SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROBERT WESLEY COWAN, Defendant and Appellant.	Crim. S055415 Kern County Superior Court No. 059675A

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Kern

HONORABLE LEE P. FELICE, JUDGE

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Crim. S055415
	)	
Plaintiff and Respondent,	)	Kern County
	)	Superior Court No. 059675A
vs.	)	
	)	
ROBERT WESLEY COWAN,	)	
	)	
Defendant and Appellant.	)	
	)	
	)	

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APPELLANT'S OPENING BRIEF

I.

INTRODUCTION

A. GUILT PHASE – KILLINGS OF ALMA AND CLIFFORD MERCK

Appellant was convicted of the first degree murders of Alma and Clifford Merck with special circumstances. The murders occurred between August 31, 1984 and September 4, 1984, ten years before a complaint was filed against appellant. The most critical part of the prosecution's case, and the development that prompted the filing of the complaint, was a positive match between two of appellant's known fingerprints and two latent fingerprints found at the crime scene. This identification was not made until June, 1994, even though both the latent fingerprints and appellant's known fingerprints had been in the prosecution's possession since the victims were discovered on September 4, 1984, and appellant had been considered a suspect since the time of the killings.

The unreasonable delay in filing the complaint greatly prejudiced appellant's ability to defend himself against the murder charges. Most significantly, a prior examination of the fingerprint evidence by a Sheriff's Department criminalist in November,1984, had resulted in a negative finding. By 1994, however, that criminalist could no longer recall the specific differences he had found between the latent fingerprints and appellant's known fingerprints. In addition, the criminalist could not re-examine the two sets of fingerprints due to his deteriorating eyesight. As a result of this, and other prejudice resulting from the faded memories of appellant and witnesses, and from the loss of physical evidence, appellant was denied due process of law by having to defend himself against murder charges that were not filed until ten years after the crimes were committed. The trial court erred in denying appellant's motions to dismiss based on pre-arrest delay.

Substantial constitutional errors also occurred during the selection of the jury that heard the case. The trial court found that a prima facie case of racial discrimination had not been shown even though the prosecutor used peremptory challenges to excuse all three Black prospective jurors called to the jury box. These prospective jurors had almost nothing in common other than their race. In addition, the trial court erroneously excused two prospective jurors who assured the court that their views regarding capital punishment would not impair the performance of their duties.

Appellant was also denied his constitutional right to be tried, and sentenced by, an impartial judge who was continually present during the entire trial. During the second day of the prosecution's guilt phase case, the trial judge realized that he was a friend of two prosecution witnesses who were related to Alma Merck. Rather than immediately recuse himself, the judge

erroneously continued to preside over the court proceedings, including witness examinations and evidentiary rulings, for the remainder of the day. When the judge finally agreed to recuse himself the next morning, he erroneously denied appellant's motion for a mistrial, and instead substituted in another judge who was unfamiliar with the trial record. The substitute judge then had to rule on a significant number of substantive issues, including issues that required him to assess the credibility of a prior witness whom he had not seen testify.

Appellant's guilt phase was marred by additional, prejudicial errors that undermined his constitutional rights to due process, a fair trial, confrontation of the evidence against him, a fair and impartial jury and a reliable guilt determination. The prosecution was permitted to unfairly bolster its case through the erroneous introduction of prior statements made by two of its witnesses when no exceptions to the hearsay rule allowed admission of the evidence. The erroneously admitted evidence included the only evidence that appellant had admitted to having "killed an old couple in Bakersfield." (RT 2391-2392.) In addition, the erroneous admission of the prior statements of the second witness, who linked appellant to the firearm allegedly used to kill Clifford Merck, allowed the prosecution to improperly rehabilitate that witness after he had been significantly impeached by the defense. Additionally, the trial court erred in permitting a prosecution criminalist to testify that the handgun allegedly possessed by appellant was the weapon used to shoot Clifford Merck. The criminalist's opinion was based on his use of a new scientific technique that was not shown to have satisfied the standard of *People v. Kelly* (1976) 17 Cal.3d 24. The trial court also should have excluded photographs of Alma Merck while alive. These photographs had no probative value and only served to generate overwhelming sympathy for the victim. Finally, the trial court erred in admitting the prior testimony of appellant's

deceased, former girlfriend that she believed appellant had murdered the Mercks. This speculative evidence was apt to have influenced the jurors who were likely to have believed that appellant's girlfriend at the time of the killings would have known if he had committed the murders.

In addition to erroneously admitting evidence offered by the prosecution, the trial court improperly excluded evidence that appellant sought to admit as part of his defense. Such evidence consisted of appellant's offer to be interviewed by the sergeant investigating the case on February 14, 1985. This evidence was highly probative of appellant's innocence because it showed that appellant acted without a consciousness of guilt.

All of the trial court's errors, both individually and collectively, prejudiced appellant, and require reversal of the convictions. The prosecution's case against appellant was very tenuous. There was no eyewitness testimony identifying appellant as the killer, and other than the erroneously-admitted evidence described above, no evidence that appellant had ever admitted to committing the crimes. The prosecution's case primarily rested on circumstantial evidence whose reliability was highly questionable.

B. GUILT PHASE – KILLING OF JEWELL FRANCIS RUSSELL

Although the jury did not convict appellant of the murder of Jewell Francis Russell, trial court errors in the admission of evidence relating to this offense were not harmless because the jury was allowed to consider the Russell killing, if sufficiently proven, as an aggravating factor for determination of penalty. In the absence of these errors, there may have been fewer or even no jurors who believed that appellant's guilt of the Russell murder had been sufficiently proven to be considered as a factor in aggravation. These errors included the admission of the prior

testimony of appellant's deceased, former girlfriend that she believed appellant had murdered Russell. Like her opinion that appellant had murdered the Mercks, this speculative evidence was apt to have influenced the jurors who were likely to have believed that appellant's girlfriend would have known if he had committed the murder. In addition, the trial court erred in admitting evidence that appellant's brother returned home with more than $200 in folded currency, allegedly taken from Russell, in the absence of any evidence establishing that a conspiracy existed between appellant and his brother.

C. PENALTY PHASE

Like the guilt phase, appellant's penalty trial was marred by prejudicial errors that undermined his constitutional rights to due process, a fair trial, confrontation of the evidence against him, a fair and impartial jury, and a reliable penalty determination. Appellant was sentenced to death only for the murder of Alma Merck. The jury returned a verdict of life in prison without possibility of parole for the murder of Clifford Merck. Unique to the penalty phase evidence relating to Alma was testimony from several of her family members. Despite repeated objections by defense counsel, the trial court permitted victim impact testimony concerning Alma Merck that far exceeded the scope of *Payne v. Tennessee* (1991) 501 U.S. 808. The family members speculated about Alma's experiences and extreme suffering during the crime, expressed opinions that appellant lacked remorse subsequent to the crime, and appealed to the jury to return a death verdict.

In addition, the court's instruction concerning the jury's consideration of other crimes of violence allegedly committed by appellant was flawed in several ways. First, the trial court failed to identify the Russell murder as one of the other crimes of violence that had to be proven

beyond a reasonable doubt before it could be considered by the jury as an aggravating factor. As a result, the jury may well have believed that a lesser standard of proof applied to its consideration of the Russell murder. The trial court also erred in failing to define the term "reasonable doubt" when explaining the standard of proof for other crimes evidence. The jury was unlikely to have remembered the precise definition given during the guilt phase or, if remembered, may have believed that that definition was inapplicable in light of the directive to disregard all instructions during other phases of the trial. Finally, the trial court listed residential burglary and residential robbery as separate crimes of violence for the jury to consider as aggravating factors when the two crimes were based on the same act of violence. This error allowed the prosecution to improperly inflate its case for the death penalty.

Appellant's request for two penalty phase instructions was also erroneously denied. Appellant sought to have the jury instructed that its finding of first degree murder with special circumstances was not itself an aggravating factor and that the death penalty must be considered to be a more severe penalty than life in prison without parole. These instructions were necessary for the jury to make a fair and reliable penalty determination.

Additionally, as in the guilt phase, the trial court's rulings on the admission of evidence were not free of prejudicial error. The prosecution sought to establish that appellant had previously abused the oldest son of his girlfriend in order to show the existence of a factor in aggravation. For that purpose, the trial court permitted admission of a prior statement made by the alleged victim's younger brother when no exception to the hearsay rule allowed admission of the evidence.

Finally, the trial court erred by not adequately investigating the possibility of juror

misconduct. The possible misconduct consisted of unauthorized contact between a juror and penalty phase witnesses, and jurors coercing a hold-out juror to vote for death.

All of the trial court's errors, both individually and collectively, prejudiced appellant, and require reversal of the death sentence. The penalty decision was close, and a death verdict was far from a foregone conclusion. Appellant introduced the testimony of family members who described his trouble childhood, including brutal, unwarranted beatings inflicted by his alcoholic father. In addition, evidence of appellant's good character was presented by appellant's recent girlfriend and her children. They described appellant as a kind, loving and helpful person.

II.

STATEMENT OF THE CASE

This is an automatic appeal from a judgment of death entered by the Kern County Superior Court on August 5, 1996.

On August 10, 1994, a four-count complaint was filed in the Municipal Court of Kern County against appellant, Robert Wesley Cowan, and co-defendant Gerald Thomas Cowan.[1] (CT 2.) Count I charged the defendants with the murder of Clifford Merck (Pen. Code, § 187), occurring on or about August 31, 1984 through September 4, 1984, and alleged that each defendant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). (CT 2-3.) The count further charged appellant with two special circumstances: that multiple murders had been committed (Pen. Code, § 190.2, subd. (a)(3)) and that the murder had occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); it charged Gerald Cowan with two special circumstances: that multiple murders had been committed (Pen. Code, § 190.2, subd. (a)(3)) and that the murder had occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). (CT 3.)

Count II charged the defendants with the murder of Alma Merck (Pen. Code, § 187), occurring on or about August 31, 1984 through September 4, 1984, and alleged that each defendant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). (CT 5.) The count further charged appellant with one special circumstance: that the

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[1]Gerald Thomas Cowan is defendant's brother. On February 20, 1997, Gerald Cowan pled no contest to voluntary manslaughter, a lesser included offense of Count III of the information, and admitted to personally using a knife. (Augmented CT 892 .) Gerald Cowan was later sentenced to four years in state prison. (Augmented CT 894; *see People v. Cowan* (1996) 14 Cal.4th 367.)

murder had occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); it charged Gerald Cowan with one special circumstance: that the murder had occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). (CT 5-6.)

Count III charged the defendants with the murder of Jewell Francis Russell, occurring on or about September 4, 1984 through September 7, 1984. (CT 8.) The count further charged appellant with two special circumstances: that multiple murders had been committed (Pen. Code, § 190.2, subd. (a)(3)), and that the murder had occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)); it charged Gerald Cowan with two special circumstances: that multiple murders had been committed (Pen. Code, § 190.2, subd. (a)(3)), and that the murder had occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)). (CT 8-9.)

Count IV charged the defendants with the first degree robbery of Clifford Merck, occurring on or about September 4, 1984 through September 7, 1987, and alleged that each defendant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). (CT 10-11.) Finally, the complaint alleged that appellant had previously served three separate prison sentences (Pen. Code, § 667.5, subd. (b)) and previously suffered two serious felony convictions (Pen. Code, § 667, subd (a)). (CT 3-5, 6-8, 9-10, 11-13.)

Appellant was arraigned on August 10, 1994, and pled not guilty to each count of the complaint. Appellant also denied the truth of all enhancement and special circumstance allegations. (CT 18.) At a hearing on August 24, 1994, the municipal court granted appellant's motion to strike Count IV on the ground that the charge was barred by the statute of limitations. (CT 19; Reporter's Transcript, August 24, 1994, p. 4.)

On August 25, 1994, appellant filed a motion to dismiss the complaint based on prejudicial pre-arrest delay. (CT 20, 491.) The hearing on the motion was held concurrently with the preliminary examination, which began on September 6, 1994 and concluded on September 12, 1994. (CT 21.) At the conclusion of the evidentiary hearing, the municipal court denied appellant's motion to dismiss and held appellant and his co-defendant to answer for the offenses charged in Counts I-III of the complaint. (CT 22-23.)

On September 23, 1994, a three-count information was filed in the Superior Court of Kern County against appellant and co-defendant Gerald Cowan. (CT 647-656.) Counts I-III of the information were the same as Counts I-III of the complaint except for the following additions. In both Counts I and II, the information added the enhancement allegation that each defendant was armed with a firearm during the commission of the offense (Pen. Code, § 12022, subd. (a)(1)); appellant was also charged with the special circumstance that the murder occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii); and Gerald Cowan was also charged with the special circumstance that the murder occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). (CT 648, 649, 650, 651.) With respect to Count III, the information added the enhancement allegation that each defendant was armed with a deadly weapon (Pen. Code, § 12022, subd. (b); appellant was also charged with the special circumstance that the murder occurred during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(vii); and Gerald Cowan was also charged with the special circumstance that the murder occurred during the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). (CT 653-654.) Finally, the information modified the prior conviction allegations to allege that appellant had previously served only one prison term (Pen. Code, § 667.5, subd. (b)) and suffered

only one serious felony conviction (Pen. Code, § 667, subd. (a)). (CT 649-650, 652, 654-655.)

Appellant was arraigned on the information on September 26, 1994. He pled not guilty to all counts, and also denied the truth of all enhancement and special circumstance allegations. (CT 663-664.) On November 3, 1994, appellant filed a motion to dismiss the information for prejudicial pre-arrest delay and, in the alternative, a motion to dismiss pursuant to Penal Code section 995. (CT 694.) This motion alleged that the delay in arresting appellant was unreasonable and had resulted in prejudice to the defense due to the failure of witnesses to recall exculpatory evidence. (CT 709-717.) A supplemental motion to dismiss for prejudicial pre-arrest delay was filed by appellant on December 28, 1994. (CT 847.) This supplemental motion alleged that the Kern County Sheriff's Department had lost material evidence during the 10-year delay between the homicides and appellant's arrest. (CT 847-852.) On January 30, 1995, an evidentiary hearing was held on appellant's motion to dismiss. (CT 893.) The motion was later denied. (CT 1051.)

On December 1, 1995, the prosecution filed a victim impact statement, explaining that during the penalty phase it would call the son of Alma Merck and the son of Jewell Francis Russell to testify about how they were affected by the homicides. (CT 1056.) On the same date, the prosecution also filed a notice of intention to introduce evidence in aggravation during the penalty phase. (CT 1063.) The notice listed five items: (1) the nature and circumstances of the homicides charged in the information; (2) appellant's alleged prior conviction for robbery on March 26, 1970; (3) appellant's alleged robbery at gunpoint of James Foster and Jessie Cruz on October 24, 1985; (4) appellant's alleged battery of a nine-year old boy on April 9, 1993; and (5) any other criminal activity by appellant that involved the use or attempted use, or the express or

implied threat to use, force or violence.

On January 19, 1996, co-defendant Gerald Cowan filed a motion to dismiss for violation of due process based on pre-arrest delay. (CT 1069.) Appellant joined in the motion on January 26, 1996. (CT 1096.) The motion alleged that the memories of defense witnesses had faded, that law enforcement had lost evidence, and that the defense investigator had been unable to locate critical witnesses. (CT 1069-1095A.) The motion was never ruled upon by the superior court, as co-defendant Gerald Cowan later pled no contest to the lesser related offense of voluntary manslaughter. (Augmented CT 892, 894.)

Pursuant to appellant's motion, a conditional examination of witness James Roy Woodin was held on February 22, 1996. (CT 1114.) At the conclusion of the witness's testimony, appellant renewed his motion to dismiss based on prejudicial pre-arrest delay. (CT 1114, 1134.) The renewed motion, made on the ground that Woodin's memory had faded due to the passage of time, was denied by the superior court. (CT 1114, 1135, 1137.)

On March 14, 1996, appellant filed a supplemental motion to dismiss for pre-arrest delay, and a motion to exclude photographs. (CT 1202, 1211.) The dismissal motion renewed and supplemented prior dismissal motions filed by both defendants. In the motion, appellant identified further prejudice resulting from the delay – the destruction of additional physical evidence by law enforcement, the inability of the defense investigator to find additional witnesses, and the destruction of social history records relating to appellant. (CT 1203-1204.) The motion to exclude photographs sought to exclude post-mortem photographs of the victims on the ground that the probative value of the evidence was substantially outweighed by the undue prejudice resulting from their admission. (CT 1211-1212.)

On March 19, 1996, appellant's case was assigned to trial before the Honorable Stephen P. Gildner. (CT 1216.) Additional pretrial motions were filed by the parties on March 25, 1996. These included the prosecution's motion to impeach appellant with prior felony convictions (CT 1243), the prosecution's motion to admit the prior testimony of Gerald Tags, who had died (CT 1262), appellant's supplemental motion to dismiss for pre-arrest delay based on law enforcement's destruction of evidence (CT 1268), appellant's motion to bifurcate the trial on the truth of the alleged prior convictions (CT 1274), and appellant's motion to exclude the testimony of Danny Phinney (CT 1274). On March 25, 1996, the superior court deferred ruling on the prosecution's motion to impeach appellant until appellant had testified, and ordered that the trial on the truth of the alleged prior convictions be bifurcated from the trial on the substantive charges. (CT 1274.) After further argument on March 26, 1996, the trial court denied both appellant's motion to exclude the testimony of Danny Phinney and his motion to exclude post-mortem photographs of the victims. (CT 1278.) The court also granted the prosecution's motion to admit the prior testimony of Gerald Tags. (CT 12778.) On March 27, 1996, appellant's supplemental motions to dismiss for prejudicial pre-arrest delay were denied. (CT 1279.)

The jury selection process began on April 8, 1996. (CT 1284.) From April 8 to April 15, prospective jurors were screened for hardships and their knowledge of the case. (CT 1284-1298.) Those found to be eligible for jury selection were required to complete questionnaires.

On April 15, 1996, the prosecution informed the court and the defense that criminalist Gregory Laskowski had recently retested the ballistics evidence and changed his opinion as to whether the two bullets recovered from the body of Clifford Merck had been fired by a firearm alleged to have been possessed by appellant. (CT 1296.) Although Laskowski had previously

concluded that the bullets could not have been fired from this gun, he now believed that the bullets had in fact been shot from appellant's gun. After Laskowski testified about the circumstances that led him to reexamine the ballistic evidence, appellant moved to exclude the test results based on the untimeliness of the retesting. (CT 1296.) That motion, and appellant's alternative motion for a continuance, were denied. (CT 1296.)

Individual, sequestered voir dire of the prospective jurors commenced on April 17, 1996, and concluded on May 2, 1996. (CT 1299, 1318.) On May 7, 1996, counsel exercised their peremptory challenges, and a jury with two alternates was sworn. (CT 1320.) Appellant's motion to dismiss the jury venire pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, and his renewal of that motion, were denied. (CT 1320.) On May 10, 1996, appellant filed a motion to sever the trial on Count III from the trial on Counts I and II. (CT 1323.) The superior court denied that motion on May 13, 1996. (CT 1330.) Counsel then made opening statements and the prosecution commenced its case-in-chief. (CT 1330.)

On May 15, 1996, the trial judge informed counsel that he had a friendship with two of the prosecution witnesses who had not yet testified. (CT 1339.) Appellant then requested that the trial judge recuse himself from the proceedings and moved for a mistrial. (CT 1339.) The trial judge deferred ruling on the motions and resumed trial proceedings over the objection of the defense. (CT 1339.) The next morning, the trial judge denied appellant's motion for a mistrial and then recused himself. (CT 1341.) The trial was transferred to the Honorable Lee P. Felice and continued until May 20, 1996. (CT 1341.)

On May 20, 1996, the trial court overruled appellant's hearsay objections to the admission of prior statements made by witness Danny Phinney to law enforcement officers. (CT

1345.) The prosecution then resumed the presentation of its case-in-chief. On May 22, 1996, the superior court held an evidentiary hearing pursuant to Evidence Code section 402 to determine if a new scientific method had been used to retest the ballistics evidence. After hearing testimony from criminalist Gregory Laskowski, the court ruled that a new scientific method had not been employed and that the results of the retest could be admitted into evidence. (CT 1351.) The court also ruled that if appellant testified, he could be impeached with his 1986 felony convictions for robbery, burglary and receiving stolen property. (CT 1353.)

On May 28, 1996, appellant moved for a mistrial based on the prosecution's eliciting testimony about statements made, and actions taken, by Gerald Cowan. (CT 1357.) Appellant also renewed his motion for dismissal based on prejudicial pre-arrest delay. (CT 1357.) Both motions were denied by the superior court. (CT 1357.) The prosecution then rested its case, and the defense commenced the presentation of its evidence. (CT 1357.) The defense completed its case on May 29, 1996. (CT 1361.)

Both counsel presented closing arguments, and the jury began its deliberations, on June 3, 1996. (CT 1364.) Deliberations continued through June 4 and 5, and concluded at 3:30 p.m. on June 6. (CT 1458.) With respect to Counts I and II, the jury found that appellant was guilty of first degree murder and that he was armed with a weapon.[2] Also found to be true were all special circumstances charged in both counts – multiple murder, murder during the commission of a robbery, and murder during the commission of a burglary. (CT 1461-1471.) With respect to Count III, the jury was unable to reach a verdict and the court declared a mistrial. (CT 1459.)

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[2]The verdict forms inadvertently omitted the allegations in Counts I and II that appellant personally used a firearm during the commission of the offenses. (Penal Code, § 12022.5, subd. (a).) After the guilt phase, the prosecutor struck these allegations. (RT 2805.)

On June 10, 1996, the superior court found that appellant had previously suffered a serious felony conviction within the meaning of Penal Code section 667, subdivision (a), but had not previously served a prison term within the meaning of Penal Code section 667.5, subdivision (c). (CT 1477.) Appellant then made two motions concerning the penalty phase. He moved to have a different jury sit during the penalty phase, and to preclude the jury from considering the robbery and burglary special circumstances as more than one circumstance in aggravation. Both motions were denied. (CT 1477.)

On June 11, 1996, the prosecutor made her penalty phase opening statement and presented her case-in-chief. (CT 1479.) Appellant's notion for a mistrial based on the admission of improper victim impact evidence was denied. (CT 1480.) The next day, the court held an evidentiary hearing concerning an allegation that the prosecutor had communicated with a juror. (CT 1482.) The court found that no such communication had occurred between the juror and the prosecutor. (CT 1482.) The defense then made an opening statement and presented its case. (CT 1482.) After rebuttal from the prosecution, counsel for both parties made closing arguments. (CT 1483.) At 3:35 p.m., on June 12, the jury retired to deliberate. (CT 1482.) Deliberations continued through June 13 and reached a conclusion at 2:10 p.m. on June 14, 1996. (CT 1487, 1573.) Appellant's motion for mistrial based on the jury's being allowed to consider the circumstances of the Russell murder was denied. (CT 1573.) With respect to Count I, the jury returned a verdict of life without possibility of parole; with respect to Count II, the jury returned a verdict of death. (CT 1573, 1582-1583.)

On July 23, 1996, appellant filed a motion for new trial that was based on three grounds: (1) the prosecutor introduced improper victim impact evidence during the penalty phase; (2)

penalty phase prosecution witnesses commented on appellant's failure to testify; and (3) the prosecutor introduced penalty phase evidence that was not related to any of the statutory aggravating factors. (CT 1588-1597.) Appellant's motion was denied by the superior court on August 5, 1996. (CT 1614.) The court then reviewed the evidence in aggravation and mitigation, and found that the aggravating circumstances substantially outweighed the mitigating circumstances. (CT 1629.) On Count I the court imposed a sentence of life without possibility of parole, enhanced by one year for the armed with a firearm allegation. (CT 1636.) With respect to Count II, the court imposed a sentence of death, enhanced by one year for the armed with a firearm allegation. (CT 1636.) The sentences on the two counts were ordered to run consecutively. (CT 1637.) In addition, the court added five years to appellant's sentence for the prior serious felony conviction. (CT 1637.)

The commitment on appellant's judgment was filed on August 5, 1996, and appellant filed a timely notice of appeal on the same date. (CT 1645, 1650.) In addition, since a judgment of death was imposed, an appeal is deemed to have been automatically taken. (Pen. Code, § 1239, subd. (b).)

III.

STATEMENT OF FACTS

A. GUILT PHASE

1. Introduction

On September 4, 1984, the deceased bodies of Alma Merck, then 81 years old, and Clifford Merck, then 75 years old, were found at their residence at 713 McClean Street, Bakersfield. On September 8, 1984, the deceased body of Jewell Francis Russell, then 55 years old, was found at his residence at 370 Ash Street, Shafter. The prosecution contended that with respect to each killing appellant had committed first degree murder. The prosecution's theory of first degree murder was two-fold: (1) each killing was premeditated and deliberate; and (2) each killing occurred during the commission of a robbery and burglary. Appellant did not testify during the guilt phase of the trial. The defense contended that key components of the prosecution's case were not credible; that other evidence on which the prosecution relied heavily was inconclusive; and that the prosecution had fallen far short of establishing that appellant was the person who had killed the three victims.

2. Alma and Clifford Merck - Prosecution Case

a. The Mercks Are Last Seen Alive

Margarita Macias, a neighbor of Alma and Clifford Merck, last saw the Mercks alive on Saturday, September 1, 1984. On that day, Macias first saw Alma and Clifford sitting on their front porch at about 10:00 a.m. (RT 1482.) She noticed Clifford again when the mailman arrived between 1:00 p.m. and 2:00 p.m. (RT 1483.)

On Tuesday, September 4, Macias learned that the Mercks had been killed. (RT 1482.)

Between September 1 and September 4, Macias had not seen appellant or his Pontiac Ventura automobile in the neighborhood. (RT 1487.) During this time, she had also not heard the Mercks' dog barking, nor noticed anything unusual at the house except that the drapes had remained closed. (RT 1488, 1489.) According to Macias, the Mercks had few visitors and never allowed strangers into their home. (RT 1484, 1491.) The Mercks also had a habit of locking their front door. (RT 1486.)

Robert Johnson was the son of Alma Merck. On Friday, August 31, he telephoned the Mercks and arranged to visit them on the morning of September 4. (RT 1492, 1493.) When Johnson arrived with his wife, he first knocked at the back door, which was unlocked, and then at the front door, which was locked, without receiving a response. (RT 1493, 1497.) Johnson then heard the Mercks' dog barking from inside the house. He looked through a window but did not see anyone inside. (RT 1493.) Johnson went back around to the rear of the house and opened the unlocked back door. (RT 1493.) Inside, he observed that items of property were lined up from the kitchen to the back door. (RT 1493.) Johnson left the house and told his wife that something was wrong. He then went to the south side of the house to look through another window, and noticed that flies were swarming around the window. (RT 1493.) Johnson's wife went to telephone the Sheriff's Department. Johnson did not notice any signs of forced entry at the Merck's residence. (RT 1502, 1503.) Later, when Johnson went back into the house, he found that it had been trashed and food was still on the stove and in the oven. (RT 1504.)

b. Discovery of the Bodies and Crime Scene Evidence

Gregory Laskowski was assigned to the homicide section of the Kern County Criminalistics Laboratory. (RT 1599.) At approximately 11:00 a.m. on September 4, 1984,

Laskowski arrived at 713 McClean Street. (RT 1600.) His purpose was to analyze the crime scene and consult with the detectives concerning the collection and preservation of physical evidence. (RT 1600.)

Laskowski did not observe any signs of forced entry into the house, but found that the house had been ransacked and was in disarray. (RT 1603, 1618.) A console television and boxes of items had been left in the laundry room near the rear door. (RT 1602.) Strewn about the floor of the hallway from the living room to the bedrooms were a couple of purses, a slipper, clothing and other items. (RT 1602-1603.) Throughout the house furniture had been overturned and drawers left open. (RT 1603.) Much of the contents of the drawers had been removed and left on the floor. (RT 1603.) The wires of a wall telephone near the kitchen had been pulled loose and the receiver was missing. (RT 1605.) Lamps with severed electrical cords had been placed on tables in the living room. (RT 1606.) On a table in the kitchen were bottles of prescription pills and medicine, and a small pocket knife with an open blade. (RT 1605.)

When Laskowski entered one of the bedrooms, he observed the body of Clifford Merck lying across the bed in a prone position. (RT 1606.) Clifford's legs and hands were bound with lamp cords and his head was under a bed pillow. (RT 1606.) An orange throw pillow was near Clifford's abdomen. (RT 1608.) Both the bed and throw pillows had stellate holes made by gunshots. (RT 1608, 1609.) Laskowski explained that a firearm had been discharged in close proximity to each pillow in order to muffle the sound of the discharge. (RT 1609.) Laskowski, however, was unable to locate any shell casings in the residence. (RT 1618.)

In the closet of another bedroom, Laskowski observed the body of Alma Clifford. (RT 1611.) Alma's hands were bound with a lamp cord, and a cord with the telephone receiver

attached was wrapped around Alma's mouth and neck. (RT 1612.) Laskowski later determined that the lamp cords used to bind Clifford and Alma matched the cut cords of the lamps in the Merck house. (RT 1616.)

Three members of the technical investigation section of the Kern County Sheriff's Department, Quintin Nerida, Helen Sparks and Jim Smith, also arrived to investigate the crime scene. (RT 1516.) Initially, the investigators did a short walk-through of the house in order to determine what work they needed to do and what equipment they needed to bring in from the vehicles. (RT 1517.) The investigators then collected a total of 44 latent prints from inside the Merck residence. (RT 1542.)

Among the prints found by Nerida were two latent prints from a location that was slightly above the door knob, on the inside edge of the back door. (RT 1518, 1519.) The back door was the suspected point of entry. (RT 1517.) Nerida brushed powder on the door to develop the prints and used plastic tape to lift them. (RT 1543.) These prints, which were numbered 9 and 10, were then transferred to a lift card, on which Nerida drew a sketch of the location at which the prints were found. (RT 1518.) At trial, the lift card was identified as People's Exhibit No. 6. (RT 1518.)

Among the prints found by Sparks was a latent print lifted from the bottom of a plastic tray that had been removed from a sewing kit. (RT 1575.) The tray had been placed on a table in the dining area of the house. (RT 1575.) Sparks brushed powder on the tray to develop the print and used plastic tape to lift it. (RT 1576.) This print, numbered 44, was then transferred to a single lift card, on which Sparks drew a sketch of the location at which the print was found. (RT 1575, 1578.) At trial, the lift card was identified as People's Exhibit No. 7. (RT 1575.)

On November 1, 1984, the 44 latent prints lifted by Nerida and Sparks were compared to the known prints of several suspects, including those of appellant. (RT 1589-1590.) The comparisons were made by Jerry Roper, who had been assigned to the technical investigation section of the Kern County Sheriff's Department in August, 1977. (RT 1588.) Prior to 1984, Roper had received both classroom and on-the-job training in the field of fingerprint comparisons, and had qualified as an expert witness on approximately 600 to 800 occasions. (RT 1588, 1592.) In 1987, Roper left the technical investigation section after his eyesight deteriorated to such an extent that he was no longer able to conduct fingerprint comparisons. (RT 1589.)

When Roper compared the latent prints lifted by Nerida and Sparks to the known prints of appellant and other suspects, he did not find that any of the latent prints matched any of the known prints.[3] (RT 1589.) Roper testified that could not recall if his work was reviewed by any other member of the technical investigation section.[4] (RT 1590.)

James Christopherson, then a patrol officer, arrived at 713 McClean Street to help secure the scene and to look for possible witnesses. (RT 1890.) Christopherson interviewed a number of neighbors and asked if they had seen any vehicles parked outside the Merck residence. (RT 1898.) At that time, the vehicle that appellant drove was an aqua blue, 1967 Pontiac Ventura.

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[3]Latent print number 44 was also run through a computer in Sacramento to determine if it matched any of the known prints in the computer. The computer search returned a negative result. (RT 1982-1983.)

[4]Testimony as to whether the technical investigation section had a policy that required a second investigator to review the results of all fingerprint comparisons was inconsistent. According to Nerida, there was such a policy even when no match was found. (RT 1515.) However, Jerry Grimes, who was then the sergeant in charge of the section, testified that a reexamination was required only when a match with a known print was made. (RT 2102, 2104.)

(RT 1897.) None of the neighbors had seen such a vehicle in the area. (RT 1898.)

c. Autopsy Evidence

Armand Dollinger, a medical doctor specializing in forensic pathology performed autopsies on the bodies of Alma and Clifford Merck on September 5, 1984. (RT 2225, 2229.) Dollinger found that Clifford's wrists were tied with electrical cord, and that a bullet had entered Clifford's head slightly in front of his left ear and come to rest behind his right ear. (RT 2261, 2262.) A second bullet had entered at the base of the left side of Clifford's neck and come to rest in the spinal canal. (RT 2262.) Both bullets were recovered and given to criminalist Gregory Laskowski. (RT 2262.) Dollinger concluded that Clifford's death was a homicide caused by perforating lacerations of the brain and spinal cord due to penetrating gunshot wounds. (RT 2263.) In addition, based on the body's advanced state of decomposition, Dollinger believed that Clifford had been dead several days. (RT 2261.)

Dollinger found that Alma's body was also in an advanced state of decomposition, and that her ankles and wrists were bound with electrical cord. (RT 2264.) In addition, a telephone cord was wound tightly around her neck, with one loop over her chin. Dollinger determined that Alma's death was a homicide caused by asphyxiation due to strangulation by the telephone cord. (RT 2265.)

d. Property Allegedly Missing from the Mercks' Home

Alma's son, Robert Johnson, who visited the Mercks two to three times a year, testified about rings worn by his mother. (RT 1496.) Johnson initially testified that every time he visited Alma she was wearing her wedding rings, but that he did not pay attention as to whether she was also wearing other rings. (RT 1498.) Johnson then contradicted himself, testifying that Alma

sometimes would not wear her rings, and wear only a watch. (RT 1498.) Johnson was shown Defense Exhibit A, a photograph of Alma wearing a ring, and asked if he recognized that piece of jewelry. He responded that he had previously seen the ring, but that he did not think that he could now recognize it. (RT 1498, 1499.) Johnson also testified that he did not know if his mother had a habit of wearing the ring depicted in the photograph, and that since Alma's death he had not been shown any ring that he recognized as being the ring in the photograph. (RT 1499.)

Johnson was also questioned about whether Clifford Merck smoked cigarettes. He testified that Clifford had smoked, but may have quit prior to his death. When Johnson observed Clifford smoking, Clifford used a lighter to light his cigarettes, but Johnson could not recall anything distinctive about the lighter. (RT 1499-1500.)

Johnson was next questioned about whether Clifford owned a firearm. Johnson recalled that Clifford had a revolver with a white handle, which may have been made of pearl or ivory. (RT 1501.)

Finally, Johnson was asked about whether the Mercks received Social Security checks. Johnson testified that the Mercks did have checks from Social Security mailed to their house, but that he and his family had been unable to find any checks when they cleaned up the house after the killings. (RT 1504.) Later, Johnson and his sister went to the Social Security office to report that the checks were missing. (RT 1505.)

Also questioned about whether Alma owned a particular ring and whether Clifford owned a particular lighter was Margarita Macias, the neighbor who had been friends with the Mercks for approximately 20 years before their deaths. (RT 1483.) She would occasionally help the Mercks

by driving Clifford to the bank (Clifford was unable to drive due to his poor eyesight), and by providing medical assistance to Alma. (RT 1483.) Macias had no recollection of Clifford Merck ever smoking or being in possession of an unusual lighter. (RT 1485.) She also had no recollection of Alma Merck wearing any particular jewelry, including the ring on Alma's finger that was shown in the photograph marked as Defendant's Exhibit A. (RT 1483-1484.)

Alma Merck's daughter, Mary Watts, testified that her mother owned a white metal ring with a turquoise stone. (RT 1872.) Mary did not know if the turquoise ring, which had been purchased in New Mexico when the Mercks were on vacation, was found in the house after the discovery of the bodies. (RT 1874.) Sometime after Alma's death, Mary was shown a ring, obtained by the investigating officers, which she recognized. (RT 1872.) Mary further testified that her stepfather, Clifford Merck, had a habit of having his initials scratched onto all his personal possessions.[5] (RT 1873-1874, 1875.) Sometimes Clifford would have both the letters "C" and "M" engraved, and other times just the letter "M." (RT 1875.) Alma, however, did not have the same habit of engraving her initials on her jewelry. (RT 1875.)

At trial, Mary was shown People's Exhibit No. 39, which was a ring in a box. Mary testified that the exhibit looked like the ring that her mother wore all the time. (RT 1874, 1880.) Mary also testified that the ring depicted in photographs marked as Defendant's Exhibit A and People's Exhibits 36 through 38 looked like the ring worn by Alma Merck. (RT 1873, 1880.) In one of the photographs the underside of the ring was visible, and it appeared that the letter "M" had been scratched onto the ring. (RT 1873.)

