens v. Roth (7th Cir. 1999) 172 F.3d 991, 997.)

"Whatever the reason for failing to discharge [its Brady] obligation, the prosecution remains accountable for the consequence." (In re Brown, supra, 17 Cal.4th at p. 878.) "Any other rule would leave the defendant's due process rights to the fortuity of a subordinate agency's procedural protocol, which the Supreme Court has squarely rejected." (In re Brown, supra, at pp.

880-881.)

In this case, Mr. Cooper's professed excuse for failing to disclose the welfare fraud conviction of Mrs. Farkas was nothing other than his office's practice of "compartmentalizing of information," which purportedly kept Mr. Cooper, a capital crimes division attorney, from accessing information in the hands of welfare fraud division investigators. This did not constitute a lawful excuse for the failure to disclose the fact of the witness's misdemeanor conviction to Roy's attorneys. (Carey v. Duckworth (7th Cir. 1984) 738 F.2d 875, 878 ["[A] prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."]; cited with approval in In re Brown, supra, 17 Cal.4th at p. 879, fn. 3.)

The trial court accepted Ms. Martinez's denial of actual knowledge of Mrs. Farkas's conviction, but found that the information would have been "as readily available" to her as it would have been to Mr. Cooper. (RT 10925.) Ms. Martinez's access to the public defender's database was equally irrelevant, and failed to provide any legal ground for the denial of a mistrial. A prosecutor's obligation to turn over Brady information stands independent of a defendant's knowledge. (Banks v. Reynolds (10th Cir. 1995) 54 F.3d 1508, 1517.) The fact that Ms. Martinez "should have known" that Ms. Farkas was a client of the public defender is irrelevant to whether the prosecution had an obligation to disclose the information. (Ibid.; see also Strickler v. Greene, supra, 527 U.S. at p. 283 [Maintaining an "open file" policy does not *ipso facto* discharge a prosecutor's duty under Brady to disclose exculpatory or impeachment evidence.]; Crivens v. Roth, supra, 172 F.3d at pp. 997-998 [A defendant's failure to elicit a witness's impeaching criminal history on cross-examination does not excuse the prosecutor's failure to disclose.]; In re Pratt, supra, 69 Cal.App.4th at p. 1317 [Defense ability to

access to probation officer's report in superior court file with reference to witness's convictions no excuse for failure to discharge Brady obligations.])

Roy's motion for mistrial was meritorious and should have been granted. To warrant reversal, a defendant

> "'need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"

(In re Brown, supra, 17 Cal.4th at pp. 886-887; citing Kyles v. Whitley, supra, 514 U.S. at pp. 434-435.)

Ms. Farkas was a witness for the prosecution at the guilt phase trial, prior to Mr. Kinney's involvement in Roy's case. In addition to furnishing biographical facts about her daughter Laurie, such her age, friendship with Angie, and grade in school, Ms. Farkas gave testimony which encompassed Roy's personal relationship with, and his attitude and behavior toward Laurie during the year, and evening, preceding her death. Ms. Farkas also testified to facts, such as how much money Laurie had when she left the house for the movies in the evening on January 26, 1991, and how Roy behaved unusually, by leaving the Farkas residence early in the evening, preceding the crimes. (RT 3556-3574, 3578-3589.)

Testimony elicited from Ms. Farkas was used to persuade the jury that Roy, on the evening of January 26th, and early morning hours of January 27th, was acting with a preconceived plan to have sexual intercourse with Laurie.

(See RT 9052-9055.)[33] This was critically important evidence for the prosecution's theory to support the attempted rape and the attempted rape-murder special circumstance charge.

The testimony of Ms. Farkas regarding how much money Laurie had was relied upon to prove the commission or attempted of a robbery, as well as the special circumstance based on robbery-murder. (RT 9061-9062, 9266 [Mr. Cooper's argument], 9150-9156 [Ms. O'Neill's argument], 9175 [Mr. Kinney's argument].) Ms. Farkas's testimony was therefore material to crucial guilt and penalty phase issues beyond proof of the mere identity of the young woman who died. (People v. Waidla (2000) 22 Cal.4th 690, 723 [evidence probative of element of robbery is material]; People v. Alvarez (1996) 14 Cal.4th 155, 245 [evidence of rape and robbery each material to question of penalty].

At the guilt-phase trial, Roy's alleged preconceived intent to rob, intent to rape, and intent to kill a witness, were hotly contested issues. Evidence that Ms. Farkas kept accepting welfare benefits intended for the support of her deceased daughter may well have diffused the impact and credibility of her testimony, and possibly the testimony of other family members as well, that Roy harbored inappropriate sexual interest in the young female victim prior to the night she died, and/or that Laurie possessed $7 in babysitting earnings when she left her home that night. The evidence might also have been used to raise questions in jurors' minds regarding the veracity and sincerity of Ms.

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[33] Mr. Cooper argued in closing: "Now, relating to this case is: Well, is there any evidence the defendant intended to have sexual intercourse, had desire, intent to do that with Laurie [F.] on this night? I'd submit to you that there is evidence in two forms. First, by way of what you know of a preexisting state of mind that he had towards her, and also by way of the conduct that you know that he engaged in on that night." (RT 9055.)

Farkas's testimony that Roy departed uncharacteristically early from the Farkas residence on the night of the crimes, and whether in fact he made false statements, suggesting he was leaving to meet friends. These facts, in turn, would have had significance to the jury's assessment of Roy's mental state on the evening in question, since this evidence was relied upon by the prosecution to help establish Roy's planning and intent.

There is more than a reasonable probability that the outcome of the guilt and penalty phase trials would have been different. Though identity of the perpetrator was not contested, evidence bearing on Roy's mental state, the number and types of crimes committed against the two girls, and the truth of the charged special circumstances was disputed. The jury's decisions regarding whether the Roy harbored specific intent to commit first degree murder, whether the killing was accomplished in the commission or attempted commission of a rape or robbery, and even whether the murder was committed with the deliberate intent to prevent Laurie from reporting the attempted rape of Angie, may have been different had Ms. Farkas's entire testimony been discounted. (In re Brown, supra, 17 Cal.4th at p. 889; In re Pratt, supra, 69 Cal.App.4th at p. 1317; Singh v. Prunty, supra, 142 F.3d at p. 1164; Carriger v. Stewart, supra, 132 F.3d at p. 482; Paradis v. Arave, supra, 130 F.3d at p. 400; Ballinger v. Kerby, supra, 3 F.3d at p. 1376; Jacobs v. Singletary, supra, 952 F.2d at p. 1289; Lester Kills on Top v. State, supra, 273 Mont. at p. 45; 901 P.2d at pp. 1376-1377.)

The Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." (Burger v. Kemp (1987) 483 U.S. 776, 785; Kyles v. Whitley, supra, 514 U.S. at p. 422.) "When the credibility of a witness plays a pivotal role in a conviction, it may become an issue upon which [the courts] will reverse a conviction." (Crivens

v. Roth, supra, 172 F.3d at p. 998.) In this case, both the guilt and death judgments were deprived of reliability by the prosecution's failure to reveal that Ms. Farkas had committed an act of moral turpitude, leading to her conviction of welfare fraud, prior to this witness's guilt-phase testimony.

XIV THE GUILT AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES AS THE RESULT OF THE DISTRICT ATTORNEY'S FAILURE TO PROVIDE DISCOVERY OF VENUS FARKAS'S WELFARE FRAUD CONVICTION UNTIL AFTER THE GUILT-PHASE TRIAL.

The denial of a mistrial violated appellant's rights under the Confrontation and Compulsory Process Clauses of the United States Constitution (U.S. Const., Amendment VI) as well as his right to due process of law (U.S. Const., Amendments V & XIV).

In Davis v. Alaska (1974) 415 U.S. 308 [Davis], the United States Supreme Court declared:

> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas, 380 U.S. 400 (1965).*"

(Davis at p. 315.)

The Supreme Court further explained the role cross-examination and impeachment in securing the constitutional right of confrontation:

> "Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama, 380 U.S. 415, 418 (1965).* Professor Wigmore stated: [¶] The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose

> of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' 5 J. Wigmore, Evidence, § 1395, p. 123 (3d ed. 1940). (Emphasis in original.)" [¶] Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues and personalities in the case at hand. The partiality of the witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3 A.J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Green v. McElroy, 360 U.S. 496 (1950), n4.*"

(Davis v. Alaska, supra, 415 U.S. at pp. 315-316.)

In Davis v. Alaska, supra, the issue was whether the Confrontation Clause was violated by prohibiting cross-examination directed at eliciting possible bias derived from a juvenile witness' probationary status, when such impeachment would conflict with the State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. (Id. at p. 309.)

Prohibiting the defense from making inquiry into the juvenile's probationary status was found to violate the Sixth Amendment.

The high court held: ". . . [D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Appellant was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' [Citation.]"

In Ritchie v. Pennsylvania (1987) 480 U.S. 39 [hereafter, Ritchie], the United States Supreme Court revisited the Confrontation Clause as well as the Compulsory Process Clause, in a case in which the defendant was denied pretrial discovery of information which had potential use for impeachment purposes. The defendant in Ritchie was charged with sexual offenses victimizing his minor daughter. During pretrial discovery, the defense served the Commonwealth of Pennsylvania's Children and Youth Services [hereafter "CYS"], the child welfare investigating agency, with a subpoena seeking access to records concerning his daughter. CYS failed to honor the subpoena and the trial judge refused to order CYS to disclose its files. (Id. at pp. 42-45.)

On appeal, the defendant argued that he could not effectively cross-examine his daughter without the CYS material, in violation of the Confrontation and Compulsory Process Clauses of the federal constitution.

The United States Supreme Court declined to reach a decision which would have the effect of "transform[ing] the Confrontation Clause into a constitutionally compelled rule of discovery." (Pennsylvania v. Ritchie, supra, 480 U.S. at p. 52.) The Court stated, in relevant part: "We simply hold that

with respect to this issue, the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial." (Id. at p. 53, fn. 9.)

Respecting the defendant's claim that his compulsory process rights had been violated, the Court responded:

> "This Court has never squarely held that the Compulsory Process Clause guarantees the right to discovery the identity of witnesses, or to require the government to produce exculpatory evidence. But cf. *United States v. Nixon, 418 U.S. 683, 709, 711 (1974) (suggesting that the Clause may require the production of evidence).* Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment. See *United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963).* See also *Wardius v. Oregon, 412 U.S. 470 (1973).* Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no greater protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process."

(Pennsylvania v. Ritchie, supra, 480 U.S. at p. 56.)

The Supreme Court held that Ritchie was entitled to have the trial court review the juvenile's CYS file. "We agree that Ritchie is entitled to know whether the CYS file contains information that may have changed the outcome of the trial had it been disclosed. We agree that a remand is necessary." (Id. at p. 61.)

At least one Justice, in a concurring opinion, disagreed with the

Plurality's narrow reading of the Confrontation Clause in the Ritchie case. "Although [Justice Blackmun] believes that 'there are cases, perhaps most of them, where simple questioning of a witness will satisfy the purposes of cross-examination," *id. at p. 62* (Blackmun, J., concurring), he also believes that there are cases in which a state rule that precludes a defendant from access to information before trial may hinder that defendant's opportunity for effective cross-examination at trial, and thus that such a rule equally may violate the Confrontation Clause. *Id. at pp. 63-65.*'" (Kentucky v. Stincer (1987) 482 U.S. 730, 738, fn. 9.)

Furthermore, the plurality decision in Pennsylvania v. Ritchie marked a departure from earlier cases of the Supreme Court, which suggested that any state action which denies effective cross-examination, also violates the Confrontation Clause. In Delaware v. Van Arsdall (1986) 475 U.S. 673, for example, counsel was improperly restricted from cross-examining a prosecution witness regarding criminal charges pending against him when he agreed to testify against the defendant. The Supreme Court held: "By cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." (Id. at p. 679.)

The Supreme Court explained: "We think that 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 a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (Delaware v. Van Arsdall at p. 680, citing Davis v. Alaska, supra, 415 U.S.

at p. 318.) The matter was remanded to the Delaware Supreme Court with directions to determine whether under Chapman harmless error analysis, the error was harmless beyond a reasonable doubt. (Id. at p. 684; see Chapman v. California (1967) 368 U.S. 18, 24.)

Other cases make it clear that the Confrontation Clause is violated if the defense is not "'given a full and fair opportunity to probe and expose [forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'" (United States v. Owens (1988) 484 U.S. 554, 558; citation omitted; accord: Maryland v. Craig (1990) 497 U.S. 836, 847.) Here, the prosecutor's discovery violation, and the subsequent denial of a mistrial upon discovery of the violation, meant that Mr. Kinney and Ms. Martinez were prohibited from engaging in prototypical cross-examination to expose facts from which the jury could reasonably draw the inference that Ms. Farkas was not a truthful witness and her testimony should be given scant weight.

Moreover, it cannot be found that the error was harmless beyond a reasonable doubt. This is a death penalty case. Mrs. Farkas was much more than the deceased victim's mother and a witness to the victim's identity; she was also a material witness to the establishment of facts relevant to prove that the killing was committed intentionally, and that the alleged special circumstances of robbery-murder, attempted rape-murder, and witness killing were true. "A reasonable jury might have received a significantly different impression of [the witness's] credibility" had a mistrial been granted, and Roy's counsel been given an opportunity to pursue this significant line of cross-examination. (Delaware v. Van Arsdall, supra, 475 U.S. at p. 680.)

United States Supreme Court cases since Ritchie also suggest that a defendant's right to compulsory process may be denied by denial of discovery,

which interferes with effective cross-examination. In Taylor v. Illinois (1988) 484 U.S. 400, the Court, quoting United States v. Nixon (1974) 418 U.S. 683, 709, states:

> "'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of justice would be defeated if judgments were to be found on partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed by the prosecution or by the defense.'"

(Taylor v. Illinois, supra, at p. 409.)

The Supreme Court in Taylor v. Illinois, also states:

> "The defendant's right to compulsory process is itself designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were found to be found on a partial or speculative presentation of the facts.'"

(Id. at p. 411; quoting United States v. Nixon, supra, 418 U.S. at p. 709.)

Overturning a state trial court decision imposing exclusion of a defense witness's testimony as a sanction for a discovery violation by a defense attorney, the United States Supreme Court emphasized the ills produced when the truthseeking process is distorted in a criminal case by the withholding of relevant evidence:

> "Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence. Violation of discovery rules thus cannot go uncorrected and undeterred without undermining the truthseeking process. The question in this case, however, is not whether discovery rules should be enforced but whether the need to correct and deter

> discovery violations requires a sanction that itself distorts the truthseeking process by excluding material evidence of innocence in a criminal case." (Taylor v. Illinois, supra, 484 U.S. at p. 419.)
>
> Finally, the Supreme Court declared:
>
> > "The Compulsory Process and Due Process Clauses thus require courts to conduct a searching substantive inquiry whenever the government seeks to exclude defense evidence. After all, '[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.'"

(Taylor v. Illinois, supra, 484 U.S. at p. 423; quoting Chambers v. Mississippi (1973) 410 U.S. 284, 302.)

The question considered in Taylor v. Illinois was obviously not the same as the issue raised here. The same Sixth Amendment principles apply, however, with equal force. By virtue of the prosecutor's discovery violation, Roy was deprived of known evidence with indisputable value to impeach the veracity of a material witness on issues of guilt and penalty. When the discovery violation was revealed too late to permit impeachment during the guilt-phase of the trial, the trial court refused to rectify the problem by granting a mistrial.

Appellant submits that the denial of discovery, followed by the denial of a mistrial after the guilt-phase trial, violated both the Confrontation and Compulsory Process Clauses of the federal constitution.

In People v. Gurule (2002) 28 Cal.4th 557, this Court recently recognized that in light of the United States Supreme Court's decision in Pennsylvania v. Ritchie, supra, 480 U.S. 39, it is not at all clear whether or to what extent the Confrontation and Compulsory Process Clauses of the Sixth Amendment grant pretrial discovery rights to an accused. (Id. at p. 593; accord: People v. Hammon (1997) 15 Cal.4th 1117, 1125.)

However, this Court has implicitly assumed that a defendant's confrontation and compulsory process rights might in some cases be violated by the denial of discovery. In Alvarado v. Superior Court (Lopez) (2000) 23 Cal.4th 1121, this Court examined the Confrontation Clause in analyzing the validity of an order, entered prior to a criminal trial, authorizing the prosecutor to refuse to disclose to the defendants and their counsel the identities of crucial prosecution witnesses, on the ground that disclosure would pose a significant danger to the witnesses' safety. This Court found the withholding of identifying witness information to be constitutionally impermissible:

> "In short, though the People correctly assert the confrontation clause does not establish an absolute rule that a witness's true identity always must be disclosed, in every case in which the testimony of a witness has been found crucial to the prosecution's case [.] [T]he courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination."

(Id. at p. 1146.)

This Court held:

> "As we have explained, the serious threat to the witnesses' safety disclosed by the evidence presented by the prosecution in this case clearly justified delaying disclosure of the witnesses' identities to the defense, but the trial court's order went beyond constitutional bounds in determining that, notwithstanding the significant impairment of defendants' ability to investigate and cross-examine the witnesses or the apparently crucial nature of the witnesses' proposed testimony, the prosecution could withhold the identities of 'witnesses 1, 2 and 3' from the defense for the duration of the proceedings and have them testify anonymously at trial. Accordingly, we reverse the judgment of the Court of Appeal insofar as it upholds this aspect of the court's order."

(Id. at pp. 1151-1152.)

Accordingly, this Court has clearly recognized that sometimes denial of discovery will violate the Confrontation Clause if it results in a significant impairment of the defendant's ability to investigate and cross-examine the witness. Such an unconstitutional impairment occurred in this case with the belated disclosure of Mrs. Farkas's welfare fraud conviction, and the denial of a mistrial.

XV THE FRESNO COUNTY PUBLIC DEFENDER'S REPRESENTATION OF MRS. FARKAS CONSTITUTED AN ACTUAL CONFLICT OF INTEREST, WHICH MANDATED THE GRANTING OF A MISTRIAL.

Error under Brady v. Maryland, supra, 373 U.S. 83, is measured not only in terms of the likely impact of the undisclosed evidence, but also the "possible synergistic evidentiary effect it could have generated." (In re Brown, supra, 17 Cal.4th at p. 889.) One prejudicial byproduct of the prosecutor's abdication of duty under Brady, was the belated discovery by Ms. Martinez of a conflict of interest stemming from the Fresno County Public Defender's contemporaneous representation of Ms. Farkas in her welfare fraud case. The ramifications of the conflict are considerable, and require reversal of the penalty phase judgment.