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[5]On cross-examination, Watts was asked to examine a lighter that was marked as Defendant's Exhibit AA(1). Watts did not find any initials engraved on the lighter. (RT 1878.)

Mary Watts's husband, Quentin Watts, testified that he had visited the Mercks about once a month, and that he had seen Clifford with a shotgun and a handgun. (RT 1882.) Prior to Clifford's death, Quentin had last seen the weapons in 1978 or 1979. (RT 1884.) Quentin had never seen the grips of the handgun removed. Quentin was aware, however, that Clifford had tools that he used to engrave all the personal property that he owned. (RT 1883.) At trial, Quentin identified People's Exhibit 30 as resembling the handgun that Clifford had owned. (RT 1882.)

Another daughter of Alma Merck, Betty Turner, testified that she would visit her mother and stepfather at their residence and sometimes stay overnight. (RT 2169.) Turner observed that Clifford owned a single-fold wallet that was hand stitched and had the initials "C.M." carved into it. (RT 2169.) In addition, Turner testified that Alma had several jewelry boxes in her bedroom. (RT 2170.) Attached to the top of one jewelry box was a five-inch ballerina figure standing on a round mirror. When the box was wound up, the ballerina and mirror would turn.[6] (RT 2170, 2173.) A green jewelry box in the bedroom was kept by Turner after her mother's death. (RT 2170.) According to Turner, her mother owned lots of costume jewelry, as well as a ring that was silver and turquoise. (RT 2171.) Neither prior to trial, nor at trial, was Turner asked to examine any jewelry to see if she recognized it as belonging to her mother.

Jerry Jones, who was married to Alma Merck's granddaughter, Terri Jones, testified that he visited the Mercks many times at the house on McClean Street. (RT 2053.) During these visits, he would often accompany Clifford to the backyard, where Clifford would use a lighter to

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[6]On cross-examination, Turner was asked if the figure attached to the jewelry box was a swan rather than a ballerina. Turner responded that the figure was definitely not a swan. (RT 2173.)

light cigarettes. (RT 2053.) Twelve years prior to the trial, Sergeant Craig Fraley, of the Kern County Sheriff's Department, showed Jerry a lighter case that Jerry identified as being the case used by Clifford.[7] (RT 2054.) At trial, Jerry was shown Defendant's Exhibit AA(1), but, as a result of the passage of time, he could not recognize whether it was Clifford's lighter case.[8] (RT 2054.) The exhibit was not marked with Clifford's initials. Jerry was aware that Clifford had a habit of marking all his possessions with the initials "C.M." Alma did not have the same practice, although Clifford sometimes would mark property for her. (RT 2057-2058.)

Jerry also testified that during his visits with the Mercks, he noticed that Alma would wear a certain ring. In 1985, when Jerry was shown a ring by Sergeant Fraley, he was unable to identify the ring as the one worn by Alma. Similarly, at trial, he was unable to positively identify People's Exhibit 39 as Alma's ring.[9] Jerry also did not recognize a handgun, shown to him at the Bakersfield Police Department, as one belonging to Clifford. (RT 2055-2056.)

Terri Jones, Jerry's wife, testified that she often visited with her grandmother, Alma Merck, and was familiar with the jewelry that Alma owned. According to Terri, Alma wore a

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[7]Craig Fraley did not actually obtain the position of sergeant until 1987. (Reporter's Transcript, September 7, 1994, p. 199.) For the sake of consistency, appellant will refer to Fraley as a sergeant throughout the brief.

[8]Sergeant Fraley testified that Defendant's Exhibit AA(1) was, in fact, the lighter case that Jerry had identified during an interview on January 30, 1985. (RT 2165-2166.)

[9]The transcript incorrectly states that the ring shown to Jerry Jones was People's Exhibit 13. Exhibit 13, however, was a photograph of the deceased body of Clifford Merck, while Exhibit 39 was a white box containing a ring. The error in the transcript was overlooked by the parties in the record correction proceedings.

silver and turquoise ring that looked like People's Exhibit 39.[10] Terri also identified Defendant's Exhibit A as a photograph of Alma wearing the silver and turquoise ring. Terry had kept the photograph at her own house before giving it to the police. Aside from the ring, Alma had no other turquoise jewelry. Alma's other jewelry included a diamond wristwatch, earrings, a necklace with a watch on it, a pearl bracelet and costume-type jewelry. (RT 2060-2061.)

e. Appellant's Alleged Possession of Property Missing From the Mercks' Home

Danny Phinney testified about the circumstances under which he allegedly observed appellant to be in possession of property that was missing from the Mercks' home. At the time he made these observations, Phinney had been a long-time methamphetamine addict and was using drugs at least once a day. (RT 1665, 1672.) Phinney also suffered from a life-long bipolar disorder, which he defined as "having two centers to [his] brain," one manic and the other depressed.[11] (RT 1673, 1674.) According to Phinney, his bipolar disorder caused his mind to race, jumbled his thought process and impaired his short term memory. (RT 1674.) In addition, Phinney would sometimes recall two separate incidents as one incident, and other times completely forget a transaction that he had witnessed. (RT 1475.)

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[10]On cross-examination, Terri was asked if she had been able to recognize People's Exhibit 39 when Sergeant Fraley showed it to her in January, 1985. (RT 2062.) Terri answered that she only recalled being shown a photograph of a ring that she did not recognize. According to Terri, the ring in the photograph was not the turquoise ring that was marked as People's Exhibit 39. (RT 2062-2063.)

[11]Phinney explained that at one time he received medication for his bipolar disorder. This treatment began in 1992 or 1993 and lasted for a couple of years. Otherwise, Phinney was self-medicating himself with alcohol and drugs. (RT 1673-1674.)

Prior to 1984, Phinney had been using methamphetamine for about 17 years.[12] (RT 1676.) Phinney began his drug use by ingesting two or three methamphetamine pills a day, and gradually increased his consumption to 20 or 30 pills a day. (RT 1677.) In 1982, Phinney changed his method of methamphetamine consumption to injection and consumed at least a quarter of a gram on a daily basis. (RT 1677.) Phinney's methamphetamine addiction caused him sometimes to "go through periods of paranoia or delusions." (RT 1677-1678.) He would see things or hear sounds that were not in fact real. (RT 1678.) One example of such a delusion was that Phinney would stare at a tree and believe that there were two or three people camping in the branches. (RT 1678.) Another example was that Phinney would observe several trash cans in the distance and believe that the cans were police officers. (RT 1679.)

These drug-induced, delusional episodes occurred periodically in 1984, causing Phinney's perception of events to be jumbled. (RT 1681.) In 1984, Phinney was under the influence of methamphetamine most of the time and regularly going on methamphetamine "runs" that lasted four days to a week. (RT 1685, 1686, 1713.) He supported himself with food stamps and unemployment income, and by house-sitting for drug dealers and helping friends trade stolen property for drugs. (RT 1689, 1744.) All his efforts were spent on obtaining methamphetamine to satisfy his addiction. (RT 1689.)

At the time of his testimony, Phinney was still using methamphetamine, although sometimes he snorted or ate it, instead of injecting it. (RT 1688.) Phinney testified that he had known appellant for more than 12-15 years. (RT 1652.) Phinney recalled "to an extent" that in

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[12]Phinney also had experience using other drugs. He had used barbiturates for a short time during his freshman year of high school (RT 1682), taken mescaline during his sophomore year (RT 1681, 1687) and consumed about 100 hits of acid, mostly while a teenager (RT 1683).

September 1984, he and appellant had run into each other at a Chief Auto Parts store. (RT 1652.) He could not remember the exact date or time they met, but said that if he had previously told the officers who interviewed him that it was during the week after Labor Day, the statement would have been correct.[13] (RT 1654.)

The prosecutor asked Phinney if appellant owed him money at the time they met at the store. (RT 1654.) Phinney "guess[ed]" that he was owed money by appellant. (RT 1654.) Phinney also thought that after their meeting at the store, he and appellant went to the home of appellant's brother in East Bakersfield. (RT 1654.) Appellant's girlfriend, Gerry Tags, was at the house. (RT 1655.) She showed Phinney a jewelry box that played music when it was wound up. When the music played, a figurine danced on a mirror on the top of the box. (RT 1655.) It also "seemed" to Phinney that a second box was shown to him because he "seemed" to remember that "there was a big one and a little one." (RT 1655.) The second box was made of green vinyl and had a mirror inside.[14] (RT 1742.)

In addition to examining the jewelry boxes, Phinney looked through an old leather wallet that appellant showed him. (RT 1656.) The wallet had some kind of design or name tooled into it. (RT 1656.) According to Phinney, the wallet contained a driver's license with a name "like Mirck or Merck."[15] (RT 1657.) Phinney could not remember the exact date of birth on the

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[13]On cross-examination, Phinney acknowledged that he really "[did]n't have any idea when [the meeting with appellant] occurred." (RT 1713.)

[14]Tags' mother, Emma Foreman, also testified about a jewelry box. She testified that she saw a black jewelry box in the trunk of the car in which Tags and appellant sometimes lived. (RT 2243, 2247.)

[15]According to the testimony of Alma Merck's daughter, Mary Watts, Clifford had stopped driving sometime prior to his death because of poor eyesight. Watts did not know if

license, but he thought that the date "was like early nineteen hundreds."[16] (RT 1657.) Phinney also recalled that he was shown some junk jewelry, pearl necklaces, silver dollars including a 1922 S dollar, bags of pennies, an antique woman's watch, and a stack of elk or moose pins. (RT 1655, 1658, 1742.) He may also have seen a high school graduation ring at the house. (RT 1658.)

Phinney was asked if he recalled previously telling Sergeant Diederich that he saw Social Security checks. (RT 1658.) Phinney answered that reviewing the transcript of his interview reminded him that there were two checks at the house. (RT 1659.) He could not remember the location in the house where he observed the checks. Nor could he remember the first name of the person to whom each check was made out. On direct examination, Phinney claimed that he could remember that the last name of each person was Merck. (RT 1659.) However, on cross-examination Phinney admitted that he had not really paid any attention to the names on the checks, and that he might have learned the name Merck from a newspaper article he read about the killings. (RT 1732-1733.)

Phinney further testified that on October 14, 1984, he was arrested at the Caravan Inn for felony drug charges. (RT 1659, 1720.) At that time, Phinney was under the influence of methamphetamine. (RT 1713.) Phinney had a .38 caliber handgun that the police seized from

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Clifford still had a driver's license when he was killed. (RT 1878-79.)

[16]Phinney further testified that if he had not reviewed the transcript of the statement he made to Sergeant John Diederich, of the Kern County Sheriff's Department, in 1984, he "would not have remembered any of it." (RT 1657.)

his van.[17] (RT 1691.) He also had a small .25 caliber automatic Colt handgun that the police seized from the inn. According to Phinney, he had purchased the Colt handgun in a drug transaction. When asked to identify the person who had sold him the gun, Phinney responded that he was "pretty sure" that appellant had sold him the weapon. Phinney also testified that he recalled previously telling Sergeant Diederich that appellant had traded the gun to him for drugs. According to Phinney, his prior statement to the sergeant was true. (RT 1660.) Phinney explained further, however, that appellant had not actually traded the gun to him. Rather, the gun was traded through Phinney to Robb Lutts, for whom Phinney served as a lackey. The trade took place at the Bakersfield Inn, when that inn was still open.[18] (RT 1661.)

After Lutts received the gun, he and Phinney took it apart and used a large caliber barrel brush in an effort to "somehow or other . . . hide the rifling." (RT 1661-1662.) Appellant had not told them anything about the origin of the gun, but had said, "'Don't get caught with it. Eat it, or throw it away, but don't get caught with it.'" (RT 1662.)

After taking the grips off the gun, Phinney noticed that there were initials inscribed on the inside of the handles. (RT 1663.) He and Lutts attempted to file away the initials but were unable to do so. (RT 1664.) At trial, Phinney was shown a gun that was marked Exhibit 30 and asked if it looked like the gun that had been obtained from appellant. Phinney responded that the exhibit "look[ed] pretty much like it." (RT 1663.)

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[17]The van, which was a 1947 International milk truck, actually belonged to Phinney's brother. (RT 1692.) Phinney had previously lived in the truck behind his father's gas station. (RT 1693.) He also used the truck to help people move household objects. (RT 1692.)

[18]When Phinney was arrested at the Caravan Inn, the only information Phinney gave the arresting officers about the seized handguns was that they belonged to Robb Lutts. Phinney also stated that most of the property that Lutts "c[a]me across" was stolen." (RT 2502.)

About two weeks after his arrest, while Phinney was still in jail, Phinney was given a newspaper article from the Bakersfield Californian. The article was passed to him by Robb Lutts. (RT 1665, 1728.) The article concerned a secret witness program for persons who provided information relating to the killings of Clifford and Alma Merck. (RT 1665.) The article mentioned that Alma Merck was 81 years old, that Clifford Merck was 75 years old, that the killing took place at 713 McClean Street, and that $5,000 was being offered as a reward. (RT 1729, 1733.) The article did not describe any items allegedly taken from the residence. (RT 1738-1739.)

When Phinney first read the article, it did not immediately remind him of anything, and he did not recognize the names of the victims. (RT 1666, 1732.) However, another person, possibly Robb Lutts, hollered out to him to "[c]heck out the initials."[19] (RT 1666.) Phinney then realized that the initials he had seen inscribed on the handles of the Colt handgun matched those of the male victim mentioned in the newspaper article. (RT 1667.) In addition, the name of the street identified in the article as the one on which the killings took place seemed familiar to Phinney. (RT 1732.) According to Phinney, in his "jumbled memory" he thought that McClean was the last name on the Social Security checks that appellant had showed him. (RT 1732.)

After reading the newspaper article, Phinney decided that he wanted to provide the police with the information that he had about the Colt handgun. (RT 1667.) At the time, Phinney wanted to get out of jail for two reasons. First, he was being housed in protective custody and he "wanted to get out of P.C. real bad," lest other inmates believe that he was a snitch because of his

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[19]Phinney later testified to a somewhat different version. He said that someone had actually written on the article, "Check out the initials." (RT 1730-1731.)

housing location. (RT 1721-1722, 1724.) Second, Phinney was going through methamphetamine withdrawal and wanted to get out of jail so he could use drugs again. (RT 1724.) Phinney recognized that providing information about the Colt handgun might give him a chance to get out of jail. (RT 1724.)

In preparation for making a statement to law enforcement, Phinney wrote some notes to himself. (RT 1726.) Phinney then offered to cooperate with law enforcement during an in-chambers, pretrial conference in his own criminal case before Judge Gary Friedman. (RT 1668-1669.) During this conference, Phinney's thoughts "were scrambled" and he was "a little disoriented" due to his drug addiction and having been in jail. (RT 1669.)

When Phinney was later interviewed by Sergeant Diederich on December 21, 1984, he told the sergeant that he could not remember how he had obtained the Colt handgun. (RT 1736.) Phinney's explanation for this statement was that he "had never rolled over on a friend before." (RT 1736-1737.) Phinney also told the sergeant that the two initials he observed on the Colt handgun were both located on one side of the grip. (RT 1667, 1720.) Diederich then removed the handles from the gun and showed Phinney that each initial was on a different side. (RT 1667.)

Phinney otherwise did not recall what he said in the interview with Sergeant Diederich. (RT 1734.) He may have been very confused at the time of the interview and may have also lied to the sergeant. (RT 1734-1735.) When Phinney was asked if he told the sergeant whatever he believed would get him out of jail regardless of the truth, he responded that "that's a possibility," but his statement "had to have enough fact to be substantiated so it had some power." (RT 1735.) Phinney just wanted to "give them something to investigate" and "give [himself] a little

break on some time." (RT 1735.)

Phinney's concern in making the statement was also to "exonerate himself from anything to do with the weapon." (RT 1660.) It seemed to Phinney that "people were trying to somehow or other push the gun off on" him. Although Phinney did not know why people were trying to do that, he "wanted them to know that it wasn't [his] gun." (RT 1661.) He was concerned that the gun had been used in the killing of the Mercks, and he did not want it linked to him. (RT 1737-1738.) After Phinney provided his statement to Sergeant Diederich, he "wound up getting some kind of deal." (RT 1660.)

In the spring of 1985, after Phinney had been released from jail, he had a conversation with appellant at the home of a mutual friend. Appellant told Phinney that the police had questioned him "about some stolen merchandise," and that he knew how the police had obtained this information. (RT 1671.) Appellant further told Phinney, "'You don't have any worry, Danny, I'm still your friend. We have no problem here." (RT 1671.) Phinney was then warned by appellant, "[J]ust don't ever get on the stand, you know, we going to have no problem." (RT 1672.) Phinney promised appellant that he would not testify against him. Three nights before Phinney testified, a girl he knew told him that his testimony "wasn't going to do any good." (RT 1669-1670.) Phinney did not construe either the statements made by appellant or those made by the girl to be threats. (RT 1670.)

At the time of his testimony, Phinney had a lengthy criminal record that had resulted primarily from his addiction to narcotics and alcohol. (RT 1652.) He had never been sentenced to state prison but had served a number of county jail incarcerations for being under the influence of various drugs. (RT 1652.)

Sergeant John Diederich testified about the interview that he and Sergeant Craig Fraley conducted with Danny Phinney on December 21, 1984. (RT 1841.) At the time of the interview, Phinney had been in the custody of the sheriff's department for approximately two months. (RT 1843.) Phinney did not appear to be under the influence of any drug, or to be going through withdrawal. (RT 1843.) Phinney was nervous at the beginning of the interview, but then seemed to settle down as it progressed. (RT 1843.) The story that Phinney told the officers "jumped around a little bit," and was "a little bit fragmented." (RT 1843.)

Phinney told Diederich that his memory of his meeting with appellant had been triggered by watching a television episode of Barnaby Jones that had something to do with coins. (RT 1851.) He also told the sergeant that he had read something about the killing of the Mercks in a newspaper article that concerned a secret witness program. (RT 1851, 1857.) The article refreshed Phinney's memory by mentioning that the killings occurred on McClean Street. (RT 1857.) Phinney told the sergeant that after reading the article he lay in his bunk making notes and thinking about what he was going to say when he was interviewed by law enforcement. (RT 1858.) He was also concerned that Lutts may already have been interviewed by the police and made a statement about the Colt handgun. (RT 1859.)

Phinney explained to the sergeant that during the first week of September 1984, at about midnight, he had run into appellant at the Chief Auto Parts store. (RT 1844.) He then went with appellant to a house at 1530 ½ Pearl Street, Bakersfield. (RT 1844.) At that house, Phinney saw appellant in possession of some coins, including a bag of pennies, some half-dollars and silver dollars. (RT 1845.) One of the silver dollars was marked 1922 D. (RT 1845.) Appellant also had some jewelry and two "government-type checks" that were in a "government-type" envelope.

(RT 1845, 1846.) According to Sergeant Diederich, Phinney recalled that the name on the checks was Merck,[20] that the address on the checks was a three-digit address on McClean Street, and that the total amount of the checks was approximately $600. (RT 1846.) The jewelry observed by Phinney included a necklace with the name Dotty or Dolly inscribed on it, some "plastic pearls," and a Shafter High School ring that was dated 1983.[21] (RT 1853-1854, 1869.)

Phinney further described seeing an older, brown leather billfold with some carving on it at the residence. (RT 1846-1847.) Inside the billfold was a driver's license, medical cards, a Blue Cross/Blue Shield card, telephone cards and a Social Security card. (RT 1847.) Phinney told Diederich that the height listed on the driver's license was six feet, three inches, that the weight was 147 pounds, and that the year of birth was 1911 or 1914. (RT 1851-1853.)

Finally, Phinney told the sergeant about seeing appellant with a unique music box. When the box opened, a swan figurine danced on top of a mirror. (RT 1854.) After further investigation, Sergeant Diederich was unable to identify the music box as having belonged to the Mercks. (RT 1854.)

When Sergeant Diederich questioned Phinney about the .25 caliber Colt handgun, Phinney said that the gun belonged to Lutts and that he had heard that appellant had sold a gun to Lutts. (RT 1866, 1870.) Phinney, however, had not been present when Lutts obtained the weapon. (RT 1855, 1866.) In addition, Phinney never mentioned acting as an intermediary in

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[20]When asked by Sergeant Diederich how the name was spelled on the checks, Phinney responded that he thought that the name began with the letters "M-Y," and that he kept "thinking of it as Myrick." (RT 1864.)

[21]Sergeant Diederich later determined that a woman named Daisy had lived with the Mercks. (RT 1869.)

the transfer of the handgun from appellant to Lutts. (RT 1856.) Nor did he tell the sergeant that after Lutts had obtained the handgun, he and Lutts attempted to alter the rifling marks on the inside of the barrel. (RT 1861.) Phinney told the sergeant that the handgun had initials inscribed on one side of the grip. (RT 1860.) Diederich then removed the handle from the gun recovered from Lutts and showed Phinney that the grip actually had an initial on each side. (RT 1860.) Diederich was also told by Phinney that Lutts had attempted to file the initials off the grip of the gun. (RT 1869.) Phinney was fairly sure that the weapon that the sergeant showed him was the handgun that Lutts had obtained. (RT 1861.) Until reading the newspaper article, Phinney had no idea that the handgun had been used in a murder. (RT 1871.) Phinney told the sergeant that he believed that appellant had been robbing stores or committing other similar crimes. (RT 1871.)

According to Diederich, Phinney never asked for any leniency on his criminal case during the interview. Nor did Phinney asked to be released from protective custody. (RT 1847.) Diederich also testified that he did not make any promises to Phinney in exchange for his cooperation. (RT 1847.)

Robb Lutts also testified about the .25-caliber automatic Colt handgun allegedly obtained from appellant. Lutts explained that he and his friend Danny Phinney were very involved in the sale and use of drugs in the Bakersfield area. (RT 1627.) Lutts sold drugs to make money to buy methamphetamine for his personal use. (RT 1629.) He also frequently exchanged drugs for stolen property. (RT 1645.) Occasionally, Lutts was involved in methamphetamine transactions with appellant and his girlfriend. (RT 1629-1630.) Appellant and his girlfriend usually paid cash for the methamphetamine, but sometimes they traded jewelry for the drugs. (RT 1649.)

On October 14, 1984, Lutts was staying at the Caravan Inn, with Phinney and Phinney's girlfriend, and selling drugs from his room. (RT 1630.) During the day, the police came to the inn, arrested Lutts and seized a .38-caliber Smith and Wesson handgun and a loaded, .25-caliber automatic Colt handgun.[22] (RT 1630, 1636, 1637.) Due to the passage of more than 12 years and his heavy drug usage in 1984, Lutts did not have a clear memory of how he had obtained the Colt firearm. (RT 1631, 1635.) Lutts had been using methamphetamine for a couple of years prior to 1984 and had increased his daily intake to a gram or more. (RT 1638.) According to Lutts, he was under the influence of methamphetamine most of the time, and was likely to have been under the influence when he obtained the Colt handgun. The use of methamphetamine made Lutts feel paranoid and impaired his ability to accurately perceive and recall events he had witnessed. (RT 1639, 1640.)

Despite these memory problems, Lutts testified that he believed that he had received the Colt handgun in a trade for drugs with appellant, and that Phinney was "somehow" involved in the transaction.[23] (RT 1631, 1648.) Lutts, however, had no recollection of ever seeing appellant in possession of the Colt firearm. (RT 1641.) Nor could he recall appellant being present when the transaction involving the gun took place. (RT 1640.) According to Lutts, this transaction occurred about three weeks to a month before his arrest, when Lutts was living at the Bakersfield

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[22]At the time of the arrest, Lutts also had jewelry, drugs, scales, and a Zippo lighter in his possession. Most of the jewelry Lutts had received in exchange for drugs. (RT 1642.) The lighter had been obtained by Lutts at a swap meet and engraved by his girlfriend. (RT 1647.)

[23]When asked at trial to identify Robert Cowan, Lutts initially pointed at the courtroom bailiff. Only after the prosecutor asked if appellant was at counsel table was Lutts able to identify him. Lutts explained that 12 years had passed since he had last seen appellant. (RT 1636-1637.)

Inn. (RT 1635, 1637.) Lutts obtained the Colt handgun because he needed protection from the dangers associated with being a drug dealer. (RT 1637.)

After obtaining the handgun, Lutts took the weapon apart and observed the initial "C" and another initial, either "M" or "W," on the grips. (RT 1633.) Lutts believed that on at least one occasion both he and Phinney filed on the initials. (RT 1634.) Lutts did not do anything to alter the interior of the gun barrel, nor did he see Phinney make any such alterations. (RT 1634, 1640.)

Lutts testified that he had a lengthy criminal record that included a number of misdemeanor convictions and felony convictions for possessing methamphetamine for sale, possessing cocaine for sale and robbery. (RT 1628.) The robbery offense was Lutts's most recent conviction, and he had been paroled about three and a half years before testifying. (RT 1628.)

Tam Hodgson, who was a Bakersfield police officer in 1984 , testified about the arrest of Phinney and Lutts on October 14, 1984. (RT 2299.) He and two other officers went to the Caravan Inn to investigate a report of narcotics activity. They entered room 124, which was registered to Lutts, and the adjoining room, 123, which was unregistered. (RT 2300-2301.) The door between the two rooms was open, and both were being used by the occupants. (RT 2303.) The officers arrested Lutts, Phinney and three other persons. Property was seized from the motel rooms, the persons of those arrested and a van belonging to Phinney. (RT 2301.) Included in the property seized was a .25 caliber automatic Colt handgun found hidden in a trash can under the sink in room 123. (RT 2302.) The gun was loaded with six live rounds. (RT 2318.) At trial, Hodgson identified People's Exhibit 30 as the handgun that he seized from the motel room. (RT

2303.)

In addition to recovering the .25 caliber handgun, Hodgson found nine .25 caliber cartridges in Lutts's left front pocket. Inside Phinney's van was a loaded .38 caliber handgun, methamphetamine and a coin purse and plastic bag, both containing jewelry, including some turquoise. (RT 2316- 2318.)

Hodgson also testified, based on his experience, that it was common for drug dealers to exchange drugs for stolen property, including jewelry or weapons, and for drug dealers to use stolen property to obtain drugs. (RT 2304, 2323.) Hodgson further explained that he had spoken with heroin users about the effects of heroin withdrawal. He was told that withdrawal caused severe neuro-chemical changes that resulted in such physical symptoms as sweating, nausea, vomiting and aches. (RT 2306.) In Hodgson's experience, persons undergoing withdrawal typically were not cooperative with law enforcement because they were not functional and were only focusing on their physical condition. (RT 2308.) After the withdrawal had ended, however, heroin users would often cooperate with law enforcement in order to get out of custody and resume their drug habits. (RT 2309.)

The .25 caliber Colt handgun that the police took from Phinney on October 14, 1984 was examined by criminalist Gregory Laskowski on October 19, 1984. (RT 2186, 2215.) The criminalist compared two bullets removed from Clifford Merck's head with bullets that he test fired from the Colt handgun. (RT 2189.) During the comparison, Laskowski examined the individual and class characteristics of both the recovered bullets and the test bullets. (RT 2184.) Laskowski concluded that the bullets recovered from Clifford had not been fired by the Colt handgun. (RT 2189.)

The prosecution also presented the testimony of Ronnie Woodin, who testified about a case for a cigarette lighter that he allegedly received from appellant. Woodin had been friends with appellant since they were young. (RT 1923.) On approximately September 12 or 13, 1984, when Woodin was probably high from smoking marijuana,[24] appellant showed him a bag of stuff and asked him if he wanted to buy anything. (RT 1924, 1926, 1930, 1932, 1938.) Inside the bag was a case that fit over a disposable Bic lighter.[25] (RT 1925.) Woodin liked the case and bought it for five dollars. (RT 1926.) Woodin did not ask appellant how he had obtained the lighter case. (RT 1928.) When Woodin was questioned by Sergeant Fraley in January, 1985, the sergeant took the lighter case from him. (RT 1926, 2165.) At trial, Woodin was shown Defendant's Exhibit AA(1). He testified that "as far as [he could] remember," the exhibit "look[ed] like the same one" as the lighter case sold to him by appellant. (RT 1925-1926.) At the time that Woodin bought the lighter case from appellant, he also observed appellant with a guitar case that appellant moved from the trunk of one car to that of another car. (RT 1928.) Woodin did not believe that seeing appellant with a guitar case was unusual because appellant had been playing guitar for a few years and often carried different guitars with him. (RT 1929-1930.)

Woodin further testified that he continued to smoke marijuana through the time he was interviewed by Sergeant Fraley in January, 1985. (RT 1936.) At the time of the interview,

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[24]Woodin testified that in September, 1984, he was smoking marijuana "all the time." (RT 1924.)

[25]Woodin could not recall exactly what other items were in the bag, although he described the contents as "junky stuff." (RT 1927.) He thought the bag might have had some beads and pearls in it. (RT 1927.)

Woodin was probably high from marijuana. (RT 1937.)

Woodin had never been convicted of a felony or arrested for any drug offenses, but had suffered a prior misdemeanor conviction for driving under the influence of alcohol. (RT 1923-1924.)

Appellant's sister, Catherine Glass, was asked at trial whether appellant had sold her any jewelry in September, 1984.[26] Glass initially testified that she could not remember whether appellant had done so. (RT 1940.) However, after further questioning about her prior statement to Sergeant Fraley and her testimony at the preliminary examination, Glass said that appellant probably did sell her a ring. (RT 1942.) Glass also recalled that she had given a ring to Sergeant Fraley after he questioned her in January, 1985. (RT 1943.) Glass did not know if People's Exhibit 39 was the ring that she had bought from appellant. (RT 1942.)

Sergeant Fraley testified that during his interview with Catherine Glass she told him she had bought a ring that had a turquoise stone set in either silver or a white metal from appellant. (RT 2163.) She then gave the sergeant the ring that was marked at trial as People's Exhibit 39. (RT 2164.)

f. Admissions Allegedly Made by Appellant

Emma Foreman, the mother of Gerry Tags, was asked if she had ever heard appellant mention that he had harmed some elderly people. (RT 2247.) Foreman replied that he had done so one time when he was speaking with Tags. When then asked what appellant said, Foreman described a statement made by appellant that did not actually refer to killing any elderly persons.

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[26]Appellant uses the spelling of Glass's first name that is found in the trial transcript. In the transcript of the preliminary examination, Glass's first name is spelled Katherine. (PERT, 9/8/94, 81.)

Foreman testified that appellant said he would cut Tags's throat. (RT 2247.)

John Porter, then a lieutenant in the Shafter Police Department, interviewed Emma Foreman on January 26, 1990. (RT 2391, 2489.) Porter testified that he asked Foreman if appellant had ever said anything about killing an elderly couple in Bakersfield. (RT 2391.) According to Porter, Foreman's answer was that appellant had said he found an elderly couple in a bedroom and beat them to death. (RT 2392.) Foreman, however, said that the date on which she heard appellant mention killing the elderly couple was "about a month before or after Bobby was murdered," and therefore could have been before the Mercks were killed.[27] (RT 2490.)

In the prior testimony of Gerry Tags, that was admitted at trial due to Tags's death, Tags testified that when she asked appellant if he "did . . . those two old people on McClean Street," appellant replied, "No, I did not do them." (RT 2403.)

g. Reopening the Investigation in 1994

James Christopherson, who became a detective in the Kern County Sheriff's Department in 1994, testified that no one was arrested for the killing of the Mercks in 1984 and the investigation became dormant. (RT 1890.) The investigation was reopened by Detective Christopherson in May, 1994. (RT 1891, 1897.)

On May 12, 1994, Christopherson requested that the latent prints lifted from 713 McClean Street be re-examined. (RT 1892, 1901.) That request was received by Sharon Pierce, an evidence technician at the Kern County Sheriff's Department. (RT 1944, 1946.) Pierce compared the latent prints with the known prints of a number of persons, including those of

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[27]Foreman was also interviewed by Sergeant Craig Fraley on February 14, 1985. Sergeant Fraley had no recollection of Foreman stating during that interview that she had heard appellant admit to fatally beating an "old couple" in Bakersfield. (RT 2515-2516.)

appellant. (RT 1947.) According to Pierce, she found that latent print number 44 (People's Exhibit 7), which was lifted from the bottom of the sewing tray, matched the left middle finger of appellant; and that latent print number 10 (People's Exhibit 6), which was lifted from the edge of the back door, matched the left thumb of appellant.[28] (RT 1957.) Consistent with office procedure, Pierce turned the case file over to Thomas Jones, the senior latent print examiner, for a second comparison. (RT 1958, 1991.)

Jones testified that he identified the same matches with appellant's known prints that Pierce had found. (RT 1994-1995.) In addition, Jones offered his opinion that Jerry Roper, who had initially examined the prints and found no matches in 1984, was an incompetent examiner. Jones's opinion was based on his prior review of Roper's work in other cases. (RT 1999.) Jones had found that Roper had previously failed to make identifications when in fact there were matches between the latent and known prints. (RT 2021.) Despite forming this opinion as to Roper's incompetence prior to 1984, Jones never told the District Attorney, defense attorneys or the courts that he believed that Roper lacked competence as a fingerprint examiner. (RT 2007, 2014.) Jones, however, did inform his supervisors of Roper's shortcomings,[29] and Roper was eventually transferred from the technical investigation section. (RT 2010, 2013.)

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[28]Latent print number 9, which was also lifted from the rear door, did not match any of appellant's known prints. (RT 1967.)

[29]Jerry Grimes, who in 1984 was the sergeant in charge of the technical investigations department, confirmed that Jones had complained to him about Roper's abilities as a fingerprint examiner. (RT 2099.) Despite receiving this complaint, Grimes did not take any action to prevent Roper from continuing to conduct fingerprint comparisons. (RT 2103.) Grimes, however, did have Jones review prior cases in which Roper had failed to make fingerprint identifications. Grimes believed that Roper was not totally incompetent as a fingerprint examiner, but that Roper may not have received adequate training. (RT 2108.)

On July 11, 1994, after having verified the findings made by Pierce, Jones brought appellant's known prints and latent prints 9, 10 and 44 to the Department of Justice in Sacramento. (RT 2015, 2027.) There, Jones gave the prints to Martin Collins, the latent print supervisor, so they could be re-examined. (RT 2016.) Jones explained to Collins that Jerry Roper had previously found no matches between the latents and appellant's known prints, but that both he and Sharon Pierce had found matches. (RT 2017, 2035.) Collins then conducted his own examination and concluded that there were positive matches between two of the latents and appellant's known prints. (RT 2029.) According to Collins's testimony, one match was with appellant's right thumb and had 12 points of similarity.[30] A second match was with appellant's left middle finger and had 10 points of similarity. (RT 2030.)

Christopherson continued his investigation by interviewing appellant on August 8, 1994. Appellant denied any involvement in the killing of the Mercks. (RT 1892-1893, 1907.) Appellant further stated that he had never been to the house at 713 McClean Street, and that he did not know how his fingerprints could have been found there. (RT 1894.)

Detective Christopherson also spoke to Danny Phinney on August 23, 1994. (RT 1894, 1902.) According to Christopherson, Phinney said that Robb Lutts had obtained a .25-caliber handgun from appellant in exchange for drugs. Phinney had acted as a "go-between" in this exchange. (RT 1894, 1902.) Phinney then explained that after appellant had left, he and Lutts took the gun apart and saw the initials "C" and "M" engraved on the inside of the grips. (RT 1902.) In addition, Lutts put objects down the barrel of the gun in an effort to alter the rifling

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[30]Collins's findings were inconsistent with those of Pierce and Jones, who, as explained above, found it was appellant's left thumb that matched the latent print. (RT 1957, 1995.)

characteristics. (RT 1894, 1902-1903.) Phinney told Detective Christopherson that he and Lutts were afraid that the gun had been used in a murder. (RT 1903-1904.)

Sometime later, Detective Christopherson told criminalist Gregory Laskowski that the gun taken from Phinney had possibly been altered, and requested that Laskowski re-examine the Colt handgun. (RT 1894, 1905.) On April 15, 1996, Laskowski used a stereo-zoom microscope to examine the interior of the gun barrel and confirmed that the barrel had been distorted. (RT 2192-2193.) The lands of the gun barrel had been splayed out, particularly in the crown area. (RT 2192.) Laskowski had not noticed this distortion when he used only a small bore light to examine the gun barrel in 1984. (RT 2192, 2215-2216.)

After observing the distortion of the barrel, the criminalist used a silicone rubber compound known as Mikrosil to make a mold of the interior of the gun barrel. (RT 2193.) Laskowski had previously used Mikrosil to make molds of gun barrels on two or three occasions. (RT 2194.) After removing the Mikrosil mold from the gun barrel, he used a microscope to compare the mold with the two bullets recovered from Clifford Merck's head. (RT 2196.) Laskowski concluded, based on a comparison of the land and groove impressions and the direction of twist of the mold and the bullets, that the recovered bullets had been fired by the Colt handgun. (RT 2197.) This conclusion was also based on Laskowski's review of a diagram sent to him by Colt. (RT 2211-2212.) The diagram, dated March 29, 1943, showed measurements for the barrel of a .25 caliber automatic and included a notation that the diagram superseded an older version. (RT 2212.) Laskowski did not know if the Colt gun that he examined, which was made in 1908, was manufactured with the same specifications as those depicted in the 1943 diagram. (RT 2235.) Colt no longer had any earlier versions of the diagram. (RT 2212.)

On cross-examination, Laskowski was asked to compare the land and groove measurements with those set forth in the Colt diagram. Laskowski concluded that the measurements were consistent, in that they were within the range of variation established by the manufacturer. (RT 2240.) Laskowski also testified, after reviewing a reference book provided by defense counsel, that from 1908 to 1941 Colt manufactured 409,000 handguns that were .25 caliber automatics. (RT 2211.)

3. Jewell Francis Russell - Prosecution Case

a. Discovery of the Body

Danny Russell testified that on September 7, 1984, at about 9:30 p.m., he and his friend, Michael Lopez, passed by the home of his father, Jewell Francis Russell (nicknamed Bobby), at 370 Ash Street, Shafter. Danny noticed that all the lights and a television were on inside the house. (RT 2064.) Feeling that something was wrong, Danny entered the house through the unlocked side door. (RT 2065.) Once inside the kitchen, Danny noticed a strong odor and lots of blood. Drag marks led to the living room, where there was more blood on the floor. (RT 2066.) Danny then went to his sister's house to call the police. (RT 2067.)

Shafter Police Officer Paul Petersen arrived at 370 Ash Street, at approximately 10:15 p.m., in response to Danny's call. (RT 2074-2075, 2240.) At the residence, Petersen met with Danny, Lopez, and Danny's sister and brother-in-law. (RT 2075.) Petersen then entered the side door of the house and went into the kitchen, where he saw blood stains and drag marks on the floor. (RT 2076.) A knife and a sheath were hanging on the side of a kitchen cabinet. (RT 2241.) The bloody drag marks led to the living room, where Petersen noticed dried blood on the rug, a red and white towel with a stain on it, a guitar, cowboy boots, shoes and socks. (RT 2077,

2079.)

Petersen then followed the odor of a dead body to the northeast bedroom, where he observed a person's leg and head protruding from underneath the bed. (RT 2077.) Petersen approached and found the deceased, Jewell Francis Russell, with blood on his head. (RT 2079.) The officer then left the house to notify the Coroner's Office and the Chief of Police, and to request dispatch to send a technical investigation team. (RT 2080.)

While waiting for assistance to arrive, Petersen determined that Russell's yellow Ford Pinto vehicle was missing from outside the house.[31] (RT 2080.) When Kern County Sheriff's Department technical investigators Jerry Grimes and Rosemary Ramirez arrived, Petersen showed them around the crime scene. (RT 2081.) Grimes noticed that there were bloody drag marks leading from the living room to the bedroom in which Russell's body was found. (RT 2096.) In addition, the drawers in the bedroom were open, and things were lying out. (RT 2096.)

After accompanying the technical investigators through the house, Officer Petersen assisted the coroner in removing Russell's body from under the bed. (RT 2083.) When the bed was picked up, Petersen observed that Russell was lying on his stomach and his head was resting on its right cheek. (RT 2083.) In addition, the pockets of Russell's pants were turned inside out. (RT 2083.) The right side of Russell's throat had been slit with a sharp instrument and his face was bruised. (RT 2085.)

Petersen collected a number of items of evidence from the house, including a Camel filter

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[31]Several hours later, the vehicle was found abandoned by the California Highway Patrol. (RT 2080.)

cigarette butt, a knife and sheath, a Cleveland golf club and a Mossberg model 158 shotgun. (RT 2084.) Petersen located the shotgun between the mattress and box spring of the bed under which Russell's body was found. (RT 2084.) It appeared to Petersen that the bruising on Russell's face had been inflicted by the stock of the shotgun. (RT 2085.)

b. Autopsy Evidence

Armand Dollinger, a medical doctor specializing in forensic pathology, performed an autopsy on the deceased body of Jewell Francis Russell on September 10, 1984. (RT 2266.) Dollinger found that Russell had numerous bruises around his face from a blunt force trauma such as a fist or shoe, and a bruise on his chest wall. (RT 2267.) In addition, there was a large slashing incised wound on the right side of Russell's neck that severed the sternocleidomastoid muscle, cartoid sheath and artery, jugular vein, trachea, larynx and spine. (RT 2267.) Dollinger determined that Russell's cause of death was a homicide caused by exsanguination; he bled to death due to the incised wound of the throat. (RT 2268.)

c. Admissions Allegedly Made by Appellant and Other Evidence Allegedly Linking Appellant to Russell's Killing

Emma Foreman testified that her daughter, Gerry Lynn Tags, was appellant's girlfriend in 1984. (RT 2243.) Sometime afer Russell's death, Foreman overheard an argument between appellant and her daughter in a bedroom at Foreman's house. (RT 2245.) Appellant wanted Tags to work as a prostitute, as she had done in the past, but Tags did not feel well on this occasion. (RT 2245.) According to Foreman, appellant stated, "If you don't go out, I'll cut your damn throat." He then added, "I'll do you like I did mother fucking Bobby. Appellant also threatened to beat up Foreman if she told anyone about what she heard him say. (RT 2246.)

Foreman also testified that on one occasion she observed the corner of a guitar and bloody clothing in the trunk of the car in which Tags and appellant sometimes lived. (RT 2247.) Foreman did not pay attention to the clothes because she knew that appellant had recently cut his hand working on the car. (RT 2248.)

On February 14, 1985, Foreman was interviewed by Sergeant Craig Fraley. (RT 2248.) According to Foreman, she told Fraley about the threat appellant made to Tags and appellant's reference to Bobby. (RT 2249.) Foreman also told Fraley that appellant did not like her, and that she in turn hated him with "a purple passion." (RT 2249.) Sergeant Fraley, however, had no recollection of Foreman stating during the interview that she had heard appellant confess to killing Russell. (RT 2515-2516.)

Gerry Tags's step-uncle, Ray Davidson, testified that Tags and appellant were living with him in September, 1994. (RT 2251, 2254.) The morning after Russell was killed, appellant came to the house in appellant's old, green Pontiac car.[32] (RT 2254.) The next morning when Davidson was sitting in the Pontiac, he noticed a knife and a combat boot under the back seat. (RT 2254, 2255, 2272.) The boot appeared to have a blood stain on it, but appellant told Davidson that the stain was shoe polish.[33] (RT 2254.) Later that day, Davidson saw appellant with some jewelry and quite a bit of money. (RT 2272.) The jewelry, which was mostly men's, included a watch that Davidson thought belonged to Russell. Davidson had formerly worked for Russell and had seen the watch that he wore. (RT 2273.) Several days later, Davidson heard

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[32]The color of appellant's Pontiac was described by Detective Christopherson as being aqua blue. (See RT 1897.)

[33]On cross-examination, Davidson testified, inconsistently, that appellant was wearing the boot that appeared to have blood on it. (RT 2286.)

appellant state that "he had done away with Bob, or something like that. Bob would not be around no more or something like that." (RT 2255.)

Davidson also explained that he began using heroin in about 1982 and that at the time of his testimony he was taking prescription drugs for medical problems. (RT 2253, 2275.) He had also used methamphetamine in the past. (RT 2288.) In addition, Davidson had previously been in jail for possession of drugs, assault with a deadly weapon, and being under the influence of drugs. (RT 2252.) He had also been arrested for passing valium and codeine drug prescriptions belonging to other persons, and had served 17 months in state prison for a felony conviction. (RT 2252, 2253, 2275.)

On October 10, 1986, Davidson was in custody, having been arrested eight hours earlier. Davidson was suffering from cramps and vomiting caused by withdrawal from the use of valium, codeine and reds. (RT 2277, 2282-2284.) Davidson told a law enforcement officer that he wanted to make a statement. (RT 2284.) Davidson then met with Sergeant Craig Fraley. The first comment he made to Fraley was that if he were released from custody he would be able to get more information from Gerry Tags and Johnny Davidson. (RT 2277, 2280, Defense Exhibits GG and HH.)

d. Prior Testimony of Gerry Lynn Tags

Gerry Lynn Tags testified at the preliminary examination on September 7, 1995. She passed away before trial and portions of her prior testimony were read to the jury. (RT 2330.)

Tags testified that she was appellant's girlfriend in September, 1984, and that they had lived together for three or four years. (RT 2332.) In 1984, appellant was unemployed and injected methamphetamine two or three times a day. (RT 2232-2233.) Tags too was a heavy

user of methamphetamine during that period. (RT 2333, 2352.) According to her, she injected all of the methamphetamine she could obtain and was high most of the time. (RT 2352.) The methamphetamine would cause her to go for days without sleep, including one occasion when Tags remained awake for nine days.[34] (RT 2353-2354.) Tags gave appellant the money she earned working as a prostitute. (RT 2334.)

In September, 1984, Tags learned that Russell had been killed. (RT 2335.) She knew Russell because his son, Danny, was the father of her son. (RT 2334.) Tags spent the night before she learned of Russell's death with Mitzi Culbertson, who was Russell's daughter and, at that time, the girlfriend of appellant's brother, Gerald Cowan. (RT 2335-2336.) Tags, Mitzi, Gerald and appellant were playing cards in the kitchen of Mitzi's apartment when appellant and Tags had an argument. (RT 2336.) Tags then went upstairs to sleep. (RT 2337.)

Tags was woken up just before day break when she heard Gerald coming into the apartment and yelling. (RT 2337, 2338.) She went downstairs and found that Gerald was very mad, and that appellant was not at the apartment. (RT 2338-2339.) Tags then went back to bed until appellant returned to the apartment about an hour later. (RT 2339.) Appellant's clothes were different from those he was wearing when they played cards earlier in the evening.[35] (RT

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[34]At the time of the preliminary examination, Tags was no longer using methamphetamine because she was being treated for cancer with hormone pills. (RT 2376.)

[35]In an interview with District Attorney Investigator Christopher Hillis on June 18, 1986, Tags was asked whether appellant had changed his clothes before or after he left Mitzi's apartment. (RT 2491-2492.) Tags initially said that when appellant returned to Mitzi's apartment he was wearing clothes that were different from the clothes that he had worn when he left the apartment. (RT 2494.) Later, in the interview, however, Tags said that appellant had changed his clothes before leaving the apartment, and that Mitzi had told Tags that she too thought appellant had changed before leaving. (RT 2495.)

2338, 2340.) Appellant and Gerald were arguing about something, and appellant told Tags that he and Tags should leave, which they did in their Pontiac car. (RT 2339.) Tags did not ask appellant to explain what had happened.[36] (RT 2340.)

According to Tags, about a week or two later she noticed in the trunk of her Pontiac car the clothes that appellant was wearing during the card game. They appeared to have blood on them. (RT 2342-2343.) In addition, she found a knife with blood on it wrapped up in the clothes. (RT 2344, 2371.) When Tags picked up the knife, appellant came over to the car, knocked her down and told her not to touch anything that belonged to him. He then shut the trunk. (RT 2344.) Tags testified that she recognized the knife from having previously seen it at Russell's house.[37] (RT 2344.) She did not recall making a contrary statement to District Attorney Investigator Chris Hillis in 1986 that she had not seen the knife before.[38] (RT 2368-2369.)

Tags further testified that prior to Russell's death she and appellant would often see Russell at the Howdy House, where Russell would play pool. Russell always had a lot of money, which he kept in his pocket. (RT 2345.) Tags warned Russell about the way that he would pull his money out of his pocket and show it off. (RT 2346.)

Shortly after Russell's funeral, Tags, appellant and Gerald Cowan drove to Oklahoma, where Tags's father lived, and then to Florida. (RT 2348.) During the trip, which lasted two to

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[36]On cross-examination, Tags admitted that she really did not recall the month and year this took place. (RT 2358.)

[37]Tags also observed a guitar case in the trunk of the car about a month or two after Russell's death. (RT 2346-2347.)

[38]Hillis later testified that Tags told him that she had never seen the knife before. (RT 2497.)

three weeks, they did not use drugs because they could not find any. (RT 2349, 2386.) While traveling to Oklahoma, neither appellant nor Gerald talked about what had happened to Russell or to an elderly couple back in California. (RT 2349.) Tags testified, however, that on one occasion at her sister's house in Oklahoma, Tags asked appellant, who was drunk at the time, whether he had really killed Russell. Appellant replied, "Yeah, bitch, and if you say anything, I'll cut your throat, just like I did his." (RT 2349, 2361, 2365-2366.) When Tags was later interviewed by District Attorney Investigator Chris Hillis in 1986, her description of what appellant told him was somewhat different. In that interview, Tags said that she asked appellant if he murdered Russell and appellant responded, "What if I did?" Tags started crying and repeated the question. Appellant got mad and repeated his answer. Appellant then said, "If you say anything about it, I'll do you the same way that I did him. Cut your throat."[39] (RT 2363.)

Tags further testified that after returning from the trip to Oklahoma, she spoke with Mitzi about the circumstances of Russell's death. (RT 2356.) Mitzi told Tags that her father had been beaten and had his throat slit, and that the body had been found under a bed.[40] (RT 2356.) Tags

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[39]According to Investigator Hillis's report, Tags also told him that the next morning she asked appellant again whether he had killed Russell. Appellant answered that he had not, and explained that he had only claimed to have killed Russell the night before because he was drunk. (RT 2367.) Tags denied that this conversation between her and appellant had occurred the next morning, and did not recall describing such a conversation to Hillis. (RT 2366, 2368.)

In addition, Tags was asked if she also had told Investigator Hillis that when she returned to California appellant repeated his threat to cut her throat as he had cut Russell's throat. (RT 2385.) Tags could not remember making that statement to Hillis. She also testified initially that she did not speak to appellant again about killing Russell after they returned to California. (RT 2385.) Later, however, she testified that she thought that she had. (RT 2385.)

[40]In Mitzi's testimony, she denied telling Tags that Russell's throat had been cut and his body found under a bed. (RT 2466.) Instead, according to Mitzi, in a conversation that took place years after her father's death, Tags told Mitzi that Russell's throat had been slit. (RT 2466, 2467.)

then told Ray and Johnny Davidson what Mitzi had told her. (RT 2356-2357.)

Tags testified that she hated appellant, in part because he had turned her out as a prostitute and beat her. (RT 2372.) She began hating him about a year or two after they got together, and she still hated him at the time she was interviewed by Investigator Hillis, as well as at the time she gave her testimony at the preliminary examination. (RT 2373.) Tags also hated appellant because she believed he had "hurt people that should haven't been hurt[]." (RT 2384-2385.) When asked if she was talking about the people in this case, Tags responded, "Both of the cases." (RT 2385.)

Tags was impeached with a prior inconsistent statement she made when interviewed by Sergeant Craig Fraley on February 14, 1985. In that interview, Tags told Fraley that she knew nothing about the murders of Russell and the Mercks. (RT 2370.)

e. Testimony of Mitzi Cowan[41]

Mitzi Cowan testified that in 1984 she was dating appellant's brother, Gerald Cowan, and had since married him. (RT 2426.) In September, 1984, she and Gerald were living together in an apartment. Sometime after September 1, 1984, but before September 5, 1994, appellant and Tags came to visit her and Gerald. (RT 2426.) When appellant arrived, he was carrying a box that contained clothes and other items, including a silver wristwatch and a heart-shaped, silver necklace watch. (RT 2427.) Gerald took out the necklace watch and later that day threw it away in a vacant field.[42] (RT 2428-2429.)

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[41]Mitzi was previously identified in the opening brief as Mitzi Culbertson, which was the name she used in 1984, prior to her marriage to Gerald Cowan.

[42]Mitzi did not mention the watch necklace in any of her interviews with law enforcement or defense counsel, or in her testimony at the preliminary examination. (RT 2449-2453.)

As Russell's daughter, Mitzi was familiar with how Russell carried his money. (RT 2429.) He would neatly fold the bills in half and place them in his pocket. (RT 2429.) Mitzi frequently observed Russell take the folded bills from his pocket and display them. (RT 2429.)

A day or two before September 6, 1984, appellant and Tags again came to visit Mitzi and Gerald at their apartment.[43] (RT 2429.) Mitzi recalled that appellant stayed at the apartment until 5:00 p.m. and then walked out the door with Gerald, while Tags remained with her. (RT 2431.) At the time, there were two vehicles at the apartment, one belonging to Mitzi and the other belonging to appellant and Tags. (RT 2431.) At about 10:00 p.m., Gerald returned by himself. (RT 2432.) According to Mitzi, Gerald asked Mitzi if he could borrow her car, and she gave him the keys. (RT 2432.) Gerald then left and returned alone at 1:00 a.m. (RT 2433.) At this time, Gerald was carrying more than two hundred dollars in U.S. currency that was folded in half. (RT 2440.) Gerald threw the money on the bed. (RT 2441.) Mitzi and Gerald then went to bed.

According to Mitzi, at about 3:00 a.m. there was a knock at the door of the apartment. (RT 2441.) Gerald went downstairs, followed by Mitzi. When Mitzi arrived at the door, Gerald was yelling at appellant, "Where did you go? Where did you go? Why did you leave me?" (RT 2442.) Mitzi noticed that appellant was wearing clothes different from those he was wearing when he left the house at 5:00 p.m. (RT 2442.) Appellant and Tags then left the apartment. (RT 2442.)

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[43]Mitzi testified that she was not certain if the date was the third, fourth or fifth of September, although it seemed more likely to her that it was September 4. (RT 2446.) In her statement to Investigator Lynch in October, 1984, however, she stated that appellant and Tags came to the apartment on September 5. (RT 2449.)

After this date, Mitzi continued to have contact with appellant. She never saw appellant in possession of any property belonging to her deceased father. (RT 2455.) She also never heard appellant make any statements that indicated he had any involvement in her father's death. (RT 2456.)

Mitzi further testified that in September, 1984, she was using methamphetamine, but not every day. (RT 2443-2445.) She had also tried cocaine during this period. (RT 2444.)

4. Defense Case

a. Evidence Relating to the Lighter Case and Turquoise Ring

Ruth Scott testified that she and her husband were retired from a jewelry manufacturing business in New Mexico. (RT 2473.) The business manufactured components for Indian jewelry and sold them wholesale. (RT 2473-2474.) One item manufactured by the company was a cigarette lighter case to which an emblem of a dancing rain God known as Kachina was attached. (RT 2476-2477.) According to Scott, the lighter case marked Defense Exhibit AA(1), which the prosecution contended had been taken from Clifford Merck by appellant during the killings, was one of the Kachina lighter cases that her company made. (RT 2477, 2485.) Scott further testified that from 1976 to 1981, her company made 50,000 Kachina lighter cases, some of which were sold in California. (RT 2478.)

Defense counsel asked Scott to examine the ring that the prosecution contended had been taken from Alma Merck by appellant during the killings. (RT 2480.) Scott recognized the ring as a piece of Navajo jewelry with a low grade turquoise stone. (RT 2480, 2483.) According to Scott, she had seen thousands of such rings; they were very popular, low-cost tourist items. (RT 2480, 2484.) Defense counsel pointed out to Scott that there was a marking on the inside of the

ring. (RT 2481.) Based on her experience, Scott believed that the inscription on the ring was not an initial, but the number three, which signified that the wholesaler had paid three dollars for the ring. (RT 2483.)

Damon Taylor testified that in 1984 he was the manager of a discount cigarette store that sold various kinds of lighter cases. (RT 2508-2509.) Amongst the cases sold at the store was a case that was similar to Defendant's Exhibit AA(1). (RT 2509.) Taylor described the emblem on Exhibit AA(1) as depicting an Inca Indian. (RT 2510.) According to Taylor, the Inca Indian case was common in Bakersfield in 1984. Taylor's store ordered 50 to 100 cases each week and sold each case for a dollar or a dollar and a half. (RT 2510.) In addition, other stores in Bakersfield sold similar lighter cases. (RT 2511.)

b. Testimony of Clinical Psychologist David Bird

Dr. David Bird testified that he was a clinical psychologist and was familiar with the effects of methamphetamine abuse. (RT 2521.) According to Dr. Bird, methamphetamine use initially creates a sense of euphoria and a heightened awareness of the environment. (RT 2521.) Continued use of methamphetamine, however, has a damaging effect on language comprehension, memory, perception and visual motor control. (RT 2521-2522.) Thus, chronic users will often ask other people to repeat, or further explain, what they said. (RT 2522.) They will also be unable to recall what occurred for a period of hours, days or even weeks. (RT 2522.) In addition, chronic users tend to confuse events that they may have experienced or witnessed with events that were reported to them by others. (RT 2523.) As a result, they will imagine that they personally experienced or witnessed an event that they were actually told about by someone else. (RT 2523.)

Dr. Bird further explained that methamphetamine will often keep the user awake for days at a time. (RT 2523.) During that time, the user's ability to accurately perceive, process and record information is greatly reduced, as the user is operating by habit rather than responding to the environment. (RT 2524.) In addition, the longer the user remains awake, the more likely he or she is to enter into a psychotic state. (RT 2524.) While in such a state, the user will not respond to reality but to imagined events that he or she believes are real. (RT 2524.) After the psychotic state has ended, the user will have difficulty distinguishing what he imagined from what actually occurred. (RT 2525.)

Dr. Bird additionally testified that he had reviewed the transcript of Gerry Tags's testimony at the preliminary examination, as well as the transcript of her statement to law enforcement, and had found specific indications that she suffered from the effects of prolonged methamphetamine abuse. (RT 2525, 2541.) Dr. Bird noted that according to Tags's own testimony she was a daily user of methamphetamine who frequently "over amped." (RT 2525.) As Dr. Bird explained, "over amp[ing]" occurs when a person uses more methamphetamine than the liver can process damaging to the brain's ability to comprehend and perceive. (RT 2526.)

Dr. Bird found further evidence that Tags had been "over amping" in her inability to comprehend the questions she was being asked at the preliminary examination and during her interview with law enforcement, and in the frequent confusion in her answers. (RT 2527, 2542.) According to Dr. Bird, this "over amping" indicated that Tags was losing some capacity to comprehend, that she was subject to faulty recall, that her memory was contaminated and that she was prone to mix up reality with her imagination. (RT 2527.)

Dr. Bird also explained that some of the brain damage caused by methamphetamine use is

permanent, while other damage is temporary. (RT 2528.) Even after recovery, however, most of the information perceived by the person during the period of drug use remains jumbled. (RT 2529.) In addition, Dr. Bird explained that a person's feeling of hatred for an individual during the period of methamphetamine use would taint the person's perception and recollection of events related to that individual. (RT 2529.) That taint would result from the fact that methamphetamine use causes the development of a paranoid schizophrenic personality syndrome in the user. The user would then project his or her paranoid delusions onto the individual the user hates. (RT 2529.) As a result of this process, the user may imagine that the hated individual has made certain statements or taken certain actions. (RT 2530.)

In addition to studying the effects of methamphetamine use, Dr. Bird had also researched the effects of heroin use. (RT 2530.) Dr. Bird explained that heroin is a pain analgesic that causes a feeling of stuporous euphoria. (RT 2530.) While under the influence of heroin, a user's attention to the outside world will be greatly reduced. A person addicted to heroin will undergo withdrawal when not using the drug. (RT 2532.) During withdrawal, the user experiences a very strong biological reaction that includes nausea, rapid heartbeat, profuse sweating, throbbing headaches and body aches. (RT 2531, 2534.) In Dr. Bird's opinion, an addict experiencing withdrawal would do anything, including "lie, cheat, steal, borrow [or] swindle," in order to find more heroin. (RT 2535.)

B. PENALTY PHASE

1. Prosecution Case

a. Victim Impact Evidence

The prosecution presented the testimony of three family members of Alma and Clifford Merck. Alma's granddaughter, Denise Cox, testified that Alma had suffered from Parkinson's disease in the six to eight months before her death. Learning of her grandmother's death was very difficult and a shock. It was also difficult for Cox when she and other family members cleaned out Alma's house a couple days after the bodies were found. She would never forget the smell of death and blood that was everywhere in the house, and she was also upset that furniture and drawers had been turned upside down. (RT 2845.)

Cox explained that she continued to think in her own mind of what she believed Alma experienced just prior to her death. (RT 2845.) She imagined Alma pleading for her life and hearing her husband, Clifford, being murdered in the other room. (RT 2845-2846.) Cox further emphasized that Alma and Clifford were older people, who could not hear or see well, and were defenseless and helpless. (RT 2846.) She could understand someone robbing and tying them up, but not someone brutally murdering them.

Cox added that her entire family and their friends had been affected by Alma's death. (RT 2846.) She was praying for appellant because she believed that his heart was hard, he lacked remorse and he did not realize what he had done. (RT 2487.) She wanted appellant to feel the pain and guilt of what he had done, and she wanted the jury to sentence him to death. (RT 2847.)

Betty Turner testified that she was the youngest of Alma's four children. (RT 2848.) She identified People's Exhibit 70 as a photograph of her mother and Clifford Merck. (RT 2848.)

According to Turner, Alma and Clifford were married for almost 33 years, and Clifford was not considered simply a stepfather but a family member. (RT 2849.) Family was very important to Alma and Clifford. Alma always greeted Turner with a big hug and told her that she missed her. Clifford loved to tell stories and was easy going, although opinionated at times. They were quiet, loving people who stayed to themselves. (RT 2849.)

Turner further testified that she would never forget when she received the telephone call informing her that Alma and Clifford had been killed. (RT 2849.) She knew that Clifford had tried his best to protect her mother. (RT 2849.) She also knew that her mother was terrified and had gone through "pure hell" before her death. (RT 2850.) Turner added that she had no sympathy for anyone who took the innocent life of another. (RT 2850.)

Terri Jones, another of Alma's granddaughters, testified that she would never forget the pain caused by the death of Alma and Clifford. (RT 2851.) Jones explained that her grandmother had been crying in a conversation they had a couple of days before the killings. At that time, Alma was suffering from Parkinson's disease and recovering from a broken hip. (RT 2851.)

Jones went into shock after learning of the killings and was unable to attend the funeral. (RT 2852.) The killings also caused pain for Jones's mother and Jones's two children. (RT 2852.)

b. Evidence of Other Crimes Committed by Appellant

James Foster testified that at about noon on October 24, 1985, he and Jessie Cruz went to Foster's apartment to change clothes. (RT 2853-2854.) When Foster entered his bedroom, he noticed that the sliding glass door was ajar. He then turned around and saw appellant coming out

of the closet. Appellant was armed with a blue steel revolver that he pointed at Foster's head. (RT 2855.) According to Foster, appellant told him not to move or he would shoot. (RT 2856.) Appellant then had Foster call to Cruz. When Cruz entered the bedroom, appellant forced both Foster and Cruz to lie down and he bound their hands and feet. (RT 2856.) Appellant then went through the room pulling out the phone cords. He also cocked and uncocked his revolver, stating that he would kill Foster and Cruz. (RT 2857.) After about 10 to 15 minutes, appellant left the apartment through the sliding glass door. (RT 2857.) Missing from Foster's apartment were some belt buckles, coins, a Sony walkman, one or two telephones and other household items. (RT 2859.)

Betty Abney testified that on April 9, 1993, she lived next door to appellant and Brenda Hunt. (RT 2864.) At about 1:00 p.m., Abney was visiting with Linda Bryson, who lived across the street. (RT 2865.) From the window in Bryson's kitchen, Abney saw appellant standing in front of Brenda's young child named Robert. (RT 2866.) According to Abney, appellant lifted Robert up by his hair and threw him to the ground. (RT 2866.) Abney instructed Bryson to call the police and then went outside to yell at appellant. (RT 2867.) When the police arrived, they spoke with Robert and then arrested appellant. (RT 2868.)

Abney further testified that on a different date she saw appellant grab Brenda Hunt by her hair while Brenda and appellant were having an argument. (RT 2869.) On another occasion Abney saw appellant grab and throw Robert's younger brother, Michael, after Michael had not done something he was supposed to do. (RT 2869.)

The prosecution also introduced certified court records showing that appellant had been convicted of robbery in 1970. (RT 2872-2875.)

2. Defense Case

a. Family Background and Childhood

Selma Yates testified that appellant was her nephew. (RT 2888.) Yates was the younger sister of appellant's mother, Betty; Yates's husband, Leroy, was the brother of appellant's father, Wes. (RT 2888.) According to Yates, Wes, who worked as a carpenter, was a very good person when sober, but like his brothers and father he liked to drink alcohol. (RT 2889, 2990.) When drunk, Wes always wanted to fight. (RT 2889.)

Yates further explained that Wes's father, George, was violent even when not drunk and was always beating his children and wife. (RT 2890.) According to Yates, George's wife suffered a broken leg and arm, and was constantly black and blue, as a result of the beatings. (RT 2890.)

Yates further testified that appellant was one of eight children. From the time that appellant was two until he was 14 or 15 years old, he was subjected to beatings by his father for no reason. (RT 2891.) One episode of violence occurred when appellant was six years old and he, his siblings and his mother were visiting at Yates's home. Wes busted into Yates's house on Christmas eve, after having been gone for two days, drinking. He then started to beat Betty while appellant and his cousin grabbed his legs, trying to get him to stop. Yates finally knocked Wes out with a rolling pin and had him arrested. (RT 2893.) After the police arrived, Wes regained consciousness and threatened to return and kill everyone when he was released from jail. (RT 2894.)

According to Yates, Wes spent every weekend drunk and out of the house. When he returned home on Monday, he would fight anyone who was there. (RT 2894-2895.) In addition,

as a result of Wes's spending all his money on alcohol over the weekend, Betty and her children had little, if any, money for food and would sometimes go hungry. (RT 2895.)

When appellant became a teenager, Wes began to take appellant to the bars and get him drunk. (RT 2898.) Wes's father had done the same thing with him as a teenager. (RT 2899.)

Yates was also aware that appellant had trouble in school. His grades were poor, and he was sometimes disciplined for behavioral problems. (RT 2896.)

Finally, Yates was asked about her feelings regarding appellant being executed. Yates answered that she did not believe in the death penalty in a case like appellant's because she had heard of too many innocent men being executed. (RT 2899.) She also believed that appellant was good with children as long as his father was not around, although on one occasion she did write the court to ask that appellant have a psychiatric evaluation. (RT 2900.)

Yates's son, Leroy Cowan, a successful businessman who was very involved in church activities, also testified about appellant's family background. (RT 2901-2903.) Leroy and appellant spent a lot of time together when they were children, prior to 1962; Leroy and his family often stayed over at appellant's home. (RT 2903-2904.) Leroy recalled staying with appellant on one occasion when appellant's family lived in a World War II barrack that had been refurbished as an apartment for the poor. (RT 2904.) The apartment had three rooms. All of the girls and both mothers stayed in the bedroom, while all the boys slept in a hide-away that folded out in the main room. (RT 2905.) The walls of the apartment had holes in them, and the residence was infested with rats and mice. (RT 2905.) Appellant had no toys, and the children had to make up games. (RT 2905.)

Leroy recalled that appellant's father was out drinking when Leroy and his family first

arrived at the apartment. (RT 2905.) When Wes came home in the middle of the night, Leroy, appellant and appellant's older brother, Don, were asleep in the hide-away bed, with Leroy on the edge of the bed. Wes jerked Leroy out of bed and began to hit him with a belt until he realized that it was Leroy whom he had grabbed. Wes then threw Leroy to the side and began to beat appellant with the belt. When the belt got wrapped around appellant's hands, Wes continued to hit appellant with his fists. Appellant pleaded with his father, "No, dad. Stop, dad. What did I do, dad?" Eventually, the police arrived and arrested Wes. (RT 2906.)

Leroy testified that there were numerous other occasions on which Wes beat appellant in a similar manner after returning home drunk. These incidents occurred both at the refurbished barracks and at other residences in which the family lived. (RT 2907, 2914.) According to Leroy, once Wes started beating appellant, he could not be convinced to stop. When Betty and Leroy's mother tried to stop Wes, he only became more violent, and Leroy's mother would sometimes have to knock him out in order to end the assault. (RT 2907.)

The last incident during which Leroy witnessed Wes beat appellant began with appellant and Leroy helping Wes at his construction site during the day. Wes then left work early and drove the boys to a bar in a panel wagon. (RT 2915.) Wes locked the boys in the windowless vehicle and went off drinking. (RT 2915.) Leroy and appellant remained in the wagon for the rest of the afternoon. When Wes returned, he was so drunk that the boys were able to escape without being beaten. (RT 2916.) Later that night, however, Wes came home while the boys were asleep. He grabbed Leroy and pushed him aside, and then began beating appellant while appellant pleaded for him to stop. (RT 2914.)

On those occasions when Wes came home while appellant, Leroy and the other children

were awake, they would immediately try to determine if Wes was drunk. (RT 2913.) If he was, they would hide or go outside until Wes had fallen asleep or gone away. (RT 2913.) Sometimes, however, the children were not fast enough, and Wes would use a belt or his fists to beat whomever he caught. The usual victim of the beating was appellant. (RT 2913.)

Wes's violence extended to appellant's mother as well. Leroy's most vivid recollection of such violence was one Christmas when Betty and her children had come to Leroy's home because Wes had disappeared drinking after receiving his pay check. While Leroy, appellant and appellant's brother were playing with a toy, Wes burst through the door and went straight for Betty, who was pregnant at the time. (RT 2908.) Wes screamed at Betty and forced her up against the wall. He then continued striking Betty until Leroy's mother knocked him out with a rolling pin. While the police were dragging Wes out of the residence, he yelled, "When I get out, I'm going to kill you." (RT 2910.)

At a later date, when Betty was again pregnant and Wes was not around, Leroy and his family went to live temporarily with Betty in Bakersfield to help her with the birth of the new baby. Appellant was then 14, and having both academic and behavioral problems at school. (RT 2909-2910, 2912.) Leroy then began to attend school with appellant, and appellant's academic performance and behavior greatly improved. Appellant's teachers were so impressed with his improvement that they asked if Leroy could remain in school with appellant. (RT 2910.) Appellant became a lot happier when he thought that Leroy would continue in school with him. Ultimately, however, Leroy returned home with his family, and according to Leroy, "[I]t was as if a light had went out and then [appellant] seemed depressed again." (RT 2911.) After Leroy left, appellant had difficulty remaining in school. (RT 2913.)

Leroy last saw appellant at the Cowan family reunion in 1976. At that time, appellant said that he had experienced some hard times but that he was "trying to make do with what he had." (RT 2916.) Leroy believed that appellant should not be executed, because if appellant had committed the killings he could have done so only while under the influence of alcohol or drugs. In addition, Leroy did not feel that a death sentence would be fair in light of the difficulties appellant had experienced in his childhood. (RT 2917.)

b. Character Evidence

Brenda Hunt testified that she met appellant in 1993 and became his girlfriend. (RT 2920.) Appellant then moved in with Hunt and her five children for about eight months; he helped support the family with his social security income. (RT 2921, 2923.) Initially, both Hunt and appellant were using methamphetamine. After moving in with Hunt, however, appellant suggested that they stop using drugs, and they both tried very hard to do so. They paid their bills, bought food and took care of the children, although they occasionally slipped back into drug use. Eventually, Hunt stopped all drug use after entering a drug rehabilitation program. She then found employment and began attending church with her children. (RT 2922-2923.)

Hunt further testified that although appellant was arrested for abusing her son, Robert, in April, 1993, he did not actually commit a crime. Her children were jumping on the backs of cars that were driving by her house, and she asked appellant go out to the street to get the children to stop. After appellant went out to the street, Hunt heard her neighbor, Betty Abney, hollering about the police being called. Hunt told Abney that everything was all right. Robert, did not have any bruises or scrapes, and he did not complain of any pain. Robert was upset only because the police had taken appellant to jail. (RT 2923-2925.)

Appellant never hurt Hunt, and he treated her children as if they were his own. (RT 2925.) Appellant was kind, helped the children with their homework, and entertained them by singing and playing the guitar. Appellant also took the children camping and fishing, and to the park to view the fireworks on the Fourth of July. Over the course of their relationship, Hunt noticed that appellant became more comfortable acting as a father and a family man. (RT 2926.) He also became more open, affectionate and trusting. Hunt did not want appellant to be executed because she and her children loved him, and they would visit him if appellant were allowed to live in prison. (RT 2927.) Appellant's execution would devastate her. (RT 2928.)

Three of Hunt's children also testified about their relationship with appellant: Robert Hunt, who was 12 at the time of trial (RT 2930), Michael Hunt, who was 10 at the time of trial (RT 2938), and Melody Hunt, who was 7 at the time of trial. (RT 2946.) The children testified that appellant treated them well and with respect. (RT 2930-2931, 2940, 2948.) They often referred to appellant as "Dad" and had a good relationship with him. (RT 2931, 2932, 2940, 2948.) Appellant sometimes helped Robert with his homework, and he took all the children fishing and camping, and to the fair. (RT 2932, 2941.) He also bought presents for Melody and once gave Melody and her sister a ride on his motorcycle. (RT 2948.) In addition, almost every day appellant played guitar and sang songs, including some that he wrote about the family. (RT 2932- 2933, 2943.) Appellant also taught the children how to play the guitar and had begun to make one for them. (RT 2935, 2942.)