In a criminal case, a conflict arises when an attorney represents a defendant and concurrently has, or formerly had an attorney-client relationship with a person who is a witness in that matter.[34] (People v. Bonin, supra, 47 Cal.3d at p. 475; Leverson v. Superior Court, supra, 34 Cal.3d at pp. 536-540; United States v. Armedo-Sarmiento, supra, 524 F.2d at p. 592.) Because an attorney's "conflicting obligations to multiple clients 'effectively seal his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors," reversal is automatic when a trial court improperly requires joint representation over timely objection." (Mickens v. Taylor, supra, 122 S.Ct. at pp. 1241-1242; quoting Holloway v. Arkansas, supra, 435 U.S. at pp. 489-440.)

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[34] The law governing conflict of interest is summarized in Argument X, supra, and will not be reiterated here.

An actual conflict of interest existed for Ms. Martinez, by virtue of her status as an employee of the Fresno County Public Defender. The public defender was simultaneously attorney for Roy, and a material witness against him, Mrs. Farkas.

Ms. Martinez's conflicting obligations to Mrs. Farkas in fact "sealed her lips" against helping Roy's quest for a mistrial. At the hearing on Roy's motion, Ms. Martinez was discouraged from testifying because the trial court disliked the idea of one of Roy's attorneys becoming a witness in the matter. (RT 10846-10847.) The trial court, in effect, ruled that the testimony of Ms. Martinez was unnecessary because Mr. Cooper had expressed no need to cross-examine Ms. Martinez, even assuming she corroborated Mr. Schiavon's testimony that Mrs. Farkas admitted disclosing her welfare fraud conviction to Mr. Cooper prior to the preliminary examination. (RT 10846-10847.) Yet the court's denial of the motion for mistrial was based on fact findings that necessarily required an evaluation of the witnesses' credibility. The Court, in essence, found that testimony by Mr. Cooper and Mrs. Farkas, asserting that Mr. Cooper had no foreknowledge of the misdemeanor conviction, was credible, and Mr. Schiavon's testimony to the contrary was not.

Accordingly, Ms. Martinez's conflicting obligations to Mrs. Farkas and Roy actually interfered with Mr. Kinney's ability to present credible evidence to support his claim that the prosecutor suppressed evidence of the witness's misdemeanor welfare fraud conviction in bad faith. A conflict existed because it clearly would have profited Roy to have Ms. Martinez testify and attack the credibility of the public defender's other client, Mrs. Farkas, at the hearing of the motion for mistrial. (Uhl v. Municipal Court, supra, 37 Cal.App.3d at p. 533.)

The trial court's finding that no future conflict of interest would exist

for the public defender, even if Mr. Kinney should decide to call Mrs. Farkas to the stand at the penalty phase for purposes of impeachment, strains credulity. An actual conflict of interest did exist. Two attorneys from the same firm, i.e., the public defender's office, represented Roy and also a prosecution witness who had testified against Roy at the guilt phase trial. (People v. Pennington, supra, 228 Cal.App.3d at p. 965; see also Burger v. Kemp (1987) 483 U.S. 776, 783 [assuming, but not holding that two law partners are considered as one attorney].)

The public defender's conflict pervaded the proceedings. As Mr. Kinney aptly pointed out in arguing for a mistrial, Mr. Kinney was not present during Mrs. Farkas's guilt-phase testimony; Ms. Martinez, the attorney with the conflict of interest, was present. (RT 10916.) Mr. Kinney was disadvantaged in trying to assess, in hindsight the emotional impact of Mrs. Farkas's testimony on the charges, and did not know what effect impeachment could have had. (RT 10921.) As lead counsel, and the only attorney who could properly attack the credibility of Mrs. Farkas during penalty phase proceedings, Mr. Kinney was clearly handicapped by his absence during the witness's guilt-phase testimony in fashioning a penalty-phase strategy to deal with the witness's previously undisclosed acts of moral turpitude.

At the motion for mistrial, Mr. Kinney argued that he might have to call Mrs. Farkas as a witness at the penalty phase trial for the purpose of getting the impeaching information in front of the jury. He asserted that this would put Ms. Martinez in a conflict situation. (RT 10932.) When it was suggested by the trial court that the way to address the problem was to have "a nonconflicted" attorney handle the witness, Mr. Kinney pointed out again that he – the only remaining "nonconflicted" attorney – had not heard the witness, or seen her demeanor when she testified at the guilt phase. (RT

10934.) Ms. Martinez concurred. She might have more effectively cross-examined Mrs. Farkas, if she testified, but the public defender's conflict would prevent her from doing so. (RT 10936.)

Roy could have, had he been asked, declined to discharge Ms. Martinez. However, a valid waiver of a conflict of interest can only be achieved if the defendant has sufficient awareness of the relevant circumstances and the likely consequences. (People v. Bonin, supra, 47 Cal.3d at p. 837.) In this case, the trial court did not bother to invite a waiver by Roy of Ms. Martinez's conflict of interest. (Id. at p. 839; see also People v. Mroczko (1983) 35 Cal.3d 86, 110-112.) Roy's mere presence at the motion for mistrial does not suffice to establish a knowing waiver of the right to counsel whose loyalty is unimpaired. (Bonin at pp. 840-842.)

As in Holloway v. Arkansas, supra, 435 U.S. 475, prejudice should be presumed and reversal should be automatic because counsel made a contemporaneous object that an actual conflict of interest existed, and made an offer of proof focusing explicitly on the probable risk that the conflict would affect counsels' handling of the penalty phase trial. (Holloway v. Arkansas, supra, 435 U.S. at p. 484.)

Even if reversal is not "automatic," the record demonstrates that an actual conflict existed – one which "adversely affected his counsel's performance." (Mickens v. Taylor, supra, 535 U.S. at p. 1245.) Mr. Kinney did not call Mrs. Farkas as a penalty phase witness. There is a distinct probability that Mr. Kinney decided not to re-call the witness because of Ms. Martinez's conflict. As such, this case presents facts similar to the facts presented in Glasser v. United States (1942) 315 U.S. 60, in which the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked the defendant with the crime, and failed to resist the

presentation of arguably inadmissible evidence. (Id. at p. 75.)

There was plainly a "chilling effect on the constitutional guarantee of effective assistance and free flow of attorney-client communications," such Mr. Kinney was left with the "Hobson's choice" of either avoiding any attempt to impeach a material guilt-phase witness whose misdemeanor welfare fraud conviction was belatedly disclosed, or attempting impeachment despite a conflict of interest by the only attorney who had been present during the witness's testimony at the guilt-phase trial. (Aceves v. Superior Court, supra, 51 Cal.App.4th at p. 595.) Hence, some effect on counsel's handling of the penalty phase trial is "likely." (Lockhart v. Terhune, supra, 250 F.3d at p. 1231.) This Court should refuse to "indulge in nice calculations as to the amount of prejudice" attributable to the conflict. (Glasser v. United States, supra, at p. 76.) The Court's failure to grant a mistrial following trial counsels' timely objection to the conflict means that reversal of the death judgment is now required. (Glasser v. United States, supra, 315 U.S. at pp. 72-75.)

Furthermore, because Roy faced the possibility of capital punishment, almost any favorable evidence introduced at the penalty phase had the potential to save his life. The possible impact of evidence capable of undermining the credibility of Laurie's mother, respecting Roy's behavior and attitude toward Laurie prior to her death, cannot be determined with any certainty in hindsight. In such circumstances, the discovery of a conflict of interest with counsel assumes "gigantic importance." (People v. Mroczko, supra, 35 Cal.3d at p. 105.) In other words, even if the damage to Mrs. Farkas' testimony would not have been enough to affect the guilt phase verdicts – a point not conceded – it might well have been sufficient to tip the scales during penalty phase deliberations.

Given the numerous delays in the case, and many prior disruptions in the continuity of representation, the trial court's reluctance to start anew is understandable. Nevertheless, the development of a second conflict of interest with the public defender's office, following a second tardy disclosure by the prosecutor of the facts giving rise to a conflict, demanded the granting of a mistrial and the setting of a new trial.

XVI THE ERRORS ASSERTED IN ARGUMENT SECTION 2 [ARGUMENTS VII-XV], INDIVIDUALLY AND CUMULATIVELY DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW AND A RELIABLE DEATH JUDGMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS (U.S. CONST., AMENDMENTS V, VIII, XIV; CAL. CONST. ART. I, SECTIONS 7, 15, AND 17).

It would be difficult to imagine a criminal case marked by more disruption to the integrity and continuity of the attorney-client relationship than this one. Despite an irreconcilable breakdown in the attorney-client relationship, the court denied Roy's repeated meritorious motions to discharge his deputy public defenders and engaged in unprecedented experimentation by appointing Mr. Kinney to serve as a "communicator" without official status as counsel. As a result, throughout the course of these proceedings, the three attorneys dropped in and out of the attorney-client relationship, or changed official roles, depending on the ever changing rulings of the trial court, the caprices of counsel, or the specific circumstances at the time, such as Ms. Martinez's inability to corroborate her investigator's account of statements made by Ms. Farkas concerning disclosure of the welfare fraud conviction.

Belated disclosures by the prosecuting attorney revealed actual conflicts of interest with not just one, but two other public defender clients, including a conflict involving the deceased victim's own mother, Venus Farkas, a public defender client at the time of her guilt phase testimony. Discovery of the conflicts resulted in lengthy delays in the proceedings while Roy's various counsel took opposing positions in protracted appellate court litigation to advance their rights not to serve as counsel in Roy's case. The

conflict litigation exacerbated the distrust which precipitated Roy's motions to discharge counsel in the first instance, contributed to a further breakdown of the attorney-client relationship, and had the undesirable side effect of denying Roy the opportunity to impeach a material guilt-phase witness -- Mrs. Farkas -- by eliciting evidence she had engaged in fraud.

To make matters worse, the attorney who had served as lead counsel for the majority of the trial – Ms. O'Neill – developed cancer, and had to withdraw from the case prior to the penalty phase. The penalty trial went forward after a 10-month delay with a physically and mentally ill, exhausted and overworked Mr. Kinney at the helm. Trial proceeded over a panoply of objections by virtually everyone involved in the case, including Mr. Kinney, Ms. Martinez, Ms. O'Neill and Roy personally, that Mr. Kinney could not furnish adequate representation because of his absence during the guilt phase, his poor physical and mental health, and lack of preparedness, that Ms. Martinez was not sufficiently qualified to supplant the need for a competent lead counsel, and that only starting anew could restore fairness to the proceedings. Even the prosecutor objected to the selection of Mr. Kinney as lead counsel.

Disruption in the continuity of counsel, in effect, rendered all defense counsel functionally absent at critical stages of these proceedings. Actual or constructive denial of the assistance of counsel is "structural error" which is considered presumptively prejudicial. (Strickland v. Washington (1984) 466 U.S. 668, 692; Penson v. Ohio (1988) 488 U.S. 75, 88; Evitts v. Lucy (1985) 469 U.S. 387, 396.).) Nominal representation by an attorney does not suffice to render proceedings constitutionally adequate; a defendant whose counsel is unable to provide effective representation is in no better position than a defendant with no counsel at all. (Holloway v. Arkansas (1978) 435 U.S. 475,

490.) The cumulative errors affecting the right to counsel produced a trial setting that was so fundamentally unfair that Roy was deprived of federal Due Process as well as his Sixth Amendment right to counsel. (Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622; People v. Hill (1998) 17 Cal.4th 800, 844-845.)

The trial court's multiplicity of erroneous rulings denied Roy his state-created liberty interest in the correct and non-arbitrary application of California state laws. The Court ignored the need for replacement counsel early in the proceedings, engaged in unprecedented experimentation with the right to counsel merely to avoid delay, disregarded and vacillated in the application of settled rules governing conflicts of interest merely to avoid a mistrial, and forced the penalty trial to proceed even after the lead attorney developed cancer and had to be relieved. The result was a violation of the Fourteenth Amendment's Due Process Clause. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346; Hewett v. Helms (1983) 459 U.S. 460, 466; Ford v. Wainwright (1986) 447 U.S. 399, 428 [Concurring Op., O'Connor, J.].)

Furthermore, the errors described in Arguments VII-XV all occurred in the context of a death penalty case. "[D]eath as punishment is unique in its severity and irrevocability." (Gregg v. Georgia (1976) 428 U.S. 153, 187.) "The awesome severity of a sentence of death makes it qualitatively different from all other sanctions." (Satterwhite v. Texas (1988) 486 U.S. 249, 262-263.) Because there is a qualitative difference between death and other permissible forms of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment . . . ." (Woodson v. North Carolina (1976) 428 U.S. 289, 305.)

The United States Supreme Court has repeatedly emphasized that the greater the need for reliability in capital cases means that death penalty trials

must be policed at *all stages* for procedural fairness and accuracy of factfinding. (Satterwhite v. Texas, supra, 486 U.S. at pp. 262-263.) Capital sentences will be struck down when the circumstances under which they were imposed create an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously, or by whim or mistake. (Caldwell v. Mississippi (1985) 472 U.S. 320, 343; California v. Ramos (1983) 463 U.S. 992, 998-999; Eddings v. Oklahoma (1982) 455 U.S. 104, 118.)

Review of a death sentence is among the most serious examinations any appellate court ever undertakes. (Duvall v. Reynolds (10th Cir. 1998) 139 F.3d 768, 798.) The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (Parker v. Dugger (1991) 498 U.S. 308, 321.)

In this case, the reliability of the entire proceeding was compromised in violation of the Eighth Amendment by the a series of errors affecting Roy's right to a fair trial, and depriving him of representation by an unconflicted trial attorney.

ARGUMENT SECTION 3

ARGUMENTS PERTAINING TO THE EXTREMELY LENGTHY DELAY BETWEEN THE GUILT AND PENALTY PHASE TRIALS, AND THE COURT'S REFUSAL TO POLL THE JURY ABOUT EXPOSURE TO PREJUDICIAL MIDTRIAL PUBLICITY AND/OR LOSS OF MEMORY DURING THE LENGTHY RECESS IN THE PROCEEDINGS.

THE INTERRELATED FACTS

Admonitions Before and During Guilt Phase Jury Selection

The following procedure was employed for jury selection. Groups of jurors were screened for hardship. Those jurors who were not excused for hardship were asked to fill out written juror questionnaires which included several questions designed to elicit panelists' exposure to pretrial publicity.[35]

Jurors who were not excused for hardship were then subjected to individual sequestered *voir dire* pursuant to Hovey v. Superor Court (1980) 28 Cal.3d 1 [Hovey *voir dire*]. The trial court initially ruled that pretrial publicity would not be covered during sequestered *voir dire*. (RT 156.) Part

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[35] The questionnaire asked what magazines and newspapers jurors read frequently, and what portions of the paper, or magazine, jurors read. A question asked jurors to list favorite radio and television programs, and to identify "the most serious criminal cases you have followed in the media during the past five years." There was also one question directed at "the great deal of publicity lately about the death penalty." (Supplemental Clerk's Transcript #6 [SCT #6.].) Only two sitting jurors and alternates did not list the Fresno Bee as one of the newspapers he or she frequently or occasionally read – Jurors Jocelyn Cregar and Ricky DeBeaord. (See SCT #6, 390-391 [Behnsch]; 428-429 [Belk]; 1985-1986 [DeBeaord]; 1681-1682 [Cregar]; 2668–2669 [Fees]; 3239-3240 [Givens]; 3315-3316 [Gleason]; 3467-3468 [Gosland]; 5520-5521 [Lujan]; 6319-6320 [Murray]; 6776-6777 [Perez]; 7726-7727 [Schmidt]; 8259-8260 [Stollar]; 8375-8376 [Sylvester]; 8907-8908 [Wakefield].)

way through Hovey *voir dire*, the court changed its mind and advised counsel that questions pertaining to pretrial publicity could be posed to sequestered jurors. (RT 1903.) Consequently, of the jurors and alternates in Roy's case, Jurors Behnsch, Cregar, Fees, Givens, Gosland, DeBeaord, Belk, Lujan, and Murray were not asked any questions during sequestered *voir dire* about exposure to pretrial publicity. (RT 488-498, 663-679, 895-905, 1105-1115, 1132-1143, 1144-1153, 1391-1402, 1518-1529, 1687-1695.)

Jurors Schmidt, Sylvester, Gleason, Perez, Wakefield, and Stollar were subjected to Hovey *voir dire* after the Court's change of procedure. Each was briefly questioned about exposure to pretrial publicity in sequestered session, and reported little significant exposure, or no exposure at all to pretrial news coverage of the case. (RT 1905-1923, 1973-1992, 2523-2531, 2771-2790, 2797-2809, 2986-2988.)

During Hovey questioning, the trial court sometimes, but not always, admonished prospective jurors not to read newspaper coverage of the case. Of Roy's jurors, only Sylvester, Perez, and Stoller were given such admonitions. The Court told Sylvester, "And from now on I don't want you to read anything about this case." (RT 1983.) Perez was advised, "If something comes up in the paper, as long as you're a prospective juror, I'd ask you not to read it and set it aside for later." (RT 2773.) Stoller was instructed, "Until such time as you're excused as a juror I would not want you to read anything about it either or watch anything about it on TV." (RT 2988.) However, neither Sylvester or Stoller ended up participating in the verdicts.[36]

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[36] Juror Sylvester was dismissed due to a family emergency in the midst of trial. She was replaced by Juror Stoller, who was subsequently excused for exercising poor judgment during jury deliberations. Jurors Lujan, Givens, DeBeaord, Cregar, Murray, Schmidt, Wakefield, Perez, Behnsch,

After Hovey *voir dire* was completed, on October 5, 1993, questioning of jurors who had not been dismissed for hardship, or for cause was commenced. Before general questioning began, the court asked panelists as a group whether they had heard anything about the case from newspapers, or other persons. (RT 3053.) The few panelists reporting media exposure or contact with anyone about the case, were questioned privately about it. (RT 3053.)

The court then admonished: "[O]h, by the way, I am going to ask you not to read any newspaper accounts of this trial. The paper will write up the case. Probably not on a daily basis, but fairly near, and I'll ask you to have a friend cut it out, if you want to read it, and preserve until after the trial if you're chosen as a juror. Of course, if you're excused, you can do whatever you want." (RT 3054.)