The children further testified that appellant never beat or hurt them, although appellant spanked them when they got into trouble. (RT 2933, 2941, 2949.) Although appellant was arrested in April 1993, for abusing Robert, appellant did not actually hit him. (RT 2933.)

According to Robert, appellant merely picked him up after he tripped on a tree stump in the front yard. (RT 2933-2934.)

If appellant were executed, the children would feel sad, but if appellant were allowed to live they would visit and write to him. (RT 2936-2937, 2944, 2949.)

3. Prosecution Rebuttal

Michael Rascoe, a senior deputy sheriff for Kern County, testified that on April 9, 1993, he interviewed Robert Hunt, who was eight or nine years old at the time. Rascoe asked Robert about an incident that had allegedly taken place in the front yard. (RT 2952.) Initially, Robert, who appeared to have been crying, was reluctant to talk to Rascoe. Robert said that he had been told that if he talked he would be taken out of the house. (RT 2953, 2956.) Robert then explained that he and some other children, including his brother Michael, had been playing in the front yard. They had been warned to stay off a van that was parked in front of the residence. (RT 2953.) Appellant came outside and was mad because he thought that the children had been playing on the van. According to Rascoe, Robert then said that appellant grabbed him by the hair, shook him, and pushed him to the ground. (RT 2954.) Robert also stated that his neck and head hurt, but Rascoe did not observe any bruises or signs of injury. (RT 2956-2957.)

Rascoe testified that he also interviewed Michael Hunt about the incident. (RT 2954.) According to Rascoe, Michael told him that appellant had grabbed Robert by the hair, picked him up off the ground, and thrown him backwards, causing Robert to fall on his back. (RT 2955.)

IV.

ARGUMENT

A. APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE 10-YEAR DELAY BETWEEN THE COMMISSION OF THE CHARGED OFFENSES AND APPELLANT'S ARREST

1. Introduction

Appellant was convicted of two murders allegedly committed between August 31, 1984 and September 4, 1984. (CT 647, 650; RT 1482, 1493.) Appellant was not arrested for the crimes until August 8, 1994, and a complaint was filed in municipal court two days later. Thus, almost ten years passed before appellant was arrested and charged with the homicides. (CT 2.) Appellant repeatedly moved for dismissal of the case based on a violation of due process resulting from the 10-year delay between the commission of the charged offenses and his prosecution. These motions were erroneously denied by the trial court, as the lengthy delay deprived appellant of a fair opportunity to rebut the case against him.[44]

Appellant's defense was prejudiced by the pre-arrest delay in several ways. First, appellant was impaired in his ability to rebut the testimony of the prosecution's criminalists that fingerprints lifted from the Mercks' residence matched appellant's known fingerprints. That finding, which precipitated the decision to have appellant arrested, was not made until June, 1994, and was inconsistent with the results of a prior examination conducted by technical investigator Jerry Roper in November, 1984. Due to the passage of time, however, Roper was unable to recall the differences he had found between the latent prints and appellant's known

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[44]Appellant will not address those portions of the motions that concerned how his defense to the Jewell Russell killing was prejudiced since appellant was not convicted of that murder.

prints. Moreover, Roper's eyesight had deteriorated over the years and he was therefore unable to reexamine the two sets of fingerprints.

Additional prejudice resulted from the fading memories of appellant and other witnesses. Appellant was unable to remember his whereabouts at the time that Alma and Clifford Merck were killed, and what persons he may have been with at that time. Nor could he recall how he came to possess, if in fact he did possess, any property that was taken from the Mercks' home during the killings. Moreover, the passage of time caused witnesses to have difficulty remembering the specific features of the property that was missing from the Mercks' home. Appellant was thus impaired in his ability to challenge whether any property he allegedly possessed did in fact belong to the Mercks. Additionally, other witnesses had faded memories concerning whether they had actually obtained from appellant property that allegedly belonged to the Mercks. Thus, the defense was unable to adequately cross-examine these witnesses to show that appellant was not the source of any property that was originally taken from the victims.

Further, during the ten years leading up to appellant's arrest, numerous pieces of property that law enforcement agents had taken from the Mercks' residence and booked into evidence had been lost or destroyed. Appellant was prejudiced by the loss of this evidence because he never had the opportunity to examine the evidence for the presence of fingerprints. A finding that appellant's fingerprints were not present on the evidence, or that another suspect's fingerprints were present, would have supported his claim that he did not commit the killings. Finally, jewelry that had been seized by the police during the arrests of Danny Phinney and Robb Lutts on October 14, 1984 had been either released or destroyed. Appellant thus did not have the opportunity to show the recovered jewelry to witnesses who were familiar with the jewelry taken

during the killing of the Mercks. An identification of the jewelry as having belonged to the Mercks would have corroborated appellant's defense that Phinney and Lutts, rather than appellant and his brother, were the killers.

This prejudice suffered by appellant as a result of the 10-year pre-arrest delay was not justified by any legitimate law enforcement purpose. The additional investigation that led to the filing of the complaint was the 1994 reexamination of evidence that had been in the possession of law enforcement since the beginning of the case: appellant's known fingerprints and the latent fingerprints from the crime scene. No additional law enforcement investigation was done, and no new evidence gathered, for almost seven years prior to that reexamination. All of the evidence that the prosecution relied upon to justify the defendant's arrest had been in the prosecution's possession since 1986. Since there was no justification for the unconscionable delay in reexamining the fingerprint evidence, the trial court abused its discretion in denying appellant's motions to dismiss based on prejudicial pre-arrest delay.

2. Relevant Facts and Proceedings

a. Motion to Dismiss the Complaint

Appellant's first motion to dismiss was filed on August 25, 1994, prior to the preliminary examination. (CT 20, 491.) The motion argued that the prejudice resulting from the 10-year delay in initiating criminal proceedings violated appellant's constitutional right to a fair trial. (CT 491.)

Appellant's motion was supported by a declaration from his lead trial counsel, Michael Sprague. (CT 494.) In that declaration, Sprague claimed that by October 1986, law enforcement investigation had uncovered evidence linking the defendant and his brother, Gerald Cowan, to

the killings of Alma and Clifford Merck. (CT 495-497.) This evidence included witnesses who claimed that appellant had either sold or given them property that had previously been owned by the Mercks, and witnesses who claimed that they had heard appellant make admissions concerning the killings. (CT 496-497.) The declaration further stated that while the decision to arrest appellant on August 8, 1994 was precipitated by the recent matching of his fingerprints to latent prints lifted from the Mercks' home, the latent prints had been in the possession of law enforcement since shortly after the killings in 1984, and appellant's known prints had been in the criminal justice system since his prison commitment in 1970. (CT 497.)

Finally, defense counsel's declaration claimed that appellant had been prejudiced by the pre-arrest delay in several ways. First, "[d]ue to the passage of time," appellant was unable to recall "where he was, who he was with, or where he was living, or located at the time of the [] homicides." (CT 497.) Appellant also had no recollection of whether he had ever possessed, and if so, how he had obtained possession of, any of the items allegedly belonging to the Mercks. (CT 497.) Lastly, witnesses who were "critical to the defense . . . ha[d] no present recollection of events back in 1984 and other witnesses [we]re so debilitated that they also [could] not remember critical facts favorable to the defense due to the lapse of time." (CT 498.)

In a written opposition to appellant's motion for dismissal, the prosecution argued that the defense had not met its burden of establishing that the pre-arrest delay caused prejudice. (CT 515.) Alternatively, the prosecution contended that if appellant had been prejudiced, the delay in his arrest was justified. (CT 516.) According to the prosecutor's declaration, appellant and his brother became suspects in the killing of the Mercks in October, 1984. (CT 518.) The detectives then "interviewed witnesses from 1984 to 1987 which circumstantially connected defendants to

the Merck[s] . . . crime scene." (CT 518.) "However, the District Attorney's Office declined to prosecute during those years because it was feared the evidence which existed at that time was not of sufficient strength to support a conviction by jury." (CT 518.) In 1994, a homicide detective reopened the case, and appellant's known fingerprints were again compared to latent prints lifted from the crime scene. (CT 519.) This time the comparison resulted in a finding that two of the fingerprints found at the Mercks' home had been left by appellant. (CT 519.) Following the discovery of the positive comparison, appellant and his brother were arrested on August 8, 1994, and a complaint charging them with the homicides was filed on August 10, 1994. (CT 519.)

b. Evidentiary Hearing on Appellant's Motion to Dismiss the Complaint

An evidentiary hearing on appellant's motion to dismiss the complaint was held concurrently with the preliminary examination, which began on September 6, 1994, and concluded on September 12, 1994. (CT, 21, 524.)[45] Before the hearing, the magistrate stated that he would consider any evidence presented during the preliminary examination for the purpose of determining the motion to dismiss unless such evidence was specifically excluded from the motion. (CT 525.) The pertinent testimony is summarized below.

1. Law Enforcement Investigation

Quintin Nerida testified that he formerly worked as a technical investigator for the Kern County Sheriff's Department, and that he had participated in the processing of the Mercks'

[45]The transcript of the first day of the preliminary examination, September 6, 1994, is found both in Volume III of the Clerk's Transcript (pages 522-638) and in a separate bound volume. Appellant cites to the pages in the Clerk's Transcript. The transcripts of the remaining three days of the preliminary examination are found in three separate bound volumes. Each volume begins again at page one.

residence on September 4, 1984. (CT 559.) After having his memory refreshed, Nerida recalled that he lifted two fingerprints from the inside edge of the back door to the service porch, (CT 566-567), and that another investigator, Helen Sparks, lifted a fingerprint from the bottom of a plastic sewing crate that was on a table in the dining area (CT 567-568).

On October 31, 1984, a sheriff's detective requested that the latent fingerprints lifted from the Mercks' residence be compared with the known fingerprints of appellant and other suspects. (CT 635.) Appellant's fingerprints had been on file with the Sheriff's Department since August 11, 1967. (Preliminary Examination Reporter's Transcript, September 7, 1994, at page 9, hereafter cited as PERT, 9/7/94, ____.) Kern County Sheriff's Department technical investigator Jerry Roper conducted the comparison and found that there were no matches. (CT 635.)

Sergeant John Diederich testified that he previously served as a detective for the Kern County Sheriff's Department, and that on December 19, 1984, he was assigned to do follow-up investigation concerning the killings of Alma and Clifford Merck and Jewell Russell. (PERT, 9/7/94, 175, 179.) Diederich's investigation included the following: On December 19, 1984, Diederich retrieved from the police department property room a gun that had been seized from a person named Robb Lutts. (PERT, 9/7/94, 175.) Diederich removed the grip of the gun and found that the initials "C" and "M" were engraved underneath. (PERT, 9/7/94, 176.) On December 20, 1984, the detective interviewed an operations officer at the Bakersfield Social Security office and was told that the Mercks were recipients of Social Security checks that were usually received by the 3rd of the month. (PERT, 9/7/94, 178.) On December 21, 1984, Diederich interviewed Danny Phinney, who stated that the gun with the engraved initials was

taken by the police when he and Robb Lutts were arrested together.[46] (PERT, 9/7/94, 179.) Phinney also told Diederich that in the first part of September, 1984, appellant showed him some property that he had in his trunk, including coins, men's and women's jewelry, jewelry boxes, social security checks that possibly had a McClean Street address on them, and a man's wallet that contained a California Driver's License for a person with a name similar to "Myerck" with a three digit address on McClean Street and a birth date of 1911 or 1914. (PERT, 9/7/94, 184-186.) On December 26, 1984, Diederich interviewed Mary Watts, Alma Merck's daughter, and Terry Jones, Alma's granddaughter. Both women described jewelry and other personal property that Alma and Clifford had owned. (PERT, 9/7/94, 188-191.) In January, 1985, Sergeant Diederich was transferred from the homicide department, and his investigation of the killings stopped. (PERT, 9/7/94, 191-192.)

Sergeant Craig Fraley testified that on December 19, 1984, he was assigned to assist Sergeant Diederich in the homicide investigation, and that when Diederich was transferred from the homicide unit, he became the primary investigator. (PERT, 9/7/94, 199-200; PERT, 9/8/94, 33.) Fraley continued to investigate the case until "somewhere around July to September of '87" when he too was transferred from the homicide unit. (PERT, 9/7/94, 200; PERT, 9/8/94, 34.) During the time that Fraley investigated the killings, no suspects were arrested and a criminal complaint was not filed. (PERT, 9/7/94, 201.)

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[46]Sergeant Diederich's testimony did not include the date on which Phinney and Lutts were arrested. Law enforcement reports relating to that arrest established that the arrest date was October 14, 1984. (CT 1149.) Additionally, at the preliminary examination Sergeant Diederich was not permitted to testify that Lutts had told Phinney that appellant had given him the gun with the engraved initials. (PERT, 9/7/94, 180-181.) That statement, however, was contained in Diederich's report of his interview with Phinney. (CT 314.)

The investigation that Sergeant Fraley completed included the following: On January 24, 1985, Fraley interviewed Ronnie Woodin, who told Fraley that appellant had sold him a silver cigarette lighter with a turquoise inset around September 10, 1984. (PERT, 9/7/94, 203.) Woodin further stated that appellant had other property for sale including costume jewelry, old coins, rings, necklaces, tools and an old, black guitar case. (PERT, 9/7/94, 204, 207.)

On January 28, 1985, Fraley interviewed appellant's sister, Catherine Glass. (PERT, 9/8/94, 4.) Glass told Fraley that three or four months before she had purchased a ring from appellant, and she gave the ring she had purchased to Fraley. (PERT, 9/8/94, 9-10.) Inscribed inside the ring, according to Fraley, were the initials "A" and "M." (PERT, 9/8/94, 11.) Fraley further testified that the ring looked similar to a ring that Alma Merck was wearing in a photograph taken while Alma was alive. (PERT, 9/8/94, 12.)

On January 30, 1985, Fraley interviewed Mary Watts, Alma's daughter. (PERT, 9/8/94, 13.) Watts told Fraley that the ring obtained from Catherine Glass had belonged to her mother. (PERT, 9/8/94, 13.) On the same date, Fraley also interviewed Jerry Jones, who was married to Alma Merck's granddaughter. (PERT, 9/8/94, 13, 15.) Jones identified the cigarette lighter obtained from Ronnie Woodin as having belonged to Clifford Merck. (PERT, 9/8/94, 14.) On February 6, 1985, Fraley interviewed Betty Turner, another daughter of Alma. (PERT, 9/8/94, 15.) Turner also identified the cigarette lighter obtained from Ronnie Woodin as having belonged to Clifford, and the ring obtained from Catherine Glass as having belonged to Alma. (PERT, 9/8/94, 15-16.)

On February 14, 1985, Fraley spoke with Gerry Tags, appellant's girlfriend, who told Fraley that she had no knowledge of the killings. (PERT, 9/8/94, 44.) Later that day, appellant

telephoned Fraley to complain that Fraley had mistreated Tags during the interview. Appellant also offered to come to the police station to discuss the case with Fraley. (PERT, 9/8/94, 45.) Fraley, however, did not have appellant come to the office for an interview because he "was still looking at the circumstances surrounding the homicide and right at that point in time . . . was not prepared to take him on . . . ." (PERT, 9/8/94, 45.) In fact, Fraley never attempted to interview appellant, despite having obtained the above-described information that suggested appellant's involvement in the killings of the Mercks and his own belief that appellant was a suspect. (PERT, 9/8/94, 50, 73.)

Other investigation tasks performed by Sergeant Fraley included having the knife found at the Mercks' residence sent to the crime laboratory for analysis (PERT, 9/8/94, 66), and requesting that certain evidence, including guns seized during the investigation and the cigarette lighter turned over by Ronnie Woodin, be processed for fingerprints (PERT, 9/8/94, 67). Fraley further requested that the examiners compare any latent prints recovered from this evidence to appellant's known prints. (PERT, 9/8/94, 68.)

In late 1985 or early 1986, Fraley met with attorneys from the District Attorney's Office and provided them with all of his investigation reports. (PERT, 9/8/94, 56.) At that time, Fraley did not believe that he had "sufficient probable cause" to arrest appellant. (PERT, 9/8/94, 66.) At the meeting Fraley was advised about the investigation that still needed to be done and the evidence that still needed to be obtained in order for a criminal action to be brought. (PERT, 9/7/94, 201.) Specifically, Fraley was told that all of the evidence and statements he had "acquired up to that point were circumstantial in nature and that there was going to have to be direct evidence forthcoming before they could issue the case." (PERT, 9/8/94, 60.) After

receiving this advice, Fraley "continued to gather the information from witnesses that [he] could." (PERT, 9/8/94, 61.)

Additionally, after the meeting the District Attorney's Office assigned one of its own investigators, Chris Hillis, to work on the case "in a parallel route" with Fraley. (PERT, 9/7/94, 201.) Fraley and Hillis had a few short conversations about the investigation, and Hillis told Fraley that he had interviewed Gerald Cowan in June, 1986. (PERT, 9/8/94, 48-49.) After Fraley left the homicide unit, he was occasionally consulted about the homicide investigation. The law enforcement officers who spoke with him were Hillis, John Porter, an officer with the Shafter Police Department, and James Christopherson, a detective with the Kern County Sheriff's Department. (PERT, 9/7/94, 202.)

When Sergeant Fraley transferred from the homicide unit on September 10, 1987, he gave the homicide case file to his supervisor "for reassignment or continued investigation." (PERT, 9/8/94, 34.) Fraley also advised his supervisor "about what was going on in the case at that time," and told him "that the district attorney's office, one of their investigators, was still looking into the matter . . . ." (PERT, 9/8/94, 34.) During the last three months that Fraley handled the investigation, he did "very little in the case." (PERT, 9/8/94, 70.) The sergeant's leads had dried up and he "didn't have anything that was current that [he] could actively pursue and work on." (PERT, 9/8/94, 70.)

James Christopherson testified that in September, 1984, he was a patrol deputy for the Kern County Sheriff's Department, and responded to the Merck residence at the time that the bodies were discovered. (PERT, 9/12/94, 11.) For approximately three years after the homicides, Christopherson, who knew appellant from previous contacts, continued to work as a

patrolman in the Mercks' neighborhood. (PERT, 9/12/94, 13-14.) On occasion, he would ask people on the street if they had heard of any new information relating to the Mercks' homicides. (PERT, 9/12/94, 17.)

Christopherson later became a detective for the sheriff's department and just before May, 1994, he became more interested in investigating the unsolved case. (PERT, 9/8/94, 184-185.) At that time, Christopherson was between assignments, and he obtained information that suggested that someone other than the Cowans may have been involved in the homicides. (PERT, 9/8/94, 185; PERT, 9/12/94, 66.) The detective asked the sergeant in charge of the homicide section some questions about the case, and the next morning he was given the case file and told to review it in his spare time. (PERT, 9/8/94, 186; PERT, 9/12/94, 18.) Although the case was still considered open, it was no longer assigned to a particular detective for active investigation. (PERT, 9/12/94, 20-21.) In fact, the most recent report in the file that had been prepared by a Kern County Sheriff's Department detective was dated July, 1987. (PERT, 9/12/94, 24.) It appeared to Christopherson that as of that date the investigation of the Sheriff's Department had come to a standstill and that all "active leads [had] dried up." (PERT, 9/12/94, 26, 27.)

After reviewing the file, Christopherson contacted Thomas Jones, a fingerprint specialist in the evidence section of the Sheriff's Department, and requested that the latent prints obtained from 713 McLean Street be compared again to those of appellant, his brother and another suspect. (PERT, 9/8/94, 187; PERT, 9/12/94, 24.) This request was made on May 12, 1994. (PERT, 9/8/94, 188.) On June 27, 1994, Christopherson received a report from evidence technician Sharon Pierce that two of the latent prints matched appellant's known prints. (PERT,

9/8/94, 188.) The detective then further reviewed the reports in the file, including reports relating to the killing of Jewell Russell, and met with his supervisor. (PERT, 9/8/94, 188.) After receiving his supervisor's approval, Christopherson presented the case to the District Attorney's Office. (PERT, 9/8/94, 189.) Christopherson also arranged for the Department of Justice to check the fingerprint identifications for accuracy. (PERT, 9/8/94, 189.) The comparison done by the Department of Justice confirmed Sharon Pierce's findings. (PERT, 9/8/94, 190.)

Christopherson was then informed by the District Attorney's Office that complaints would be filed against appellant and his brother. The detective arrested both appellant and Gerald Cowan on August 8, 1994. (PERT, 9/8/94, 191.) After the arrest, Christopherson interviewed appellant. (PERT, 9/12/94, 6.) When appellant was asked to explain why so many people had said that appellant had given them property that belonged to the victims, appellant responded that he did not know. (PERT, 9/12/94, 59-60.) Appellant also stated that he could not remember if he had ever been inside the Mercks' home. (PERT, 9/12/94, 60.) Finally, when asked about whether appellant had ever been on the street on which the Mercks lived, appellant stated "I just don't remember. I don't remember going on that street. I used to go on that street all the time." (PERT, 9/12/94, 60.) Appellant did tell the detective that he did not kill the Mercks, that he would have remembered if he had done so, and that he had never traded a gun for drugs. (PERT, 9/12/94, 73.)

Christopher Hillis testified that in 1986 he was employed as an investigator for the Kern County District Attorney. (PERT, 9/12/94, 78.) In the summer of 1986, he was asked by the District Attorney to review some unsolved homicide cases, including the killings of the Mercks and Russell. (PERT, 9/12/94, 80, 85.) Hillis obtained the files, reviewed the police reports, and

examined the physical evidence. (PERT, 9/12/94, 80.) Hillis's investigation lasted about two months and included interviewing appellant's girlfriend, Gerry Tags, Gerald Cowan and Mitzi Cowan (then Culbertson), and requesting that the prints of another suspect be examined. (PERT, 9/12/94, 81, 84, 85, 87.) Hillis then presented the additional information that he had gathered to Bart Hegeler, the supervising attorney at the District Attorney's Office. (PERT, 9/12/94, 81.) Hegeler did not feel that there was sufficient evidence to convict appellant's and therefore decided not to file a complaint. (PERT, 9/12/94, 82.) Hillis was disappointed by Hegeler's decision because he felt that the evidence showed that appellant had committed the killings. (PERT, 9/12/94, 86.) After the decision not to file a complaint, Hillis stopped working on the case in order to devote more time to other investigations. (PERT, 9/12/94, 83.)

2. Faded Memory of Technical Investigator Jerry Roper

At the preliminary examination, Jerry Roper testified that in 1984 he worked as a technical investigator for the Kern County Sheriff's Department. (PERT, 9/12/94, 91.) His tasks included processing and comparing fingerprints. (PERT, 9/12/94, 91.) Roper left the technical investigation section in 1986, and due to the passage of time he had no recollection of performing any fingerprint comparison work in appellant's case. (PERT, 9/12/94, 94, 96.) Roper was able to identify a fingerprint comparison request dated November 1, 1984 that instructed him to compare latent prints to the known prints of certain persons. (PERT, 9/12/94, 95.) However, reviewing that request (which also showed that the results of the comparisons were negative) did not refresh Roper's memory as to what work he had performed in response to the request. Roper's memory was also not refreshed by looking at People's Exhibits 12 and 13, the latents found by Sharon Pierce to match appellant's known prints. (PERT, 9/12/94, 96.)

Roper further testified that the request itself directed Roper to compare the known prints of appellant and others to the latent prints lifted from the crime scene, and that Roper's examination resulted in a negative finding with respect to all of those latents. (PERT, 9/12/94, 97, 101.) Due to the passage of time, however, Roper had no recollection of what work he actually performed in November, 1984, what latent prints he examined and what known prints he compared to the latent prints. (PERT, 9/12/94, 98, 103-104.) He also could not recall what differences he found between the latent prints he examined and appellant's known prints that led him to conclude that the latent prints were not made by appellant. (PERT, 9/12/94, 107.) Moreover, Roper was now unable to recompare appellant's known prints to the latent prints because, as Roper testified, "It's been too many years and my eyes are too bad now." (PERT, 9/12/94, 107.)

3. Faded Witness Memories Relating to Property Allegedly Taken From the Mercks' Residence

At the preliminary examination, Robert Johnson, Alma's son, testified about property that he discovered was missing from the Mercks' home when he found the victims' bodies. (CT 530-532.) Amongst the items missing were a knife collection (CT 532), a small revolver with a pearl handle that had Clifford Merck's initials on it (CT 531), a shotgun (CT 531), a silver coin collection (CT 531, 538), two Social Security checks (CT 530), and a silver watch (CT 532). Due to the "passage of time," Johnson could not recall the type and number of knives that were in the collection (CT 534, 537), could not describe the color of the revolver (CT 535), could not identify the type and gauge of the shotgun (CT 537-538), could not remember the number, packaging and value of the coins in the collection (CT 538), could not remember the color of the

Social Security checks (CT 539), and could not describe the band of the silver watch (CT 544).

Catherine Glass, appellant's sister, testified that she remembered previously speaking with law enforcement officers about the case, but due to the passage of time she could not recall the identities of the people with whom she spoke or the details of what she said. (PERT, 9/8/94, 85.) The parties then stipulated that Glass was interviewed by Sergeant Craig Fraley on January 28, 1985, and by District Attorney Investigator Chris Hillis on July 29, 1986. (PERT, 9/8/94, 85.) Glass thought that she may have given a ring that she had received from either appellant or Gerry Tags to one of the detectives. (PERT, 9/8/94, 88.) Glass, however, could not recall if the ring shown to her in court, which had been identified as having belonged to Alma Merck (PERT, 9/8/94, 13), was the ring she had previously received.[47] (PERT, 9/8/94, 88.). She explained, "That's been a lot of years ago," and that she had only a vague memory of what happened when she was interviewed by the detectives. (PERT, 9/8/94, 13, 88.)

4. The Magistrate's Ruling

At the end of the combined evidentiary hearing and preliminary examination, the magistrate denied appellant's motion to dismiss the complaint. (PERT, 9/12/94, 116-117.) The magistrate explained that although many witnesses needed to refresh their memories by reviewing notes and audio tapes, his "general impression" was "that [the witnesses] in a lot of instances have remarkable recollection of what was transpiring back at that time." (PERT, 9/12/94, 116.) Additionally, the magistrate did not "find any deliberate acts by law enforcement or the agencies not to bring this case to trial or to push forward with it as soon as they could."

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[47]The ring shown to Catherine Glass at the hearing was the ring that Sergeant Fraley claimed to have received from her. (PERT, 9/8/94, 10-11, 88.)

(PERT, 9/12/94, 116.) According to the magistrate, it appeared that "there was an inadvertent failure to detect a critical fingerprint analysis," and that "as late as '86, '87 there were other people seriously considered as suspects in the case that were being investigated." (PERT, 9/12/94, 116-117.) Finally, the court observed that "the testimony of Mr. Smith coupled with the fingerprint . . . [that] connected Robert Cowan with the case certainly added [a] substantial amount to the body of evidence against the defendants."[48] (PERT, 9/12/94, 117.)

c. Motion to Dismiss the Information

On November 3, 1994, appellant filed a motion to dismiss the information based on prejudicial pre-arrest delay. (CT 694.) The motion asserted that the 10-year delay violated appellant's right to a fair trial under both the federal and state constitutions, and was based in part on the transcript of the combined evidentiary hearing and preliminary examination. (CT 695.) Also attached as exhibits to the motion were nine law enforcement reports that described some of the evidence that, years earlier, had been gathered against appellant in connection with the killings of the Mercks and Russell. (CT 718-744.) The reports included interviews with witnesses Ronnie Woodin (on January 24, 1985) and Emma Foreman, who was Gerry Tags's

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[48]The magistrate's reference to "the testimony of Mr. Smith" related to testimony given by Jimmy Dwayne Smith at the preliminary examination. The magistrate, however, overlooked the fact that Smith did not make himself known to law enforcement until August 15, 1994, one week *after* appellant and his brother were arrested. (PERT, 9/8/94, 113, 119-120.) Thus, the information Smith provided to Detective Christopherson had no bearing on the determination by the Kern County District Attorney that there was probable cause to arrest appellant. Furthermore, Smith's testimony primarily concerned admissions made to him, and property given to him, by appellant's brother that implicated appellant's brother in the killings of the Mercks and the killing of Jewell Russell. (PERT, 9/8/94, 102, 107, 110.) Smith was never called as a witness at appellant's trial. In fact, an abstract of judgment showed that on May 10, 1984, Smith had been sentenced to two years in state prison with 130 days credit, indicating that Smith was actually in state prison at the time he claimed to have been with appellant and his brother. (PERT, 9/8/94, 127; CT 689.)

mother (on January 26, 1990).

According to the report of the interview with Ronnie Woodin, Sergeant Fraley was told by Woodin that sometime around September 10, 1984, he purchased an unusual cigarette lighter case from appellant. (CT 743.) Woodin gave the case, which was metal and decorated with an Indian figure made from blue stones, to Fraley. (CT 743.) Woodin also told Fraley that when he asked how appellant obtained the lighter case, appellant told Woodin to "never mind where he got it." (CT 743.) According to the report of the interview with Emma Foreman, Shafter Police Sergeant Buoni and Lieutenant Porter were told by Foreman that appellant had admitted to her that he murdered an old couple in Bakersfield by beating them to death. (CT 741.) Foreman could not recall the exact date that appellant made this admission, but she believed that the admission occurred about a month before or after Russell's killing. (CT 741.)

Also filed in support of appellant's motion for dismissal was appellant's declaration executed on November 4, 1994, in which appellant stated that he had "no present memory due to the lapse of time as to his whereabouts or activities between 9-1-84 to 9-10-84." (CT 748.)

On November 28, 1994, the prosecution filed an opposition to appellant's motion to dismiss. (CT 774.) The opposition was supported by the declaration of Deputy District Attorney Cynthia Zimmer. (CT 775-787.) That declaration outlined the investigation that had been done by the Kern County Sheriff's Department, the Kern County District Attorney and the Shafter Police Department. (CT 775-787.) The prosecution contended that appellant had not demonstrated prejudice resulting from the pre-arrest delay, and alternatively, that any prejudice was outweighed by the need for the prosecution to further investigate the case. (CT 789.)

The superior court heard oral argument on appellant's motion to dismiss on November

29, 1994. (CT 823-833.) During the argument, defense counsel emphasized that appellant had been prejudiced by fingerprint technician Jerry Roper's faded memory and diminished eyesight. Defense counsel argued that Roper could not recall the specific factors that led to his finding that none of the latent prints matched appellant's known prints, and that Roper could not refresh his memory by reexamining the prints because his eyesight had deteriorated over the years. (CT 825-826.) Defense counsel also informed the court that he had just been told by the prosecutor that some of the evidence from the case had been lost by the law enforcement agencies, and that appellant would be submitting a supplemental brief to address the prejudice resulting from the loss of that evidence. (CT 831.) The superior court then delayed ruling on appellant's motion until it received the supplemental briefing. (CT 832.)

d. First Supplemental Motion to Dismiss the Information

On December 28, 1994, appellant filed a supplemental motion to dismiss the information due to pre-arrest delay. (CT 847.) This supplemental motion was based on the fact that various items of evidence recovered from the Mercks' residence had been lost by the Kern County Sheriff's Department. (CT 850-851.) The missing evidence included the following items that had been found stacked up in the area of the back porch: papers, jewelry boxes, a radio, and a cutlery set (CT 854); and the following items that had been found in the living room: purses, a plate, $50 U.S. currency, a cigar box, a coupon book, cut pieces of lamp cord, and a piece of carpet. (CT 854-855.) Appellant contended that he was prejudiced by the loss of evidence because he was now unable to examine the evidence for the presence of fingerprints. (CT 851.) A finding that appellant's fingerprints were not present on the evidence would have supported his claim that he did not commit the killings. (CT 851.) In its opposition pleading, the prosecution

explained that the Sheriff's property manager had investigated the disappearance of the evidence and concluded that the evidence probably had been destroyed in 1985. (CT 876.) The prosecution further argued that the missing evidence was not material, and that the loss of the evidence did not prejudice appellant's defense. (CT 879.)

An evidentiary hearing relating to the missing evidence was held on January 30, 1995. (CT 898.) At the hearing, William Thompson testified that he had been the property manager for the Sheriff's Department since March, 1992. (CT 904.) Thompson was unable to locate any records indicating what had become of the missing evidence, although other case evidence had been checked out for analysis by the crime laboratory and then returned on May 4, 1985. (CT 906.) Thompson's investigation led him to believe that the lost property had disappeared as of July, 1985. (CT 908, 916.) After taking appellant's motion under submission, the superior court denied the motion, without explanation, on February 10, 1995. (Augmented CT 205[49], CT 926.)

e. Co-defendant Gerald Cowan's Motion to Dismiss, Which Was Joined by Appellant

On January 19, 1996, co-defendant Gerald Cowan filed another motion to dismiss based on a violation of due process resulting from pre-arrest delay. (CT 1069.) Appellant joined in that motion on January 26, 1996. (CT 1096.) The motion alleged that the memories of defense witnesses had faded, that law enforcement had lost "potentially exculpatory evidence," that "five potential alibi witnesses" could not be located, and that a "potentially exculpatory witness"

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[49]There is no minute order in appellant's court file that specifically shows the denial of the motion. The motion, however, was joined by co-defendant Gerald Cowan. (Augmented CT 201.) In the co-defendant's court file, a minute order dated February 10, 1995, indicates that the motion to dismiss was denied. (Augmented CT 205.) Additionally, a minute order filed in appellant's case on September 11, 1995 clarified that all prior motions to dismiss had been denied. (CT 1051.)

(Gerry Tags) had died. (CT 1072, 1074.) Gerald Cowan's motion was never ruled upon by the court, apparently because Gerald entered a no contest plea to the lesser offense of voluntary manslaughter (Count III), and admitted to personal use of a knife, on January 29, 1996. (Reporter's Transcript, 1/29/96, 10.)

f. Renewal of Motion to Dismiss During Conditional Examination of James Roy Woodin

On February 22, 1996, appellant orally renewed his motion to dismiss during the conditional examination of James Roy Woodin. (CT 1134.) Appellant's counsel questioned Woodin about statements he had allegedly made during an interview with Sergeant Diederich and Sergeant Fraley on June 18, 1985. According to the report of the interview, Woodin said that he was told by his brother, Ronnie Woodin, that Gerald Cowan, not appellant, had sold Ronnie a turquoise or silver lighter case that was taken during the killing of an old man. (CT 1108-1109.) During the conditional examination, Woodin initially denied making the statements contained in the report. (CT 1124, 1126, 1128.) Later, however, when asked if he had told the officers that Ronnie had said the lighter was purchased from Gerald Cowan, Woodin responded, "No, I don't remember it, period, being questioned about this." (CT 1127.) Based on this testimony, in which Woodin described his faded memory, appellant renewed his motion to dismiss. Appellant's motion was denied. (CT 1136-1137.)

g. Second and Third Supplemental Motions to Dismiss

On March 14 and 25, 1996, appellant and his co-defendant jointly filed supplemental motions to dismiss for a violation of due process resulting from pre-arrest delay.[50] (CT 1202,

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[50]The no contest plea previously entered by co-defendant Gerald Cowan was set aside by the court on the ground that a prosecution for voluntary manslaughter was barred by the statute of

1268.) The dismissal motions renewed and supplemented appellant's prior dismissal motions as well as the co-defendant's prior dismissal motions in which appellant had joined. (CT 1202-1203, 1268-1269.) In the motions, appellant identified additional prejudice resulting from the delay. The prejudice included the fact that the property seized by the Bakersfield police during the arrests of Danny Phinney and Robb Lutts on October 14, 1984 was no longer in the custody of the police. The property, which included women's jewelry and men's watches, had been kept for only seven years. (CT 1146-1147, 1165, 1203-1204.) Had such jewelry been retained, appellant argued, witnesses may have been able to identify it as jewelry that had been taken from the Mercks' home, thereby suggesting that Phinney and Lutts, rather than appellant and his brother, were the killers. (CT 1203-1204.)

Appellant additionally contended that his penalty phase defense was prejudiced because records relating to his prior prison incarceration were destroyed sometime between the date of the killings and the date of appellant's arrest. (CT 1204.) According to appellant's motion, these records would have shown that appellant adjusted well when incarcerated, and had not received any disciplinary violations. (CT 1204.)

The supplemental dismissal motions were argued and denied on March 27, 1996. (RT 162-183.) The court did not provide any explanation for its decision other than to state that it was interpreting the case law as requiring that appellant demonstrate actual prejudice, rather than presuming prejudice from the delay. (RT 183.)

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limitations. (Augmented CT 869.) That ruling was later reversed by this Court (see *People v. Cowan* (1996) 14 Cal.4th 367), and Gerald Cowan re-entered his no contest plea to the lesser offense of voluntary manslaughter on February 20, 1997. (Augmented CT 892 .)

h. Renewal of Motion to Dismiss During Trial

During the cross-examination of Mitzi Cowan, who was the last witness called by the prosecution, appellant "renew[ed] the motion for prearrest, prejudicial delay." (RT 2462.) The additional ground for the motion articulated by defense counsel concerned the loss of witnesses who purportedly could have testified to having seen Jewell Russell alive at a time that was later than the time that the prosecution claimed that he was killed. (RT 2462-2463.) The trial court denied the renewed motion, stating that the prior rulings "will remain the same." (RT 2463.)

3. The Trial Court Abused its Discretion in Denying Appellant's Motions to Dismiss for Pre-Arrest Delay

a. Applicable Law – California Constitution

In *People v. Catlin* (2001) 26 Cal.4th 81, 107, this Court explained that delay in prosecution that occurs before the accused is arrested may constitute a denial of the right to a fair trial and to due process of law under article I, section 15 of the California Constitution, and therefore require dismissal of the case. A three-step analysis is employed to determine whether a pre-accusation delay has violated a defendant's state constitutional rights. First, the court decides whether the defendant has demonstrated prejudice arising from the delay. (*Ibid.*; see also *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504-507; *People v. Morris* (1988) 46 Cal.3d 1, 37, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 910-912.) A defendant may establish prejudice by the "'loss of material witnesses due to a lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107, quoting *People v. Morris*, *supra*, 46 Cal.3d at p. 37.) Even the faded memory of

prosecution witnesses may cause prejudice where the loss of memory precludes adequate cross-examination. (*People v. Hill* (1984) 37 Cal.3d 491, 498 [memories of victims were "apparently too uncertain to permit adequate cross-examination on the particulars of the person who attacked them"].) Additionally, "'[i]f witnesses die or disappear during a delay, the prejudice is obvious.'" (*People v. Hartman* (1985) 170 Cal.App.3d 572, 579.)

If the defendant is able to show prejudice, the court examines the justification offered by the prosecution for the delay. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107; see also *Scherling v. Superior Court*, *supra*, 22 Cal.3d at pp. 504-507; *People v. Morris*, *supra*, 46 Cal.3d at p. 37; *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at pp. 910-912.) The reasonableness of the prosecution's justification is reviewed in light of "the particular circumstances surrounding the decision not to prosecute, the length of the delay, and the reasons for the subsequent re-evaluation and prosecution . . . ." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.) While "a prosecutor is entitled to a reasonable time in which to investigate an offense for the purpose of determining whether a prosecution is warranted . . . . police negligence in evidence gathering or case preparation for evaluation by the district attorney cannot justify a lengthy pre-arrest delay." (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.) Thus, "[a] 'legitimate reason' logically requires something more than the absence of governmental bad faith. Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial." (*Penny v. Superior Court (County of Tulare)* (1972) 28 Cal.App.3d 941, 953.) "Further, the delay may be unreasonable if the

prosecution delayed in filing charges when all the evidence was discovered years earlier." (*People v. Hartman*, *supra*, 170 Cal.App.3d at p. 581.)

If the prosecution successfully establishes some justification, the court balances the harm to the defendant against the justification for the delay. (*People v. Catlin*, *supra*, 26 Cal.4th at 107.) "Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. By the same token, the more reasonable the delay, the more prejudice the defense would have to show to require dismissal." (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 915.) Moreover, this Court has stated that "it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligence of law enforcement agencies or the prosecution."[51] (*Scherling v. Superior Court*, *supra*, 22 Cal.3d at p. 508; see also *People v. Pellegrino* (1978) 86 Cal.App.3d 776, 780.)

A trial court's ruling on the motion to dismiss is reviewed for abuse of discretion, and its factual determinations will be upheld only if supported by substantial evidence. (*People v. Morris*, *supra*, 46 Cal.3d at p. 38; *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at pp. 911-912.)

b. Applicable Law – Federal Constitution

In *United States v. Marion* (1971) 404 U.S. 307, 324 and *United States v. Lovasco* (1977) 431 U.S. 783, 795, the United States Supreme Court similarly recognized that a delay in prosecution that occurs before an indictment is filed may constitute a denial of the right to a fair

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[51]This point seemed to be overlooked by the magistrate at the preliminary examination, who, in denying the initial motion for dismissal, emphasized that he did not "find any deliberate acts by law enforcement or the agencies not to bring this case to trial or to push forward with it as soon as they could." (PERT, 9/12/94,116.) Appellant, nevertheless, does not concede that the prosecution was merely negligent in delaying appellant's arrest.

trial and to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and therefore require dismissal of the case. According to this Court's opinion in *Caitlin*, an analysis similar to that used under state law is employed to determine federal constitutional error, except that the defendant must make an additional showing that the delay in prosecution was undertaken to gain a tactical advantage for the prosecution. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.) As authority for this conclusion, *Catlin* cites to *United States v. Lovasco*, *supra*, 431 U.S. at p. 795. Appellant respectfully submits that this Court has misinterpreted *Lovasco*'s holding. Indeed, both the Ninth and Fourth Circuits of the United States Court of Appeals have expressly rejected the interpretation of *Lovasco* espoused in *Catlin*.[52] (*United States v. Moran* (9th Cir. 1985) 759 F.2d 777, 781; *Howell v. Barker* (4th Cir. 1990) 904 F.2d 889, 895.)

In *United States v. Moran*, the government asserted that certain language from *United States v. Lovasco*, *supra*, 431 U.S. at p. 795, fn. 17, as well as from *United States v. Marion* (1971) 404 U.S. 307, 324, required that the defendant "prove that the government intentionally delayed the indictment to gain a tactical advantage or delayed it in reckless disregard of the circumstances indicating an appreciable risk of harm to the defense." (*United States v. Moran*, *supra*, 759 F.2d at p. 781.) That contention was rejected by the Ninth Circuit, which explained, "The language from these two cases merely acknowledges governmental concessions that

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[52]Appellant acknowledges that the Ninth and Fourth circuits represent the minority view and that the remaining federal circuits have held that in order to establish that a lengthy pre-indictment delay rises to the level of a due process violation, a defendant must show both actual prejudice and that the government intentionally delayed the indictment to gain an unfair tactical advantage or had some other bad faith motive. (See cases cited in *Jones v. Angelone* (4th Cir. 1996) 94 F.3d 900, 905.) As explained below, however, this view is contrary to the holding of the United States Supreme Court in *Lovasco*.

intentional or reckless conduct would or might be considered violations of the due process clause if actual prejudice has been shown. The *Lovasco* court did not set intent or recklessness as required standards of fault. In fact, in both the *Marion* and *Lovasco* cases, the Court stated that it 'could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions.' *Lovasco*, 431 U.S. at 796." (*United States v. Moran*, *supra*, 759 F.2d at p. 781.) *Moran* then quoted the concluding statement from *Lovasco*: "'We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment.'" (*United States v. Moran*, *supra*, 759 F.2d at p. 781, quoting *United States v. Lovasco*, *supra*, 431 U.S. at p. 797.)

Moran, therefore, held that the determination of whether a pre-indictment delay has violated due process is essentially decided under a balancing test, and that intentional or reckless behavior by the government is not a prerequisite to a finding of a constitutional violation. (*United States v. Moran*, *supra*, 759 F.2d at p. 782.) A due process violation may result from "mere negligent conduct by the prosecutors," although "the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged." (*Ibid.*)

A similar conclusion was reached by the Fourth Circuit in *Howell v. Barker*, *supra*, 904 F.2d at p. 895. The Fourth Circuit explained that "in both *Lovasco* and *Marion*, the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial necessitated a case-by-case inquiry based on the circumstances of each case. Rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court

examined the facts in conjunction with the basic due process inquiry: 'whether the action complained of . . . violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions" . . . and which define "the community's sense of fair play and decency."'" (*Ibid.*, quoting *United States v. Lovasco*, *supra*, 431 U.S. at p. 790.)

Thus, the Fourth Circuit found did not agree with that in order to establish a due process violation a defendant had to prove an improper prosecutorial motive, in addition to establishing prejudice. "Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive." (*Ibid.*)

c. Appellant Was Prejudiced by the 10-Year Delay Before His Arrest and the Filing of the Complaint

The 10-year delay before appellant's arrest and the filing of the complaint substantially impaired appellant's ability to defend against the murder charges. Indeed, appellant suffered prejudice in numerous ways.

1. Impaired Ability to Rebut Evidence That Appellant's Fingerprints Were Lifted from the Mercks' Residence

One of the most important factual issues for the jury to decide at trial was whether any of the latent fingerprints lifted from the Mercks' residence matched appellant's known fingerprints. When Kern County technical investigator Jerry Roper conducted his examination, he found that

there was no match. (CT 635; PERT, 9/12/94, 97, 101; RT 1589-1590.) At the time of that examination, Roper had seven years of experience conducting fingerprint comparisons and had qualified as an expert witness in court on approximately 600-800 occasions. (RT 1591-1592.) However, when the fingerprints were reexamined almost ten years later, Kern County evidence technician Sharon Pierce and Martin Collins, a Department of Justice criminalist, reached a different result, finding that two of the latent prints were made by appellant. (PERT, 9/8/94, 188, 190; RT 1957, 2029.)

This fingerprint evidence was critical to the case. It was the results of the retesting that led directly to the prosecutor's decision to file a complaint against appellant. Due to the passage of time, however, appellant's ability to rebut the testimony of the prosecution's criminalists with Roper's earlier findings was drastically impaired. Roper left the technical investigation section in 1986, and by the time of the preliminary examination in September, 1994, he no longer had a recollection of performing any fingerprint comparisons in appellant's case. (PERT, 9/12/94, 94, 96.) In addition, Roper's memory was not refreshed by his reviewing the fingerprint comparison request form and the cards containing the fingerprints lifted from the Mercks' residence. (PERT, 9/12/94, 94, 96.) Roper was thus unable to explain what differences he had previously found between the latent prints and appellant's known prints that led him to conclude that the latent prints were not made by appellant. (PERT, 9/12/94, 107.) Moreover, this prejudice could not be remedied by having Roper reexamine the latent and known fingerprints. By the time of the preliminary examination, Roper's eyesight had deteriorated to such an extent that he was no longer able to conduct fingerprint comparisons. (PERT, 9/12/94, 107.) Nor could the prejudice have been remedied by having another criminalist reexamine the latent and known fingerprints.

No other criminalist could have known what differences were observed by Roper that led him to conclude that the latent prints were not left by appellant.

Thus, although Roper did testify about the results of his 1984 examination (RT 1589-1590), that testimony was far less weighty in the absence of an explanation of the differences that Roper discovered between the known and latent prints. While Martin Collins was able to identify the number of points of similarity he observed (RT 2030), Roper was unable to rebut that testimony by identifying the number of points of difference he found. The lengthy pre-arrest delay therefore deprived appellant of competent, expert testimony that would have rebutted the prosecution's claim that appellant's fingerprints had been located at the crime scene.

Appellant's loss of Roper's expert testimony is similar to the loss of evidence found to be prejudicial in *People v. Hartman*, *supra*, 170 Cal.App.3d 572. In *Hartman*, the defendant was charged with a murder that occurred seven years earlier. On the day after the victim's body was found, Dr. Carpenter, a deputy coroner, concluded that the victim had died from natural causes. (*Id.*, at p. 575.) Approximately one year later, the victim's widow hired an independent pathologist, Dr. Jindrich, who, after performing a second autopsy, found that the victim had died at the hands of another. (*Id.*, at p. 576.) Several months later, Dr. Kornblum, another pathologist hired by the victim's widow, reviewed the case. Dr. Kornblum agreed with the second autopsy that the victim's death was a homicide. (*Id.*, at p. 577.) Six more years passed before the District Attorney charged the defendant with murder. (*Ibid.*)

In holding that the defendant's right to due process of law had been violated, the Court of Appeal concluded that the defendant had suffered prejudice from the prolonged delay in charging him with the murder. (*Id.*, at pp. 579-580.) By the time that the murder charge was filed, both

Dr. Carpenter and his supervisor, Dr. Wisely, who had agreed with Dr. Carpenter's finding that the death was not a homicide, had passed away. "As a result, Dr. Carpenter was unable to explain his findings or conclusions at the trial, or to rebut the implications, raised by several witnesses, that he had been negligent. Likewise, Dr. Wisely could not testify why he supported Dr. Carpenter's determination that Langlos' death was due to natural causes." (*Id.*, at pp. 579-580.)

Here, although Jerry Roper had not passed away, the prolonged passage of time placed Roper in a situation similar to that of Dr. Carpenter in *Hartman*. Roper was unable to explain his findings or conclusions with respect to his fingerprint comparisons. He also was unable to rebut the claim made by prosecution witnesses that his examination was not competently performed.[53] (RT 1999, 2108.) As a result, the prejudice resulting from Jerry Roper's faded memory and lost eyesight was huge. Appellant lost a critical tool for attacking the accuracy of the fingerprint evidence relied upon by the prosecution to prove its case. Because Roper could no longer reconstruct what led to his negative conclusions, no other expert could be made privy to Roper's analysis and methodology. Roper's inability to defend the contrary conclusion he reached when he examined the fingerprint evidence much more proximately to the time of the crimes was therefore beyond repair, and the prosecutor heavily capitalized on the disadvantage it had caused to appellant's defense in its closing argument. (RT 2657-2658.).

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[53]The prosecutor also took advantage of Roper's inability to rebut these claims by strenuously arguing Roper's incompetence during her closing summation. (RT 2657.)

2. Appellant's Loss of Memory as to Both His Whereabouts at the Time of the Killings and Whether He Ever Possessed Any Property Belonging to the Mercks

As a result of the prolonged pre-arrest delay, appellant was unable to recall his whereabouts at the time that the Mercks were killed, and also unable to recall how he obtained possession of any property that may have belonged to the Mercks. In a declaration attached to appellant's initial motion to dismiss the complaint, defense counsel stated that "[d]ue to the passage of time," appellant was unable to recall "where he was, who he was with, or where he was living, or located at the time of the homicides." (CT 497.) The declaration further stated that appellant had no recollection of whether he ever possessed, and if so, how he obtained possession of, any of the property allegedly belonging to the Mercks. (CT 497.)

A declaration executed by appellant himself was filed in support of the motion to dismiss the information. In that declaration, appellant stated that he had "no present memory due to the lapse of time as to his whereabouts or activities between 9-1-84 to 9-10-84." (CT 748.) Appellant also described his loss of memory in his interview with Detective Christopherson after his arrest on August 8, 1994. (PERT, 9/12/94, 59-60, 73.) In that interview, appellant explained that he could not remember if he had ever been inside the Mercks' home. (PERT, 9/12/94, 60.) Thus, appellant had no way of knowing, to say nothing of proving, where he was at the time and on the day that the prosecution claimed he had killed the Mercks.

The declarations of appellant and his counsel, and appellant's interview with Christopherson, were more than adequate to establish prejudice. In *People v. Vanderburg* (1973) 32 Cal.App.3d 526, 531, the Court of Appeal stated that "[the defendant]'s statement in his affidavit that because of the 11-month delay (from May 20, 1971 to April 10, 1972) he is unable

to account for his whereabouts on May 20, 1971, is sufficient to support a finding that he suffered prejudice from the delay in prosecution." (See also *People v. Pellegrino, supra*, 86 Cal.App.3d at p. 780 [Attorney General conceded that the defendants' affidavits of inability to recall demonstrated enough prejudice to shift the burden to the state to justify the delay].)

The prejudice resulting from appellant's loss of memory was great. Since he could not recall his whereabouts at the time of his killings, he was unable to identify any alibi witnesses for his counsel to subpoena. (*Jones v. Superior Court* (1971) 3 Cal.3d 734, 740 ["most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and to secure evidence of his activities at time of the events in question"].) Additionally, appellant's faded memory prevented him from being able to rebut the prosecution's claim that he possessed property belonging to the Mercks shortly after the killings. Absent the delay, appellant may well have been able to explain that he never possessed any property that belonged to the Mercks, or alternatively that even if he did, he either received the property from someone else without any knowledge that the property was taken during the killings, or that he did know that the property was taken during the killings but did not participate in those crimes.

3. Faded Memories of Witnesses Regarding Appellant Possessing Property That Was Allegedly Taken From The Mercks

A large part of the prosecution's case against appellant was based on testimony from witnesses that appellant possessed property that was allegedly taken from the Mercks during the killings. These witnesses, however, suffered from faded memories that prevented adequate cross-examination that may well have undermined the prosecution's case. For example, during the first evidentiary hearing, Robert Johnson, who was Alma Merck's son, was unable to

completely describe the property that was missing from the Mercks' residence after the killings had occurred.[54] (CT 534, 537-538, 539, 544, 547, 547A.) Had Johnson's descriptions been more detailed, the defense may have been able to show that the property appellant possessed did not actually match the property taken from the Mercks. Also, at the evidentiary hearing, appellant's sister, Catherine Glass, was unable to recall whether a ring shown to her in court was the ring that had been given to her by either appellant or Gerry Tags.[55] (PERT, 9/8/94, 88.) The ring shown to Glass was identified as having belonged to Alma Merck. Had Glass's memory been sharper, she may have been able to testify that the ring she received from either appellant or Tags was not the ring shown to her in court.

At trial, Jerry Jones, the husband of Alma's granddaughter, was asked if he recognized a particular lighter case as having belonged to Clifford. (RT 2054.) The prosecution's theory was that appellant took the lighter case during the killing of Clifford and then sold it to Ronnie Woodin, who later gave it to Sergeant Fraley. Due to the passage of time, however, Jones could not recognize whether the lighter case shown to him in court was the one owned by Clifford. (RT 2054.) Woodin also could not be certain that the lighter case was the same one sold to him by appellant. His testimony was only that "as far as [he could] remember," it "look[ed] like the same one." (RT 1925-1926.) Had the witnesses' memories been clearer about the lighter case, the defense may have been able to show that the lighter case that appellant sold to Woodin was

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[54]Johnson's memory was no better at trial. Johnson did not think he could recognize a ring that his mother had owned (RT 1498-1499), and he could not recall anything distinctive about a lighter that Clifford had used to light his cigarettes. (RT 1499-1500.)

[55]At trial, Glass was again shown the ring and, as before, was unable to recall if it was the ring she had obtained from appellant. (RT 1942.)

not actually the one that Clifford owned.

The prosecution, at trial, also sought to link appellant to the killings through evidence relating to Clifford's Colt handgun that was missing when the bodies were found. The weapon was recovered by the police during the arrest of Danny Phinney and Robb Lutts, at a motel room, on October 14, 1984. Phinney and Lutts claimed that they had obtained the handgun from appellant, but their faded memories precluded effective cross-examination. Phinney, at least in part as a result of the passage of time, could recall only "to an extent" that he and appellant had met in September of 1984, and he could not remember the exact date or time. (RT 1652, 1654.) He was also only "pretty sure" that it was appellant who traded the Colt handgun through him to Robb Lutts. (RT 1600.)

Lutts testified that, due to the passage of time, he did not have a clear memory of how he obtained the Colt handgun. (RT 1631, 1635.) Although he believed that he received the weapon in a trade for drugs with appellant, and that Phinney was "somehow" involved in the transaction, he could not recall appellant being present at that time. (RT 1631, 1640, 1648.) Additionally, when asked at trial to identify Robert Cowan, Lutts initially pointed at the courtroom bailiff. Only after the prosecutor asked if appellant was at counsel table was Lutts able to identify him. Lutts explained his error by noting that 12 years had passed since he had last seen appellant. (RT 1636-1637.) Thus, the uncertain memories of Phinney and Lutts precluded defense counsel from effectively cross-examining them on one of the most critical issues in the case – whether appellant had given Clifford's handgun to Phinney and Lutts. Had the memories of the witnesses been clearer, defense counsel may well have been able to show that appellant was not the source of the weapon. Moreover, such a showing would have corroborated appellant's theory that the

Mercks were actually killed by Lutts and Phinney.[56] (See RT 2722-2724.)

This Court has recognized that prejudice will result when a witness's faded memory precludes defense counsel from engaging in effective cross-examination. (*People v. Hill*, *supra*, 37 Cal.3d at pp. 498-499.) In *Hill*, the defendant was charged with several counts of robbery, burglary and rape, and the prosecution based its case principally on the eyewitness testimony of two of the three victims. The defendant claimed that he was prejudiced because the memories of two of the victims had faded over time. One victim was able to identify the defendant at a lineup within a few months of the crime, but by the time of the preliminary hearing she had "mentally blocked" much of her memory on the subject. (*Ibid.*, internal quotations omitted.) She could testify only that the defendant "look[ed] like" the same man. (*Ibid.*, internal quotations omitted.) When asked about aspects of the perpetrator's physical appearance, she responded many times that she could not recall. Likewise, the second victim's memory had developed significant gaps. Initially, she selected the defendant's photograph from a photo spread, but later could not recall whether the officer who showed her the photo spread told her that the perpetrator's photograph was among them. Then, when asked to participate in a lineup, she circled two numbers on the lineup card, that of the defendant and another person, writing in the margin that "it was difficult to make a positive identification after so much time had passed." (*Ibid.*)

The State in *Hill* objected to the defendant's reliance on the fading memories of the two

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[56]It is possible that the claim of memory loss by Phinney and Lutts was conveniently feigned in order for them to more effectively point the finger at appellant and away from themselves as the killers of the Mercks. If that were the case, appellant would have been further prejudiced by the pre-arrest delay, which provided Phinney and Lutts with a seemingly plausible excuse, loss of memory, for not having to give answers that would have revealed their culpability.

victims as a ground for prejudice, "arguing that any deterioration in their memories redounded to defendant's benefit because it weakened the prosecution's case." (*Ibid.*) That argument was rejected by this Court, which explained that "to contend that a faded memory aids the defendant is to assume defendant's guilt; if he is innocent, obviously he would prefer witnesses who forthrightly so testify." (*Ibid.*) This Court further explained that usually when a defendant claims prejudice resulting from a witness's faded memory, he is referring to a defense witness, "[b]ut we can see no reason why a defendant may not seek to prove that the fading memory of a prosecution witness has also made a fair trial impossible." (*Ibid.*) This point is particularly apt here, where some of the witnesses were actually third party suspects who had a self-interested motive to claim, conveniently, that the passage of time had resulted in their memories fading.

In *Hill*, this Court found that if the victims had sharper memories, they might have excluded the defendant as the person who had assaulted them. (*Ibid.*) Instead, their memories were "apparently too uncertain to permit adequate cross-examination of the particulars of the person who attacked them." (*Ibid.*) Likewise, in appellant's case, if the witnesses' memories had not faded, defense counsel may have been able to establish through cross-examination that appellant did not possess any of the property that was allegedly taken from the Mercks, or alternatively that if he did possess such property, he did not obtain it by participation in, or even with knowledge of, the killings. With the witnesses' memories faded, however, appellant was unfairly deprived of this opportunity to rebut the prosecution's case.

4. Faded Memories of Witnesses Regarding Admissions Allegedly Made by Appellant

Appellant was additionally prejudiced by the fading memory of Emma Foreman

regarding admissions allegedly made by appellant. On January 26, 1990, Foreman told Shafter Police Sergeant Buoni and Lieutenant Porter that appellant had admitted to her that he had murdered an old couple in Bakersfield by beating them to death. (CT 741, RT 2392.) Foreman, however, could not recall the exact date that appellant made this admission, but she believed that the admission was made either about a month before or after Jewell Russell's killing. (CT 741, RT 2490.) As discussed above, to assume that Foreman's uncertain memory would necessarily aid the defense is inconsistent with the presumption of innocence. Rather, in assessing prejudice under *Hill*, it must be accepted that had the witness's memory been certain she may well have remembered that the defendant's statement was actually made about a month before Jewell Russell's killing, at a time when the Mercks were still alive. Thus, adequate cross-examination could have shown that if in fact appellant made such an admission, his statement was not a reference to the killing of the Mercks.

5. Loss of Evidence

Finally, appellant was prejudiced by the loss of material evidence by the Kern County Sheriff's Department and the Bakersfield Police Department. The evidence lost by the Sheriff's Department consisted of both property that was stacked up in the area of the Mercks' back porch and property that was found in the Mercks' living room. The former included papers, jewelry boxes, a radio and a cutlery set, while the latter included purses, a plate, $50 U.S. currency, a cigar box, a coupon book, cut pieces of lamp cord, and a piece of carpet. (CT 854-855.) The Sheriff's property manager determined that the evidence was destroyed as of July, 1985, long before appellant's arrest. (CT 876.) Appellant was prejudiced by this loss of evidence because he was unable to have it examined for the presence of fingerprints. A finding that appellant's

prints were not on the evidence, or that the prints of another suspect were, would have supported his claim that he did not commit the killings.

The evidence lost by the Bakersfield Police Department was property seized by the police during the arrests of Danny Phinney and Robb Lutts at the Caravan Inn on October 14, 1984. The lost property, which included women's jewelry and men's watches, was kept by the police for only seven years after the arrests. (CT 1146-1147, 1165, 1203-1204.) Appellant was prejudiced by the loss because had such jewelry been retained, witnesses may have been able to identify it as jewelry taken from the Mercks' home during the killings. Such testimony would have corroborated appellant's defense that Phinney and Lutts, rather than appellant and his brother, were the killers.

d. The Almost 10-Year Delay Before Appellant's Arrest and the Filing of the Complaint Was Unreasonable and Unnecessary

Balanced against the extreme prejudice that resulted from the 10-year pre-arrest delay is the absence of a legitimate reason for the tardy prosecution. Indeed, early on in the investigation, law enforcement agencies had gathered sufficient evidence to justify appellant's arrest. On December 21, 1984, Sergeant Diederich learned from Danny Phinney that in early September, 1984, appellant had allegedly given Phinney and Robb Lutts the Colt handgun taken from the Mercks' residence during the homicides. (CT 314; PERT, 9/7/94, 179.) Phinney also told Diederich that he saw appellant in possession of coins, men's and women's jewelry, jewelry boxes, social security checks that possibly had a McClean Street address on them, and a man's wallet that contained a California driver's license for a person with a name similar to "Myerick" with a three digit address on McClean Street and a birth date of 1911 or 1914. (PERT, 9/7/94,

184-186.)

Not long thereafter, on January 24, 1985, Sergeant Fraley learned from Ronnie Woodin that on approximately September 10, 1984, appellant sold Woodin a lighter case with a turquoise inset. (PERT, 9/7/94.) Four days later, Catherine Glass told Sergeant Fraley that three or four months earlier she had bought a ring from appellant. The ring was described as being inscribed with the initials "A" and "M." (PERT, 9/8/94, 10-11.) On January 30, 1985, Alma Merck's daughter, Mary Watts, identified the ring that Glass gave to Sergeant Fraley as having belonged to her mother. (PERT, 9/8/84, 13.) On the same date, Jerry Jones told Sergeant Fraley that he recognized the lighter case that Woodin gave to Fraley as having been owned by Clifford Merck. (PERT, 9/8/94, 14.) On February 6, 1985, Betty Turner, another one of Alma's daughters, confirmed to Sergeant Fraley that the lighter case belonged to Clifford and the ring belonged to Alma. (PERT, 9/8/94, 15-16.)

This evidence that appellant allegedly possessed a large amount of stolen property belonging to the Mercks shortly after the robberies and killings was more than sufficient to justify appellant's arrest. Indeed, District Attorney Investigator Christopher Hillis, who investigated the case for about two months during the summer of 1986, testified that he believed that the evidence collected showed that appellant had committed the killings. (PERT, 9/12/94, 80, 85, 86.) The District Attorney decision's not to file a complaint when the case against appellant was first brought to the office by Sergeant Fraley in late 1985 or early 1986, and again when the case was brought to the office by Hillis in the summer of 1986, were unreasonable.

Additionally, the District Attorney and the law enforcement agencies were negligent in failing to diligently pursue the investigation after the initial determinations not to file charges

were made. Once the District Attorney chose not to file a complaint Hillis stopped working on the case. (PERT, 9/12/94, 83.) Not long thereafter, in September, 1987, Sergeant Fraley transferred from the sheriff's homicide unit. In the few months prior to his transfer, he did "very little in the case." (PERT, 9/8/94, 70.) Upon transferring, Fraley gave the case file to his supervisor "for reassignment or continued investigation." (PERT, 9/8/94, 34.) The case, however, was not reassigned and investigation was not continued until almost seven years later, in early 1994.

When, at that time, Detective Christopherson began his review of the file, the case was still considered open, but was no longer assigned to a particular detective for active investigation. (PERT, 9/12/94, 20-21.) In fact, Christopherson found that the most recent report in the file prepared by a Kern County Sheriff's Department detective was dated July, 1987, almost seven years earlier. (PERT, 9/12/94, 24.) It appeared to Christopherson that as of July, 1987, the investigation by the Sheriff's Department had ceased. (PERT, 9/12/94, 26, 27.)

Significantly, Christopherson's investigation did not lead to the discovery of any new evidence prior to the District Attorney's decision to have appellant arrested on August 8, 1994. Instead, the arrest was predicated upon Christopherson's request that Sharon Pierce reexamine evidence that had been in the case file since the time of the killings: the latent fingerprints obtained from the Mercks' house and appellant's known fingerprints. Why almost ten years passed before this evidence was reexamined was never explained by the prosecution. Moreover, this delay was especially negligent in light of Quentin Nerida's testimony at trial that the technical investigation section had a policy that required a second investigator to review the results of all fingerprint comparisons even when no match was found. (RT 1515.) However, no

such check was performed when Roper found that the latents did not match appellant's known prints.

While it is true that Jerry Grimes, who was formerly the supervisor of the technical investigation section, disputed that there was a policy to recheck negative findings (RT 2102, 2104), even in the absence of such a policy the delay in reexamining the fingerprint evidence was inexcusable. According to senior latent print examiner Thomas Jones, Roper was considered to be an incompetent examiner even prior to 1984. (RT 1999.) Jones based his opinion on his review of work that Roper performed in other cases in which Roper failed to make identifications when in fact there were matches between the latents and known prints. (RT 1999, 2021.) Jones expressed his opinion to supervisor Grimes, who believed that although Roper was not totally incompetent as a fingerprint examiner, Roper had not received adequate training.[57] (RT 2108.) Grimes's concerns about Roper's competence led him to request that Jones reexamine prior cases in which Roper had failed to make fingerprint identifications, although inexplicably the Mercks' homicides were overlooked for nine and a half years. (RT 2108.)

In essence, the trial court's denial of appellant's motion to dismiss unfairly allowed the prosecution to have it both ways. The prosecution was able to obtain a conviction by arguing persuasively to the jury that Roper's findings should be disbelieved because he was not a competent fingerprint examiner. At the same time, it was able to defeat the motion to dismiss by

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[57]Grimes was not certain if Jones told him about Roper's alleged incompetence prior to November, 1984, when Roper did the fingerprint comparisons in the Mercks' case. (RT 2000.) However, even if Grimes was not informed at that time, it could not have been long thereafter that questions were raised about Roper's expertise. Grimes testified that he instructed Jones not only to check Roper's prior work but to monitor his future assignments. (RT 2108.) Thus, the concerns about Roper's competence must have arisen before Roper stopped working as a fingerprint examiner in 1987. (RT 1589.)

claiming that the ten-year delay in arresting appellant was justified by the fact that the fingerprint evidence was not reexamined until May, 1994. If Roper was as incompetent as the prosecution claimed at trial, and the Sheriff's Department held that opinion long before 1994, it necessarily follows that a nine-and-a-half-year delay in reexamining the fingerprint evidence was unjustified.

In addition, given the substantial doubts about Roper's competence that law enforcement had in 1984, along with the abundance of evidence apparently linking appellant to the killings of the Mercks, the delay in reexamining the fingerprint evidence was not merely "inadvertent," as the magistrate stated at the preliminary examination (PERT, 9/12/94,116-117), but a reckless disregard of the circumstances with an appreciable risk of harm to the defense. The Sheriff's Department should have included the Mercks' homicides amongst the cases in which Roper's fingerprint comparisons were reexamined. It must also have been known that a delay of almost 10 years would disadvantage the defense by resulting in the fading of memories and the potential loss of alibi witnesses and other evidence.

Moreover, Sergeant Fraley had an opportunity to preserve appellant's recollection of critical events at a time when appellant's whereabouts were fresh in mind, but failed to do so. On February 14, 1985, after Fraley spoke to Gerry Tags about the killings, appellant telephoned the sergeant. In their telephone conversation, appellant offered to come to the police station to discuss the case with Fraley. (PERT, 9/8/94, 45.) Fraley refused appellant's offer, and no attempt was ever made to interview appellant until after his arrest. This unwillingness to allow appellant to make a record of his whereabouts at the time of the killings further suggested that the Sheriff's Department, at the very least, acted recklessly, in unnecessarily delaying the investigation. Moreover, Fraley's unwillingness to interview appellant indicated to appellant that

law enforcement was not interested in what he had to say, and thereby lulled him into believing that he was not actually being considered a suspect in the killings. Appellant would thus have had no reason to preserve any alibi evidence, or to keep it fresh in mind, especially for another nine years until his arrest.

e. The Prejudice Suffered by Appellant Greatly Outweighed Any Justification for the Pre-Arrest Delay

Since the prejudice, as described above, was so extreme, and the proffered justification for the delay so insubstantial, the trial court abused its discretion in denying appellant's motions to dismiss for violation of due process. This was not a case in which obtaining the additional evidence that the prosecution believed it needed for prosecuting appellant had to be delayed until a scientific breakthrough occurred, or a case in which the evidence could not have been found with the exercise of due diligence. The additional investigation done in 1994, i.e., the reexamination of the fingerprint evidence, occurred after seven years of inactivity in the case. The reexamination of the fingerprint evidence not only could have taken place many years earlier, but would have occurred much sooner if the prosecution had only conducted a reasonable and diligent investigation. Thus, the 10-year delay in arresting appellant resulted in a violation of appellant's fundamental right to due process and a fair trial under both the state and federal constitutions. The trial court abused its discretion in denying appellant's motions for dismissal. (*People v. Morris* (1988) 46 Cal.3d 1, 38, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 544, fn. 5, and 545, fn. 6 [trial court's ruling on motion to dismiss for prosecutorial delay is reviewed for abuse of discretion].)

3. Conclusion

For all the foregoing reasons, appellant's conviction and judgment of death must be reversed, and the action dismissed.

B. AFTER REALIZING DURING THE GUILT PHASE THAT HE WAS A FRIEND OF TWO PROSECUTION WITNESSES WHO WERE RELATED TO ALMA MERCK, THE TRIAL JUDGE ERRED BY: (1) CONTINUING TO PRESIDE OVER THE TRIAL PROCEEDINGS FOR THE REMAINDER OF THE DAY; AND (2) THEN SUBSTITUTING ANOTHER JUDGE FOR HIMSELF RATHER THAN DECLARING A MISTRIAL

1. Relevant Facts and Proceedings

During the second day of the prosecution's guilt phase case, Judge Stephen Gildner discovered that he was a friend of two upcoming prosecution witnesses, Terry and Jerry Jones. Although the names of the witnesses were on the prosecution's witness list, the judge had not recognized them as his friends until he saw the witnesses outside the courtroom when returning from the lunch recess. Judge Gildner spoke briefly with the Joneses and learned that Terry Jones was related to Alma Merck. (RT 1696.)

Before resuming the trial proceedings, the judge addressed appellant, appellant's counsel and the prosecutor outside the presence of the jury. Judge Gildner explained that Terry and Jerry Jones were more than casual family friends, and that his oldest son and the oldest son of the witnesses had been close friends for more than 10 years. (RT 1696, 1699.) The judge also expressed concern that during the trial he might have to judge the credibility of his friends. (RT 1697.)

After conferring amongst themselves and with appellant, appellant's counsel moved for a mistrial based on Judge Gildner's relationship with Terry and Jerry Jones. (RT 1699.) Before ruling on the motion, the judge asked the prosecutor to describe the expected testimony of the witnesses. (RT 1699.) The prosecutor explained that the witnesses would identify various items of property allegedly seen in appellant's possession as belonging to the Mercks. Additionally,

the judge was told that if there were a penalty phase, the witnesses might be called to testify about how they were affected by the murders. (RT 1700-1701.) Judge Gildner further acknowledged that if the jury returned a death sentence he would have to judge the credibility of the witnesses in deciding the automatic application for modification of the death verdict pursuant to Penal Code section 190.4, subdivision (e). (RT 1702.)

After recessing in order to give the issue more thought, Judge Gildner decided to deny appellant's motion for mistrial "chiefly because I am trying to buy some more time, to be frank with you, to think about this a little bit more." (RT 1703.) He also ordered that the trial resume for the rest of the afternoon, and explained that he would meet again with counsel and appellant the next morning in order to resolve the disqualification issue. (RT 1704.) Appellant objected to going forward with the trial and requested that the trial be recessed until Judge Gildner reached a decision. That objection was overruled. (RT 1705-1706.)