Pre-Guilt Phase Admonitions

On October 6, 1993, the original panel of 12 jurors was sworn. (RT 3298-3299.) Alternates were thereupon selected and sworn. (RT 3323.) Just before the guilt phase, the court admonished the newly-sworn jury in the following manner:

> "Now folks, I'm going to give you the long admonition at this time and I won't do that every night. Normally, I just give you the short admonition. But tonight – or this afternoon here, I'll tell you that you are required, as jurors, to decide all questions of fact in this case from the evidence received here in the trial and not from any other source.
>
> "What I'm telling you now is the most common cause for

Gosland, Gleason and Belk, the second alternate, rendered the guilt-phase verdicts. During the sanity trial, Juror Cregar was excused for cause and Juror Fees, the third alternate, replaced her. There were no further substitutions of jurors in the case.

what they call a mistrial. We have to start the whole thing over again with another jury panel because one of the jurors decides that they might want to take a picture of something involved. In other words, they go outside the courtroom for evidence or they want to go by and look at something. In fact, they had a famous case where a juror caused a mistrial in a murder case that went on for several months and he went out and saw this particular site and it had changed since he saw it and then he came back and told the other jurors about it and it was a mistrial.

"The main thing to do – there's a good rule of thumb when you get out of here, forget about this case. Don't let it hang in your thoughts. Just turn to your business of watering and planting flowers and vegetables and whatever you do for hobbies.

"You have to decide only from the evidence received in the trial. Obviously, you must never discuss the case with any other person. You'll run into a problem today because the person that – your loved ones or friends will be excited that you're on this jury. You'll just find that naturally. And the first thing they want to do is talk all about it. I recommend a fairly standard response that I understand works pretty well, and, that is, you say, 'Well, look. I'm under oath not to say anything about the case until it's over with. I'll tell you what, as soon as it's over with, I will tell you everything about it. I promise you I will. I'll tell you what? If you see anything in the newspaper or anything, can you clip it out for me? I can't read anything during the case.'"

In response to a juror's question, whether it was all right for friends and family to know on what case they were serving, the trial court responded:

"I think you can say -- yes. That's a matter of public record. But you should avoid the follow-up questions, 'Oh, isn't he the guy that –' et cetera, et cetera. And before you know it, you're right in the middle of something that you really don't want to be. But if you can avoid it, yes, please avoid it. You can say you are on the case of People verses Roy. And that's really all the further you'll want to go. Before you know it, you're right in the midst of something because they've read

this and they've read that.

"Believe me, you know, the articles in the newspaper are fine and they have their place, but they aren't ever 100 percent accurate. I've just never seen that. Sometimes I read an article about my case in my court and I look it and say, 'That happened in my court? I can't believe it.' And it didn't happen." (RT 3333-3334.)

Another juror asked if she had "gone too far" by telling her students that she might be gone for up to three months because there was a chance of being put on a potential murder trial. (RT 3334.)

The court responded:

"No, That's okay. [¶] You must never discuss the case with any other person. Here's an important thing. You must not form or express any opinion. You know what I mean by express. But form means private thoughts. You've got your mind made up about this, you know, before you listen, before you – close your mind and that's not the kind of folks you jurors are. We know you're the cream of the crop out of some 700 warrants that have gone out. We need people that maintain an open mind until they hear both sides. That's what we want you to do. So don't be forming any opinions.

"Believe it or not, you'll have a chance to discuss it with the other jurors when the case is over and you'll like that. That's a good opportunity. And you'll benefit from their thinking.

"Naturally, it goes without saying, you must never, ever, make any independent investigation if you hear about an address or something like that, or go out. That means don't be looking up law or consider or discuss facts as to which there is no evidence. You must never, on your own, visit the scene, conduct experiments, consult reference works like the encyclopedia or law books or dictionaries to try to find things out. Whatever is needed for you will be provided, literally everything in this courtroom. You must never consult persons for additional information." (RT 3335.)

On October 12, 1993, before any witness testimony was taken, the

court read the information, and gave an introductory statement about the purpose of opening statements. (RT 3506-3517.) No further admonition was given, and at no time was there an explicit directive to the jury not to read, view, or listen to any newspaper, radio, television, or any other media reporting on Roy's trial or other matters.

Admonitions During the Guilt Phase

Thereafter during the guilt phase, each time the jury was excused for the day, the trial court usually gave a truncated admonition "not to discuss the matter amongst yourselves or form or express any opinion on the subject matter." On rare occasions, the court added: "Anything you hear about the case will be reported immediately to my bailiff." Infrequently, the court cautioned jurors against using other resources, like dictionaries or encyclopedias, as aids to testimony. Once in awhile the court gave no admonition at all, other than to remind jurors, "Same admonitions, folks." (RT 3666-3667; 3839; 4029; 4187; 4341; 4698; 4782; 4936; 5104; 5116; 5402; 5291; 5402; 5747; 5951; 6103; 6291; 6645; 6837; 7029; 7119; 7286; 7433; 7594; 7786; 7954; 8090; 8263; 8439; 8650; 8786; 8986; 9036; 9180; 9301.)

Post-Guilt Phase, Pre-Sanity Phase Admonitions

On January 4, 1994, following the acceptance of the guilt phase verdicts, at the request of Roy's counsel, the trial court warned: "There will probably be a fair amount of publicity concerning your verdicts. I will specifically order you not to read anything about this case in the newspaper. If you're watching your favorite news program at night and this matter comes on, I just ask you to leave the room during that particular time. No doubt there will be some commenting about the case and that's really not for your ears at this time, please." (RT 9440-9441; SRT #7, p. 215.)

Pre-Sanity Phase Request for New Jury and Jury Polling

On January 7, 1994, prior to commencement of the sanity trial, Ms.

O'Neill moved to have a new jury impaneled to do the sanity and penalty phases, comprised of jurors that had not been biased by ongoing publicity about the Polly Klaas kidnaping-murder and a related flurry of anti-crime legislation.[37] (RT 9455.) Ms. O'Neill pleaded with the Court that the timing of Roy's case had made it virtually impossible for him to receive a fair trial. She explained:

> "This was the worst time in the world for a case like this to be tried. In our case, as the Court knows, the victim who died was a 14-year-old young woman. The Polly Klaas case happened during this trial. Three Strikes You're Out is in the paper every day. There's speeches by the Governor every other day that say we need to keep these criminals behind bars. The newspaper articles have appeared in the Fresno Bee almost daily, including one Tuesday, the day the verdict was rendered in this case, on the 4th, that basically described – the big words were "The Killers". [¶] We feel that there isn't any way that our client can get a fair trial for anything else that's going to happen in this case. I think the jury, if they were polled today in a neutral way, would tell you what their verdict is and that's death. I think they've totally made up their mind. Because some of the special circumstances were so weak, in the opinion of the defense, we feel their mind is totally made up; they didn't even consider – I'm not trying to put the jury down. . . ." (RT

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[37] Polly Klaas was the 12-year-old victim who was kidnaped from her bedroom and murdered on October 1, 1993. Her disappearance touched off a nationwide search until the perpetrator led police to the body. (See, *Killer of Polly Klaas sentenced to death;* CNN Interactive U.S. News Story; September 26, 1996 [http://www.cnn.com/US/9609/26/davis.klaas/.].) Jury selection in Roy's case commenced in late August of 1993. The Klass kidnaping occurred on October 1, 1993, as Roy's jury was being selected. While the guilt phase trial was still in progress, in December of 1993, Polly's body was found, generating a wave of publicity and public outcry for stiffer criminal penalties. (See, *Anger Over Klaas Killing Generates Support for Three Strikes Initiative"*; Fresno Bee; December 7, 1993, Page A1; *TV Reporter Shows Sensitivity in Covering Polly Klaas Story; Fresno Bee; December 10, 1993; Page D14.)* Guilt phase opening statements were not presented in Roy's case until October 12, 1993. After a three-month trial, the guilt phase verdicts were returned on January 4, 1994. (RT 9404-9439.)

9452-9453.)[38]

Ms. O'Neill argued further that Roy could no longer receive a fair trial because of publicity about the Three Strikes Legislation, sponsored by a local man named Reynolds, who had lost his daughter [Kimber Reynolds] to violent crime. (RT 9454.)

Mr. Kinney echoed Ms. O'Neill's sentiments. He pointed out that the article about "The Killers" had included a picture of Mr. Kinney's client, John Malarkey, and mentioned Kinney by name. Mr. Kinney also argued that, one day after the guilty verdict, the Fresno Bee had carried a story entitled "Anti-

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[38] Ms. O'Neill was referring to an article in the Fresno Bee entitled, "*The Killers: Many of Those Who Committed Homicides in Fresno in 1993 Were Young Male Minorities.*"

On January 5, 1994, the day after the verdicts, the Fresno Bee Metro Section published an article entitled "*Patterson to appear at Crime Forum With Governor: City Council Urges Legislature to Enact 'Three Strikes' Initiative.*" The article announced the formation of a new crime panel, comprised of 20 persons including Fresno Mayor Jim Patterson, former Governor Wilson, and former Attorney General Dan Lungren, which was to hold a special public forum on crime. It also reported that the Fresno City Council had passed a proclamation on January 6, 1994, urging the Governor and State Legislature to enact the "Three Strikes and You're Out" ballot initiative, spearheaded by Mike Reynolds, a Fresno resident and the father of teenage murder victim Kimber Reynolds.

Eighteen-year-old college student Kimber Reynolds was shot in the head during an attempted robbery committed in the Tower District of Fresno in July of 1992. She died without regaining consciousness. (See, *Woman in Critical Condition Shooting Linked to 3 Other Crimes: The Young Woman Came Home to Visit Friends and Relatives;* Fresno Bee; July 1, 1992, Page B1; *A Tender Tribute to Daughter: Kimber Reynolds, Tower District Shooting Victim, Dies. There Are No Arrests Yet in the Case;* Fresno Bee; July 2, 1992, Page A1.) Kimber's father, Mike Reynolds, became a major proponent of the Three Strikes Legislation. (*Assembly Weighs Bill Stiffening Penalties for Repeat Felons: Supporters Include Mike Reynolds, Whose Daughter Kimber Was Killed Last Year*; Fresno Bee; April 20, 1993, Page B4.)

crime measures dominate the capital," featuring a picture of the father of Polly Klaas. (RT 9456.)[39] Mr. Kinney pointed out that the Governor, that night, had been "standing up with his fist saying, 'Three Strikes you're out.'" (RT 9456.) Kinney remarked, "It doesn't take a brain surgeon to figure out that our client has two prior felonies." (RT 9456.)

Mr. Kinney also argued that Roy had been prejudiced by events in the local Kimber Reynolds murder case, including a plea bargain which had resulted in a mere twelve year sentence for one of the perpetrators. (RT 9456.) Kinney advised the court that the prejudicial publicity included pictures of the District Attorney standing with "poor Mr. Reynolds," decrying his great loss. (RT 9456.)

Mr. Kinney also informed the court about another highly prejudicial story which had appeared in the Fresno Bee following the guilty verdicts, illustrated with a photograph of some people dancing on victim Laurie's grave. (RT 9455-9456.)[40]

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[39] Counsel was referring to an article published by the Fresno Bee on January 5, 1994, entitled "*Anti-Crime Measures Dominate Capitol: Fathers of Three Kidnap-Murder Victims Support Get-Tough Proposals.*" The article featured the fathers of three high profile murder victims, Polly Klaas, Kevin Collins and Fresno's Kimber Reynolds, all advocates of anti-crime legislation directed at habitual offenders.

[40] On January 5, 1994, the Fresno Bee carried a story entitled "'*Justice Was Served, Laurie' Roy Guilty of Murdering Girl, 14: Special Findings Mean Killer Faces Death Penalty or Life in Prison Without Parole.*" The closing paragraphs of the article read: "After Tuesday's verdict, [Venus [Kit]] Farkas wiped dirt off the marble headstone at her daughter's grave, clearing the instruction, 'Taken before life could begin'." She recalled how Laurie was buried in blue jeans, black leather shoes and a sweater Angie gave her and with a photo of Marilyn Monroe, whom she admired. 'It hurts,' she said, softly, 'because we trusted Royal.' Suddenly, she and her sister, Helene Painter, began to dance next to the grave. It was in honor of Laurie, a Fresno

Ms. O'Neill requested a neutral polling of jurors to determine whether any had prejudged the case. (RT 9460, 9464.) The court refused the request for a new jury, and refused the request to poll jurors asserting that the jury had already been told not to read the newspaper and watch television. (RT 9463.)

Sanity Trial -- The Open Jury Notebook Incident

On January 12, 1994 just prior to the commencement of witness testimony at the sanity trial, Mr. Kinney called the Court's attention to a juror notebook that had been left open on the juror's chair. Mr. Kinney had inadvertently noticed contents of writing on the open page. (RT 9519.)

Later, prior to adjournment for the day, Mr. Kinney advised the trial court that visibly written on the open notebook page was the following statement: "Was he aware of his crimes? Yes." (RT 9614.) Mr. Kinney pointed out that this statement had been written without the benefit of hearing any sanity phase evidence. (RT 9615.) Ms. O'Neill argued that the juror's writing demonstrated that the prior motion to poll jurors had been meritorious; it was evidence of a juror's prejudgment of the case. (RT 9616-9617.)

Mr. Kinney moved to have the notebook of the juror – Sandra Schmidt – "put on the record." (RT 9618.) The court chastised Mr. Kinney for looking at the open juror notebook, and expressed a disinclination to poll the jury. (RT 9620.) Ms. O'Neill reiterated her concern that there continued to be problems with prejudicial publicity stemming from groups of citizens advocating, "'Hang them all'". (RT 9623.)

High student who dreamed of being a defense lawyer or a model. 'We danced because every time Laurie wanted to celebrate, she would dance,' Painter said. . . . they danced, smiling, giggling loudly, hand in hand, a country waltz that lasted 20 seconds. Then they quietly left the cemetery, tears wiped away, satisfied that justice was done. Satisfied that her daughter's spirit was finally at rest." Farkas and Painter had both testified against Roy at his trial.

The court admonished counsel that the juror notebooks were private, and counsel were "by no means . . . to put [themselves] in a position to read them." (RT 9624.) The court refused to put the juror's writing in the record. (RT 9625.)

On January 13, 1994, Roy's counsel moved for a mistrial on the ground that the jury could not be fair and impartial. (RT 9630.) Mr. Kinney again moved the trial court to take steps to preserve the page of the juror's notebook for the record. (RT 9630.)

Thereafter, outside the presence of other jurors, the court questioned Juror Schmidt briefly in a general way, and elicited assurances from the juror that she had a "completely open mind." (RT 9635-9636.) No questions were asked about the entry in the juror's notebook. The court then denied the motion for mistrial. (RT 9637.)

Ms. O'Neill objected to the sufficiency of the trial court's questions to Ms. Schmidt, arguing they were leading, and "of literally of no value to find out her true feelings about anything." (RT 9637.) She renewed the motion for mistrial, which was denied. (RT 9637.) The court stated that there was "no reason whatsoever" to suspect that Roy had other than a fair and impartial jury. (RT 9637.) Mr. Kinney renewed his motion to preserve the page of Juror Schmidt's notebook as evidence. The court, once again, denied the request. (RT 9639.)

Post Sanity Phase Admonition

The sanity trial concluded on January 20, 1994, with verdicts finding Roy sane on all counts. (RT 9945-9959.) On that date, no long delay in the proceedings was yet anticipated. Before discharge, the trial court cautioned the jurors to "avoid reading or watching" likely news coverage of the recent sanity phase verdicts. No other cautionary admonition was given. (RT 9961.)

Admonishments and Information Imparted to Jurors During Long Delay Between Sanity and Penalty Phases

On January 27, 1994, the court announced to the jury that a substantial delay in commencing the penalty phase had become unavoidable due to law and motion matters which had come up in the case, requiring appellate review. (RT 10117.) The jury was advised that they would be contacted and notified if the delay would be longer than a few weeks. (RT 10119.) Jurors were told to "[j]ust go about your regular business." (RT10124.) Before the jury departed, the court said:

> "Okay. Usual Admonishments. You are admonished not to discuss the matter amongst each other or anyone else or form or express any opinion on the subject matter. We'll see you when we call you back." (RT 10126.)

No other cautionary admonition was given. After jurors had left, Mr. Kinney expressed concern that the court had not admonished the jury about exposure to the press. (RT 10126.) The court responded: "I don't think I'll call them back. I've told them so many times about not watching TV and the press." (RT 10126.)

Letters to Roy's jurors were mailed out on March 16, 1994, reminding them that the case was still pending. (CT 1337.)[41]

On May 13, 1994, a status conference was held at which Ms. O'Neill repeated her request that the jury be polled individually regarding the effects of any reading they had done about the case. (RT 10347.)

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[41] This letter, signed by Judge John Fitch, read: "I just wanted to let you know that you are still very much needed as a juror in our case – which is still pending. [¶] The matter which is causing the delay is still in the appeal courts, and everyday I am hopeful that we will have a resolution of the issue quickly. Of course, I will contact you immediately when a decision is received. Our case is still my number one priority." (Original emphasis.)

A tentative penalty trial date of June 27, 1994, was selected. (CT 1328; RT 10342 et seq.) On May 16, 1994, the trial court sent a letter to jurors notifying them of the June 27, 1994, trial date. (CT 1339.)[42]

On May 17, 1993 On May 24, 1994, and May 27, 1994, Judge Fitch personally spoke with several jurors who had called to report scheduling problems.[43] A new trial date of July 5, 1994, was proposed to accommodate a juror with a pre-planned vacation. (CT 1328-1329, 1343-1344.)

The Court's written communications with jurors were devoid of reminders not to discuss the case, or not to read, listen, or watch stories about the case that might occur in the print media, or on radio or television.

Pre-Penalty Phase Requests for Jury Polling

On June 3, 1994, in anticipation of the penalty phase trial, Ms. O'Neill and Ms. Martinez, filed a written "Motion to Individually Poll the Jury Due to Passage of Time." (CT 1322.) The motion requested that returning jurors be questioned individually, in a separate hearing, to determine whether they remained fair and impartial. In support of the motion, it was alleged, inter alia, that during the long recess in the proceedings, there had been press coverage regarding the "Three Strikes and You're Out Legislation, amending Pen. Code, § 667, the public defender's declaration of a conflict because of the office's representation of Mr. Scott, and the well-publicized murder of

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[42] This letter, signed by the judge, states: "We can start the trial on Monday, June 27, 1994. It could last as long as four weeks. [¶] Please immediately call my clerk at 488-3586 and let us know if this is satisfactory with you. [¶] Again, thank you for your personal sacrifices and patience!"

[43] A defense motion for mistrial based on improper communication between the judge and jurors is the subject of another claim of error raised elsewhere in this brief. (See CT 1327 et seq.)

Polly Klaas.[44] (CT 1323-1325.) Shortly after this motion was filed, Ms.