The trial resumed with continued cross-examination of witness Danny Phinney. (RT 1711.) During the examination, Judge Gildner ruled on various evidentiary objections made by appellant's counsel (RT 1719 [appellant's objection for non-responsive answer sustained], and 1723 [appellant's motion to strike granted]) and by the prosecutor (RT 1728 [prosecution's objection to having witness read newspaper article out loud sustained], 1730 [prosecution's objection to admission of newspaper article sustained], 1734 [prosecution's objection to having witness read newspaper article out loud sustained], and 1745 [prosecution's objection that a question called for speculation sustained]).

After the examination of the witness had been completed, Judge Gildner again denied appellant's motion for a mistrial. The judge explained his concern that if a mistrial were granted,

absent appellant's consent, a retrial might be barred by the double jeopardy clause. (RT 1747-1748.) He then expressed his intent to recuse himself under Code of Civil Procedure section 170.1, subdivision (a)(6)(C), explaining that a person aware of his relationship with the witnesses might reasonably entertain a doubt that he would be able to be impartial: "[G]iven that [judicial] canon and given the subparagraph of 170.6 and given the present circumstances of this case and the possibility that I may have to assess the credibility of people who appear to me to be central to the prosecution's case, a recusal may be appropriate. It may even be required." (RT 1747, 1753.)

The next morning Judge Gildner again stated his concern that, absent appellant's consent, the granting of a mistrial would result in a double-jeopardy bar to a retrial. Appellant's motion for a mistrial was therefore again denied. Judge Gildner then recused himself from further participation in the case and transferred the matter to Judge Lee Felice for completion of the trial.[58] (RT 1757.)

2. After Realizing That He Was a Friend of Two Prosecution Witnesses Who Were Related to Alma Merck, the Trial Judge Should Have Immediately Recused Himself from Further Participation in the Trial

The right to due process of law guaranteed by both the state and federal constitutions requires that a defendant be tried before, and sentenced by, an impartial judge. (*People v.* Brown (1994) 6 Cal.4th 322, 332.) As the United States Supreme Court said long ago, "No matter what the evidence was against [the defendant], he had the right to have an impartial judge." (*Tumey v. Ohio* (1927) 273 U.S. 510, 535.) Moreover, "it certainly violates the Fourteenth Amendment and

[58]The case previously had been assigned to Judge Felice, but when he became ill during pretrial proceedings the case was sent to Judge Gildner for trial.

deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which" is not impartial. (*Id.*, at p. 523.) Fairness, however, requires more than simply the absence of actual bias in the trial of cases. "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" (*In re Murchison* (1955) 349 U.S. 133, 136.) This due process imperative is all the more compelling in the context of a capital prosecution. As the United States Supreme Court has stated, because "death is a different kind of punishment from any other which may be imposed, . . . [i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358.)

Thus, in determining whether a due process violation has been established, this Court has not merely considered whether the trial judge was actually biased, but has applied the test set forth in subdivision (a)(6)(C) of Code of Civil Procedure section 170.1. (See *People v. Brown*, *supra*, 6 Cal.4th at pp. 336-337.) That subdivision requires the disqualification of a judge when "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Here, once Judge Gildner realized that he was a friend of two upcoming prosecution witnesses, his disqualification was required – as Judge Gildner himself seemed to acknowledge the following morning. (See RT 1747, 1753.) The witnesses were expected to present significant testimony in the guilt phase relating to whether property allegedly possessed by appellant belonged to the victims, and in the penalty phase relating to the effect of the killings on family members. These circumstances reasonably gave rise to doubts as to whether Judge

Gildner could be impartial. A objective observer might reasonably conclude that Judge Gildner would be reluctant to disbelieve his friends when ruling on motions that contested the sufficiency of the evidence to support a murder conviction or challenged the appropriateness of a death sentence. Moreover, an observer would reasonably have believed that the judge would be biased against appellant because Alma Merck was a relative of the judge's friends, who were greatly saddened by her death.

When grounds for disqualification of a judge exist, "the judge . . . shall not further participate in the proceeding, except as provided in section 170.4, unless his or her disqualification is waived by the parties as provided in subdivision (b)." (Code of Civ. Pro., § 170.3, subd. (a)(1); see also *People v. Bridges* (1982) 132 Cal.App.3d 234, 238 ["Once disqualified, the judge remains disqualified"]; *Geldermann, Inc. v. Bruner* (1991) 229 Cal.App.3d 662, 665 ["limited, partial or conditional recusal" is not permitted].) Here, appellant did not waive Judge Gildner's disqualification, and none of the exceptions listed in section 170.4 were applicable. Thus, Judge Gildner erred by remaining as the judge during the completion of Danny Phinney's testimony. Moreover, his participation was not merely ministerial, as he ruled on numerous evidentiary objections by both parties, as well as on appellant's motion for a mistrial.

Judge Gildner's continued participation in the trial after discovering grounds for disqualification requires a per se reversal of the judgment against appellant. A trial before a judge who is not impartial constitutes a "structural defect[] in the constitution of the mechanism, which def[ies] analysis by 'harmless error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) In addition, appellant was prejudiced by Judge Gildner's denial of the mistrial

motion, which as explained below, should have been granted.

3. The Trial Judge Should Have Granted Appellant's Motion for a Mistrial Rather than Substitute Another Judge for Himself

In *Freeman v. United States* (2nd Cir. 1915) 227 F. 732, the Second Circuit Court of Appeals considered whether the substitution of one judge for another during a trial violated the defendant's right to trial by jury under the Sixth Amendment to the United States Constitution. *Freeman* held that in a criminal case trial by jury includes a judge who "must remain identical from the beginning to the end. It is not possible, for either the government or the accused, or for both, to consent to a substitution . . . of one judge for another judge . . . . The continuous presence of the same judge . . . is . . . essential throughout the whole of the trial." (*Id.*, at pp. 759-760.) The court's rationale for this holding was that "[a] trial judge should have before him all the evidence that is before the jury, and he does not have it all before him if the jury has seen and heard the witnesses give their testimony upon the stand while he has only read it as recorded in the minutes. Witnesses seen and heard by the jury must be seen and heard by the judge." (*Id.*, at p. 759.) Only when observing the manner of a witness while testifying can the judge accurately determine the credibility of the witness. (*Id.*, at p. 756.) The judgment of conviction was, therefore, reversed by the Second Circuit without any need for a showing of prejudice. (*Id.*, at p. 760.)

Similarly, in *Randel v. Beto* (5th Cir. 1965) 354 F.2d 495, 503, the Fifth Circuit recognized that the substitution of another judge in a criminal case can create "serious constitutional problems." The court explained that the trial court's discretion to grant a new trial based on a verdict being unsupported by the evidence is "almost the only protection to the citizen

against illegal or oppressive verdicts of prejudiced, careless, or ignorant juries." (*Id.*, at p. 503.) Unless the trial judge has seen the witnesses testify, however, the judge will be unable to knowingly exercise that discretion.

Appellant acknowledges that this Court has disagreed with *Freeman* and held that neither the state nor federal constitutional right to trial by jury requires that the same judge preside over the entire trial. (*People v. Espinoza* (1992) 3 Cal.4th 806, 829.) According to *Espinoza*, the appropriateness of a mid-trial substitution of a judge is governed by Penal Code section 1053.[59] Appellant submits that *Espinoza* was wrongly decided and that this Court should find that section 1053 violates the defendant's state and federal constitutional rights to trial by jury. (See *McIntyre v. State* (Ga. 1995) 463 S.E.2d 476, 482 and fn. 2 (dis. opn. of Sears, J.) ["Virtually all state and federal courts continue to adhere to *Freeman*'s ruling that a judge in a criminal case may not be substituted after evidence has been adduced before the original judge."]; *State v. Davis* (Mo. 1978) 564 S.W.2d 876, 878-879 [reversing judgment in a criminal case because, while no Missouri cases have decided whether a new judge may be substituted in after evidence has been presented but before instructions have been given and final arguments had, "(c)ases in other jurisdictions have held it is reversible error to substitute a judge at a similar point in a trial without the consent of the defendant"].) The trial court should have granted appellant's motion for a mistrial.[60]

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[59]That section states in relevant part, "If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial . . . ."

[60]Judge Gildner's reluctance to grant a mistrial was based on his concern that the granting of such a motion would result in a double jeopardy bar to a retrial. (RT 1747-1748, 1757.) That

Moreover, *Espinoza* is distinguishable from the instant case because in *Espinoza* the substitute judge "review[ed] the transcript of the proceedings" before continuing with the trial. (*Id.*, at p. 828.) Here, there is no indication in the record that Judge Felice read the transcript of the testimony given by the eight witnesses prior to his participation in the trial.[61] At the very least, the substitution of Judge Felice should not have occurred without his first becoming familiar with the trial record. Indeed, other jurisdictions that have allowed the substitution of a trial judge have required as a safeguard that the judge first certify that he or she has become familiar with the record before proceeding with the trial. (See Fed. R. Crim. Proc. 25(a); Md.Rule 4-361(b); and Iowa R. Crim. P. 18(7)(b)(1).)

The importance of such a safeguard was discussed by the Court of Appeals of Maryland in *Hood v. State* (Md. 1994) 637 A.2d 1208. In *Hood*, the trial judge became ill on the third day of trial, and another judge presided over the remainder of the proceedings. (*Id.*, at p. 1209.) The substitute judge did not comply with Maryland Rule 4-361(b), which mandated that a judge, who is substituting for another judge who became disabled during a jury trial, "certify[] that he or she

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concern was misplaced. The discharge of a jury without a verdict does not bar a retrial if the defendant consents to the discharge or legal necessity requires it. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.) Here, appellant consented to the discharge by moving for the mistrial. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 713 [consent to discharge of the jury will "a fortiori be implied when the defendant actually initiates or joins in a motion for mistrial"].) The discharge was also required by legal necessity since the trial judge was unable to continue due to his disqualification.

[61]It appears that Judge Felice reviewed a part of the testimony given by Danny Phinney in order to rule on the prosecution's motion to admit prior statements made by the witness to law enforcement officers. (RT 1775-1814.) During the hearing on that motion, the judge admitted, "I am obviously not as swift on the uptake, if you will, if I had been here during the trial, the earlier proceedings in this case." (RT 1784.) Later, the judge stated that he had read "certain portions of the transcript" of Phinney's testimony. (RT 1809.)

has become familiar with the record of the trial." In *Hood*, the new judge failed to file a certificate and said nothing about what he did to familiarize himself with the record other than comment later in the course of ruling on objections that he had read the prior judge's notes and talked with the prior judge about the case. (*Id.*, at p. 1212.) The defendant's motion for a mistrial based on the mid-trial substitution of the judges was denied. (*Id.*, at p. 1210.)

The Maryland Court of Appeals initially noted that "[s]ome courts have held that a mid-trial substitution of judges is impermissible in the absence of the defendant's consent or waiver." (*Id.*, at p. 1213 and cases cited therein.) While the Maryland court did not go so far, it did find reversible error based on the substitute judge's failure to comply with Rule 4-361(b).[62] (*Ibid.*) In so doing, *Hood* emphasized the importance of having the new judge become familiar with the trial record. "Judges often enjoy a significant measure of discretion in decisions they make during the course of a trial. Rule 4-361(b) makes clear that a party is entitled to have this discretion exercised by a judge thoroughly familiar with the trial record. The same trial judge might exercise his or her discretion in one of several ways depending on how familiar he or she is with what has gone on before; and although the ruling made is within the limits of the trial judge's discretion and therefore not reversible on appeal, the parties are deprived of the exercise of informed discretion, and quite possibly of a different determination that was also within the judge's range of discretion and that might have been made had the judge been fully informed." (*Ibid.*)

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[62]The court held that the "ordinary method a judge should use to 'become familiar with the record of the trial' is to read, or to have read to him or her, a written transcript of the previous proceedings, or in the case of an audio or video record, to listen to the prior proceedings." (*Id.*, at p. 1211.) The substitute judge's alternative method of reviewing the prior judge's notes and speaking with the prior judge was inadequate. (*Id.*, at p. 1212.)

The Maryland court further observed that when there has been a deprivation of the right to a judge who is thoroughly familiar with the trial record, "it may be very difficult for a defendant to demonstrate prejudice." (*Ibid.*) For that reason, it concluded that when there is a substantive violation of Rule 4-361(b), "prejudice to the defendant must be presumed and a new trial awarded unless the State can rebut the presumption of prejudice or demonstrate beyond a reasonable doubt that the error was harmless." (*Ibid.*)

Here, as in *Hood*, the substitute judge took over the case while evidence was being presented, and then during the course of the trial "was required to rule on a significant number of substantive issues that should have been ruled on by a judge who had familiarized himself with the record . . . ." (*Id.*, at 1214.) Indeed, immediately upon becoming the trial judge, Judge Felice ruled on the admissibility of prior statements made by Danny Phinney (without having seen Phinney testify) and the extent to which Gerry Tags's former testimony would be read to the jury. (RT 1762-1835.) With respect to the prior statements made by Phinney, Judge Felice had to determine whether these statements were admissible as prior inconsistent statements and as prior recollection recorded. As explained later in Argument F2, these determinations required the trial court to decide: (1) whether Phinney had been honest in claiming that he could not recall the date that he had met with appellant; and (2) whether Phinney had been honest in claiming that he had told the truth in his prior statement to Sergeant Diederich. Thus, Judge Felice had to assess the credibility of Phinney's trial testimony without the benefit of having seen Phinney testify. As further explained in Arguments F2 and F5, the trial judge's uninformed rulings led to the erroneous admission of prejudicial evidence.

Additional rulings on substantive issues continued throughout the remainder of the trial,

and after the jury returned a death verdict Judge Felice ruled on appellant's automatic motion for modification of the death judgment pursuant to Penal Code section 190.4, subdivision (e). Thus, in addition to being denied his right to trial by jury, appellant was denied his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections seven and fifteen, of the California Constitution, by being tried before a judge who was not thoroughly familiar with all of the proceedings.

4. Conclusion

Appellant was denied his rights under the federal and state constitutions in several ways. First, due process was violated when Judge Gildner continued to preside over the trial after realizing that he was a friend of two, upcoming prosecution witnesses. Second, appellant was denied due process and his right to trial by jury when his motion for a mistrial was not granted, and instead Judge Gildner was replaced by Judge Felice who was not familiar with the testimony that had already been presented in the case. Thus, as in *Hood*, the presumption of prejudice to the defendant has not been overcome, and it cannot be concluded that the error was harmless beyond a reasonable doubt.

C. THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE PROSPECTIVE JURORS 041853 AND 045969

1. Introduction

The voir dire of all the prospective jurors began with a written questionnaire that asked a series of questions regarding, among other things, the juror's views about the death penalty. The prospective jurors then underwent individualized, sequestered voir dire in order for the attorneys to further question them about their death penalty attitudes.

A review of the voir dires of Prospective Jurors 041853 and 045969 reveals that the prospective jurors should not have been excused for cause. The jurors' views on the death penalty would not have prevented or substantially impaired them from performing their duties, and they were able to conscientiously consider all sentencing alternatives. The trial court's disqualification of Prospective Jurors 041853 and 045969 thus violated appellant's right to a fair and impartial jury, and to due process of law, under the Sixth and Fourteenth Amendments to the United States Constitution.

2. The Voir Dire of Prospective Juror 041853

In her written questionnaire, the prospective juror explained that she had previously been "pretty much" in favor of the death penalty, although she had not given the issue "deep thought." (First Supplemental CT 1139.) However, when the judge mentioned the day before that the jury might have to decide whether the defendant should be executed, she formed the belief that it was only right for God to determine whether another person should die. (First Supplemental CT 1138-1139.)

During the courtroom voir dire, Prospective Juror 041853 explained that she had

conflicting feelings about the death penalty. "I don't like the idea of [the death penalty] but, on the other hand, I don't like the other end of it, either, you know, as far as the crime or whatever, so I don't know." (RT 1057.) The trial judge then sought to clarify the prospective juror's views on the death penalty in the following colloquy.

> Q. Okay, Now if I understand you then when you said you didn't like one end of it and – but, on the other hand, you didn't like the other end of it, your view is this: Tell me if I am wrong, okay? You are not opposed to the death penalty, you just don't want to be in a position where you have to make that decision.
> A. Basically, yes.

(RT 1058-1059.) The court's inquiry was followed by questions from defense counsel. Prospective Juror 041853 was asked if she could vote for death "if the circumstances struck [her] as justifying the death penalty," even though she may do so with "sadness and reluctance." She answered unequivocally, "Yes." (RT 1060.) After reminding her that she had previously stated in the questionnaire that she could never vote for the death penalty, counsel asked whether her present attitude towards the death penalty was more accurately reflected by the statement, "I might be able to vote to impose the death penalty in the appropriate case depending on the facts and circumstances." (RT 1060.) She again answered unequivocally, "Yes." (RT 1061.)

Upon further questioning by the prosecutor, Prospective Juror 041853 explained that she had previously favored the death penalty in certain circumstances but was now "conflicted inside." (RT 1061.) Yet, when the prosecutor asked her directly if she could vote for death in appellant's case, she responded, "Again, without saying yes or no, just if I can picture these crimes and the people, what they do, I say, 'yes.' It is going to have to be presented in such a way that it is – that's terrible and –." (RT 1062.) The prospective juror's answer was then cut off by more questions from the prosecutor who asked if her attitude toward the death penalty

would cause the prosecution to have a more difficult task than the defense in the penalty phase. (RT 1063.) The prospective juror began responding, "I really don't want to –," but was interrupted again by another question from the prosecutor. The prosecutor then instructed her, "If you can't and don't want to make that decision, if you cannot make that decision, this is the time to say so." (RT 1063.) She started to respond, "I don't want to sit through this and see all that –," but again was prevented from completing her answer by another question from the prosecutor. (RT 1063.) This time the prosecutor asked, "You don't think you could handle that?" When Prospective Juror 041853 attempted to respond, "I have seen –," she was cut off by the trial judge who stated, "I have seen enough on this." (RT 1063.)

Prospective Juror 041853 was then excused for cause by the trial court without a motion from the prosecutor. (RT 1063.) The trial court stated that toward the end of the prosecutor's questioning, Prospective Juror 041853 was breaking down and crying. In addition, "[d]uring the questioning 041853's head would go back and forth from shoulder to shoulder, she would cover her mouth when she answered questions by Ms. Ryals, she was obviously – she's obviously given conflicting answers, she has been very candid that she is in conflict over this." (RT 1064.) According to the trial court, the prospective juror was "going through some kind of personal change which is leading her toward a more religious view of her life," and "she's having real problems coming to terms with the responsibilities of a juror in a case such as this." (RT 1064.) For these reasons, the trial judge concluded "sua sponte that she was an inappropriate juror on this case." (RT 1064.) Appellant's counsel objected to the excusal of the prospective juror. (RT 1065.)

3. The Voir Dire of Prospective Juror 045969

When asked in the questionnaire about her feelings concerning the death penalty, Prospective Juror 04569 answered, "I feel that the death penalty is good, if the jury is 110% sure without a doubt that the defendant is guilty of the crime." (First Supplemental CT 1560.) She also explained that she felt that the death penalty was "not done too often or to (sic) seldom. I (sic) the evidence is there and there is no doubt then the punishment should fit the crime." (First Supplemental CT 1561.) Finally, when asked to select the statement that best described what her attitude would be if she were faced with the option of voting for the death penalty, the prospective juror chose: "I might be able to vote to impose the death penalty in an appropriate case depending on the facts and circumstances." (First Supplemental CT 1562.)

During voir dire, Prospective Juror 045969 was first questioned by the trial judge. She explained that her feelings about the death penalty would not prevent her from finding the defendant guilty of first degree murder if the prosecution proved its case beyond a reasonable doubt. (RT 944.) Similarly, the prospective juror's feelings would not prevent her from finding a special circumstance to be true if that allegation were proven beyond a reasonable doubt by the prosecution. (RT 945.) Finally, the prospective juror explained that she would not automatically vote for the death penalty, or for life without possibility of parole, in every case. (RT 945.)

When next questioned by appellant's counsel, Prospective Juror 045969 stated that she was not opposed to the death penalty. (RT 945.) Additionally, when asked if, depending on the facts and circumstances, she could vote for the death penalty in the appropriate case, she responded, "If there is no doubt in my mind whatsoever, I could." (RT 945-946.)

The prosecutor explained to Prospective Juror 045969 that under the law the prosecution

was only required to prove guilt beyond a reasonable doubt, and then asked her, "Are you going to require more of me that the law requires? You said, 'If there was no doubt.'" (RT 946.) Prospective Juror 045969 responded, "If you prove to me that there is no doubt that you know that he did it." (RT 946.) This was followed by another question, whether the prospective juror expected the prosecutor "to wash away all doubt completely," to which she replied, "That's right." (RT 946.) The prosecutor then asked:

> Q. If I can't do that, then you would not vote for the death penalty, is that correct?
> A. No, I guess it is – I have to hear it.

(RT 946.)

The prosecutor next told the prospective juror that the prosecution's case could never be proven beyond all doubt, and that therefore the prospective juror would never vote for the death penalty. (RT 946-947.) This statement was followed by the question, "If what you said in your questionnaire is correct, that's how you would feel?" Prospective Juror 045969 responded with an answer that, if transcribed correctly, appears not to make sense, "That's true. I think it is impossible that you could prove it to me under 110 percent." (RT 947.) The prosecutor then moved to exclude the prospective juror for cause. (RT 947.)

Before ruling on the challenge, the trial court asked Prospective Juror 045969 a series of questions in order to clarify her state of mind.

> Q. You are going to require the prosecution to prove completely the appropriateness of death as the proper punishment?
> A. Yes.
> Q. And even though that is not what the law provides, that's what you would require Mrs. Ryals to do?
> A. Yes.
> Q. Let's take a different approach. Are you saying that I have to be sure that I

have to be convinced what I'm doing is right before I would give the death penalty?

A. Yes.

Q. Now, when you translate that into percentages, we – are you saying by 110 percent you have to be convinced in your own mind?

A. Yes.

(RT 947.)

The trial court then explained to the prospective juror that at the penalty phase neither party has the burden of proof, and that the jury determines the penalty based on its belief as to what is appropriate. (RT 948.) These statements were followed by a final series of questions from the court.

Q. Now, if you listen to the facts in the case and you are not opposed to the death penalty, and you feel that you are convinced that death is an appropriate verdict, could you give that verdict?

A. Yes.

Q. If you felt, on the other hand, that life was the appropriate verdict, could you do that, too?

A. Yes.

Q. Would that depend on the facts and the circumstances?

A. Yes.

(RT 948.) At this point defense counsel stated his objection to the prosecution's challenge for cause. (RT 948.) The challenge was granted by the trial court without explanation. (RT 948-949.)

4. Prospective Jurors 041853 and 045969 Were Erroneously Excused for Cause Because Their Views Concerning the Death Penalty Would Not Have Prevented or Substantially Impaired the Performance of Their Duties

"The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'

Wainwright v. Witt, 469 U.S. [(1985) 469 U.S. 412] at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon v. Wainwright* [(1968)] 391 U.S. [510] at 523." (*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659.)

Thus, as this Court recently explained in *People v. Heard* (2003) 31 Cal.4th 946, 958, "[a] prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt* [, *supra*], 469 U.S. 412, 424; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) A prospective jury is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations.]" The party seeking to have a prospective juror excused for cause, the prosecution in this case, bears the burden of demonstrating that a challenged juror is unfit to serve on the jury. (*People v. Stewart* (2004) 33 Cal.4th 425, 445-447.)

The fact that it would be very difficult for a juror to ever impose a death sentence is not a sufficient basis for granting a challenged for cause. (*Id.*, at p. 445.) In *Stewart*, this Court recently reiterated "that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in

determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstances that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, *supra*, 469 U.S. 412." (*Ibid.*)

Moreover, in order to determine whether a prospective juror is fit to serve in a capital case, the trial court must analyze the prospective juror's questionnaire and voir dire as a whole, rather than simply focus on an isolated statement. (*People v. Mason* (1991) 52 Cal.3d 909, 953.) Prospective jurors must not be excused if their comments as a whole indicate that their views on capital punishment would not prevent or substantially impair the performance of their duties. (*Ibid.*) In *Mason*, the defendant was charged with capital murder. During the initial questioning in voir dire, a prospective juror informed the court that she would "'always vote for capital punishment.'" (*Ibid.*) After the judge and counsel explained a juror's obligation to hear and consider mitigating evidence, the prospective juror answered that certain evidence could persuade her to vote against the death penalty. The prospective juror further explained that she "would try to leave [her] mind open and listen to everything" and that she could "really" and "realistically" see herself voting for life imprisonment instead of death. (*Id.*, at pp. 953-954.) Defense counsel's motion to excuse the prospective juror for cause was rejected by the trial court. On appeal, this Court refused to focus on the prospective juror's single statement that she would categorically vote for death in every case. Instead, the Court reviewed the prospective juror's "entire voir dire" and found that, given her other comments after being informed by the court of a juror's obligations, the prospective juror's views on capital punishment would not have

"prevented or substantially impaired the performance of her duties." (*Ibid.*)

Finally, only when the prospective juror's statements are equivocal will this Court defer to the trial court's determination of the prospective juror's state of mind. (*People v. Phillips* (2000) 22 Cal.4th 226, 234.) If the voir dire is unequivocal, the trial court's ruling will be upheld only if it is "fairly supported by the substantial evidence in the record." (*People v. Holt* (1997) 15 Cal.4th 619, 651; *People v. Heard, supra*, 31 Cal.4th at p. 958.)

a. Prospective Juror 041853

The record does not support a finding that the views of Prospective Juror 041853 would have prevented or substantially impaired the performance of her duties as a juror. Although in the questionnaire she expressed some newly-formed concerns about the death penalty, she clarified her views during the courtroom voir dire. She was not actually opposed to the death penalty, but did not relish being the one who had to make the decision. (RT 1058-1059.) Despite feeling "conflicted inside," however, she was unequivocal when questioned by defense counsel that she could vote for the death penalty if such a punishment was appropriate under the circumstances of the case. (RT 1060-1061.)

That position did not change upon further questioning by the prosecutor. When directly asked if she could vote for death in the jury room and then announce her verdict while facing the defendant, she repeated her willingness to vote for death if justified by the circumstances. She said she would wait to see the evidence presented, and if she could "picture these crimes and the people, what they do," she would return a death verdict. (RT 1062.)

The trial's court explanation for its "sua sponte" excusal of Prospective Juror 041853 is not supported by the record. While she may have been crying towards the end of the prosecutor's

questioning, that response was likely caused by the prosecutor's hostile interrogation. The prosecutor refused to accept her answer that she could vote for the death penalty and repeatedly pressured her to change her response. Each time she attempted to explain her position, the prosecutor interrupted her answer with another question designed to lead her into admitting that she could not make a penalty decision. (RT 1062-1063.)

Additionally, contrary to the trial judge's statement, Prospective Juror 041853 did not give "conflicting answers" to the questions. (RT 1064.) While she explained that she had conflicting feelings about the death penalty, she was consistent in her answers during the voir dire: she could vote for the death penalty if warranted by the evidence presented during the trial. That decision may have been a difficult one for her to make, but nothing in the record indicates that it would have been so difficult that she would have been substantially impaired in the performance of her duties as a juror.

b. Prospective Juror 045969

The record also does not support a finding that the views of Prospective Juror 045969 would have prevented or substantially impaired the performance of her duties as a juror. This prospective juror was not opposed to the death penalty, and she was unequivocal that her attitude toward the death penalty would neither prevent her from finding the defendant guilty of first degree murder nor prevent her from finding a special circumstance to be true. (RT 944-945.) Additionally, she told the court that she would not automatically vote either for the death penalty or for life without possibility of parole. (RT 945.) Instead, she would make an appropriate penalty decision based on the particular facts and circumstances of the case. (RT 948.) That is all the case law required of her.

The only concern expressed by the prospective juror regarding imposition of the death penalty was that the prosecution prove both the defendant's guilt and the appropriateness of the death penalty beyond any doubt. (RT 945-946.) When the prosecutor then directly asked her if her views meant that she would refuse to vote for death if the prosecution failed to prove its case beyond all doubt, the prospective juror answered, "No," and explained that she would "have to hear" the case before deciding the penalty. (RT 946.)

Moreover, the prospective juror's statements about the prosecution having to prove the defendant's guilt and the appropriateness of the death penalty beyond any doubt were made before the court explained how a penalty determination is made. Indeed, it was not until almost the end of the voir dire that the trial court informed the prospective juror that neither party has the burden of proof at the penalty phase, and that the jury determines the penalty based on its belief as to the appropriate sentence. Once the prospective juror was given this information, she gave no indication that she would not follow California law by voting for a death sentence if she was convinced that death was an appropriate verdict, based on the facts and circumstances of the case. (RT 948.) The present case is thus similar to *People v. Heard*, *supra*, 31 Cal.4th at p. 966, in which this Court found that the granting of the prosecution's challenge for cause was erroneous. In *Heard*, the prospective juror stated in his questionnaire that imprisonment for life without the possibility of parole to him represented a "worse" punishment than death. (*Id.*, at p. 964.) Later, however, during voir dire, the trial court explained to the prospective juror that California law considered death the more serious punishment and that the death penalty could be imposed under California law only if the aggravating circumstances outweighed the mitigating circumstances. (*Ibid.*) After being informed of the correct law, the prospective juror "did not

provide any indication that his views regarding the death penalty would prevent or significantly impair him from following the controlling California law." (*Ibid.*) Thus, this Court concluded that the "earlier juror questionnaire response, given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support [the] excusal for cause." (*Ibid.*) Here, as in *Heard*, once Prospective Juror 045969 was told the correct law concerning the standard of proof at the penalty phase, she gave no indication that she would be unable to follow that law in deciding the appropriate penalty.

Furthermore, to the extent that the prospective juror was unwilling to vote for death unless she was absolutely certain that such a penalty was appropriate, her view was not inconsistent with California law. Under California law, a juror is "free to assign whatever moral or sympathetic value [he or she] deem[s] appropriate to each and all of the various" mitigating and aggravating factors. (CALJIC 8.88; *People v. Boyde* (1988) 46 Cal.3d 212, 253-254.) Similarly, a juror has the discretion not to vote for the death penalty unless the juror is satisfied that there is no doubt about the defendant's guilt. This Court has repeatedly stated that in determining penalty, "the jurors may consider any lingering doubts they may have concerning the defendant's guilt." (*People v. Medina* (1995) 11 Cal.4th 694, 743; *People v. Zapien* (1993) 4 Cal.4th 929, 989; *People v. Kaurish* (1990) 52 Cal.3d 648, 706.) Lingering doubt is considered a factor in mitigation under Penal Code section 190.3, factor (a) (circumstances of the crime), and factor (k) (any other circumstance that extenuates the crime or any sympathetic aspect of the defendant's character or record). (*People v. Hines* (1997) 15 Cal.4th 997, 1068; People *v. Sanchez* (1996) 12 Cal.4th 1, 77-78.) In addition, as recently stated by this Court, "a [juror's] concern regarding the risk of error in the criminal justice process [] is not disqualifying by itself

. . . ." ((*Stewart, supra,* 33 Cal.4th at p. 449) [Excusal for cause was error when based on prospective juror's statement in questionnaire that "I don't believe in irrevers[i]ble penalties. A prisoner can be released if new information is found"].) Thus, Prospective Juror 045969's view that she would require certainty that the death penalty was appropriate before voting for death did not prevent or substantially impair the performance of her duties as a juror.

The erroneous excusals of Prospective Jurors 041853 and 045969 for cause violated appellant's right to an impartial jury, and his right not to be deprived of his life without due process of law, under the Sixth and Fourteenth Amendments to the United States Constitution. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 522-523.) The violation requires automatic reversal of the death judgment. (*People v. Heard*, *supra*, 31 Cal.4th. at p. 966.)

D. THE PROSECUTOR IMPROPERLY EXERCISED PEREMPTORY CHALLENGES BASED ON BIAS AGAINST BLACK JURORS

1. Relevant Facts and Proceedings

On May 7, 1996, jury selection continued with the seating of 12 prospective jurors in the jury box. Included among the 12 prospective jurors was one Black man, Prospective Juror 045921. (RT 1332.) In the gallery were three additional Black prospective jurors.

After the prosecutor and defense counsel had each exercised a first peremptory challenge, a Black woman, Prospective Juror 042519, was called to the jury box. (RT 1389.) The prosecutor exercised her very next challenge, her second peremptory, to excuse Prospective Juror 042519. (RT 1390.) The prosecutor's third challenge was used to excuse Prospective Juror 045921. (RT 1397.)

During the next recess, after each side had exercised five peremptory challenges, appellant made a motion to dismiss the jury pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258. (RT 1405.) Defense counsel explained that the prosecutor had used peremptory challenges to excuse the only two Black prospective jurors in the jury box. After the prosecutor pointed out that there were other Blacks still on the panel, the trial court ruled that it was "not satisfied that there is a prima facie case." (RT 1405.) The trial court, nonetheless, invited the prosecutor to make a record of the reasons she excused Prospective Jurors 042519 and 045921, "[i]n the event . . . a later court determines that a prima facie case [was] made." (RT 1405.)

The prosecutor explained that Prospective Juror 042519 had initially stated in her written questionnaire that she was Islamic "and that she does not sit in judgment." Later, during voir dire, she changed her mind and stated that she could make decisions about the defendant's guilt

and the appropriate penalty. Thus, the prosecutor felt "there is a very good chance that she could, between now and the time that the case is over, change her mind back and say that she cannot or does not sit in judgment on anyone." (RT 1405-1406.) Additionally, the prosecutor explained that Prospective Juror 042519 previously had been arrested for welfare fraud, and she had "feelings that [Prospective Juror 042519] could not be a fair juror to the People." (RT 1406.)

With respect to Prospective Juror 045921, the only reason given by the prosecutor for exercising a peremptory challenge was that "on his questionnaire [he] wrote down [that] he does not believe in the death penalty but he could vote for it." (RT 1406.)

After the excusal of Prospective Jurors 042519 and 045921, the prosecutor continued to exercise peremptory challenges until she passed after using her fifteenth challenge. (RT 1432.) At that point, no additional Black persons had been called to the jury box and the jury did not include any Black jurors. The defense then exercised another peremptory challenge. The prosecutor used her sixteenth challenge to excuse the prospective juror who took the seat left open after the defendant's last challenge. When the defense exercised another peremptory challenge, a Black woman, Prospective Juror 04587, was called to the jury box. The prosecutor used her very next peremptory challenge, her seventeenth, to excuse Prospective Juror 045787. (RT 1436.) After a replacement juror was seated, both sides passed, the jury was sworn and two alternates were selected. (RT 1436-1443.) No Black jurors sat on appellant's jury.

At the next recess, appellant renewed his motion to dismiss the jury pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258. Defense counsel argued that all three Blacks called to the jury box were excused by the prosecution. The trial court responded that it was "not prepared to find a prima facie case," and pointed out that there remained one Black prospective juror in the

gallery. (RT 1449.) As before, the prosecutor was allowed to make a record of her reasons for excusing the third Black prospective juror. According to the prosecutor, Prospective Juror 045787 believed that the police had previously been unkind to her brother, and she knew three persons who had been falsely accused of committing crimes. In addition, the prospective juror stated in her questionnaire that only God could sit in judgment of other persons, but later said during voir dire that she could determine appellant's guilt and the appropriate penalty. The prosecutor concluded that the prospective juror could not "continue with one decision that she could keep for any length of time, because in a period of a week, she changed her mind from not being able to sit in judgment and not being God, to being able sit in judgment of her fellow man . . . ." (RT 1450.)

2. The Prosecutor's Use of Peremptory Challenges to Excuse All the Black Prospective Jurors Called to the Jury Box Violated Appellant's State Constitutional Right to a Trial by Jury Drawn from a Representative Cross-section of the Community and His Federal Constitutional Right to Equal Protection of the Law

a. Applicable Law

Racial discrimination in the use of a peremptory challenge violates a defendant's right to be tried by a representative jury pursuant to article I, section 16 of the California Constitution (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277), and a defendant's right to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-89).[63]

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[63]At trial, defense counsel cited only *Wheeler* in support of his motion to dismiss the jury. The failure also to make a federal constitutional claim based on *Batson* does not waive the *Batson* claim on appeal. In *People v. Yeoman* (2003) 31 Cal.4th 93, 116, this Court explained that to consider a defendant's claim under *Batson*, even when only a *Wheeler* objection is made at trial, "is more consistent with fairness and good appellate practice than to deny the claim as

The test adopted in *Wheeler* for determining when the exercise of peremptory challenges violates a defendant's constitutional right to jury trial right is: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. omitted; see also *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

In order to make the showing necessary to perfect a *Wheeler* motion, "the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*People v.*

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waived."

Wheeler, *supra*, 22 Cal.3d at pp. 280-281, fn. omitted; see also *People v. Reynoso*, *supra*, 31 Cal.4th at p. 778.)