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[44] The Klaas kidnaping and murder provided the impetus for the enactment of California's Three Strikes Laws, one version adopted by the Legislature in March of 1994, and a second nearly identical version acted by initiative measure at the November 1994 General Election. (People v. Jenkins (1995) 10 Cal.4th 234, 238, fn. 2; *High Court Takes Swing at California's Three-Strikes Law*: The Legal Intelligencer, Vol. 227, No. 91, p. 4, November 6, 2002.) Richard Allen Davis was arrested and charged with the murder of Polly Klaas and the trial proceedings generated a great deal of publicity. In May of 1994, while Roy was awaiting the start of the penalty phase, police leaked the details of Mr. Davis's confession to the murder. (*Police Release Details of Davis' Confession*; The Legal Intelligencer; National News, p. 7, May 19, 1994.) The Klaas kidnaping-murder was so notorious that it spawned contempt litigation in the appellate courts after a reporter and news director of a local television station, refused to disclose the source of a person who provided information about the case of Richard Allen Davis in violation of a protective "gag" order. (See In re Beth Willon (1996) 47 Cal.App.4th 1080.) During 1994, the Fresno Bee carried many prominent stories about the Three Strikes Measures, many of which mentioned high-profile murder victims like Klaas and Kimber Reynolds. (See, e.g., *Anti-Crime Measures Dominate Capitol: Fathers of Three Kidnap-Murder Victims Support Get-Tough Proposals*, Fresno Bee, January 5, 1994, Page A1; *3-Strikes a Step Closer to June Vote: Assembly Committee Passes Bill. Reynolds Wants Measure on November Ballot, Too*, Fresno Bee, January 7, 1994, Page A1; *Little '3-Strikes' Opposition Expected: Assembly Will Debate Five Bills on the Anti-Crime Theme Monday*, Fresno Bee, January 28, 1994, Page A3; *'3 Strikes' Wins Over Assembly: Lawmakers Also Give Overwhelming Support to Four Rival Bills*, Fresno Bee, February 1, 1994, Page A1; *Few Ready to Step Into the Path of '3 Strikes'*, Fresno Bee, February 1, 1994, Page A3;; *Crime Summit Bolsters '3 Strikes': Mike Reynolds Says Only 50,000 More Signatures Are Needed to Qualify for November Ballot*, Fresno Bee, February 9, 1994, Page A1; *A Heavy Heart Drives 'Three Strikes' Initiative: Mike Reynolds Nears His Goal of 600,000 Signatures*, Fresno Bee, February 13, 1994, Page A1; *Panel May Whittle Rival '3 Strikes' Bills: Senate Committee May Limit Choices or Craft Best Provisions into One Plan*, Fresno Bee, February 13, 1994, Page A21; *Defense Uses '3 Strikes' Law as Shield*, Fresno Bee, May 24, 1994, Page B3.)

There had also been news coverage of litigation over the public

O'Neill was diagnosed with cancer and withdrew from the case. (RT 10373-10379.)

At a hearing on June 17, 1994, the trial court deferred ruling on a request by the defense to poll the jury until "such time as we get the jury back." (RT 10405.)

Pre-Penalty Phase Questioning and Admonitions

On October 4, 1995, when jurors re-convened for the penalty phase, the court briefed jurors on Ms. O'Neill's condition, which had required her withdrawal from the case, and offered "heart-felt" thanks to jurors for their patience. (RT 10526.) Although nearly ten months had passed, jurors were neither re-sworn, nor were they reminded that they were still under oath. The judge asked jurors collectively whether "there's anything you've seen or read in any media coverage concerning . . . anything that would make it difficult for you to be a fair and impartial juror in this upcoming penalty phase?" (RT 10527.) Jurors gave no audible responses to the question, but the court indicated for the record that jurors had made eye contact and shaken their

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defender's claimed conflict of interest due to that office's representation of Mr. Scott. The Fresno Bee reported on January 25, 1994, "*Lawyers for Royal Roy, Jr. want out.*" (CT 1259.) A second article in the Fresno Bee reported, "*Public Defenders' boss faces jail in Roy case.*" (CT 1260.) This article, published January 26, 1994, discussed the fact that Mr. Kinney had been brought in half way through the trial because Roy "doesn't trust women." (CT 1260.) Mr. Cooper, the district attorney is quoted as accusing the defense lawyers of attempting to delay the penalty phase. (RT 1260.) A third article published by the Fresno Bee is entitled "*Dreiling's days out of jail continue*". It appeared in the paper on February 1, 1994. (CT 1261.) This article reported that Mr. Dreiling's petition to the Fifth District Court of Appeal challenging the contempt citation, had been denied, but a new petition was being filed. (CT 1261.)

heads no. (RT 10527.)

The trial court also asked the group whether "you have all been able to keep the promises that you've given to me to not discuss the case amongst yourselves or with anybody else or form or express any opinion on the subject matter with the exception of course of having to discuss this case and its – and the scheduling with your family and friends maybe or employers, fellow employees. . . . Aside from that, have you all been able to keep your promises in this case?" (RT 10527.) Again, jurors gave no audible response but the court indicated they had made eye contact and indicated an affirmative response by a shake of the head. (RT 10528.)

Finally, the Court invited the group of jurors to raise their hands if they had any "individual concerns" pertaining to the case. (RT 10530.) Several jurors raised their hands, and thereafter spoke with the Court and counsel individually about scheduling problems.

Renewal of Defense Requests for Jury Polling

The presentation of penalty phase evidence to the jury did not begin until October 25, 1994, after pretrial hearings to determine the admissibility of evidence. On this date, before any testimony was taken, Mr. Kinney called the court's attention to the motion previously filed by Ms. O'Neill and Ms. Martinez, seeking individual *voir dire* of jurors prior to the penalty phase. (RT 10961.) Mr. Kinney advised the court that an article had appeared in the morning paper, talking about "the reason [the victim] was killed was because [Roy] wanted to have sex and various other factors." (RT 10961.) Mr. Kinney made it clear that the defense "did want individual *voir dire*." (RT 10961.) The court ruled that the verbal questioning done on October 4, 1994, was adequate and no further questioning would be done. (RT 10963.)

Before adjournment on October 25, 1994, the jury was admonished

"not to discuss the matter among yourselves or anybody else or form or express any opinion on the subject matter." (RT 11098.) A similar, very brief admonition was given before each daily adjournment during the penalty phase of the trial. (RT 11289; 11465.)

Request to Poll Jury re Jurors' Faded Memories

On November 7, 1994, following the denial of one of Roy's mid-trial motions for mistrial, Ms. Martinez again requested a polling of the jurors, for the purpose of asking them about the possible loss of memory during the ten-month delay. She noted that Roy's counsel were having difficulty remembering the guilt-phase evidence, and suggested the jurors, too, might have difficulty recalling what they had heard more than a year before. (RT 11501-11504.)

Ms. Martinez also requested individual questioning about media coverage. She asserted that defense counsel had been reviewing transcripts of prior proceedings, which caused them to realize that after the sanity phase, the trial court had failed to admonish jurors not to read newspaper articles, or listen to media coverage of the case. Roy's attorneys pointed out that the publicity about the case had been sufficiently extensive that, during the recess, Roy had been placed in isolation at the jail for his protection. (RT 11505.)[45]

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[45] At a hearing on February 2, 1994, Mr. Kinney expressed concern about Roy's mental health because he had been moved to an isolation cell due to media publicity about the case. The County Counsel Wes Merritt, appearing on behalf of the Sheriff's Department explained that there had been "heavy coverage in both the television media". (RT 10219.) Mr. Merritt stated that in newspaper articles there was "always a paragraph in newspaper articles about Roy involving juvenile victims." (RT 10224.) Because there were televisions in the jail, the Sheriff was concerned for Roy's safety. The Sheriff offered to move Roy after the publicity about the case died down. (RT 10219.)

Mr. Kinney argued that loss of memory might be a problem because Roy had testified at the guilt phase, but for tactical reasons would not be testifying again at the penalty phase. (RT 11504.)

On November 16, 1994, when penalty phase proceedings resumed after a one-week recess, the motion to poll jurors was denied. (RT 11511.)

XVII THE GUILT, SANITY AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY FAILED TO ADMONISH THE JURY IN COMPLIANCE WITH PENAL CODE SECTION 1122, PRIOR TO THE START OF THE TRIAL.

In California, Pen. Code, § 1122 requires that a criminal jury be instructed before opening statements "concerning its basic functions, duties and conduct." (Pen. Code, § 1122(a).) Instructions "shall" include "admonitions that the jurors shall not converse among themselves, or with anyone else on any subject connected to the trial" and "that they shall not read or listen to any accounts or discussions of the case reported in the newspapers or other news media." (Pen. Code, § 1122(a).) The Court's admonition did not comply with statutory requirements.

Many days before any testimony was taken, all prospective jurors who had survived hardship and Hovey *voir dire* were politely but ambiguously told that the court intended to ask jurors not to read newspaper accounts of the trial. The Court stated, in relevant part: "Another broad question for everybody, please – oh by the way, I am going to ask you not to read any newspaper accounts of the this trial . . . ." (RT 3054.) The trial judge told jurors there would be newspaper coverage about the case, and it was suggested that jurors could have a friend cut newspaper articles out and save them until after the trial. (RT 3054.) No prohibition against listening to radio, or watching television broadcasts was conveyed. Prospective jurors might reasonably have believed that this meant it was acceptable to read the newspaper unless and until chosen as a juror, at which time the court would notify jurors that reading the news was no longer permitted.

During sequestered Hovey *voir dire*, one juror who was ultimately chosen, and participated in deliberations -- Perez -- received a personal request not to read anything about the case in the newspaper, as long as he remained a "prospective" juror. (RT 2773.) The directive to Perez did not, however, include any language referring to the broadcast media. Moreover, it was not clear at the time the admonition was given that the prohibition against reading newspapers would continue to apply if Perez were selected as an actual juror.

At no time prior to, or during the guilt phase were sitting jurors and alternates told, unequivocally, that it would be misconduct to read, listen to, or watch, press coverage of the trial in the print and broadcast media. (People v. Lambright (1964) 61 Cal.2d 482, 486.) Jurors were advised in clear terms not to conduct an independent investigation of the case, and not to discuss the case with friends, family members and work colleagues, but they were not told of any prohibition against watching television, listening to the radio, or reading accounts of Roy's trial in the press. The court merely warned that news coverage is never "100 percent accurate" and recommended steps for avoiding the discussion of news coverage with others. These statements by the court tacitly implied that the reading of newspaper articles was not strictly prohibited, but merely inadvisable, due to the risk of exposure to inaccurate information. (RT 3333-3334; see, "Pre-Guilt Phase Admonitions," ante.)

The trial court's admonitions were no more effective to protect against exposure to prejudicial publicity than the admonitions found inadequate in the landmark case of Sheppard v. Maxwell (1966) 384 U.S. 333. In that case, the trial court gave jurors the following representative warning, repeated at intervals during the trial:

> "'I would suggest to you and caution you that you do not

> read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned. You will feel very much better as the trial proceeds . . . I am sure we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content. . . ." (Id. at p. 352-353.)

In that case, the United States Supreme Court found that the defendant did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment due to unfair and prejudicial news comment and the lack of a sufficiently emphatic pretrial admonition.

The real risk in Roy's case was that jurors would read coverage that, even if accurate, would be highly prejudicial, and describe evidence or facts not produced or admitted in open court for the jury. In fact, this is what occurred. For example, on September 7, 1991, long before trial commenced, the Fresno Bee carried a Metro section headline, "*Man Accused in Killing Tries to Flee Court.*" The text of the article stated that Roy "bound in chains, attempted to escape from a Fresno Municipal courtroom Friday as a judge ordered him to stand trial on charges that could bring the death penalty."

This article was inaccurate and misleading, as well as highly inflammatory. The article was referring to an incident which occurred the previous day' s court proceedings. This is what really occurred:

On September 6, 1991, as the court was holding Roy to answer following the preliminary examination, Roy became upset, stood up and started to leave the courtroom. The bailiff asked the court whether he should make Roy sit down. Defense counsel requested that the court excuse Roy from the courtroom, offering to waive his presence for the remainder of the proceedings. The bailiff, meanwhile, ordered Roy to sit down. In truth, there

was no attempted "flight" at all, as the headline implied. After a brief recess, to allow counsel to confer with their distressed client, proceedings resumed in Roy's presence with no further incident. (RT 330.)

The potential prejudice stemming from this type of coverage is great. "Jurors are not presumed to separate truth from the falsity in newspaper articles concerning the trial in which they sit as judges of fact." (Silverthorne v. United States (9th Cir. 1968) 400 F.2d 627, 643.)

On July 17, 1993, also pretrial, the Fresno Bee carried a Metro section headline, "*Prosecutor: Guilty Plea Too Good for Royal Clark.*" This article reported that Roy wanted to plead guilty to the charges but was being prevented from doing so by the district attorney's office, under a state law providing that "people charged with crimes eligible for the death penalty are not allowed to enter a guilty plea." It also contained quotes by Roy's lawyers, Ms. O'Neill and Ms. Martinez, saying that Roy "was too depressed and filled with remorse about the killing to assist them," and he would be willing to "accept a deal that would include a sentence of life in prison without the possibility of parole." Roy's desire to plead guilty was reported again in the Fresno Bee during the guilt phase trial. In an article entitled, "*Judge, Jury on the Road to Inspect Crime Scene,*" published on October 22, 1993, the Fresno Bee reports, "Roy has said he wanted to plead guilty and spend the rest of his life in prison. But because Roy could receive the death penalty, state law won't allow a guilty plea."

These articles exemplify the type of newspaper report, which, when published in the midst of trial, will often require reversal of the judgment because of the unacceptable risk that a fair trial or impartial jury may be denied. For example, in United States v. Williams (5th Cir. 1978) 568 F.2d 464, a local television station broadcast a story about the defendant's prior

trial, resulting in conviction. (Id. at p. 466.) In Mares v. United States (10th Cir. 1967) 383 F.2d 805, newspaper stories were published, midtrial, about a withdrawn guilty plea and a prior confession that had been excluded by the court. (See, also United States v. Thompson (10th Cir. 1990) 908 F.2d 648 [a newspaper article reported a previous plea agreement signed by the defendant and withdrawn].)

In People v. Lambright, supra, 61 Cal.2d 482, a California case, the newspaper published a story, midtrial, describing excluded evidence of threats to a witness. (Id. at p. 485-486: see also United States v. Herring (5th Cir. 1978) 568 F.2d 1099 [front-page news story reporting "death threats" against a celebrity witness required reversal].)

When jurors are exposed to this type of media coverage, it is considered inherently prejudicial because the information imparted -- i.e., failed plea bargains, threats against witnesses, or attempted flight -- is so clearly suggestive of an accused's guilt. The purpose of admonishing jurors in accordance with Pen. Code, § 1122, is to prevent this type of publicity from ever reaching the jury. The pretrial publication of erroneous inflammatory articles by the Fresno Bee should have put the trial court on notice that a clear and unequivocal admonition against exposure to media coverage of the trial was necessary to guarantee a fair trial, not just to comply with a statute.

Examples of constitutionally adequate admonitions against exposure to publicity are legion in the state and federal case law, and such a charge could have, and should have been given in this case. In Hilliard v. Arizona (9th Cir. 1966) 362 F.2d 908, for example, the trial court, at the outset of trial admonished:

"'During the recess and all future recesses, * * * it is

> quite important under the circumstances that you be alert and do not permit any communication to come to you. I don't care if it is by some individual or through newspaper or radio or television. I don't know, but just do not permit yourselves to be communicated with concerning any matter involving this case in any way, shape or form.'"
>
> Later, at the end of the day, the Hilliard court admonished:
>
> "'* * * Do not permit anyone to endeavor to discuss any phase of this proceeding. Do your best to remain out of the hearing of any radio announcement, if such there be, or television, or newspaper. In other words, do not permit yourselves to be communicated with in any way, shape or form concerning the possible facts of this particular case.'"

(Id. at p. 909.) In the Hilliard case, this thorough charge to the jury rendered mistrial unnecessary, even after the press reported a prior accusation of rape against the defendant. But no such charge was given in this case.

In United States v. Polizzi (9th Cir. 1974) 500 F.2d 856, a trial court gave the following admonishment:

> "I am not so sure that this will happen, but it may. There may be some newspaper attention given this case, or there may be some talk about it on radio or television. If you are selected as a juror in this case I am going to admonish you that when you leave her and go to your home and pick up the paper, if you should pick it up and see something about this case I am going to admonish you to put the paper down right away and read no more of that article, because I don't want anything coming to your attention other than that which is directed to you through the rules of evidence that we have and that will come from this court room. [¶] I will also tell you to blind yourself to the subject on TV and to deafen yourself to the subject on radio if it should happen."

(Id. at p. 881.) The Polizzi court also admonished jurors prior to the trial "to avoid any publicity" about the case. (Ibid.) This advice was found adequate

to assure that the jury would not be influenced by the press.

Similarly, in California, mistrials have been avoided in high publicity cases by giving jurors complete and frequent reminders to avoid media coverage of the case. For example, in People v. Terry (1970) 2 Cal.3d 362, "[a]t the outset of the trial, during selection of the jurors, at the time of every adjournment of the court, and on the very day the article in question was printed the judge carefully and fully admonished the jurors not to discuss the case (Pen. Code, § 1122) and not to read any newspaper articles about the case or about the trial." (Id. at p. 397.) In People v. Majors (1998) 18 Cal.4th 385, the trial court, "[a]t the outset of the trial, . . . admonished the jurors to avoid exposure to all media coverage regarding the case." (Id. at p. 425-426; accord In re Carpenter (1995) 9 Cal.4th 634, 641 ["Throughout jury selection and trial, the court continually admonished prospective jurors and then jury, in accordance with Penal code section 1122 . . . to avoid publicity relating to the case."].)

In contrast, jurors were *never* unequivocally admonished to avoid publicity about the case, including stories aired on television or radio. (RT 3054, 3334-3335.) Hence, compliance with Pen. Code § 1122, and an adequate admonition to prevent jury exposure to prejudicial publicity, was lacking.

The Court's generic order that the jury not consider any extrajudicial evidence in reaching its verdicts could not allay the potential for prejudice. (People v. Lambright, supra, 61 Cal.2d at p. 486.) Even when such advice is given, if a jury is not expressly prohibited from reading the newspaper, or listening to television and radio accounts of the trial, it "it is reasonably probable that some of the jurors [will do] so and that their misconduct, even though innocent, [will affect] the result" of the guilt phase trial. (Id. at p.

487.)

Not only was it state law error or an abuse of judicial discretion not to comply with Pen. Code, § 1122. Violation of the statute also deprived Roy of his state-created liberty interest in the correct, non-arbitrary application of California's state laws, which resulted in a violation of the Fourteenth Amendment's Due Process Clause. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346; Hewett v. Helms, supra, 459 U.S. at p. 466; Ford v. Wainwright, supra, 447 U.S. at p. 428 [Concurring Op., O'Connor, J.)