The trial court must then determine whether a "reasonable inference arises that peremptory challenges are being used on the ground of group bias alone." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 281; see also *People v. Reynoso*, *supra*, 3 Cal.4th at p. 914.) "If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges were not predicated on group bias alone." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 281; see also *People v. Reynoso*, *supra*, 31 Cal.4th at pp. 914-915.) While the showing need not rise to the level of a challenge for cause, "the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses – i.e., for reasons of specific bias as defined herein. He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of the same voir dire he also challenged similarly situated members of the majority group on identical grounds or comparable grounds." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282; see also *People v. Reynoso*, *supra*, 31 Cal.4th at p. 915.)

In *Batson v. Kentucky*, the United States Supreme Court adopted a similar test for determining when the discriminatory exercise of peremptory challenges violates the equal protection clause of the federal Constitution.[64] A party alleging discriminatory use of

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[64]Whether the *Batson* and *Wheeler* tests are completely identical has been the subject of debate in recent appellate cases. *Wheeler* used both the terms "strong likelihood" and "reasonable inference" of group bias in describing the standard for a prima facie case. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280, 281.) In *People v. Bernard* (1994) 27 Cal.App.4th 458, the Court of Appeal read the two terms as stating different standards, with "reasonable inference"

peremptories "may make out a prima facie showing of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citation.] Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." (*Id.*, at pp. 93-94.) If a race-neutral explanation is tendered, the trial court must determine whether the explanation is legitimate, and whether the moving party has proved purposeful racial discrimination. (*Id.*, at pp. 97-98; *Purkett v. Elem* (1995) 514 U.S. 765, 767.) Additionally, under federal constitutional law, as under state constitutional law, the defendant need not be a member of the excluded group in order to object to the prosecutor's discriminatory use of peremptory challenges. (*Powers v. Ohio* (1991) 499 U.S. 400, 415.)

When, as in this case, "the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied." (*People v. Welch* (1999) 20 Cal.4th 701, 746; see also *People v. Turner* (1994) 8 Cal.4th 137, 167.) Under these circumstances, the reviewing court must still determine whether a prima facie case of group bias was established. To make that determination, the reviewing court considers the entire record of voir dire to see if the record

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being a lower standard than "strong likelihood." (*Id.*, at p. 465.) The Ninth Circuit Court of Appeals then concluded that at least since *Bernard*, the California state courts have applied a lower standard of scrutiny than permitted by *Batson*, which required only an inference of discriminatory purpose to establish a prima facie case. (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1196-1197.) In *People v. Johnson* (2003) 30 Cal.4th 1302, however, this Court clarified that *Wheeler*'s terms "strong likelihood" and "reasonable inference" state the same standard, and that *Wheeler*'s standard for establishing a discriminatory use of peremptory challenges is compatible with *Batson*. (*Id.*, at pp. 1313, 1318.) "[T]o state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*Ibid.*)

suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, without regard to the actual reasons offered by the prosecutor.[65] (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200.)

b. Appellant Established a Prima Facie Case of Race Discrimination And the Prosecutor's Explanations for Her Excusal of the Black Prospective Jurors Were Not Plausible

An examination of the entire record of voir dire in the instant case leads to the conclusion that the trial court erred in finding that appellant had not established a prima facie showing of *Wheeler/Batson* error. "[A]lthough the *Batson* prima facie case requirement cannot be 'taken for granted,' it 'is not onerous.'" (*Wade v. Terhune*, *supra*, 202 F.3d at p. 1197 (quoting *United States v. Escobar-de Jesus* (1st Cir. 1999) 187 F.3d 148, 164) (quoting *United States v. Bergodere* (1st Cir. 1994) 40 F.3d 512, 516).) Indeed, *Batson*'s "inference" standard "was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure." (*Wade v. Terhune*, *supra*, 202 F.3d at p. 1197.)

Here, the first twelve prospective jurors seated in the jury box included one Black man. A second Black prospective juror was called to the jury box after the defense exercised its first

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[65]On this issue, state law and the law of the Ninth Circuit are not in agreement. The Ninth Circuit has accepted the view set forth in the plurality opinion of the Supreme Court in *Hernandez v. New York* (1991) 500 U.S. 352, 359 that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." (See *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1104.) The reviewing court moves on to the second step of determining whether the explanations offered by the prosecutor are legitimate. Appellant urges this Court to adopt the approach of the Ninth Circuit and find that the issue of whether a prima facie showing of discrimination was made is moot.

peremptory challenge. (RT 1332.) The prosecutor then used her second and third peremptory challenges to excuse the only Black prospective jurors in the jury box. (RT 1390, 1397.) Later, the prosecutor passed the jury at a time when the jury contained no Black persons. (RT 1432). The defense, however, exercised another peremptory challenge, and voir dire continued. When a third Black prospective juror was seated in the jury box following appellant's exercise of his fifteenth challenge, the prosecutor excused the juror with her very next peremptory. (RT 1434-1436.) The defense then waived any further peremptory challenges, and the prosecutor immediately agreed to accept the jury, thereby foreclosing any possibility that the remaining Black person on the jury panel would be called to the box. (RT 1438.) Thus, as a result of the prosecutor's discriminatory jury selection, no Black persons were included in the jury that decided appellant's case. (RT 1449.)

That all Black prospective jurors were struck from the jury box is a significant factor in determining the existence of a prima facie case. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698, fn. 4; compare *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813, overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 [inference of discrimination where prosecutor used peremptory challenges to excuse five of nine Black prospective jurors called to the jury box].) Additionally, the fact that one Black person remained on the panel does not weigh against finding a prima facie case since both sides immediately accepted the jury after the third Black was excused by the prosecutor. (RT 1438.) Thus, at the time that the *Wheeler* motion was renewed, jury selection had been completed and there was no longer any possibility that the Black prospective juror remaining on the panel could become a trial juror.

Also pertinent is the fact that the only significant characteristic shared by all three of the

excused Blacks was their race. Indeed, Prospective Juror 045921, a Black man, had virtually nothing in common with 042519 and 045787, Black women. Prospective Juror 05921 was unique in that he had lived in Kern County for only 22 months (First Supplemental CT 1609), had held the same job for only one year (First Supplemental CT 1608),did not supervise others at his job (First Supplemental CT 1608), had no children (First Supplemental CT 1610), had attended some college (First Supplemental CT 1611), had served in the military (First Supplemental CT 1612), followed crime stories in the news (First Supplemental CT 1614), considered it his "duty" to serve on the jury (First Supplemental CT 1614), had not previously been arrested for any criminal offenses (First Supplemental CT 1615), and had previously witnessed a crime and given a statement to the police (First Supplemental CT 1617).

In contrast, Prospective Juror 045787 had lived in Kern County for 38 years (First Supplemental CT 1769), had held the same job for 11 years (First Supplemental CT 1768), supervised another employee at her job (First Supplemental CT 1768), had two adult children (First Supplemental CT 1770), had attended only high school (First Supplemental CT 1771), did not serve in the military (First Supplemental CT 1772), did not follow crime stories in the news (First Supplemental CT 1774), and had not previously witnessed a crime (First Supplemental CT 1777).

Prospective Juror 042519, like Prospective Juror 045787, was very different from Prospective Juror 045921. Prospective Juror 042519 had lived in Kern County for 36 years (First Supplemental CT 1849), had held the same job for 10 years (First Supplemental CT 1848), supervised seven employees at her job (First Supplemental CT 1848), had adult children (First Supplemental CT 1850), only attended school through the sixth grade (First Supplemental CT

1851), did not serve in the military (First Supplemental CT 1852), did not follow crime stories in the news (First Supplemental CT 1854), and had not previously witnessed a crime (First Supplemental CT 1857).

Thus, under the totality of the circumstances of appellant's case – all three Black prospective jurors were struck from the jury box and race was the only characteristic shared by those three prospective jurors – there existed a strong inference that the prosecutor had a discriminatory purpose in exercising her peremptory challenges against Prospective Jurors 042519, 045787 and 045921. The record simply does not suggest grounds upon which the prosecutor might reasonably have challenged all three prospective jurors. The trial court thus erred in not finding a prima facie case of group bias.

The existence of a prima facie case requires this Court to review the legitimacy of the prosecutor's reasons for excusing the Black prospective jurors. The explanation offered for the excusal of Prospective Juror 045921 was particularly implausible. The only reason articulated by the prosecutor was that "on his questionnaire [he] wrote down he does not believe in the death penalty but he could vote for it." (RT 1406.) The record of the entire voir dire, however, reveals that the prospective juror's attitude toward the death penalty did not favor the defense. When asked on the questionnaire if he felt that "the death penalty [was] wrong for any reason, including religious, moral or ethical beliefs," the prospective juror checked the box "No." (First Supplemental CT 1621.) Additionally, he stated that he had "no belief" as to whether the death penalty was "imposed too often or too seldom." (First Supplemental CT 1621.)

Furthermore, during voir dire, Prospective Juror 045921 was adamant that he could follow the court's instructions, and that his attitude toward the death penalty would not prevent

him from voting to convict or from voting for the death penalty if the circumstances so warranted. He explained, "I don't believe in the death penalty, but if I'm serving on the jury and the law states this is the punishment for that crime, and if they are able to prove that was the case, and that is the punishment that it calls for, *I'm able to do it even though I don't believe in it*, but if I'm going to participate in the system, you have to play by all the rules." (RT 962, italics added.) Thus, the record does not establish that Prospective Juror 045921's attitude toward the death penalty was a valid basis for the prosecutor to exercise a peremptory challenge.

Additionally, other aspects of this prospective juror's background indicated that he was the type of juror usually accepted by the prosecution. According to his questionnaire, Prospective Juror 045921 had served as a military police officer while in the Air Force, (First Supplemental CT 1612), worked full time as a laborer (First Supplemental CT 1607-1608), had been the victim of a crime (First Supplemental CT 1616), had no complaints about the criminal justice system (First Supplemental CT 1613), considered it his "duty" to serve on the jury (First Supplemental CT 1614), had not previously been arrested for any criminal offenses (First Supplemental CT 1615), had previously witnessed a crime and given a statement to the police (First Supplemental CT 1617), and had never known anyone whom he believed to have been falsely accused of a crime (First Supplemental CT 1619). These responses suggested that the prospective juror may well have felt more of an affinity for law enforcement and the prosecution than for the defense. Thus, the only plausible explanation for the prosecutor's exercise of a peremptory challenge against Prospective Juror 045921 was racial discrimination.

The prosecutor's use of a pretextual explanation to justify his challenge of Prospective Juror 045921 calls into question the validity of her proffered reasons for excusing the other two

Black prospective jurors. While the rationales offered by the prosecutor may find some support in the record, her discriminatory purpose in challenging Prospective Juror 045921 suggests that her stated reasons for excusing Prospective Jurors 042519 and 04578 were likewise designed to conceal her true intent. That intent was to improperly exclude all Black persons from serving on appellant's jury.

The unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the reversal of the judgment where such error is established on appeal. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 927, fn. 8; *People v. Silva* (2001) 25 Cal.4th 345, 386.) Here, all three Black persons who were called to the jury box were excluded because of racial discrimination. Accordingly, the judgment against appellant must be reversed.

E. EMMA FOREMAN'S EXTRAJUDICIAL STATEMENT THAT APPELLANT ADMITTED KILLING AN ELDERLY COUPLE IN BAKERSFIELD WAS NOT INCONSISTENT WITH HER TRIAL TESTIMONY AND THEREFORE WAS NOT ADMISSIBLE UNDER EVIDENCE CODE SECTION 1235

1. Relevant Facts and Proceedings

Prosecution witness Emma Foreman was the mother of appellant's former girlfriend, Gerry Tags. During direct examination, the following colloquy took place.

Q. Did [appellant] ever say anything to you about murdering anybody?
A. Not specifically to me, but I overheard the conversation between him and Gerry, my daughter.
Q. What did he say to Gerry about murdering anybody?
A. He kept on telling her that if she didn't do what he wanted her to do, he would cut her mother-fucking throat.
Q. Did he ever mention any elderly people that had he (sic) harmed?
A. Well, one time he did.
Q. Did he say that to you or to your daughter?
VI. It was to my daughter.
Q. What did he say then?
A. He said that he would – he said he would cut her mother-fucking throat.

(RT 2246-2247.) Foreman was not asked to clarify her answer, and she was not asked any additional questions about what appellant said concerning the elderly people who had been harmed.

After Foreman completed her testimony, the prosecutor sought to impeach her with the testimony of Shafter Police Lieutenant John Porter, who, along with Sergeant Buoni, had interviewed Foreman on January 26, 1990. According to Porter's report, Foreman stated that appellant told her he killed an old couple in Bakersfield. Appellant further explained to Foreman that he caught the couple in the bedroom and then beat them to death. (RT 2389.) Defense counsel objected to admission of the prior statement on the ground that it was not inconsistent with Foreman's testimony at trial. (RT 2390.) That objection was overruled. (RT 2391.)

After the trial court's ruling, Lieutenant Porter testified as follows.

Q. During the interview you had with Ms. Foreman, did you ask her if [appellant] had ever told you about killing an old couple in Bakersfield?
A. Yes.
Q. What did she tell you?
A. That he did tell her that he killed an old couple in Bakersfield.
Q. Did she tell you more specifically what he said about killing an old couple in Bakersfield?
A. That he found them in a bedroom, and I believe he beat them to death.

(RT 2391-2392.)

2. Emma Foreman's Trial Testimony Was Neither an Express Nor Implied Denial of Her Prior Statement to Lieutenant Porter

Under Evidence Code section 1235, evidence of a prior statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with the witness's testimony at trial and is offered in compliance with Evidence Code section 770.[66] A prior inconsistent statement admitted under section 1235 is admissible not only to impeach the witness's credibility but also to prove the truth of the matters asserted therein. (*People v. Green* (1971) 3 Cal.3d 981, 985; *People v. Johnson* (1992) 3 Cal.4th 1183, 1219.)

"The 'fundamental requirement' of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony." (*People v. Sam* (1969) 71 Cal.2d 194, 210.) "Inconsistency in effect, rather than contradiction in express terms, is the test for" admissibility of the prior statement. (*People v. Green*, *supra*, 3 Cal.3d at p. 988.) A court may find inconsistency in effect by considering what the witness says and omits to say in her trial

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[66]Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

testimony. The prior statement is admissible if it has "'. . . a tendency to contradict or disprove the [trial] testimony or any inference to be deduced from it.'" (*People v. Spencer* (1969) 71 Cal.2d 933, 942.)

This Court has found that where a witness's claim of a memory loss is a deliberate attempt to avoid answering a question, the trial testimony constitutes an implied denial of the question asked, and a prior inconsistent statement is admissible. (*People v. Green*, *supra*, 3 Cal.3d at p. 989.) Furthermore, courts will rely not only on the words spoken by a witness, but also on other indicators of a reluctance to testify at trial in determining whether a witness is engaged in deliberate evasion. (*Id.*, at pp. 987-988 and fn. 6; *People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225.) If "the record shows no reasonable basis for concluding that the witness'[s] responses are evasive and untruthful," the prior statement is not admissible under section 1235. (*People v. Rios* (1985) 163 Cal.App.3d 852, 864.) Thus, the appellate courts have found that when the witness honestly has no recollection of the facts, or when the witness refuses to answer all questions, there is no "testimony" from which an inconsistency with any prior statement may be found. (*Ibid.*)

Here, Foreman's prior statement was not inconsistent with her trial testimony. When asked at trial what appellant had said about harming elderly people, Foreman did not answer the question. Instead, she gave nonresponsive testimony that appellant said that he would cut Gerry Tags's throat. (RT 2247.) The trial testimony was not expressly inconsistent with Foreman's prior statement to Lieutenant Porter that appellant had said he fatally beat two elderly people in Bakersfield.

Nor was Foreman's trial testimony impliedly inconsistent with her prior statement. There

is no reasonable basis in the record for concluding that the witness's single, nonresponsive answer was a deliberate attempt to avoid responding to the question asked by the prosecutor. Had the prosecutor repeated the question or asked Foreman to explain her answer, and had the witness given evasive answers, such an inference may have been reasonable. (See, e.g., *People v. Perez* (2000) 82 Cal.App.4th 760, 766 [deliberate evasion found where witness answered "I don't remember" or "I don't recall" to virtually all questions asked about her observations on the night of the murder and her statements to the police].) That, however, was not the case, and the prosecutor never claimed that Foreman was being evasive. (RT 2390-2391.) Moreover, there was no other indication in the record that Foreman had any degree of reluctance in testifying against appellant. To the contrary, Foreman had great animosity towards appellant and had no motivation to withhold any damning evidence she had. The witness did not hesitate to testify that appellant had admitted to killing Jewell Russell and had threatened both her and her daughter. (RT 2246.) In this case, Foreman's nonresponsive testimony was analogous to an honest failure of recollection. There was thus no "testimony" from which an inconsistency with an earlier statement that appellant had admitted killing an elderly couple could be found.

The rationale articulated by trial court in finding an inconsistency appears to be that since Foreman gave a response after the prosecutor posed the question and that response was not identical to her prior statement, there necessarily was an inconsistency regardless of the fact that the answer was nonresponsive. (RT 2390.) The trial court's analysis was both unreasonable and simplistic in isolating the witness's response from the context in which it was made. The critical determination is whether Foreman was making a deliberate attempt to avoid testifying about what appellant had said, or whether there was some other explanation for her nonresponsive

testimony. If Foreman misunderstood the question, or if her intent was simply to reiterate to the jury that appellant had threatened to kill her daughter, there was no inconsistency in effect. Here, as discussed above, the record does not provide a reasonable basis for finding a willful evasion, and the trial court therefore erred in admitting Foreman's prior statement.

3. The Trial Court's Error in Admitting Foreman's Prior Statement That Appellant Admitted Fatally Beating an Elderly Couple Requires Reversal of the Judgment

The erroneous admission of Foreman's prior statement to Lieutenant Porter violated appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution and article I, section 13 of the California Constitution. Also violated was appellant's right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution. One purpose of confrontation requirement is to ensure reliability of the witness's testimony by means of the oath. (*California v. Green* (1970) 399 U.S. 149, 158.) Thus, "the Confrontation Clause does not require excluding from evidence the prior [extrajudicial] statements of a witness who concedes making the statements" when testifying under oath. (*Id.*, at p. 164.) Here, however, Foreman never admitted that she made a prior statement to Lieutenant Porter, and therefore there existed a danger that she did not in fact make such a statement. (Contrast *People v. Green*, *supra*, 3 Cal.3d at p. 989 [admission of a prior inconsistent statement did not violate the confrontation clause where witness admitted under oath that he had made a prior statement to the police officer concerning the subject of acquiring and selling marijuana].)

When, as here, a federal constitutional violation has occurred, the conviction must be reversed unless the error can be found to have been harmless beyond a reasonable doubt.

(*Chapman v. California* (1967) 386 U.S. 18, 24.) In appellant's case, that standard has not been met. Indeed, even under the lesser standard for an error of state law it is "reasonably probable" that a result more favorable to appellant would have been reached had the trial court correctly excluded Foreman's prior statement to Lieutenant Porter. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecution's case against appellant was tenuous, so tenuous that the prosecution for years believed it did not have enough evidence to charge appellant. There was no eyewitness testimony identifying appellant as the killer, and other than Foreman's erroneously-admitted prior statement, there was no evidence that appellant had ever admitted committing the crimes. According to Gerry Tags, when she asked appellant if he "did . . . those two old people on McClean Street," appellant replied, "No, I did not do them." (RT 2403.) The prosecution's case, thus, rested primarily on two pieces of circumstantial evidence – the discovery of appellant's fingerprints at the Mercks' home and testimony from witnesses who claimed to have seen appellant in possession of property allegedly taken during the killings. The credibility of this evidence, however, was highly suspect.

With respect to the fingerprint evidence, the positive fingerprint match that the criminalists found in 1994 was contradicted by the prior findings of criminalist Jerry Roper. When Roper reviewed the latent fingerprints in 1987, he did not find any latents that matched appellant's known fingerprints. (RT 1589-1590, 1595.)

In addition, the witnesses who claimed that they saw appellant in possession of property allegedly belonging to the Mercks were not credible. The property that the witnesses described included a lighter case, a Colt handgun, Social Security checks, a wallet, a driver's license, and a

white ring with a turquoise stone.[67]

Testimony about the lighter case was given by Ronnie Woodin, who claimed to have purchased the item from appellant. Woodin's credibility, however, was severely impeached. The witness admitted that he smoked marijuana all the time and was probably "high" at the time that he allegedly bought the lighter case, as well as during his interview with Sergeant Fraley. (RT 1924, 1931.) Smoking marijuana caused Woodin to be forgetful about events that he observed. (RT 1931.) Woodin also had suffered a prior misdemeanor conviction for driving under the influence of alcohol. (RT 1923-1924.) Finally, when shown a lighter case in court, Woodin could not be certain that it was the case that he allegedly bought from appellant. Woodin could only testify that "as far as [he could] remember," the exhibit "look[ed] like the same one" as the lighter case sold to him by appellant. (RT 1925-1926.)

Equally unconvincing was the prosecution's attempt to link appellant to a ring that allegedly belonged to Alma Merck. The prosecution's theory was that appellant sold the ring to his sister, Catherine Glass, in September, 1984. At trial, however, Glass testified that she could not remember whether appellant had sold her a ring. (RT 1940.) Then, after further questioning, Glass acknowledged that appellant probably had sold her a ring, but still was not certain that such

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[67]The prosecutor also argued that appellant possessed a watch necklace that belonged to Alma Merck. (RT 2673, 2734.) That argument, however, was highly speculative and not supported by the evidence. The record established only that Alma had owned a necklace that had a watch on it. (RT 2061.) In addition, according to Mitzi Cowan, sometime between September 1, 1984, and September 5, 1984, appellant came to her apartment with some property, including a heart-shaped, silver necklace watch. (RT 2427.) Gerald Cowan took the necklace watch from appellant and later that day threw it away in a vacant field. (RT 2428-2429.) No witness identified the necklace watch that appellant possessed as being the necklace watch that belonged to Alma. Nor did any witness describe Alma's watch as being similar in style to the heart-shaped, silver necklace watch that appellant had with him. Moreover, no witness testified that Alma's watch necklace was missing.

a transaction had actually occurred. (RT 1942.) Moreover, when shown the ring that the prosecution claimed was Alma's, Glass did not recognize the jewelry as something that appellant sold her. (RT 1942.)

Also lacking credibility were prosecution witnesses Danny Phinney and Robb Lutts. Phinney was a particularly critical witness because he claimed to have seen appellant in possession of Clifford's Colt handgun that was used in the murder, Clifford's wallet and driver's license, and the Mercks' Social Security checks. Phinney's capacity to perceive, process and recall information, however, was gravely impaired. Phinney readily admitted that at the time of his interaction with appellant he was a long-time methamphetamine addict who was injecting methamphetamine at least once a day. (RT 1665, 1672.) This addiction caused Phinney to "go through periods of paranoia or delusions" (RT 1677-1678), during which he would see things and hear sounds that were not in fact real. (RT 1678.) Moreover, Phinney was still using methamphetamine at the time that he testified at appellant's trial. (RT 1688.)

In addition to being a drug addict, Phinney suffered from a life-long bipolar disorder, which he described as "having two centers to [his] brain," one manic and the other depressed. (RT 1673, 1674.) Phinney testified that his bipolar disorder caused his mind to race, jumbled his thought process and impaired his short term memory. (RT 1674.) As a result of these impairments, Phinney could only recall "to an extent" what occurred when he and appellant allegedly met in September, 1984. (RT 1652.)

Moreover, Phinney had a strong motive to cooperate with the prosecution when he first came forward to make a statement about appellant. At the time, Phinney was in custody awaiting trial on felony drug charges. Phinney not only wanted lenient treatment in his own case, but he

was concerned that the Colt handgun seized during his arrest might be linked to the murders of the Mercks. He hoped to "exonerate himself from anything to do with the weapon." (RT 1660.)

There were two other reasons why Phinney desperately wanted to be released from jail. First, he was being housed in protective custody, and he "wanted to get out of P.C. real bad," so that other inmates would not believe that he was a snitch. (RT 1721-7122, 1724.) Second, Phinney was undergoing methamphetamine withdrawal and wanted to be released so that he could use drugs again. (RT 1724.) Phinney realized that providing information about appellant and the Colt handgun might allow him to be released from custody, and he later "wound up getting some kind of deal." (RT 1660, 1724.)

The record also indicates that, prior to his first interview with Sergeant Diederich, Phinney learned about the killings from reading the newspaper. (RT 1663, 1665, 1728.) The newspaper article may well have been the source of much of the information that Phinney provided in the interview.

Phinney's lack of credibility was further evident from a significant inconsistency between his statement to Sergeant Diederich on December 21, 1984 and his trial testimony. In his prior statement, Phinney claimed that he was not present when Lutts obtained the Colt handgun, and that he had only heard that appellant sold the gun to Lutts. (RT 1855, 1866, 1870.) In addition, contrary to his trial testimony, Phinney never mentioned acting as an intermediary in the transfer of the handgun from appellant to Lutts. (RT 1856.)

Phinney also acknowledged his willingness to lie to Sergeant Diederich in order to win his release from jail. (RT 1734-1735.) According to Phinney, it was "a possibility" that he told the sergeant whatever he believed would get him out of jail, regardless of the truth. (RT 1735.)

Phinney just wanted to "give them something to investigate" and "give [himself] a little break on some time." (RT 1735.)

Finally, Phinney's extensive criminal record added to his lack of credibility. Phinney testified that he had a lengthy criminal record that resulted from his addiction to narcotics and alcohol. (RT 1652.) He had never been sentenced to state prison, but had served a number of county jail incarcerations for being under the influence of various drugs. (RT 1652.)

The credibility of prosecution witness Robb Lutts was also seriously lacking. During September of 1984, Lutts was deeply involved in the sale and use of drugs. (RT 1627.) According to Lutts, he used at least a gram of methamphetamine each day, and was under the influence of methamphetamine most of the time. (RT 1638-1640.) The use of methamphetamine made Lutts paranoid and impaired his ability to accurately perceive and recall events he witnessed. (RT 1639, 1640.)

Lutts testified that due to the passage of time and his drug use, he did not have a clear memory of how he obtained the Colt handgun that was seized by the police during his arrest on October 14, 1984. (RT 1631, 1635.) Although Lutts believed that he received the gun in a trade for drugs with appellant, he had no recollection of ever seeing appellant in possession of the weapon and he did not recall appellant being present when the transaction took place. (RT 1631, 1640, 1641, 1648.)

Lutts's extensive criminal record cast further doubt on his credibility. He had suffered a number of misdemeanor convictions, as well as felony convictions for possession of methamphetamine for sale, possession of cocaine for sale and robbery. Lutts had previously served a prison sentence and had been released on parole about three and a half years prior to his

testifying. (RT 1628.)

Thus, the prosecution's attempt to establish that appellant possessed items of property that allegedly belonged to the Mercks was far short of convincing. In addition, even if the jury were to believe that appellant did sell a ring to his sister and a lighter case to Ronnie Woodin, defense evidence raised substantial doubts as to whether the items appellant sold were actually taken from the Mercks. Ruth Scott testified that her former jewelry business manufactured the lighter case that the prosecution claimed was Clifford's. (RT 2477, 2485.) Scott explained that the lighter case shown to her in court was not a unique item, and that her company made 50,000 such cases from 1976 to 1981. Some of these cases were sold in California. (RT 2478.) Moreover, Damon Taylor testified that when he managed a Bakersfield discount cigarette store in 1984, the style of the lighter case allegedly owned by Clifford was very common. Taylor's store ordered 50 to 100 such cases each week, and sold each case for a dollar or a dollar and a half. (RT 2483.)

Equally common was the ring that Catherine Glass allegedly bought from appellant. Scott recognized the ring as a piece of Navajo jewelry with a low grade turquoise stone. (RT 2480, 2483.) She had previously seen thousands of such rings, as they were very popular, low-cost tourist items. (RT 2480, 2484.) Moreover, Scott testified that the inscription on the inside of the ring was not Alma's initial, but the number three, which signified that the wholesaler had paid three dollars for the ring. (RT 2483.)

Even if this defense evidence was rejected by the jury and the jury found that appellant possessed property belonging to the Mercks, this did not necessarily mean that appellant was involved in the killings. A third party could have committed the killings and then sold the stolen

property to appellant. Even if appellant was told that the property he was buying was taken from the Mercks, he would still be guilty only of receiving stolen property, not murder.

The closeness of the guilt determination was also reflected in the length of time that the jury deliberated before reaching verdicts. On the first day of deliberations, June 3, 1996, the jury deliberated from 3:45 p.m. to 4:38 p.m. (CT 1364.) The jury then deliberated for half a day on June 4 (CT 1369), a full day on June 5 (CT 1373), and until 3:30 p.m. on June 6 before returning verdicts (CT 1458) – a total of more than two full days.. (See *People v. Woodard* (1979) 23 Cal.3d 329, 341 ["issue of guilt in this case was far from open and shut, as evidenced by the sharply conflicting evidence and the nearly six hours of deliberations by the jury before they reached a verdict"]; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 ["jurors deliberated over nine hours over three days, which suggests that they did not find the case to be clear-cut"].)

Thus, given the circumstances described above, it is reasonably probable that a result more favorable to appellant would have been reached had Foreman's prior statement not been admitted. The evidence that appellant admitted fatally beating an elderly couple in Bakersfield added substantial weight to the prosecution's case, and may well have tipped the balance in favor of guilt. Indeed, Foreman's testimony was read back to the jury during the latter part of the jury's deliberations, an indication that the testimony was a substantial factor in the jury's decision .[68] (CT 1378; RT 2765.) Accordingly, the judgment of conviction must be reversed.

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[68]The record is not clear as to exactly when Foreman's testimony was read back to the jury. On the third day of deliberations, the jurors requested a readback of the testimony of Foreman, Gerry Tags and Mitzi Cowan. The readback began in the afternoon of June 5, 1996, and was completed during the morning of June 6, 1996. (RT 2768-2769.) The record does not indicate the order in which the testimony of the three witnesses was read. The jurors reached their verdicts at 3:30 p.m., on June 6, shortly after the readback was completed. (CT 1458.)

F. DANNY PHINNEY'S EXTRAJUDICIAL STATEMENTS WERE NOT ADMISSIBLE AS PRIOR INCONSISTENT STATEMENTS, PRIOR CONSISTENT STATEMENTS OR PAST RECOLLECTION RECORDED

1. Relevant Facts and Proceedings

Prosecution witness Danny Phinney was a long-time poly-drug abuser. (RT 1652, 1672.) He met appellant through another prosecution witness, Robb Lutts. (RT 1612.) Lutts was a methamphetamine dealer who sold drugs on occasion to appellant and his girlfriend, Gerry Tags. (RT 1629-1630.) Phinney hung around Lutts and did errands for him in exchange for drugs. (RT 1630, 1644, 1651.) Both Phinney and Lutts admitted that their memories were impaired by the passage of time and their drug use. (See, e.g., RT 1631, 1638, 1640, 1642.) Phinney also suffered from bipolar disorder, which affected his perception as well as his memory. (RT 1672, 1674.) Phinney was at times delusional. (RT 1678-1679.) When he testified, Phinney had stopped treatment for his mental illness, but was continuing to use methamphetamine. (RT 1674, 1676, 1688.)

In December 1984, after spending several months in protective custody, Phinney initiated contact with the police regarding the Mercks' homicides. (RT 1841.) The interview was taped and transcribed. (RT 1657, 1852.) Phinney's trial testimony differed in some respects from his earlier statements, but in other respects matched those statements in detail. The prosecution sought to introduce Phinney's prior statements alternatively to impeach or to rehabilitate his testimony as best to fit its theory of the case.

The prosecution argued that Phinney's interview in December 1984 was admissible pursuant to the hearsay exceptions set forth in Evidence Code sections 1235 and 1236 for prior inconsistent and consistent statements, respectively. Additionally, the trial court was urged to

admit the prior interview under Evid. Code section 1237, the hearsay exception for "prior recollection recorded." (RT 1815). Phinney was not given the opportunity during his testimony to review the tape or transcript of his earlier statements, nor was he recalled by the prosecution for further questioning to explain any discrepancies. Instead, the prosecution was allowed to elicit Phinney's prior statements from Sergeant Diederich, one of the interviewing officers.

All of Phinney's testimony had been heard by Judge Gildner. All of the rulings on appellant's hearsay objections were made by Judge Felice. The prosecution cited the following direct and cross-examination testimony as a basis for the hearsay exceptions:

a. Prior Inconsistent Statement

Q. Mr. Phinney, as much as you can remember . . . do you recall shortly after labor day running into defendant R.C. Cowan, at the Chief Auto Parts on Niles Street?
A. I don't remember the date, but I remember running into R.C.
Q. And do you recall telling the officers that that day was the week after Labor Day?
A. No, I don't recall that.

(RT 1653, 1782.)[69]

b. Prior Consistent Statement

Q. What did R.C. show you?
A. Gerry showed me a jewelry box. She showed me a couple of boxes, and one of them had a little – music box . . . and there was a lot of junk jewelry and we kind of went through it. . . .
Q. Did he show you a billfold?
A. Yes.
Q. Would you describe the billfold?
A. Just an old leather wallet with some – like name running from corner to corner on

[69]The transcript pages cited at the hearing no longer correspond to the pages on which the referenced testimony appears in the final, corrected record. In most instances, the relevant colloquy is fairly easy to locate. However, with respect to some transcript citations, the precise scope of the reference testimony is unclear. Appellant has endeavored to identify the pertinent testimony, while taking the liberty of eliding superfluous language. Places where elisions have been made are so designated.

it, or a name or a kind of design. . . . It was tooled like any leather. . . .

Q. What kind of stuff was being pulled out [of the billfold]?

A. Like an I.D. . . . It was a driver's license.

Q. Do you recall the name on the driver's license?

A. Yeah. I remember - - I think I remember it was like Mirck or Merck. . . .

Q. Did this driver's license have a birth date on it?

A. Yes, Ma'am. It was like early 1900. . . . If I had not seen the paperwork, I would not have remembered any of it. . . .

(RT 1655-1657, 1782-1783.)

c. Prior Recollection Recorded

The court further found that section 1237, prior recollection recorded, constituted an additional, independent ground for admitting Phinney's December 1984 statement, subject to the condition that Sergeant Diederich was able to lay a foundation that, at the time of the interview, he observed no signs that Phinney was going through withdrawal, was under the influence or seemed delusional. (RT 1813-1815).

d. Sergeant Diederich's Testimony

As contemplated by the court's ruling, Sergeant Diederich initially testified to his impressions of Phinney's demeanor during the 1984 interview. (RT 1842-1843.) Sergeant Diederich became aware of Phinney's drug use at the outset of the interview. (RT 1842.) He observed, moreover, that Phinney seemed nervous and that his account of events was fragmented. (RT 1843.) Nevertheless, Sergeant Diederich felt that Phinney was not under the influence of, or in withdrawal from, drugs on the day of the interview. (RT 1843, 1848.) (But see RT 1723 [Sorena: "Q. Now, were you having - - at the time that you decided to talk with law enforcement, were you in the process of having any withdrawals?" Phinney: "A. Yeah, I would imagine so."].)

With these observations as foundation, Sergeant Diederich went on to summarize

Phinney's earlier statements, mostly repeating testimony already given by Phinney. This, in effect, allowed the prosecution to present a more coherent account of Phinney's testimony through a more appealing witness, Sergeant Diederich, who had none of Phinney's credibility problems or suspect motives.

Appellant's attorney countered with numerous transcript citations establishing that the prosecution had not met the foundational requirements for admission of the proffered extrajudicial statements. (See, e.g., RT 1779, 1787-1789, 1791-1796, 1801-1806.) In essence, the cited portions of Phinney's testimony showed that: (1) Phinney did not testify inconsistently with his prior statement as required by Evidence Code sections 1235 and 770, but rather faltered because of a genuine failure of recollection; (2) defense counsel did not assert or imply that Phinney's trial testimony was fabricated after the 1984 interview, as required by sections 1236 and 791; and finally, (3) Phinney's earlier statement did not exhibit the indicia of trustworthiness that section 1237 demands. Nevertheless, the court permitted Sergeant Diederich, whose own recollection of the interview was sparse, to vouch for Phinney's veracity while minimizing the discrediting variations in Phinney's serial versions of events.

2. Phinney's Trial Testimony Was Neither an Express Nor an Implied Denial of His Prior Statement to Sergeant Diederich

Under Evidence Code section 1235, evidence of a prior statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with the witness's testimony at the trial and is offered in compliance with Evidence Code section 770.[70]

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[70]Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or [¶] (b) The witness

Compliance with both sections is required, moreover, to preserve the right of confrontation guaranteed by the Sixth Amendment. (*People v. Strickland* (1974) 11 Cal.3d 946, 954, citing *California v. Green* (1970) 399 U.S. 149.)