Furthermore, because the error occurred in the context of a death penalty case, the reliability of the death judgment was also compromised in violation of the Eighth Amendment, and Article I, § 17 of the California Constitution.

XVIII THE GUILT, SANITY AND PENALTY VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY REFUSED TO TO POLL THE JURY ABOUT HIGHLY INFLAMMATORY MEDIA COVERAGE DURING THE GUILT PHASE TRIAL.

During the guilt phase, the Fresno Bee regularly published articles about Roy's trial. Some coverage entailed no more than recapitulation of the day's testimony. Sometimes, however, articles quoted editorial, and potentially prejudicial remarks by persons such as the prosecutor, Angie H., or relatives of Laurie and Angie. For example, aside from the article reporting Roy's wish to plead guilty, there were articles describing Angie's guilt-phase testimony ("*Girl Describes Death in Park*, Fresno Bee, October 28, 1993, Metro section, p. B2), and Roy's guilt-phase testimony ("*Roy Confesses in Court to Slaying But he Says He Doesn't Know Why He Strangled Laurie*", Fresno Bee, November 11, 1993, Metro section, p. B5). The latter article included commentary on Roy's testimony by Laurie's mother: "It's a phony show . . . He knows why he killed my daughter."

Another article reported on expert testimony detailing Roy's brain damage. ("*Roy Suffers Brain Damage, Experts Testify*"; Fresno Bee, November 18, 1993, Metro section, p. B8.) This article states: "Records show Roy has a history of mental illness and he has been examined by at least 75 specialists, including psychologists hired by the District Attorney's office." Since far fewer than 75 experts testified at Roy's trial, any juror who noticed the article would have been tempted to speculate about why so few of these experts ever testified, and what the others would have had to say.

As was pointed out by Roy's counsel prior to commencement of the

sanity trial, the guilt-trial occurred, unfortunately, in a time frame when the print and broadcast media were also inundating the Fresno public with stories about local violent crime, as well as several highly-publicized recidivist offender measures known as the "Three Strikes and You're Out" laws. The most visible proponents of "Three Strikes" legislation were the fathers of teenage female murder victims in two highly-publicized cases – the Polly Klaas and Kimber Reynolds murders. Mike Reynolds was a native of Fresno; his deceased daughter, Kimber, was a former resident who was murdered in front of a popular Fresno restaurant, while on a visit home from college.

The morning of Roy's guilt phase verdicts, the article, "*The Killers: Many of Those Who Committed Homicides in Fresno in 1993 Were Young Male Minorities*" appeared. It was this article that finally prompted Roy's lawyers to request a new jury for the sanity and penalty trials, and a polling of the jury to screen for possible exposure to adverse publicity.

The largely editorial piece reported:

> "* * *
>
> "A record 98 people were killed in Fresno in 1993. Taking multiple murders into account, *that means there were more than 80 killers in Fresno last year, give or take a handful.*
>
> "Today, many are walking around free and unknown. But more than 60 have been identified and 48 have been arrested and charged with a crime.
>
> "* * *
>
> "Those are the numbers, but who are the people? *Who are these folks who ended 98 lives while upending the lives of hundreds of people who were relatives and friends of the victims?*
>
> "Are they ruthless career criminals, prison-hardened killers? Did an overcrowded criminal justice system set them lose despite obvious signs that they would kill?
>
> "Or are they petty crooks, kids with too much firepower? Are they 'normal' people pushed too far or addled by booze or

drugs?

"Based on what is known publicly about the identified suspects, it appears that most of Fresno's killers of '93 fit somewhere in the second group, with some notable exceptions.

"Although they combined to set a record number of homicides, the number isn't large enough for meaningful statistical analysis. It is big enough, however, to draw a fuzzy composite.

"*Mostly young male minorities.*

"For the most part, it isn't a surprising picture:

"They're male. Only seven of the identified suspects are women.

"They're young. *Most were in their 20s or 30s,* but three of 1993's alleged killers were 14 years old on the day of the killings. Three were 15. Five were 17 years old. Six were 18 years old. The oldest was 51.

"*They're likely to be part of an ethnic minority.* Of the identified suspects, 10 are white, 25 are Hispanic, *18 are African-American,* 11 are Asian, two are American Indian.

"*They're unemployed. A solid majority of the suspects weren't working at the time of their crime, and many hadn't held steady jobs for years.*

"They used guns. A majority of the victims, 76, were shot. Two victims were killed by motor vehicles. Four were strangled. Seven, including two infants, were beaten. Nine were stabbed.

"* * *

"*They had criminal records.* Almost all had some sort of record. Surprisingly, though, most of the records were not particularly serious.

"* * *

"Lawyer, Ernest S. Kinney, who has been practicing defense law in Fresno since 1976, agreed with the prosecutor.

"'The killers of today are far less sophisticated,' he said. 'They act like small children who want candy.'

"Ominous implications.

"* * *." (Emphasis added.)

The implications of this article appearing in the January 4th Fresno Bee were, indeed, "ominous." Roy was a part of the demographic group of

"killers" described in the article -- a young adult male Black man, with a prior criminal record, who had been unemployed at the time of his crimes. Kinney – quoted in the article – was Roy's most visible lawyer.

Moreover, on the day "*The Killers*" article appeared, Roy's unsequestered jurors were still in the process of deciding guilt, yet they had *never* been completely and unequivocally admonished to avoid exposure to media reports of Roy's trial, much less to avoid reports of the daily media circus of politicians and murder victims' family members advocating "Three Strikes and You're Out" as the antidote to Fresno's murder epidemic. Under the circumstances, it cannot be presumed coincidental that, on the morning the article appeared, the jury deliberated for less than an hour-and-a-half before returning with their verdicts – guilty on all counts, enhancements and special circumstance allegations, including the robbery charge, and robbery-murder special circumstance allegation, based largely on missing pocket change. (CT 808-809.)

The motion for jury polling and/or a new jury was meritorious and should have been granted. "As Mr. Justice Holmes said in *Patterson v. Colorado, 205 U.S. 454, 462 (1907)*: 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'" (Estes v. Texas (1965) 381 U.S. 532, 551 [Opinion of Roy, J.].) As in the case of Irwin v. Dowd (1961) 366 U.S. 717, 725, in this case, "the build-up of prejudice [was] clear and convincing." The press, state and local politicians, the victims of violent crime and the public had "opened fire" at the perceived tide of violence, seeking enactment of widely publicized and controversial anti-crime legislation directed at Roy's demographic group of killers, and supported by the parents of young girls like

Laurie, who had suffered violent deaths. (See, e.g., Sheppard v. Maxwell (1966) 384 U.S. 333, 339.) The damage was compounded because of press coverage of Roy's case which had occurred earlier during the trial, causing a risk that jurors had already been exposed to prejudicial evidence bearing on guilt that "could not be directly offered as evidence at the trial." (Marshall v. United States (1959) 360 U.S. 310, 312.)

Adverse midtrial publicity carries a greater opportunity for prejudice than does pretrial publicity. "[I]nformation reported during the trial seems far likely to remain in the mind of a juror exposed to it and he may be more inclined to seek out this information when he is personally involved in the case." (United States v. Williams, supra, 568 F.2d at p. 468.) "[E]xposure of potential jurors to news accounts before trial need not result in an aborted proceeding, since the problem can be cured by a continuance or change of venue. [*Footnote omitted.*] If the exposure occurs during the trial, however, the trial judge must squarely face the question of whether a fair trial is still possible." (Ibid.) This reasoning has compelled some appellate courts to apply stricter standards when reviewing the impact of midtrial publicity on the fairness of a criminal trial. (See, e.g., United States v. Williams, supra, 568 F.2d at p. 468.)

When publicity occurs during a trial, the polling of jurors is necessary to determine whether a significant possibility of prejudice exists. (United States v. Aragon (5th Cir. 1992) 962 F.2d 439, 442.) The Fifth Circuit has suggested a two-pronged approach to determining whether there could arise "serious questions of possible prejudice." (Id. at p. 443-444.) First, the trial court looks "to the nature of the news material to determine whether the material is innately prejudicial. Factors such as the timing of the media coverage, its possible effects on legal defenses, and the character of the

material disseminated merit consideration." (Id. at p. 444.)

"Second, the court must then discern the probability that the publicity has in fact reached the jury. At this juncture, the prominence of the media coverage and the nature, number and regularity of warnings against viewing the coverage become relevant." (United States v. Aragon, supra 962 F.2d at p. 444.) A similar approach has been employed in other federal circuit courts as well.

In Mares v. United States, supra, 383 F.2d 805, for example, the defendant's jurors had been carefully admonished to refrain from exposing themselves to publicity during the trial. Nevertheless, when an article appeared midtrial reporting on a confession which had been excluded from the trial, the defense moved for mistrial. The Tenth Circuit Court of Appeals found that the potential for prejudice posed by the article was sufficiently strong that it was reversible error for the trial court to *not* question jurors to determine whether exposure had in fact occurred, before simply denying a mistrial. (Id. at pp. 807-808.)

In United States v. Thompson supra, 908 F.2d 648, midtrial publication of a newspaper article reporting on a previous agreement by the accused to plead guilty resulted in reversal of the judgment on appeal. In that case, defense counsel had repeatedly asked for jury polling to determine whether any jurors had been exposed to the article. The trial court asked jurors "whether anything had occurred during the weekend that might affect the jurors' ability to be fair and impartial" but refused to ask the more specific question, whether jurors had read anything about the case. (Id. at p. 649.) After the guilty verdict, the defense renewed its motion to poll the jury. The Court denied the request, reasoning that it had "repeatedly admonished and instructed the jurors not to read or listen to anything contained in the news

media with regard to this case." (Id. at p. 650.) The Tenth Circuit appellate court reversed, holding: "[w]e conclude that the trial court's general inquiry as to prejudice was not sufficient to satisfy counsel's reasonable request that the jury be asked specifically about the newspaper story. At a minimum the court had a duty to ask whether the jurors had read the article concerning the case." (Ibid.)

The Sixth, Seventh and Eight Circuit Courts of Appeal employ a similar rule as the Fifth and Tenth Circuits; trial judges must poll jurors to determine whether exposure has occurred whenever potentially prejudicial news coverage *may* have reached the jurors. (See Marson v. United States (6th Cir. 1953) 203 F.2d 904; United States v. Wilson (7th Cir. 1983) 715 F.2d 1164, 1169; United States v. Accardo (7th Cir. 1962) 298 F.2d 133; Tunstall v. Hopkins (8th Cir. 2002) 306 F.3d 601, 610.)

Generally, decisions from the Ninth Circuit Court of Appeals follow an analogous approach, if not the identical rules. "When the possibility of prejudice from publicity arises during trial, the trial court has 'the affirmative duty * * * to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties.'" (See, United States v. Polizzi, supra, 500 F.2d at p. 880; see also Silverthorne v. United States, supra, 400 F.2d at p. 642 ["The trial court should not have denied the motion for mistrial without having first ascertained, by questioning the jurors, that they had not read an article about the defendant in the San Francisco Chronicle of January 27, 1996, or, if any of them had read it, that they were not influenced thereby."].) In the Ninth Circuit, midtrial publicity with great potential to prejudice will not *necessarily* require a mistrial, or reversal on appeal if: (1) the trial court has either given sufficiently frequent and emphatic

orders to jurors not to watch, listen to, or read media coverage such that exposure to the media is unlikely to have occurred; (2) midtrial publicity is largely cumulative of admissible trial evidence, or not of an inherently prejudicial character; and/or (3) the trial judge undertakes a sufficient polling of jurors to insure that exposure has not occurred. (See, e.g., Hilliard v. Arizona (9th Cir. 1966) 362 F.2d 908 [repeated and emphatic instructions given by the court]; United States v. Rewald (9th Cir. 1989) 889 F.2d 836, 864-865 [newspaper redundant of trial evidence]; United States v. Orand (9th Cir. 1973) 491 F.2d 1173, 1175-1176 [jury polled, showing no exposure].)

Of course, none of these circumstances applies here. Roy's trial court did *not* give clear, frequent, and emphatic instructions to avoid the media; the midtrial publicity was *not* cumulative of admissible trial evidence, and it included inflammatory stories about crime not directly related to Roy's case; and the court did *not* engage in any polling to detect possible media exposure.

At the state level, this Court has taken a comparable approach to analyzing the duties of a trial court when potentially prejudicial midtrial publicity occurs. Where midtrial publicity is "of a type that would leave an inerasable impression on the jury", and it is "reasonably probable that some of the jurors" were exposed, jury polling must be conducted or reversal is mandated. (See, e.g. People v. Lambright, supra, 61 Cal.2d at p. 486, 487; see also People v. Majors, supra, 18 Cal.4th 385 [reversal not required where jurors thoroughly admonished, and exposed juror was sufficiently questioned].)

By the time counsel made their motion for a new jury, and/or polling to detect the possible synergistic damage produced by media coverage of the trial and recurring news stories decrying the problem of violent crime, it was a constitutional imperative that they do so. The trial court's refusal to at least

poll the jury immediately following the guilt phase was error of constitutional dimension. The innately inflammatory content of the Fresno Bee story, "*The Killers,*" cannot be denied. The timing of the story could not have been worse, coming as it did toward the end of the deliberative process. The likely cumulative damage to Roy's theory of defense – not a denial of the killing, but a request to be held less morally and legally culpable based on a claimed absence of criminal intent – would have been devastating. In the prevailing political climate, no juror exposed to such a media barrage would have been able to give Roy the benefit of "reasonable doubt" on any contested fact issue, if doing so might be perceived as granting lenity to one of "the killers." (See, United States v. Aragon, supra, 962 F.2d at pp. 443-444.)

Furthermore, even assuming for the sake of argument jurors perceived the trial court's ambiguous pretrial admonitions to be a mandate against reading any newspaper stories about the trial, it is still highly probable that many, if not most of Roy's jurors were exposed to either television or radio coverage of the trial, the ongoing barrage of coverage about the Polly Klaas and Kimber Reynolds murders, the advocacy roles played by their grieving fathers in the fight to enact stiffer penalties for repeat offenders the problem of violent crime, or to the editorial story, "*The Killers*," commenting on Fresno's personal murder toll of 98 innocent victims in the year of Roy's trial. It is a proven fact that almost all of the jurors and alternates were regular readers of the Fresno Bee, which frequently carried such stories.

Under the United States Constitution, use of the "harmless error" test presupposes that the defendant in a criminal case has had a trial before an impartial jury. (Rose v. Roy (1986) 478 U.S. 570, 578; In re Carpenter, supra, 9 Cal.4th at p. 680 [Dissenting Op., Mosk, J.].) The same is true under the California Constitution. (People v. Cahill (1993) 5 Cal.4th 478, 501, 501-

502; In re Carpenter, supra.) When a defendant is tried by a jury comprised of one or more members "wanting in that regard," harmless error analysis is unavailable. The absence of juror impartiality is a structural defect in the trial mechanism which defies analysis by harmless error standards. (Rose v. Roy, supra, 478 U.S. at p. 577; People v. Cahill, supra, 5 Cal.4th at pp. 501-502; U.S. Const., Amendment XIV; Cal. Const., Art. VI, § 13; Arizona v. Fulminante (1991) 499 U.S. 279, 307; Johnson v. Armontrout (8th Cir. 1992) 961 F.2d 748, 756.) The error therefore requires reversal of the guilt phase judgment without any showing of actual prejudice.

Reversal of the penalty phase judgment is also required because any significant error which occurs during any phase of a capital trial necessarily deprives the jury's penalty phase judgment of its reliability in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. (Satterwhite v. Texas, supra, 486 U.S. at pp. 262-263.)

XIX THE SANITY PHASE VERDICTS MUST BE REVERSED, BECAUSE THE TRIAL COURT FAILED TO ADEQUATELY COMPLY WITH PENAL CODE SECTION 1122 PRIOR TO COMMENCEMENT OF THE SANITY PHASE.

After the guilty verdicts on January 4, 1994, the jury was for the first time explicitly warned to avoid exposure to any television or newspaper coverage. (RT 9440-9441.) Unfortunately, the admonition was worded in such a manner that it more likely than not that jurors understood the prohibition to apply to news coverage and commentary regarding the verdicts, but not future media coverage of other aspects of the case. Accordingly, the admonition did not adequately comply with the demands of Pen. Code, § 1122, or due process. (Roy adopts and incorporates by reference the arguments and authorities set forth in Argument XVII [re failure to give Pen. Code, § 1122 admonishment prior to guilt phase] and XVIII.)

Furthermore, the courts' failure and refusal to give a complete and correct admonition pursuant to Pen. Code, § 1122, also resulted in the deprivation of Roy's state-created liberty interest in the correct and non-arbitrary application of California's statutes. Such deprivations result in violations of the Fourteenth Amendment's Due Process Clause. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346; Hewett v. Helms, supra, 459 U.S. at p. 466; Ford v. Wainwright, supra, 447 U.S. at p. 428 [Concurring Op., O'Connor, J.].)

XX THE SANITY AND PENALTY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO IMPANEL A NEW JURY TO HEAR THE SANITY AND PENALTY PHASES OF THE TRIAL DESPITE THE IRREMEDIABLE EFFECTS OF PREJUDICIAL MEDIA COVERAGE DURING THE GUILT PHASE TRIAL.

The trial court, prior to the sanity phase, denied counsels' pleas for a fresh, untainted jury, and refused to conduct jury polling to insure that jurors could continue to remain impartial for purposes of determining Roy's sanity and penalty. California's death penalty statute permits the court to order a new jury for the sanity or penalty phase of a trial upon a showing of "good cause." (Pen. Code, § 190.4(c).) Good cause to impanel a new jury exists whenever the facts, as a "demonstrable reality" show the jury's inability to perform its function. (People v. Earp (1999) 20 Cal.4th 826, 891: People v. Bradford (1997) 15 Cal.4th 1229, 1354.)

In this case, it was shown as a matter of "demonstrable reality" that the guilt phase jury, poisoned by overwhelmingly adverse midtrial publicity, could no longer be fair. Prior to, and during the guilt-phase trial, press coverage relating to violent crime had been unrelenting. Most jurors regularly read the Fresno Bee, so exposure to this type of harmful publicity was highly probable. The possibility also existed, due to inadequate guilt-phase admonitions that some jurors may have read potentially prejudicial newspaper coverage of Roy's trial, including some articles containing editorial matter, or references to inadmissible evidence, such the fact that Roy had admitted he was guilty of the charged crimes. (See, e.g., "*Judge, Jury on the Road to Inspect Crime Scene,*" The Fresno Bee, October 22, 1993, Metro section,

Page B3.) In addition, the guilty verdicts had followed immediately upon the heels of the highly inflammatory article, "*The Killers*," which it is likely some jurors read. (See Arguments XVII and XVIII.) The January 5th Fresno Bee article illustrating Mrs. Farkas' outburst of jubilation at the jury's guilty verdicts magnified the potential for prejudice. The article had such great potential to prejudice Roy's quest to be found legally insane, i.e., not legally culpable for murder, that the Court should have granted Roy's request to impanel a new jury.

This Court ordinarily reviews claims concerning a trial court's denial of a new jury panel for abuse of discretion. (People v. Taylor (2001) 26 Cal.4th 1155, 1169-1170.) In most instances, this Court has affirmed the exercise of trial court discretion to deny a new jury in the midst of a capital trial; this case is, however readily distinguishable from those cases.

Here, the request for a new jury was not motivated by Mr. Kinney's mere desire to conduct a more thorough *voir dire* than his predecessor counsel. (See, People v. Gallego (1990) 52 Cal.3d 115, 197; People v. Rowland (1992) 4 Cal.4th 238, 267-268; People v. Taylor, supra, 26 Cal.4th at p. 1170.) Nor was the request for the purpose of ameliorating speculative prejudice caused by evidence presented or arguments advanced by the prosecution at the guilt phase trial. (See, People v. Taylor, supra, 26 Cal.4th at p. 1169; People v. Bonillas (1989) 48 Cal.3d 757, 785.) Roy's counsel were not arguing the need for a new trial based on the prosecutor's disparagement of defense counsel at the guilt phase (People v. Earp, supra, 20 Cal.4th at p. 890), or the inconsistency of guilt and sanity trial theories of defense (People v. Daniels (1991) 52 Cal.3d 815, 875-876.) The request for a new jury was based on much more than mere speculation that the jury, having adjudicated Roy's guilt, could not fairly consider the sanity phase

evidence. (People v. Weaver (2001) 26 Cal.4th 876, 946.)

Under the unique circumstances presented in this case, it was a manifest abuse of discretion to deny the request for a new jury panel for the sanity phase trial. The sheer extent and type of adverse publicity which had preceded the sanity trial rendered it practically impossible for Roy's jurors to remain impartial to decide the significant issues that remained to be determined. (See,People v. Cummings (1994) 4 Cal.4th 1233, 1287; Sheppard v. Maxwell, supra, 384 U.S. 333; Marshall v. United States, supra, 360 U.S. 310; Irwin v. Dowd, supra, 366 U.S. 717.)

All of the same considerations which weighed in favor of convening a new jury for the sanity phase also weighed in favor of a new penalty phase jury -- even more so. In the penalty phase of the trial, the jury had much greater discretion than they did in determining the sanity issue. Assuming for the sake of argument appellant cannot show prejudice in the sanity phase because the evidence of sanity was so considerable, the probability is much greater that the jury's discretionary death penalty determination was adversely influenced exposure to midtrial publicity.

In addition, by the time the penalty phase began, inordinate delays in the case had made the granting of a new jury even more necessary. As is more fully explained in Argument XXV, infra, the long adjournment of ten months to a year made it likely jurors' recollections of the evidence had become dulled or confused. (People v. Santamaria, supra, 229 Cal.App.3d at pp. 277-278.) A media circus of adverse publicity about the trial itself, and violent crime generally, created an increased danger that jurors memories would be impaired by the phenomenon of "confabulation" – a process by which missing information is supplied by the juror's general store of life experiences, or from logical deduction. (Jacqueline Kanovitz, Hypnotic Memories and Civil

Sexual Abuse Trials, 45 Vand. L. Rev. 1185, 1232, n. 204 (1992); Elizabeth F. Loftus and James F. Doyle, Eyewitness Testimony: Civil and Criminal 50-51 (1987). It is equally likely that jurors exposed to the barrage of media subconsciously incorporated into their memories post-event information acquired from other sources, including articles seen in the Fresno Bee or stories heard on television. (People v. Wright (1988) 45 Cal.3d 1126, 1156.)

By October of 1994, the jurors had been conscripted in service for about 13 months – jury selection had commenced on August 31, 1993. (RT 89 et seq.) The Court and the parties had originally estimated that the trial would take approximately 14 weeks – three-and-a-half months! (RT 134.) The lengthy postponement of the guilt phase trial caused hardships for many jurors, which are documented in the appellate record.

For example, Robert Fees, the alternate who had replaced Juror Cregar during the sanity trial, lost his job due to the length of the trial, and was forced to seek other employment. (RT 10121-10122; see also SCT #7; RT 10120.)[46] Two jurors who were teachers complained that "their bosses were upset because they missed a lot of last school year," and would not be pleased when the trial started again, if it meant they would miss more school. (RT 10498.) The penalty trial in fact started after the start of the new school year.

One juror, Ricky DeBeaord, struggled to cope with extended jury service while living in Sacramento, and working until 1:00 a.m. as a tractor-trailer driver. DeBeaord resolved his dilemma by not working during jury service, but did so at the expense of using his personal annual leave to survive

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[46] An off-the-record discussion was held outside the presence of the court reporter, and Roy, to discuss Juror Fees work situation.

because his employer would not pay for jury service. (RT 10531-10537.) DeBeaord's wife also moved out of California during the trial. (RT 10531.) Other jurors merely expressed the sentiment to the court's clerk that they wanted "to get this thing over and done with." (RT 10499; CT 1327.)

The prejudicial effect of the delay on jurors was intangible and irremediable. Under the circumstances, there was almost no possibility Roy would receive a fair penalty trial from the original jurors and alternates. The unanticipated delays, the resulting juror hardships, and the barrage of adverse media coverage, hammering the public about the need to take more stringent measures to prevent violent crime, converged to render a fair trial impossible, as a "demonstrable reality." (People v. Earp, supra, 20 Cal.4th at p. 891; People v. Bradford, supra, 15 Cal.4th at p. 1354.) Whether or not it was error to deny a new jury for the sanity phase (see, People v. Weaver, supra, 26 Cal.4th at p. 946), it was an abuse of discretion and a violation of Roy's constitutional rights to refuse Roy a new penalty phase jury.

Moreover, denial of a new jury panel before the sanity and penalty phases of the trial was more than just an abuse of discretion. Denial of a new jury deprived Roy of his state and federal constitutional rights to an impartial jury, and due process and a fair trial. (U.S. Const.; Amendments V, VI, XIV; Cal. Const., Art. I, §§ 7, 15, & 16.) The right to a fair trial before an impartial jury is a fundamental constitutional right guaranteed by the Sixth Amendment. (Sullivan v. Louisiana (1993) 508 U.S. 275, 277.) Both state and federal law protects a defendant's right to an impartial jury. (Holland v. Illinois (1990) 393 U.S. 474, 493; Irwin v. Dowd, supra, 366 U.S. at pp. 721-722; People v. Garceau (1993) 6 Cal.4th 140, 173.) Numerous procedural safeguards exist to prevent jury bias. (Smith v. Phillips (1982) 455 U.S. 209, 217 [re: safeguards furnished by *voir dire* and protective instructions]; United States

v. Vasquez (9th Cir. 1979) 597 F.2d 192, 194 [re: judicial safeguarding of jurors' knowledge of the case]; People v. Chaney (1991) 234 Cal.App.3d 853, 860 [re: safeguard of adequate *voir dire*].)

In the context of capital punishment, even more extensive precautions are taken to assure that jurors can be fair and impartial. (See Morgan v. Illinois (1992) 504 U.S. 719, 735-736; Turner v. Murray (1986) 476 U.S. 28, 36; People v. Armendariz (1987) 37 Cal.3d 573, 583; Hovey v. Superior Court (1980) 28 Cal.3d 1, 80.) Here, inadequate safeguards were employed to guarantee Roy's right to impartial jurors during the sanity and penalty phases of the trial.

In addition, noncompliance with Pen. Code, § 190.4 deprived Roy of his state-created liberty interest in the correct and non-arbitrary application of California's state laws. (Hicks v. Oklahoma, supra 447 U.S. 343, 346; Hewett v. Helms, supra, 459 U.S. at p. 466; Ford v. Wainwright, supra, 447 U.S. at p. 428 [Concurring Op., O'Connor, J.].) The Ninth Circuit has stated:

> "As this Court has held on more than one occasion, 'the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.'"

(Lambright v. Stewart (9th Cir. 1999) 167 F.3d 477, 486-487, quoting Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295; quoting Hicks v. Oklahoma, supra, and Ballard v. Estelle (9th Cir. 1991) 937 F.2d 453, 456.) The trial court's denial of a new jury was contrary to state law and thus denied his federal due process rights.

Moreover, because Roy's sanity was determined, and punishment selected, without the guarantee of an impartial jury, the reliability of the death judgment which followed is also irremediably compromised in violation of the Eighth Amendment and Article I, section 17 of the California Constitution.

(Woodson v. North Carolina, supra, 428 U.S. at p. 305; People v. Garceau, supra, 6 Cal.4th at p. 173; Williams v. Superior Court (1989) 49 Cal.3d 736-739.)

The trial court's decision to deny Roy's motion for a new jury was highly prejudicial and requires reversal of the sanity verdicts as well as the death sentence. The State cannot prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Chapman v. California (1967) 386 U.S. 18, 24.) Even if this Court applies a lesser standard of review, reversal would be required. It is a reasonable possibility that a new jury, untainted by the delay, and adverse midtrial publicity, would have returned more favorable sanity and/or penalty phase verdicts. (People v. Sandoval (1992) 4 Cal.4th 155, 194.) The sanity and penalty phase verdicts should be reversed and the case remanded for new sanity and penalty trials.

XXI THE SANITY AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO POLL JURORS ABOUT PREJUDICIAL NEWS COVERAGE PRIOR TO THE SANITY TRIAL.

Before refusing to impanel a new jury for the sanity phase, the trial court had an obligation to inquire of jurors whether any had been exposed to news coverage, especially the Fresno Bee articles published on January 4 and 5, 1994, and if so, whether jurors could honestly disregard it. (Silverthorne v. United States, supra, 400 F.2d at p. 643 ["We think that in view of the nature of some of the newspaper publicity unfavorable to the appellant, the trial court should have interrogated the jury, *in camera*, when requested to do so by defense counsel."].) (Appellant adopts and incorporates by reference the arguments and authorities set forth in Arguments XVIII & XX.)

United States v. Polizzi, supra, 500 F.2d 856, is a case on point. In Polizzi, the trial court fulfilled its affirmative duty to ascertain the effect of midtrial publicity on the jurors' deliberative qualifications, and took appropriate steps to eradicate or diminish the effect. First, unlike the trial court in this case, the judge in Polizzi repeatedly and explicitly warned jurors to blind themselves to television, radio and newspaper coverage of the trial. Second, after potentially prejudicial articles appeared, the court undertook individual *voir dire* of each juror, *in camera*, to determine whether any had seen the articles, and been prejudiced thereby. (Id. at pp. 880-884; see also People v. Marshall (1996) 13 Cal.4th 799, 862-863 [Reversal unnecessary where the trial court alerted jurors to factual errors contained in a midtrial newspaper article, misquoting the district attorney].)

Roy's case presents facts more like those presented in Mares v. United

States, supra, 383 F.2d 805, in which the trial court did not take preventative and remedial action sufficient to protect the defendant's rights. In Mares, the trial court actually took greater precautions than were taken by the court in this case. An unsequestered jury was given a "strong and comprehensive [pretrial] admonition against reading, listening to, or watching reports about the trial." (Id. at p. 807.) Nevertheless, the defendant's conviction was reversed because, after a potentially prejudicial newspaper article appeared midtrial, the court refused to poll jurors to discover whether any had read it. The appellate court stated:

> "The nature of the article was such that the trial court should have immediately ascertained whether any jurors had been exposed to it. This could have been done without any reference to the nature of the article. It should have been done by a careful examination of each juror out of the presence of the remaining jurors . . .The overriding interest is that of the public to secure justice in a controversy between the government and an individual. In the circumstances there was an 'imperious necessity' [citation omitted] to ascertain the fact of exposure and thereafter to take such action as might have been appropriate."

Because Roy's trial judge refused to poll jurors about midtrial publicity, including but not limited to inflammatory anti-crime editorials, "*The Killers*" article, and the very provocative story about Mrs. Farkas dancing on her daughter Laurie's grave, it cannot be presumed that the jury remained impartial for the sanity and penalty phase proceedings. The sanity and penalty phase verdicts may not be affirmed on the theory that the refusal to poll jurors was "harmless error." The error was "structural" and reversible *per se*. (Rose v. Clark, supra, 478 U.S. at p. 578; People v. Cahill, supra, 5 Cal.4th at pp. 501-502.) If even one juror was rendered impartial, the "sane" findings and the death sentence are rendered invalid under the Sixth Amendment and the

Fourteenth Amendment's Due Process Clause, as well as California's corresponding constitutional provisions (Cal. Const., Art. I, §§ 7, 15 & 16). (Irwin v. Dowd, supra, 366 U.S. at p. 722; see also In re Carpenter, supra, 9 Cal.4th at p. 677 [Dissenting Op., Mosk, J.]; People v. Nesler (1997) 16 Cal.4th 561, 583-587 [Reversal for new sanity trial based on juror's receipt of extrajudicial information].)

Furthermore, reversal for entirely new sanity and penalty phase trials is necessary. No purpose would be served by remanding to interrogate jurors after the passage of nine years. "The jurors have separated and their memories have probably dimmed . . . [t]he failure of the trial court to ascertain whether any jurors had been exposed to the prejudicial article makes a new trial imperative." (Mares v. United States, supra, 383 F.2d at p. 809.)

It is well-settled that capital trials must be policed at all stages for procedural fairness and accuracy of factfinding. (Satterwhite v. Texas, supra, 486 U.S. at p. 262-263.) Any significant error in the sanity phase of the trial necessarily deprives the death judgment of its reliability in violation of the Eighth Amendment, and Article I, section 17 of the California Constitution. Accordingly, the death judgment must be reversed.

XXII THE SANITY AND PENALTY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY REFUSED TO PRESERVE JUROR SCHMIDT'S NOTEBOOK PAGE, REFUSED TO POLL JURORS AFTER THE PAGE WAS OBSERVED, AND REFUSED TO CONDUCT ADEQUATE QUESTIONING OF JUROR. SCHMIDT ABOUT HER PRE-JUDGMENT OF APPELLANT'S SANITY.

After opening statements, but before any testimony had been taken at the sanity trial, Mr. Kinney observed a page in the open notebook of one of the jurors, Juror Schmidt, which had a handwritten entry, stating "Was he aware of his crimes? Yes." (RT 9519, 9614.) Since no evidence had yet been received, counsel reasonably perceived that Ms. Schmidt had prejudged the issue of Roy's sanity, and moved for mistrial.[47]

The trial court chastised Mr. Kinney for looking at the juror's open notebook, and refused to preserve the page of the notebook as evidence. (RT 9620, 9624, 9630, 9639.) Roy's request for jury polling (RT 9617-9620), and the motion for mistrial were denied. (RT 9630, 9637.) The Court's response to the information imparted by Mr. Kinney was clearly insufficient to guarantee that Roy would receive a fair trial by an impartial jury at the sanity

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[47] During his opening remarks to the jury, Mr. Kinney argued, in essence, that the evidence would show that Roy, due to brain damage, did not recall the crimes, did not know right from wrong, and did not appreciate the nature and quality of his acts. (RT 9471-9482.) Mr. Cooper then argued that Roy was "aware of the nature of his actions at the time of the crimes." (RT 9484.) The notebook entry seems particularly responsive to the prosecutor's arguments made right before the notebook was seen by Mr. Kinney.

and penalty phase trials.

A. Prejudgment of a cause is jury misconduct.

It is misconduct for a juror to prejudge a case without hearing the evidence. (People v. Nesler, supra, 16 Cal.4th at p. 587.) It is also misconduct for a juror to refuse to participate in the deliberative process. "Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations . . . ." (People v. Cleveland (2001) 25 Cal.4th 466, 485.)

The page from Juror Schmidt's juror notebook was relevant to show that this juror had prejudged the issue of Roy's sanity at the time of his crimes. The note evidenced a "fixed conclusion" about Roy's awareness of what he was doing, prior to the introduction of any sanity phase evidence, far in advance of deliberations. (People v. Cleveland, supra, 25 Cal.4th at p. 485.)

B. The notebook page was admissible evidence of juror misconduct.

The notebook page was admissible to prove Juror Schmidt's prejudgment of the sanity issue. Evid. Code, § 1150 bars admitting evidence showing the *effect* of statements or events on the mental processes of a juror, but it does not prohibit presentation of evidence that a statement constituting misconduct was made. (People v. Cleveland, supra, at p. 485; People v. Jones (1998) 17 Cal.4th 279, 316.) Furthermore, California's statutory prohibition against impeachment of jury verdicts only applies in a post-verdict setting. The rule does not, and cannot, prohibit constitutionally necessary and proper investigation of misconduct which occurs during jury deliberations. (People v. Cleveland, supra, 25 Cal.4th at p. 485.)

As this Court once observed in In re Stankewitz (1985) 40 Cal.3d 391,

398, fn. 2, this conclusion is "reinforced by [federal] constitutional considerations." Parker v. Gladden (1966) 385 U.S. 363, "'suggests that in criminal cases, at least [fn. omitted] [federal] constitutional rights may require inquiry into the circumstances regarding a jury's deliberation regardless of the [state] jurisdiction's rule on impeachment by jurors.'" (In re Stankewitz, supra, 40 Cal.3d at p. 398, fn. 2.)[48]

C. The refusal to preserve evidence of juror misconduct violates state and federal due process.

It was error for the trial court to refuse to preserve the notebook page, despite counsels' repeated requests. The United States Constitution imposes a duty on the state to preserve evidence "that might be expected to play a significant role in the suspect's defense." (California v. Trombetta (1984) 467 U.S. 479, 488-489.) This Court has expressly adopted the United States Supreme Court's holding in Trombetta. It has been held that the rule prohibiting destruction, or requiring preservation, of material evidence applies with equal force to evidence which is relevant to prove prosecutorial misconduct, even when such evidence is not directly relevant to the accused's guilt or innocence. (People v. Zapien (1993) 4 Cal.4th 929, 964.) By the same logic, due process is violated by the trial court's intentional destruction of evidence relevant to prove *juror* misconduct. In effect, the trial court intentionally caused the destruction of an important piece of evidence demonstrating that Juror Schmidt prejudged the case.

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[48] In fact, juror notebooks have occasionally played a role in the investigation of allegations of juror misconduct. (See, e.g., United States v. Vasquez-Ruiz (N.D. Ill 2002) 2002 U.S. Dist. LEXIS 15017; Herron v. Grewe (2002) 183 Ore.App. 485, 487-493; 52 P.3d 1106.)

D. The refusal to poll jurors, after possible misconduct was revealed, violated Appellant's rights to a fair trial and impartial jury.

It was also error for the trial court to refuse to poll the jurors. The notebook entry observed by Mr. Kinney constituted further evidence to bolster defense counsels' early claim that pervasive public anti-crime sentiment, aroused by midtrial publicity about the Klass, Reynolds, and Farkas murders, and the high murder rate in Fresno, had rendered fair sanity and penalty trials nearly impossible without a new jury. Hence, for the same reasons discussed in Argument XVIII, and XXI, Roy was denied his state and federal constitutional rights to an impartial jury, to due process and a fair trial, and a reliable death judgment, by the court's continuing refusal to canvass jurors to insure that their impartiality had not been compromised by the media circus generated by "Three Strikes" and related crime stories, including extensive news coverage of Roy's trial.

E. Appellant was denied a fair trial and an impartial jury by the trial court's failure to conduct adequate questioning of Juror Schmidt prior to denying the motion for mistrial.

"Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility." (People v. Cleveland, supra, 25 Cal.4th at p. 477.) The trial court conducted inadequate questioning of Juror Schmidt to satisfy its obligation in this case.

The questioning of Ms. Schmidt was as follows:

> "The Court: . . . .With regard to this insanity phase, do you feel you have a completely open mind on that and you'll listen to both sides and decide based on the evidence?"
> "Juror Schmidt: "Yes.
> "The Court: "Okay. In other words, I just want to make sure.

Do you feel you would have – that your mind would be closed because of something you've already heard, in other words, or do you feel when it comes to this phase you would have an open mind?
"Ms. Schmidt: Well, I think in trying not to think about it, like you said, not to when I came back, in not thinking about it at home, which you said not to think about it at home, so I didn't think about it at home.
"The Court: Good.
"Juror Schmidt: And when I came back in here and we have to start fresh, I don't think it's a terribly easy thing to do to make a separation. I think I've had to made a conscious decision to make it separate.
"The Court: Good for you.
"The Court: Right. And if we should get to the third phase – and I'm not saying we will because maybe this phase will end it all. If we get to the third phase, I think you would make that same conscious effort to have a totally open mind. Is that correct?
Juror Schmidt: Un-huh.
"The Court: Good. And so if you were seated, say, in a position of the defendant here and all, you didn't want to win necessarily, but you wanted a fair trial, would people of your state of mind give him a fair trial?
"Juror Schmidt: Yes." (RT 9635-9636.)

Ms. O'Neill was not satisfied with the court's questioning of Juror Schmidt, and for good reason. (RT 9637.) A judge must insure that a *voir dire* examination of a potentially prejudiced juror "affords a fair determination that no prejudice as been fostered." (Silverthorne v. United States, supra, 400 F.2d at pp. 637-638.) A juror's own opinion of his or her impartiality is not controlling. (United States v. Williams, supra, 568 F.2d at p. 471.) Ms. Schmidt's answers were far from unequivocal. Indeed, the juror said she was doing her best, but admitted she was having some difficulty starting anew with an open mind.

The questions propounded by the court were, for all intents and

purposes, the same as the questions asked in United States v. Thompson, supra, 908 F.2d at p. 650. In that case, the trial court asked, "Let me inquire, before you begin your deliberations, has anything occurred during the weekend that would in any way affect your ability to continue to serve as fair and impartial jurors in this case? . . . Is there any matter that you would wish to call to the Court's attention as perhaps bearing on your ability to continue to serve as fair and impartial jurors?" (Ibid.) The Tenth Circuit Court of Appeals concluded that the trial court had failed to conduct specific enough questioning to detect juror bias.

The questions propounded by the court were likewise inadequate to detect prejudice because they "were calculated to evoke responses that were subjective in nature," Ms. Schmidt was "called upon to assess [her] own impartiality for the court's benefit," and "the entire *voir dire* was too general to adequately probe the prejudice issue." (Silverthorne v. United States at p. 638.) "[I]n the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test their impartiality].' " (Silverthorne v. United States, supra, 400 F.2d at p. 638; citation omitted.)

Given the extent of midtrial publicity, and the inflammatory character of the articles published on January 4 and 5, 1994, the court should have engaged in specific questioning regarding the juror's notes, including but not limited to whether Ms. Schmidt "had read or heard specific prejudicial comment" including the articles discussed previously, or whether she had formed any opinion about Roy's awareness of what he was doing at the time of the offenses. (Sheppard v. Maxwell, supra, 384 U.S. at p. 357.) Where, as here, Roy's life was at stake, and no specific questioning was done to

determine whether Juror Schmidt had prejudged Roy's sanity without hearing sanity phase evidence, "the [trial court's] finding of impartiality does not meet constitutional standards." (Irwin v. Dowd, supra, 366 U.S. at pp. 727-728.)

Accordingly, the sanity phase verdicts must be reversed and the matter remanded for a new trial to determine whether Roy was sane at the time of his offenses. Furthermore, because capital cases must be policed at all stages for procedural fairness and accuracy of factfinding (Satterwhite v. Texas, supra, 486 U.S. at p. 263), the penalty phase verdict must also be reversed because it cannot be said with any certainty that any error infecting the sanity phase did not infect the jury's discretionary penalty phase determination as well.

XXIII THE DEATH PENALTY MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY FAILED TO GIVE AN ADMONITION COMPLIANT WITH PENAL CODE SECTION 1122 BEFORE ALLOWING SEPARATION OF THE JURY PURSUANT TO PENAL CODE SECTION 1121.

After returning verdicts finding Roy sane, on January 20, 1994, jurors were told not to discuss, or form or express any opinions about the case, and further: "Watch for any news. We have – there will be something in the newspaper about our verdict and also on TV. Please avoid reading or watching it." (RT 9961.) This admonition, like the one given at the end of the guilt phase, was specific to news coverage of the verdicts. Jurors were not sufficiently advised in compliance with Pen. Code, § 1122, to avoid all media coverage about the case. The admonition was insufficient to comply with the demands of Pen. Code, § 1122, and due process. (Appellant adopts and incorporates by reference the arguments and authorities set forth in Arguments XVII and XIX.) Furthermore, when the jury re-convened briefly before the long recess, on January 27, 1994, the Court *denied* a request by counsel to admonish jurors to avoid exposure to publicity during the break in the proceedings.

Because the jury was not properly admonished, the trial court also violated Pen. Code, § 1121, which provides in relevant part:

> "The jurors . . . may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them."

(RT 10126.)

"A trial court abuses its discretion when it exceeds the bounds of reason, all of the circumstances before it being considered." (People v. Russel (1968) 69 Cal.2d 187, 195.) Under the circumstances, it exceeded the bounds of reason to permit separation pursuant to Pen. Code, § 1121 for an indefinite period, yet not properly admonish the jurors to avoid all publicity about the case. (People v. Santamaria (1991) 229 Cal.App.3d 269, 276-277.)

The failure to comply with Pen. Code, §§ 1121 and 1122 did not just amount to a mere abuse of discretion. In addition, the trial court's incorrect and arbitrary violation of a state statute violated Roy's state-created liberty interests, in violation of the Fourteenth Amendment's Due Process Clause. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346; Hewett v. Helms, supra, 459 U.S. at p. 466; Ford v. Wainwright, supra, 447 U.S. at p. 428 [Concurring Op., O'Connor, J.].)

Furthermore, because the error allowing the jury to separate for nearly 10 months without a proper admonition occurred in the context of a capital trial, the jury's death determination has been deprived of all reliability in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. (Woodson v. North Carolina, supra, 428 U.S. at p. 302.)

XXIV THE DEATH PENALTY MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY FAILED TO CONDUCT AN ADEQUATE POLLING OF THE JURY REGARDING PREJUDICIAL MIDTRIAL PUBLICITY PRIOR TO THE PENALTY PHASE.

Due to intervening events, the jury did not reconvene for the penalty phase until October 4, 1994, nine-and-a-half months following the sanity trial, and ten months following the conclusion of the guilt phase trial. In the interim, there was news coverage of the sanity verdict, which jurors had been told to avoid. (See, "*Jury finds Roy was sane when he killed Laurie [F.].*" Fresno Bee, January 21, 1994, Metro section, page B3.) In addition, however, there were a number of articles about the delays in the proceedings caused by the public defender's efforts to withdraw from the case (CT 1259-1261), and prominent, ongoing coverage of the progress of the "Three Strikes" measures, and the Polly Klaas murder, for which no preventative admonition had been given. (See, fns. 37, 39 & 44, supra.)

When jurors returned to service on October 4, 1994, the court collectively asked jurors whether they had "seen or read any media coverage concerning . . . anything that would make it difficult for you to be a fair and impartial juror in this upcoming penalty phase?" (RT 10527.) The court did not require any audible response to the question, but merely stated for the record that jurors had made eye contact and shaken their heads, no. (RT 10527.) All requests by the defense for individual polling of jurors were denied (CT 1322 [June 3, 1994], RT 10405 [June 17, 1994]; RT 10963 [October 25, 1994]), including a specific request to poll jurors about the their ability to recall the guilt phase evidence after the long hiatus in the trial. (RT

11501-11504 [November 7, 1994].)

The collective questioning of jurors was too general to satisfy the requirements of the Sixth and Fourteenth Amendments, particularly given the duration of the recess, and the absence of any clear admonition following the sanity trial to avoid exposure to any and all news coverage of Roy's case, and the fact that nearly all jurors were known to be regular readers of the Fresno Bee.

When publicity about a criminal case is great, "the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the *voir dire* examination of jurors affords a fair determination that no prejudice has been fostered." (Silverthorne v. United States, supra, 400 F.2d at pp. 637-638.)

The trial court's collective question about jurors' exposure to "anything" did not adequately dispel the probability of prejudice accruing from the publicity, and the potential for exposure to other outside influences, during the 10 month break between the guilt and penalty phases of the trial.

> "This conclusion is predicated on two grounds: (1) the questions propounded by the court to the . . . jurors were calculated to evoke responses which were subjective in nature – the jurors were called upon to assess their own impartiality for the court's benefit, and (2) the entire *voir dire* examination was too general to adequately probe the prejudice issue."

(Silverthorne v. United States, supra, 400 F.2d at p. 638.) Merely going through the motions of obtaining jurors' assurances about their own impartiality is insufficient to *test* impartiality. (Ibid.)

In United States v. Thompson, supra, 908 F.2d 648, the trial court did more than was done in this case, and reversal was still the result. The trial

court in Thompson admonished jurors not to read or listen to the news media, and "after each recess . . . inquired of the jury panel as a whole whether anything might have occurred that would in any way influence their ability to continue to serve . . . ." (Id. at p. 649.) Jurors never gave the court any indication that anything had occurred. Following publication about a newspaper article referring to the defendant's prior guilty plea, the court asked jurors whether "anything occurred during the weekend" to impair any juror's impartiality. (Id. at p. 651.)

The trial court refused to ask any specific questions about the newspaper story. The Tenth Circuit Court of Appeals reversed, concluding:

> "[T]he trial court's general inquiry as to prejudice was not sufficient to satisfy counsel's reasonable request that the jury be asked specifically about the newspaper story. At a minimum, the court had a duty to ask whether the jurors had read the article concerning the case."

(United States v. Thompson, supra, 908 F.2d at p. 650.)

"The effect of exposure to extrajudicial reports on a juror's deliberations may be substantial even though it is not perceived by the juror himself, and a juror's good faith cannot counter this effect." (United States v. Williams, supra, 568 F.2d at p. 471.) For that reason, courts have recognized that "assurances from jurors may not be adequate to eliminate the harm done by a news report." (Ibid.) The harm caused by failing to make a sufficiently specific inquiry is not corrected by a court's "standard admonition to disregard everything not heard in court." (Ibid.)

Accordingly, the trial court's collective questioning of returning jurors, in a very general manner, failed to provide any guarantee that Roy's penalty phase trial would be fair and his jury impartial. (Irwin v. Dowd, supra, 366 U.S. at pp. 727-728.) Reversal of the penalty phase is therefore necessary

without any showing of actual prejudice. (Rose v. Roy, supra, 478 U.S. at p. 578; Arizona v. Fulminante, supra, 499 U.S. at p. 307; Johnson v. Armontrout, supra, 961 F.2d at p. 756; People v. Cahill, supra, 5 Cal.4th at pp. 501-502; In re Carpenter, supra, 9 Cal.4th at p. 680 [Dissenting op., Mosk, J.)

XXV THE DEATH PENALTY MUST BE REVERSED BECAUSE OF THE IRREMEDIABLE PREJUDICE CAUSED BY THE LONG DELAY BETWEEN THE GUILT AND PENALTY PHASES OF THE TRIAL.

A long adjournment between the guilt and penalty phases of a capital trial poses the risk that jurors' "recollections of the evidence, the arguments, and the court's instructions may become dulled or confused." (People v. Santamaria, supra, 229 Cal.App.3d at pp. 277-278.) In the Santamaria case, an unjustified midtrial recess of 11 days, during the jury's deliberations, was found too prolonged to survive constitutional scrutiny. (Id. at p. 279.) In Roy's case, the original 12 jurors were sworn on October 6, 1993, and guilt phase verdicts were returned on January 4, 1994. Penalty phase testimony commenced on October 25, 1994. Thus, nearly ten months had passed between the *end* of the guilt phase and the beginning of the penalty phase, and more than a year had passed since the start of the guilt phase trial. Even though the delay in this case occurred *between* phases of the trial, and not during deliberations, there was still an unacceptable risk that the jury's recall of guilt phase evidence, critical to evaluate the appropriateness of the death penalty, would become too faded or confused for the jury to properly perform its function.

It is almost too obvious to state that "[a]s trials become extended, jurors' memories can fade . . . ." (Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683, 1817.) This Court recognizes that it is a scientifically proven fact that "the accuracy of memory tends to decrease over time . . . ." (People v. Fudge (1994) 7 Cal.4th 1075, 1111; see also People v. Sanders (1995) 11 Cal.4th 475, 508.) The United States Supreme Court also recognizes the

fallibility of memory over time. "'Memory grows dim with the passage of time.'" (United States v. Marion (1971) 404 U.S. 307, 331, fn. 3; citation omitted.)

Statutes of limitations for initiating litigation are imposed precisely because "memories fade, evidence is lost, and circumstances change with the passage of time." (Frances H. Miller, Biological Monitoring: The Employer's Dilemma, 9 Am. J. L. and Med. 387, 405.)

In Mares v. United States, supra, 383 F.2d 805, the Tenth Circuit Court of Appeals refused to remand a matter for purpose of questioning jurors about exposure to midtrial publicity following a long delay in the proceedings. The court reasoned that remand would serve no practical purpose because jurors memories would have dimmed too much to reliably assess the prejudice caused by exposure to media coverage during the trial. (Id. at p. 809.) In this case, the delay of ten months to a year was just as likely to have resulted in the irretrievable loss of memory on the part of jurors. (RT 3501, et seq.)

Numerous studies have been done on the reliability of eyewitness identification evidence, which show that human memory becomes less and less reliable with the passage of time. The phenomenon of "confabulation" leads to the danger that one's memory will "account for missing information by supplying the missing details from the subject's general store of life experiences or from logical deductions about what the missing information ought to be." (Jacqueline Kanovitz, Hypnotic Memories and Civil Sexual Abuse Trials, 45 Vand. L. Rev. 1185, 1232, n. 204 (1992); see also Elizabeth F. Loftus and James F. Doyle, Eyewitness Testimony: Civil and Criminal 50-51 (1987).) It is known that witnesses may subconsciously incorporate into memory post-event information, both correct and mistaken, acquired from other sources, such as descriptions of events supplied in a newspaper. (People

v. Wright (1988) 45 Cal.3d 1126, 1156.) Yet in a capital case, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." (Mattox v. United States (1892) 146 U.S. 140, 149.)

Jurors in criminal cases are no different than witnesses. Over time, jurors' memories of guilt phase evidence will inevitably be distorted by confabulation and subconscious incorporation of post-trial information acquired from other sources. The risk of distortion is particularly acute here, where the midtrial recess was of long duration and accompanied by a great deal of potentially inflammatory publicity about Roy's case, the Three Strikes laws, other high-profile cases like the Polly Klass and Kimber Reynolds murders, and the shocking murder rate in Fresno in the year of Roy's trial.

Studies conducted on jury sentencing in capital cases have found that memory failure is a hindrance to researchers trying to determine exactly what goes in during jury deliberations. Jurors themselves believe they remember their deliberations very well, yet they often misremember or disagree about what actually occurred. (See, Christopher Slobogin, Symposium: The Capital Jury Project: Should Juries and the Death Penalty Mix? A Prediction About the Supreme Court's Answer; 70 Ind. L.J. 1249, Fall 1995, p. 1255; see also, Joseph L. Hoffman, Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases; 70 Ind. L.J. 1137, pp. 1146-1147, note 3 (1995).) The same problem obviously exists for jurors who must reliably recall voluminous evidence in a lengthy and complex criminal case after a long recess in the proceedings. Each juror may sincerely believe he or she accurately recalls what evidence was presented, yet due to unconscious confabulation and fading memory each will disagree regarding what the evidence actually showed. Under California's capital sentencing

scheme, juries are instructed to consider all of the evidence which has been received during any part of the trial of the case, and Roy's jury was so instructed. (CT 1614.) In this case, the prosecutor relied very heavily on the guilt-phase evidence in arguing that Roy should die. The prosecutor repeatedly emphasized that little new evidence in aggravation had been introduced at the penalty phase, except for evidence of Roy's prior crimes. (See RT 11837-11840, 11900-11919.) Mr. Kinney was not present for much of the guilt phase, so he could not be counted upon to fill gaps in jurors' recollections, or to controvert the prosecutor's account of the evidence.

For example, the prosecutor argued that it was evidence of a premeditated murder that Roy had just *happened* to have a piece of rope when he took Laurie into the other bathroom. (RT 11839.) In fact, there was no evidence to show that the strangulation of Laurie occurred in the bathroom, or to establish Roy's possession of a rope at the time he moved Laurie into the men's restroom.[49] There was testimony that Roy used a piece of rope to restrain Angie in the women's bathroom. (RT 5029.)

Roy testified at the guilt phase did not testify at the penalty phase. Yet in order to properly evaluate factors such as remorse, appreciation of criminality and wrongfulness, or the presence of emotional or mental disturbance (Pen. Code, § 190.3), the jury's accurate recollection of Roy's guilt phase testimony would have been critically important.

Exhibits presented to the trial court in support of a motion for new trial show that, in fact, loss of memory had a substantial effect on the outcome of

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[49] The presence of a rope around Laurie's neck at the time her body was found is well- established. (RT 3406, 3661, 3747.)

the penalty phase proceedings.[50] In a Fresno Bee newspaper article published on September 30, 1994, the jury foreperson, Mr. Wakefield, was quoted as saying that the death penalty was selected because Roy had "shown no remorse" for strangling Laurie. Mr. Wakefield told the reporter: "Even with the overwhelming evidence," . . . "he didn't say he was sorry." (CT 1752.) In fact, during Roy's guilt phase testimony, he expressed great sorrow and remorse for his actions. Roy told jurors he loved Laurie like a sister did not understand why he had killed her. He professed love for the members of Laurie's family, too. (RT 5799-5800, 5897, 6062.) Roy testified that he "hurt every day" and sometimes heard hallucinations of the sound of Laurie crying. (RT 5922.) He sometimes he stood in the shower and ran water over his head, or exercised repetitively as means of silencing the voices. (RT 6061.) He testified that he would rather die than be sentenced to life in prison. (RT 5929.) Roy even testified specifically that he felt *remorse*. (RT 6993.) Obviously, jurors had forgotten this testimony.

Even worse, jurors had agreed to jury service with the understanding that they would be expected to sit for a three-and-a-half to four month trial. (RT 134.) By the time the guilt phase verdicts were rendered, jurors had been in intermittent service, including attendance during jury selection, for a whopping 15 months! The trial court was forced to play on the guilt and good conscience of jurors to keep them on the jury. Letters were sent to jurors reminding them that they case was still pending, and advising that they were still "needed" in the case. (CT 1337.) On resumption of the trial, jurors were thanked profusely for their "personal sacrifices and patience" and "willingness

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[50] Appellant addresses the trial court's denial of his motion for new trial, for reduction of the sentence or for a new sentencing hearing in Argument LIII, infra.

to do your civic duty despite a lot of hardships and delays in this case." (CT 1339; RT 10526.)

As previously discussed in Argument XVIII, B, ante, a number of jurors voiced displeasure about the ongoing delays. Several suffered severe hardships, including financial sacrifice, and threats to, interruption of, or complete loss of employment, but the court, concerned about running out of alternates, granted no relief. (See, RT 10121-10122; 10498; 10531-10537; 10499; CT 1327.) "Such scheduling pressures created a risk of coercion on the jury's deliberative process similar to that which might occur with a 'time-fuse' instruction from the judge." (Key v. People (Colo. Ct. App. 1994) 865 P.2d 822 [¶] 12.)[51]

The damage caused by the long midtrial delay was consequently irremediable. A mistrial should have been granted and the guilt phase trial started anew. At the very least, the penalty phase should have commenced with a new jury. (See Arguments XX and XXIV.)

As previously stated, "death as punishment is unique in its severity and irrevocability." (Gregg v. Georgia, supra, 428 U.S. at p. 187.) Because there is a qualitative difference between death and other forms of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." (Woodson v. North

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[51] In Key v. People, supra, defense counsel was absent during an impromptu conference between deliberating jurors and the judge regarding when it would be convenient for jurors to resume deliberations. The Colorado appellate court noted that because of what occurred at the conference, two jurors developed substantial incentives to arrive at a verdict by the end of the first afternoon of deliberations. The appellate court reversed the judgment, finding that the deprivation of counsel at a critical stage of the proceedings could not be deemed harmless.

Carolina, supra, 428 U.S. at p. 305; see also Satterwhite v. Texas, supra, 486 U.S. at pp. 262-263; accord: People v. Horton, supra, 11 Cal.4th at p. 1134.)

The federal constitution demands that death penalty trials be policed at all stages for procedural fairness and accuracy of factfinding. (Satterwhite v. Texas, supra, at pp. 262-263; Strickland v. Washington, supra, 438 U.S. at p. 704 [Brennan, J., concurring in part and dissenting in part].) This Court also applies "a more exacting standard of review" when it assesses the effects of state law errors on the penalty phase of a capital trial. (People v. Brown (1988) 46 Cal.3d 432, 447.) The death penalty must be struck down if the circumstances create an unacceptable risk that death was meted out arbitrarily or capriciously, or by whim or mistake. (Caldwell v. Mississippi, supra, 472 U.S. at p. 343; California v. Ramos, supra, 463 U.S. at pp. 998-999.) Such circumstances exist in this case, by reason of the long delay between the guilt and penalty phases.

This case is unlike other cases considered by this Court, in which relatively short midtrial delays were permitted to allow counsel and jurors to celebrate the holiday season, or to permit defendants to seek extraordinary writ review of trial court rulings. (See, e.g. People v. Bolden (2002) 29 Cal.4th 515, 561 [13 day delay]; People v. McDonald (1984) 37 Cal.3d 351, 379 [three week delay]; Hamilton v. Vasquez (9th Cir. 1992) 17 F.3d 1149 [two-week recess].) In this case, one long delay -- from January 24, 1994, to March 25, 1994 – resulted from the public defender's declaration of a conflict, and pursuit of appellate court litigation over contempt citations against Assistant Public Defender Dreiling, and the public defender's right to withdraw from the case. (See, RT 9977-9981, 10004-10005, 10042-10067, 10053-10055, 10070-10093, 10084-10087, 10131-10214, 10246-10247, 10254, 10271; SCT2 1943.) Further delays – from June 7, 1994, to October

25, 1994 – resulted because Ms. O'Neill was diagnosed with cancer, and Ernest Kinney, a private defense attorney with serious health problems and too many other capital clients, was forced to replace Ms. O'Neill against his will and better judgment.

Furthermore, the long recesses in the proceedings were not, for the most part, *used* for the purpose of trial preparation in Roy's case. Both Ms. Martinez and Ms. O'Neill, for some period, completely abandoned Roy's representation to work on other cases. (RT 10329, 10318.) During the long delay which occurred *after* Mr. Kinney's appointment as lead counsel, he was prevented from working on Roy's case due to his poor mental and physical health, and due to his engagement in back-to-back trials in other murder cases. (RT 10379, 10420-10446, 10477-10497, 10503-10504, 10508, 11495-11497; CT 1385-1393, 1425-1426.)

Mr. Kinney had finished trying another high profile murder case just a few days before Roy's penalty phase began. (RT 10965; see *"Defendant thanks jury for acquittal"*; Fresno Bee, October 21, 1994, Metro section, Pg. B1.) On the day penalty proceedings were to commence, Kinney's co-counsel, Ms. Martinez, was so disturbed by Mr. Kinney's lack of preparation, and failure to consult with her in preparation for trial, that she unilaterally moved for a continuance of the trial, a request which was denied when Mr. Kinney failed to join her request. (RT 10962-10965.) Under the circumstances, the long delays can hardly be characterized as for Roy's benefit, so that counsel could be adequately prepared.

Roy was denied his inviolate right to an impartial jury, guaranteed by the state and federal constitutions, because the inevitable effect of the highly prejudicial media circus, pervasive public anti-crime sentiment generated by unfavorable press, and unhappy jurors plagued by personal and employment

problems, as well as fading memories, was to predispose the jury to return a death judgment. (U.S. Const., Amendment VI; Cal. Const., Art. I, § 16.) No state may constitutionally entrust the determination of whether a man should die to jurors predisposed to impose a death judgment. (Witherspoon v. Illinois (1968) 391 U.S. 510, 522; Fay v. New York (1947) 332 U.S. 261, 294.)

The jury's death judgment was likewise deprived of its reliability and does not pass constitutional muster under the due process, or cruel and unusual punishment clauses of the United States and California Constitutions. (U.S. Constitution, Amendments V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, & 17.) It is highly probable that jurors, because of the lapse of time, were both incapable of recalling enough of the guilt phase trial to properly perform their function of weighing aggravating against mitigating evidence to reach an appropriate penalty determination, and too greatly influenced by the desire to end protracted jury service to give Roy's case the consideration it deserved.

Reversal of the death penalty is therefore mandated.

XXVI THE DEATH PENALTY MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY REFUSED TO POLL JURORS ABOUT THEIR LOSS OF MEMORY OF GUILT PHASE EVIDENCE PRIOR TO COMMENCEMENT OF THE PENALTY PHASE OF THE TRIAL.

Defense counsel asked the trial court to poll jurors to inquire about their loss of memory during the ten-month delay between the guilt and penalty phase trials. (RT 11501-11504.) The motion to poll jurors was denied. (RT 11511.)

Before the penalty phase evidence began, the jury was given no hint from the court that there was anything that could be done to assist jurors in refreshing their recollection of the guilt and sanity phase evidence. For example, there was no mention of the possibility of reading back from transcripts of the guilt or sanity phase testimony. (RT 10526-10540; 10946-10960; 10977.) When the penalty phase concluded with the reading of instructions, once again the jury was given no explicit advice from the court regarding the availability of mechanisms to refresh jurors' recollections about guilt and sanity phase evidence, if necessary. (See, RT 12014-12040.) The juror was simply released to deliberate, according to a schedule to be set by jurors themselves. (RT 12038.)

Even if the long delay in the trial was not grounds for *per se* reversal of the judgment, the trial court's refusal to poll jurors, or take any action to guarantee that jurors would have sufficient recall of guilt phase proceedings to perform its duty, eviscerated Roy's right to a fair penalty phase trial, an impartial jury and a reliable death judgment.

As previously noted, it is a scientific fact that the accuracy of memory diminishes with time. Jurors are human, and have the same capacity to forget

as other humans do. It is therefore likely that after a ten-month break in the proceedings, some of Roy's jurors suffered from fading, or even changing and confabulated memories of what occurred during the guilt and sanity phase trials. (Appellant adopts and incorporates by reference the arguments and authorities set forth in Argument XXV, ante.)

It was fundamentally unfair, and undermined the reliability of the entire sentencing proceeding, to refuse counsels' request to poll the jury about its recall of the guilt and sanity phase evidence. In balance, it would have taken little additional time to inquire of jurors whether memory might be a problem. Furthermore, it would have consumed little time to admonish jurors that the court reporter could read from transcripts of guilt and sanity phase testimony, on request, in the event jurors forgot critical aspects of the evidence, or disagreed regarding what the evidence showed. Yet nothing at all was done to protect Roy's right to a fair sentencing proceeding.

In a capital sentencing proceeding, the accuracy and reliability of the jury's sentencing decision is of paramount importance. (Woodson v. North Carolina, supra, 428 U.S. at p. 305; Satterwhite v. Texas, supra, 486 U.S. at pp. 262-263.) The state must insure reliability in the process by which a person's life is taken. (Gregg v. Georgia, supra, 428 U.S. at pp. 196-206.) That is why a reviewing court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." (Burger v. Kemp (1987) 483 U.S. 776, 785; Kyles v. Whitley (1995) 514 U.S. 419, 422.) In this case, the refusal of the trial court to allow polling of the jury regarding possible fading memory after such a long delay violated Roy's right to a fair trial, to due process of law, an impartial jury, and a reliable death judgment, in violation of the state and federal constitutions. (U.S. Const.; Amendments V, VI, VIII, XIV; Cal. Const., Art. I, § 7, 15, 16 & 17.) Reversal of the death sentence is therefore mandated.

XXVII THE ERRORS ASSERTED IN ARGUMENT SECTION 3 [ARGUMENTS XVII-XXVII] INDIVIDUALLY AND CUMULATIVELY DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW, AN IMPARTIAL JURY AND TO A RELIABLE DEATH JUDGMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS (U.S. CONST. AMENDMENTS V, VI, VIII, XIV; CAL. CONST. ART. I, SECTIONS 7, 15, 16 & 17).

In this case, the trial court systematically neglected or refused to give statutorily mandated admonitions to avoid exposure to media coverage, before the guilt, sanity and penalty phase trials. (Arguments XVII, XIX, & XXIII.) Despite potentially prejudicial news coverage about the trial itself, and a highly inflammatory media storm about epidemic murder, including the Polly Klaas and Kimber Reynolds murders, and "Three Strikes and You're Out," the trial court also refused virtually every request by defense counsel to poll jurors to insure that no prejudicial exposure to media had occurred. (Arguments XVIII, XXI, XXIV, XXVI.) The court even refused to poll jurors to insure their impartiality after counsel observed a juror notebook page containing an entry which clearly suggested the juror had prejudged the sanity phase issues without hearing any evidence. (Argument XXII.)

The Court erroneously rejected the defense's request to convene a new jury for either the sanity or penalty phases of the trial, even though granting a new jury had the potential to perhaps avoid some of the harmful cumulative effects of the jury's likely exposure to a barrage of inflammatory media coverage, including "*The Killers*" article and the story about Laurie's mother dancing in joy on her grave following the guilt phase verdicts. The court, in denying a new jury, also failed to ameliorate the prejudice necessarily produced by the excessively long delay between the sanity and penalty trials,

and the hardships endured by jurors resulting from unanticipated events which made the trial last almost a year longer than anticipated. (Argument XX.) Last but not least, the Court unreasonably insisted in proceeding with the penalty phase without polling jurors about the effects of the long midtrial delay on their ability to recall aspects of the guilt-phase testimony. (Argument XXIV, XXVI.)

Each of these errors individually interfered with Roy's fundamental constitutional right have his case determined by a fair and impartial jury. (U.S. Const.; Amendment VI; Cal. Const., Art. I, § 16.) The Sixth Amendment provides that "the accused shall enjoy the right to a . . .public trial, by an impartial jury of the State and district wherein the crime shall have been convicted . . ." (See, Duncan v. Louisiana (1968) 391 U.S. 145, 155.) The Supreme Court insists that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." (Chambers v. Florida (1940) 309 U.S. 227, 236-237.) California's Constitution goes even further, guaranteeing trial and unanimous agreement by *twelve* impartial jurors. (Cal. Const., Art. I, § 16.) Exposure to publicity which compromises a jurors' impartiality also results in the denial of due process, as well as the right to an impartial jury. (Irwin v. Dowd, supra, 366 U.S. 717; Sheppard v. Maxwell, supra, 384 U.S. at 333; People v. Lambright, supra, 61 Cal.2d 482.)

The jurors almost all regularly read the Fresno Bee newspaper and prejudicial publicity from that as well as other sources was pervasive. Yet the court did nothing to prevent exposure or to ameliorate the probable prejudice from exposure after the fact. Consequently, it is not only possible, but probable that jury deliberations at all phases were not conducted by jurors free of prejudice, passion and excitement. This resulted in the denial of the right to an impartial jury, and the denial of due process, in violation of the state and

federal constitutions. When a defendant demonstrates that inflammatory, prejudicial pretrial publicity so pervades or saturates the community so as to render a fair trial virtually impossible, prejudice must presumed, and there is no further duty on the defendant's part to show actual bias. (Mayola v. Alabama (5th Cir. 1980) 203 F.2d 904; Woods v. Dugger (11th Cir. 1991) 923 F.2d 1454; Rideau v. Louisiana (11963) 373 U.S. 723; Leonard v. United States (1964) 378 U.S. 544 [Per Curiam reversal due to implied bias of jurors at second trial who had been in courtroom during announcement of the guilt verdict at the first trial].) Even overwhelming evidence of guilt cannot render the violation harmless. (Coleman v. Kemp (11th Cir. 1985) 778 F.2d 1487.)

Roy's due process rights were violated because the trial court violated settled state statutory procedures to prevent precisely the type of prejudice suffered in this case. The jury was supposed to be admonished before the trial, and prior to any separation, to avoid exposure to any media coverage of the case during jury service. (Pen. Code, §§ 1121, 1122.) Roy was entitled to have a new jury convened for the penalty phase under circumstances establishing that the jury could no longer perform its function. (People v. Earp, supra, 20 Cal.4th at p. 891; Pen. Code, § 190.4.) Yet this right, too, was refused. This denied Roy his state-created liberty interest in the correct and non-arbitrary application of California's laws, in violation of the Fourteenth Amendment. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346; Hewett v. Helms, supra, 459 U.S. at p. 466; Ford v. Wainwright, supra, 447 U.S. at p. 428 [Concurring Op., O'Connor].)

Furthermore, the errors described in Arguments XVII to XXVII all occurred in the context of the guilt, sanity or penalty phase of a capital trial. Each error individually irreparably compromised the reliability of the death judgment in violation of the state and federal constitutions. (Gregg v. Georgia, supra, 428 U.S. at pp. 196-206; U.S. Const., Amendment VIII; Cal.

Const., Art. I, § 17.) Death penalty trials must be policed at all stages for procedural fairness and accuracy of factfinding. (Satterwhite v. Texas, supra, 486 U.S. at pp. 262-263.) Any serious error at any stage of the proceedings creates an unacceptable risk that the death punishment will be imposed arbitrarily and capriciously, or by whim or mistake. (See, Caldwell v. Mississippi, supra, 472 U.S. at p. 343; California v. Ramos, supra, 463 U.S. at p. 999.)

Even if no single error assigned in Arguments XVII to XXVII is sufficiently egregious or prejudicial to mandate reversal of the judgment, the cumulative effect of these errors violated Roy's statutory and constitutional rights to an impartial jury, to due process and a fair trial, and a reliable death judgment. "A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." (United States v. Toles (10th Cir. 2002) 297 F.3d 959, 972.) Even where individual errors have been denied for insufficient prejudice, such errors must be included in the cumulative-error calculus. Furthermore, it is a commonsense notion that sentencing proceedings may be affected by errors in the preceding guilt phase. (Moore v. Johnson (5th Cir. 1999) 194 F.3d 586, 619; Smith v. Wainwright (11th Cir. 1984) 741 F.2d 1248, 1255 [granting evidentiary hearing on trial ineffectiveness claim because counsel's failure to impeach witness at guilt phase "may not only have affected the outcome of the guilt/innocence it may have changed the outcome of the penalty trial"].) In this case, the trial court's pervasive refusal to take even the smallest step to protect Roy's right to trial by an impartial jury, free from outside influences, passion or prejudice, resulted in a fundamentally unfair proceeding. Accordingly, the guilt, sanity and penalty phase verdicts must all be reversed. (People v. Hill (1998) 17 Cal.4th 800, 844.)

PROOF OF SERVICE BY MAIL

I reside in and maintain a home office in Corrales, New Mexico, in Sandoval County. I am over the age of 18 years and am the attorney for Royal Clark, the appellant in this action. My business address is Post Office Box 2758, Corrales, New Mexico, 87048.

On June 26, 2003, I served the attached Appellant's Opening Brief and Request for an Permission to File an Opening Brief in Excess of 280 Pages on the interested parties in this action by personal service or by placing a true copy, postage prepaid, in the U.S. Mail in Albuquerque, New Mexico, addressed as follows:

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I declare under penalty of perjury that foregoing facts are true.

Executed this June 26, 2003, at Corrales, New Mexico.

MELISSA HILL