The proponent of hearsay evidence bears the burden of showing that it falls within a hearsay exception and that it has sufficient indicia of reliability. (*People v. Woodell* (1998) 17 Cal.4th 448; *People v. Zapien, supra,* 4 Cal.4th at p. 929.) A witness's prior inconsistent statement is admissible not only to attack that witness's credibility but also as substantive evidence, provided that all of the statutory conditions for admission are met. (*People v. Green, supra,* 3 Cal.3d at p. 985; *People v. Johnson, supra,* 3 Cal.4th at p. 1219.)

"The 'fundamental requirement' of section 1235 is that the statement, in fact, be inconsistent with the witness's trial testimony." (*People v. Sam, supra,*71 Cal.2d at p. 210.) Inconsistency in effect, rather than contradiction in express terms, is the test for admissibility of a prior statement." (*People v. Green, supra,* 3 Cal.3d at p. 988.) A court may find inconsistency in effect by considering what the witness says and omits to say in his or her trial testimony. The prior statement is admissible if it has ". . . a tendency to contradict or disprove the [trial] testimony or any inference to be deduced from it." (*People v. Spencer, supra,* 71 Cal.2d at p. 942.)

This Court has held that where a witness's claim of memory loss is a deliberate attempt to avoid answering a question, the trial testimony constitutes an implied denial of the question asked and a prior inconsistent statement is admissible. (*People v. Green, supra,* 3 Cal.3d at p. 989.) Furthermore, courts may rely not only on the words spoken by a witness, but also upon

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has not been excused from giving further testimony in the action."

other indicators of a reluctance to testify at trial in determining whether a witness is engaged in deliberate evasion. (Cf., *Id.*, at pp. 987-988 & fn. 6; *People v. O'Quinn, supra,* 109 Cal.App.3d at p. 225.) If "the record shows no reasonable basis for concluding that the witness'[s] responses are evasive and untruthful," the prior statement is not admissible under section 1235. (*People v. Rios, supra,* 163 Cal.App.3d at p. 864.) Thus, the appellate courts have found that there is no "testimony" from which an inconsistency with any earlier statement may be implied when the witness honestly has no recollection of the facts. (*Ibid.*)

Here, counsel for appellant objected to the admission of Phinney's December 1984 statement under section 1235 on the ground that Phinney's trial testimony was not actually inconsistent with his earlier statement. (RT 1778). The court overruled the objection, finding that Phinney's testimony that he did not remember exactly when he ran into appellant at the auto parts store was inconsistent with his previous statement that the meeting took place during the first week of September. (RT 1782).

In the present case, Phinney's failure to recollect the exact date he ran into appellant was not inconsistent with his prior statement that this occurred in September. To defense counsel's suggestion that the meeting might have taken place in May or June, Phinney reiterated that he had no recollection when the meeting occurred.[71] When questioned on direct examination, Phinney stated repeatedly that he did not recall the date he ran into "R.C [appellant]."

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[71]Phinney did not affirmatively testify that the meeting with appellant occurred before September, possibly in May or June. (RT 1713-1714.) Rather, when queried on the subject, Phinney responded: "I don't have any idea when it occurred, to be truthful. . . . I don't know. I have no idea." (RT 1713-1714.) No reasonable juror would have concluded from these responses that Phinney believed that his meeting with appellant actually took place in May or June.

Q. . . . do you recall shortly after Labor Day running into the defendant, R. C. Cowan at the Chief Auto Parts on Niles Street?
A. I don't remember the date, but I remember running into R. C.
Q. Do you recall telling the officers that it was the week after Labor Day?
A. No, I don't recall that.

(RT 1653.)

Later in the direct examination, he amplified: "I can't remember exactly. I can't remember. If I had not seen the paperwork, I would not have remembered any of it." (RT 1657.) The paperwork included copies of police reports, as well as the transcript of the statement made to officers in [December] 1984. (RT 1657.)

Neither the prosecution nor the defense argued that Phinney's lapse of memory was feigned. Judge Felice, moreover, had no independent basis for drawing such an inference as he had not observed Phinney on the stand. (Cf., *People v. Cummings* (1993) 4 Cal.4th 1233, 1294 [judge that heard the testimony had the best opportunity to assess the credibility of the witness].) Deliberate evasion has been found where a witness answered "I don't know" or "I don't remember" to virtually all questions asked by the prosecution (*People v. Perez* (2000) 82 Cal. App.4th 760, 766), or where the witness remembered selected neutral events of the day, but was equivocal and evasive as to incriminating incidents. (*People v. Green, supra,* 3 Cal.3d 981.)

Here, there is no indication that Phinney was reluctant to testify against appellant. Nor is there any suggestion in the record that his failure to recollect was selective or calculated to avoid testifying as to material matters. (Cf., *People v. Simmons* (1981) 123 Cal. App.3d 677, 680-681.) As such, there was no testimony from which an inconsistency with Phinney's prior statement that he ran into appellant in September could be inferred.

Indeed, the very line of questioning the court cited as Phinney's "opportunity to explain

or deny" negates any possible inconsistency. Several times in her examination, the prosecutor elicited Phinney's agreement that his prior statement to the officers was "pretty close" to what happened, and Phinney volunteered that his testimony was, in fact, based on the transcript of his prior recorded interview. Thus, there could be no meaningful divergence between Phinney's trial testimony and his December 1984 statement, inasmuch as he repeatedly ratified and adopted his previous statement to Sergeant Diederich and the other officers. (RT 1653-1654 ["Q: But if you told them that [it was the week after Labor Day] it would have been the truth, is that correct. A: Yes."].)

Accordingly, the record is devoid of the foundation required to admit Sergeant Diederich's testimony under the exception for prior inconsistent statements. The trial court's error is clear.

3. All of Phinney's Improper Motives Existed at the Time He Made The Prior Consistent Statement

Evidence Code section 1236 provides that evidence of a statement previously made by a witness is admissible if the statement is consistent with his testimony at the hearing and is offered in compliance with Evidence Code section 791. Section 791 imposes the additional condition that the prior consistent statement must be offered after:

> (a) Evidence of a statement made by [the witness] that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his *testimony at the hearing* is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(Italics added.)

Neither of these antecedent requirements was present in this case. The prosecution did not waste any argument on the first requirement because Phinney was not confronted with a prior statement contradicting his trial testimony. Rather, the prosecution relied on the second alternative, i.e., that Phinney's trial testimony had been attacked as the product of recent fabrication, bias or improper motives. But that was not the thrust of counsel's cross-examination.

The attack based on improper motives was directed as much to Phinney's prior statement as to his trial testimony. Indeed, while some of the impeaching motives remained through trial, others had diminished over time. At the time of trial, Phinney was no longer (1) suffering from drug withdrawal; (2) trying to get out of protective custody; (3) seeking a better deal in his case; (4) seeking a monetary reward for information; or (5) seeking to "exonerate" himself from anything to do with a possible murder weapon. (Cf., RT 1660, 1723-1725, 1734-1737, 1791-1794 ["And it seemed like I was trying to be implicated as something to do with the gun, you know, and I didn't want that, that's for sure, if it killed somebody. . . . Might have killed somebody."].) Of course, Phinney's continuing drug use was an ever-present reason for him to assist law enforcement, to deflect attention away from his own activities and ensure police good will in the event of future contacts. (See RT 2707-2708 [Sprague: "What is the first thing that is going to happen when [Phinney] gets arrested? He is going to be calling the D.A.'s office. Hey I helped you in a murder trial. It is money in the bank."].)

In the main, defense counsel's examination of Phinney focused on the deleterious effects

of his drug use and mental illness on his ability to perceive and recall accurately.[72] Such traditional targets of impeachment do not meet the specific foundational requirements of section 791. Thus, defense counsel correctly argued that the proffered prior consistent statement was inadmissible. (RT 1794.)

The court's contrary ruling is therefore perplexing. Its analysis focuses on the irrelevant post-statement development that the Colt handgun, which Phinney all-along suspected might have had some connection to the Mercks' killings, had been matched ballistically to bullets recovered from Clifford Merck. (RT 1796.) While recognizing that the resulting motive – to distance himself from the gun – was present to "some degree" when Phinney made his statement to Sergeant Diederich, the court, nevertheless, admitted the prior statement because evidence of the gun's connection to the crime arose significantly after that statement was made. (RT 1796-97). (See *People v. Jones* (2003) 30 Cal.4th 1084, 1106-07, citing *People v. Hayes* (1990) 52 Cal.3d 577, 609 ["a prior consistent statement is admissible if it was made before the existence of any one or more of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witness's testimony"]; *People v. Coleman* (1969) 71 Cal.2d 1159, 1165 ["it was . . . incumbent on the prosecution to show that the statements were made before the improper motive 'is alleged to have arisen'"].)

Had defense counsel, in fact, suggested on cross-examination – directly or by implication – that Phinney's false testimony was motivated by Laskowski's re-examination of the Colt handgun, the court's reasoning might have been sound. But, since appellant's counsel never

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[72]That is not to say that appellant abandoned the defense of third party liability. In closing, defense counsel argued at length that it was "highly probable" that Lutts and Phinney were the perpetrators of the Mercks' homicides. (RT 2697, 2699, 2706, 2719, 2722-2724.)

sought to establish that Phinney's trial testimony was impacted to any degree by the new ballistics evidence, the court's analysis founders on a clearly counterfactual premise. Indeed, even if it were assumed, as unlikely as it might seem, that Phinney were made privy to the prosecution's forensic results, the new ballistics evidence would surely have relieved, rather than heightened, Phinney's anxiety that he might himself be a suspect in the Mercks' homicides.

Judge Felice's misconstrual of Phinney's cross-examination is not only fatal to his ruling, but serves, as well, to underscore the error in Judge Gildner's decision to proceed with Phinney's testimony despite the judge's disqualifying conflict. (See Argument B, *supra.*) Pressed to make such complex evidentiary rulings in the midst of trial, Judge Felice could more easily have misread Phinney's examination based on a cold record, than if he had also observed the testimony and had an accurate, independent recollection of what was said. In any event, because appellant focused on the constancy of Phinney's motives to fabricate both his earlier statement and his trial testimony equally, none of the prerequisites for admitting a prior consistent statement were met.

4. Phinney's Prior Statement was not Made at or Near the Time He Obtained the Colt Handgun, nor When His Perception or Memory of the Occurrence was Fresh and His Recollection Could Have Been Refreshed Without Extrinsic Evidence

The hearsay exception described in Evidence Code section 1237, commonly referred to as "past recollection recorded," states six requirements for admissibility of a prior written statement:

(1) the statement would have been admissible if made by the witness while testifying;

(2) the witness must lack a sufficient present recollection of the facts to allow him to testify fully and accurately;

(3) the writing was made at a time when the fact recorded actually occurred or when the fact recorded was fresh in the witness's memory;

(4) the writing must have been made by the witness personally or under his direction by another person at the time the witness's statement was made for the purpose of recording the statement;

(5) the witness must testify that the prior statement was a true statement of the facts; and

(6) the statement must be authenticated as an accurate record of the witness's statement.

(Evid. Code, § 1237(a), 1 Jefferson, California Bench Book (Third Edition, 1997) ¶ 11.3, pp. 188-189.)

These requirements ensure that "[s]ection 1237 makes only a narrow exception to the hearsay rule consistent with trustworthiness." (*People v. Simmons, supra,* 123 Cal.App.3d at p. 679.) The judge who hears the witness's testimony has the best opportunity to assess the witness's credibility, that is: whether the witness testified truthfully and reliably that the prior statement is true as to the facts. (*People v. Cummings, supra,* 4 Cal.4th at p. 1294.) Even then, the prior writing, which may be read to the jury, may not itself be admitted into evidence as an exhibit unless offered by an adverse party. (Evid. Code, § 1237(b).)

Two cases control in this area: *Simmons, supra,* 123 Cal.App.3d at p. 679 [statement inadmissible where amnesiac witness could not attest to trustworthiness of previously recorded facts], and *Cummings, supra,* 4 Cal.4th at p. 1294 [statement properly admitted where witness, who could not recall content of conversation with defendant, testified that he had truthfully reported conversation while it was fresh in his mind]. Apart from these two decisions, there is scant case law or commentary to guide the determination of admissibility under this section.

Finding the analogy to *Cummings* more apt, the trial court ruled that Phinney's prior

statement could be admitted as a prior recorded recollection, provided that Sergeant Diederich testified, as proffered, that during the 1984 interview Phinney did not appear to be under the influence of drugs or in withdrawal, and did not conduct himself in a way that would suggest he was delusional or otherwise impaired. (RT 1812.) Thus, in the wake of Phinney's cross-examination, casting serious doubt on the truthfulness of his earlier statement, no less than his trial testimony, the court allowed Sergeant Diederich, in effect, to vouch for the prior statement's reliability as a substitute foundation, as well as a substitute for the judge's own observation of the witness.

The court's analysis was seriously flawed. First of all, under section 1237, it must be the declarant, not a third party, who establishes the veracity of the previously recorded statement. (Evid. Code, § 1237(a)(3).) Here, the court chose to credit the mere impressions of Sergeant Diederich – recalled twelve years after the fact – while disregarding Phinney's own testimony regarding his disordered mental state and lack of truthfulness during the previous interview. (RT 1733-1735.) Indeed, the court should have been troubled, rather than assuaged, by Phinney's explanation that, in telling the officers "whatever [he] thought would get [him] out of custody," he made sure to have "enough fact (sic) to be substantiated . . . ," when neither Phinney – nor the record as a whole – provided any means to distinguish the lies in his statement from the purportedly verifiable facts. (RT 1735.) Moreover, when questioned by defense counsel, Sergeant Diederich conceded that he had not corroborated any of the information given him by Phinney regarding the meeting where items allegedly taken from the Mercks were displayed. (RT 1849-1850.)

The court's analogy to *Cummings* also overlooked a key distinction between the cases. In

Cummings, this Court upheld the admission of a witness's previously recorded statement despite the witness's testimony that he was delusional and did not know what the facts were. (*Cummings*, *supra,* 4 Cal.4th at p. 1294.) That, however, is as far as the analogy to *Cummings* holds.

In *Cummings*, the witness, Kanan, had reported an incriminating conversation with the defendant *two days* after it occurred. (*Id.*, at p.1292.) Although Kanan testified at trial that he was unable to recall the content of his conversation with the defendant, he also testified that he had truthfully reported the conversation to the police while it was fresh in his mind. (*Id.*, at p. 1293.)

Here, the alleged encounter with appellant took place early in September 1984. Phinney was then arrested in mid-October and saw the newspaper article discussing the Mercks' homicides at the end of that month. It was not until December 21, nearly four months after the purported meeting, that Phinney made his statement to the police. Section 1237 requires, without exception, that the proffered recorded statement was made either "at the time [the fact recorded in the writing] actually occurred, or was fresh in the witness' mind." In light of the several months – drug-blighted – gap between the September meeting and the December interview, it cannot possibly be said that the recorded facts were reliably fresh in Phinney's addled mind.

As important, the finding of trustworthiness in *Cummings* was not made in the face of an admission by the witness that he had lied in his previous statement. *Falsum in unum, falsum in omnium* is a guiding principle in determining credibility. (See, e.g., CALJIC 2.21.2 ["Witness Willfully False"].) Here, in contravention of this sound cautionary rule, Judge Felice discounted

Phinney's acknowledgment that he had lied to Sergeant Diederich – most critically, about the origins of the Colt handgun – and focused instead on Phinney's terse, prompted affirmance of the truth of the earlier statement. (RT 1653 [Ryals: "Q. And is what you told those officers the truth?" Phinney: "A. Yes, ma'am"].) While, in some cases a witness's demeanor or other corroboration may override the inference that if he lied as to some matters, he probably lied as to others, neither of these offsetting factors was present in this case. Except for the gun, none of the "Merck" items that Phinney allegedly observed in appellant's possession were recovered or produced at trial, and his purported recollection of the Merck name and the McClean Street address could easily be explained by the newspaper article he read. Thus, unlike *Cummings*, there was no credible confirmation of the veracity of the earlier statement.

Moreover, unlike the trial judge in *Cummings*, Judge Felice had not observed Phinney's demeanor on the witness stand and thus had no personal basis for determining Phinney's truthfulness. (Cf., 4 Cal.4th at 1294: ["We cannot conclude that the (trial judge) abused her discretion (in admitting the evidence.) She heard the testimony and had the best opportunity to assess the credibility of the witness]."")

Under these circumstances, the unrestricted admission of Phinney's prior recorded statement was clearly mistaken. That court's error is underscored by the proposed scope of its ruling. With reference to section 1237, the court stated: "This ruling is specifically to the statements which Miss Ryals wishes to admit and is in addition to the Court's other rulings." (RT 1814-1815.)

Seemingly, the court lost sight of section 1237's fundamental requirement, namely, that the witness suffered a failure of recall as to material facts. By contrast, the admission of a

statement under section 1235 or section 1236 necessarily presupposes that the witness fully remembered the facts at issue, but recounted them in a manner that was either inconsistent or consistent with an earlier statement. Section 1237, thus, may, under some circumstances, serve as an alternative to section 1235, but, logically, that section can never operate as an additional basis for admitting prior statements that were allowed in under sections 1235 or 1236 because of their conflicting foundational requirements.

Appellant's criticism of the trial court's ruling reaches deeper than the flawed analogy to *Cummings,* to test the constitutional underpinnings of the *Cummings* decision itself. Appellant urges the Court to reconsider its holding in *Cummings* with respect to Evidence Code section 1237, in light of the United States Supreme Court's recent decision in *Crawford v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 1354.

It has long been recognized that "the modification of a state's hearsay rules to create new exceptions for admission of evidence against a defendant will often raise questions of compatibility with the defendant's right to confrontation." (*California v. Green, supra,* 399 U.S. at p. 155.) In *Green*, the United States Supreme Court examined – and upheld – the constitutionality of Evidence Code section 1235, allowing the substantive use of prior inconsistent statements. While recognizing that belated cross-examination may not serve as an adequate substitute for cross-examination contemporaneous with the original statement, the Court, nonetheless, concluded that the main danger of such substitution – that the witness's false testimony will harden and become inured to effective cross-examination – "disappears when the witness has changed his testimony so that, far from 'hardening,' his prior statement has now softened to the point where he now repudiates it." (*Id.*, at p. 159.)

This palliative consideration does not exist in relation to section 1237, however. The threshold requirement of that section is that the witness can no longer remember material facts which were recorded in an earlier statement. The earlier statement need not have been made under oath, nor need the declarant have been subjected to contemporaneous cross-examination. Thus, a witness who asserts a loss of memory at trial may escape cross-examination entirely. In such a case, as here, there will have been no cross-examination at the time the statement was made, and later cross-examination at trial will be thwarted by the witness's lack of recall. With respect to section 1237, therefore, the rationale of *California v. Green* – narrowly focused on the compatibility of section 1235 with the confrontation clause – does not apply at all. (*Id.*, at pp. 155, 160 ["the inability to cross-examine the witness at the time he made the prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of *full and effective cross-examination* at the time of trial" (italics added)].) The foundational criteria of sections 1235 and 1237 are fundamentally different, and no requirement of section 1237 ensures the defendant minimal, much less full and effective, cross-examination when the witness claims complete or selective memory loss. Clearly, the witness's bare assertion that the prior statement was true, which is all section 1237 demands of him, falls far short of the assurance of constitutionally-adequate cross-examination required by the Court in *Green*.

Indeed, whether the lack of recall is total, as in *Simmons*, or partial, as in *Cummings*, the impact on cross-examination is the same. In neither case can the witness be meaningfully examined regarding the details of the statement, as in every instance the answer will be essentially identical: "I don't remember." In both scenarios, the witness is effectively insulated from full cross-examination. This renders section 1237 inherently incompatible with the

confrontation clause. *Cummings* should therefore be revisited to put section 1237 to the test of emergent United States Supreme Court law. Section 1237 will not pass.

The United States Supreme Court's recent opinion in *Crawford* again stressed that the "regulation of out-of-court statements" cannot be left to the rules of evidence. Although *Crawford* specifically addressed the admissibility of a statement made to the police by an unavailable witness, the decision's implications are broad enough to reach this case. Over time, the Supreme Court's jurisprudence had come to sanction the admission of hearsay evidence, without any meaningful opportunity for cross-examination, provided the evidence fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) In *Crawford*, the Court emphatically rejected this surrogate means of assessing hearsay testimony, noting that this "reliability" standard would "often fail[] to protect against paradigmatic confrontation violations." (*Crawford, supra*, 124 S.Ct. at p. 1364.) As definitively expressed by Justice Scalia, writing for the court: "Where testimonial statements are involved, we do not believe the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to . . . a mere judicial determination of reliability." (*Id.*, at p. 1370.)

By logical extension, *Crawford* supports the proposition that where a witness is effectively unavailable for cross-examination by dint of memory loss, a hearsay exception, such as that provided section1237 is bound to embrace testimony that the Confrontation Clause plainly means to exclude. Thus, *Simmons* can be reconciled with *Crawford*; *Cummings* cannot.

In *Simmons*, the court observed: "Section 1237 was not meant to eliminate the defendant's right to confrontation. Here [where the witness does not recall the events recorded in

his prior statement] admissibility would be the same as if the hearsay were to be admitted without any foundation as to its veracity, and the declarant absent from the hearing. Section 1237 merely recognizes that time universally erodes human memory . . . to a greater or lesser degree . . . . The motive behind 1237 is to allow previously recorded statements into evidence where the trustworthiness of the contents of the maker is attested to by the maker, subject to the test of cross-examination, *a procedure not meaningfully available here*. Section 1237 makes only a narrow exception to the hearsay rule consistent with trustworthiness. That it did not intend to eliminate that important requirement is evident . . ." (*Simmons*, *supra*, 123 Cal.App.3d at p. 682 (italics added.)

In view of the defendant's lack of recall, the court in *Simmons* declined to give any weight to his response to a leading question that, to the best of his knowledge and recollection, his prior statement was true at the time written. (*Id.*, at p. 683.) The court concluded that the "indicia of reliability required to satisfy the confrontation clause, oath, cross-examination and an opportunity to examine demeanor, are completely lacking as to the admissibility under section 1237." (*Ibid.*)

Simmons focused solely on the application of section 1237 to the particular circumstances of that case. *Simmons* did not analyze the constitutionality of the section itself. Rather, without citation to any authority, *Simmons* simply assumes that section 1237 is compatible with the Confrontation Clause.

In turn, this Court in *Cummings* treated *Simmons's* unexamined assumption that section 1237 is constitutional as established black letter law. (*Cummings*, *supra*, 4 Cal.4th at p.1292, fn. 31.) Moreover, to the extent both cases addressed the Confrontation Clause issue, their approach

was based on the *Ohio v. Roberts* "reliability" standard, which has since been expressly rejected in *Crawford.* (See, e.g., *Cummings*, *supra*, 4 Cal.4th at p.1293 [". . . whether an adequate foundation for admission of Kanan's statement to Holder had been established turned on whether Kanan's testimony that his statement was true was reliable"].) Under United States Supreme Court precedent, the dual requirements of section 1237 – that the witness appear at trial and swear to the truthfulness of the prior statement – are insufficient to satisfy the Confrontation Clause because, while the witness may be present physically in the courtroom, he is absent mentally in the most crucial respect. That the witness may be generally cross-examined does not cure the constitutional defect, in that some avenues of cross-examination will inevitably be foreclosed by the witness's lack of recall.

Indeed, the problem is most pronounced in cases like *Cummings* and here, where the statement is presented through the testimony of a different, more credible witness, further shielding the declarant himself from full cross-examination.

Accordingly, this Court is urged, in the first instance, to re-consider its decision in *Cummings* and to hold that neither the statutory, nor constitutional requisites for the admission of Phinney's prior statement were met.

5. The Trial Court's Error in Admitting Phinney's Prior Statement was Prejudicial and Requires Reversal of the Judgment

The prejudice to appellant of permitting the improper and misleading rehabilitation of Phinney was great. Not only were the court's rulings in themselves erroneous, but their ultimate effect was to allow Sergeant Diederich to substitute his inherent trustworthiness for Phinney's impaired credibility, thereby skewing the jury's calculus in favor of guilt. Sergeant Diederich

essentially vouched for Phinney's reliability. He might as well have testified that he believed the contents of Phinney's statement – hence, his trial testimony – to be true. Appellant simply had no means to overcome the prejudicial impact of Sergeant Diederich's vouching.

Phinney became a critical witness only after Laskowski's re-testing of the Colt handgun. Phinney's testimony was the only evidence connecting appellant directly to the weapon. Lutts had no more than a vague recollection that appellant had some connection to the Colt, and he directly contradicted Phinney's testimony that it was Lutts who altered the gun. Thus, had the jury rejected Phinney's unsupported testimony, Laskowski's conclusion that the Colt was the murder weapon would have been of limited relevance to the determination of appellant's guilt or innocence.

A comparison between the different outcomes as to the Russell and Mercks charges underscores the importance of Phinney's testimony regarding the gun. With respect to the Russell charges, the jury was presented with a parade of witnesses claiming to have seen appellant with property belonging to Russell near the time Russell was killed, and to have heard appellant confess to the crime. Yet, the jury refused to convict on the word of these witnesses, who like Phinney, had serious credibility deficits.

The chief difference in the evidence presented as to the two sets of murder charges is that the prosecution ultimately procured ballistics and fingerprint matches in the case of the Mercks, which did not depend on the testimony of patently biased and unreliable civilian witnesses. However, the probative value of Laskowski's testimony would have been nil without Phinney's linking appellant to the alleged murder weapon. The prosecutor clearly recognized that Phinney's credibility was key to a guilty verdict and therefore devoted a considerable portion of

her closing argument to discussing Phinney's testimony, seeking to rebut each and every point of impeachment raised by the defense. (See RT 2661-2668.)

Thus, the prosecution was rewarded, in effect, for impermissibly delaying for more than a decade bringing these charges against appellant, with the foreseeable consequence that the memories of witnesses, both prosecution and defense, would have faded. (See Argument A3, *supra*.) As a result, what would previously have been excluded as inadmissible hearsay – i.e, an informant's prior, inherently unreliable statement – was deemed admissible by virtue of the memory loss caused by the prosecution's own actions.

As such, it is incontestible that the court's serial errors, which allowed the prosecutor to improperly rehabilitate Phinney and bolster his credibility, were highly prejudicial to appellant's cause. Moreover, the above-cited case law makes clear that the erroneous admission of this hearsay testimony inevitably violated the Confrontation Clause and thus falls under the *Chapman* test for constitutional error. (*Chapman*, *supra*, 386 U.S. at p. 24 [reversal required unless error found harmless beyond a reasonable doubt].) In light of all the deficiencies in the government's proof, as discussed more fully in Argument E3, *supra,* that standard cannot be met; nor even the lesser standard for error under state law. (*Watson*, *supra*, 46 Cal.2d at p. 836 [reversal required if it is reasonably probable that, absent the error, a result more favorable to the defendant would have been reached].) Accordingly, the judgment of guilt must be set aside.

G. CRIMINALIST GREGORY LASKOWSKI'S BALLISTICS EVIDENCE WAS WRONGLY ADMITTED AS EXPERT TESTIMONY WITHOUT THE PROPER FOUNDATION FOR A NEW SCIENTIFIC APPLICATION

1. Facts and Proceedings

On the morning of April 15, 1996, during voir dire, the prosecution disclosed for the first time that criminalist Gregory Laskowski had made a positive match between the .25 Colt handgun taken from Lutts and Phinney and the two bullets recovered from Clifford Merck. (RT 433.) Earlier ballistics comparisons between the same gun and the bullets had been negative. (RT 435.) Defense counsel was taken by surprise and objected to the admission of the newly-surfaced evidence on various grounds. (RT 472-473, 477-478, 478-485.) Counsel further indicated that they intended to seek a *Kelly-Frye* foundational hearing on Mikrosil casting but had insufficient information to proceed at that time.[73] (RT 477-478.) The hearing was deferred.

On May 22, 1996, prior to Laskowski's testimony, defense counsel renewed their substantive objections to the proffered ballistics evidence and requested a foundational hearing under Evidence Code section 402. (RT 2118.) The court agreed to first hear testimony regarding the procedures used by Laskowski for the ballistics comparison, to determine preliminarily whether those procedures involved a new scientific methodology. (RT 2124.)

Laskowski's testimony was then taken outside the presence of the jury. (RT 2127, et seq.) On direct examination, Laskowski initially described his experience and training in the field of firearms and tool mark identification. (RT 2128-2130.) He then recounted the sequence of events that led him to re-examine the Colt handgun on or about April 12, 1996. (RT 2130.)

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[73]*People v. Kelly* (1976) 17 Cal.3d 24, and *Frye v. United States* (D.C. Cir. 1923) 292 F. 1013 (hereafter *Kelly-Frye*).

The impetus for the new comparison was information received by Laskowski from Detective Christopherson, based on an interview with Danny Phinney, that the Colt pistol had been altered after the shooting of Clifford Merck.[74] According to Laskowski, such an alteration would have made it difficult to accurately compare the gun with the known bullets. (RT 2131.)

After closer inspection of the Colt's barrel, Laskowski concluded that, because of the damage to the inside of the gun, he would be unable to match bullets test-fired from the gun to any known bullets. As a result, Laskowski decided to try a technique to cast the interior of the gun barrel. (RT 2132.) Laskowski had learned one such casting method, generally used for tool mark identification, as part of his training. (RT 2133.) Based on tests performed during his training, Laskowski believed that barrel molds could reproduce the unique characteristics of a particular firearm. (RT 2133.) He decided to use Mikrosil, a rubbery silicone material, to cast the interior of the barrel because of its reputation "as the premier casting material for toolmarks." (RT 2134.)

Laskowski proceeded to prepare the Mikrosil and cast the barrel of the Colt. He testified that he was guided by the manufacturer's instructions and a scientific research paper reported in the Association of Firearms and Tool Marks Journal. (RT 2134.) After removing the hardened Mikrosil, Laskowski compared the impressions left on the mold with the markings on the two

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[74]The timing of events leading to the re-examination of the Colt pistol is as follows: on August 23, 1994, in preparation for appellant's preliminary hearing, Detective Christopherson re-interviewed Danny Phinney. (RT 1902.) In that interview, Phinney mentioned for the first time that he believed Lutts had tampered with the barrel of the Colt. (RT 1902.) Christopherson did not convey this new information to Laskowski until April 11, 1996, more than a year-and-a-half later. (RT 436.) Laskowski retested the Colt, using the Mikrosil-casting method on Friday, April 12, 1996, and reported the new findings to Christopherson and the District Attorney that same afternoon. (RT 440, 457.) The Deputy District Attorney attempted to contact one of appellant's attorneys later that same day, but failed to reach him and left no message. (RT 411.)

bullets recovered during the autopsy. (RT 2135.) After making these comparisons, Laskowski concluded that the two spent bullets came from the Colt handgun. (RT 2136-37.)

Although Laskowski testified that the procedure was a generally-accepted scientific methodology for firearms identification, his opinion was effectively challenged on cross-examination. (RT 2137.) When pressed by defense counsel, Laskowski could not name a single ballistics expert who had used Mikrosil casting in a forensic firearms examination or any one in his profession who had testified in court regarding this technique. (RT 2137-2142, 2150-2151.) In fact, Laskowski had conducted a survey throughout the State to determine if any other examiner had performed a Mikrosil-based firearms comparison and had testified to the results in court; he could not find a single instance where this had occurred or where the technique had gotten past a *Kelly-Frye* objection. (RT 457, 2142.)

Prompted by counsel's questioning, Laskowski also acknowledged a variety of problems affecting Mikrosil casting. These included distortions caused by problems with light absorption under the microscope, as well as bubbles, limpness and shrinkage of the material. (RT 2148-2158). Nevertheless, Laskowski resisted counsel's suggestion that the use of Mikrosil casting for a ballistics comparison was either a new scientific procedure or a new application of an existing technique. (RT 2150.) Even so, he had to admit that the procedure he used was "rare," and "not routine." (RT 2143, 2152.)

Based on this testimony, defense counsel moved to exclude the proffered ballistics evidence, arguing that Mikrosil-casting for ballistic comparisons was a new process, or a novel application of an existing process, which had no demonstrable acceptance by the forensics community or the courts. (RT 2158-59.) The trial court disagreed, characterizing Laskowski's

method as only "a little bit different technique." (RT 2162.) However, it is the extent of acceptance by the relevant scientific community, not merely the degree of similarity to an established technique, that determines admissibility under the *Kelly-Frye* standard. (See, e.g., *People v. Ashmus* (1991) 54 Cal.3d 932, 969-971.)

Accordingly, appellant contends that the admission of the Mikrosil ballistics-casting comparison evidence was erroneous because the technique devised by Laskowski has no history of study, testing or actual use for that purpose.

2. The Use of Mikrosil Casting for Ballistics Examination Constitutes a New, Unproved Methodology Under *Kelly-Frye*

The California test for determining the admissibility of a new scientific technique continues to be the one described in *People v. Kelly, supra,* 17 Cal.3d 24. Under the *Kelly-Frye* rule, the proponent of expert testimony based on the application of a new scientific technique must prove its reliability by demonstrating that the technique "is *sufficiently established to have gained general acceptance in the particular field to which it belongs.*" (*Id.*, at p. 30, quoting *Frye, supra*, 293 F. at p. 1014 (italics in original).) The rule deliberately "assign[s] the task of determining the reliability of the evolving technique to members of the scientific community from which the new method emerges," rather than leaving the decision, in the first instance, to the sound discretion of the trial court.[75] (*Id.*, at p. 31.) This approach was adopted to assure that "*those most qualified to assess the general validity of a scientific method will have the*

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[75]In *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, the United States Supreme Court held that *Frye* was abrogated by Fed.R.Evid. 702, which charged trial judges with the responsibility of acting as "gatekeepers" to exclude unreliable expert testimony. In *People v. Leahy* (1994) 8 Cal.4th 587, this Court affirmed that the "*Kelly-Frye* formulation . . . should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in this state." (*Id.*, at p. 591.)

determinative voice." (*Ibid.*, italics in original.)

Under the *Kelly-Frye* rule, the admissibility of such evidence also requires (1) testimony as to general acceptance given by a person "properly qualified as an expert to give an opinion on the subject," and (2) testimony as to the use of "correct scientific procedures in the particular case." (*Ibid.; Ashmus*, *supra*, at 969.) In addition to the appropriate credentials and experience, the expert witness must also be "impartial," that is, not so personally invested in establishing the technique's acceptance that he might not be objective. (*Kelly*, *supra*, at pp. 37-40.)

The party offering the evidence has the burden of proving its admissibility by a preponderance of the evidence. (*Ashmus*, *supra*, 54 Cal.3d at 969; Evid. Code, § 115.) Proffered scientific evidence may be excluded even if the foundational testimony is uncontradicted. (See, e.g., *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1540.) On appeal, a *Kelly-Frye* ruling is reviewed independently. (*Ashmus*, *supra*, 54 Cal.3d at p. 971.)

A "new scientific technique," requiring separate *Kelly-Frye* validation, may include a novel application of an established technique. (See, e.g., *Ashmus*, *supra*, 54 Cal.3d at p. 971 [prosecution conceded that electrophoresis analysis of dried semen stains was a new scientific technique, notwithstanding that the electrophoretic analysis of fresh specimens was a generally accepted forensic technique]; *People v. Brown* (1985) 40 Cal.3d 512, reversed on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538.) Even a technique which has been in long-standing use by police officers may be considered "new" for *Kelly-Frye* purposes if it has not been repeatedly "use[d], stud[ied], test[ed] and confirm[ed] by scientists or trained technicians." (*People v. Leahy* (1994) 8 Cal.4th 587, 605.)

In *Leahy*, after affirming the "cautious" and "conservative" *Kelly-Frye* approach, this

Court held that HGN ("horizontal gaze nystagmus") field sobriety testing was a "new scientific technique" within the scope of the *Kelly* formulation although HGN testing had been used by law enforcement agencies for more than thirty years. (*Ibid.*) The Court opined that to hold otherwise would unjustifiably render a scientific technique "immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom." (*Id.*, at p. 606, italics in original.)

Under the cautionary rule, the use of Mikrosil casting for firearms identification is a new and untested technique for *Kelly-Frye* purposes. The traditionally-accepted method for casting gun barrels uses lead, the material from which bullets are made. (RT 2140.) While it may be true that polymer compounds are supplanting lead as a casting medium, the use of Mikrosil, specifically, is not supported by the professional literature. From the vast library of ballistics publications, Laskowski was able to cite only a single paper in which Mikrosil barrel-casting was discussed, and then only in the abstract. (RT 2144.) Indeed, despite an extensive survey of his fellow examiners, Laskowski did not come across a single firearms expert or criminalist who had actually used Mikrosil casting for a forensic comparison or had been qualified to testify in court regarding that technique. (RT 2137-2142, 2144-2145.) Underscoring their lack of ballistics experience with Mikrosil, all of the contacted examiners encouraged Laskowski to go forward with the casting because "they wanted to know what the outcome would be." (RT 2150.) Their curiosity is telling and a serious strike against Laskowski's impartiality. He was clearly invested in demonstrating the viability of the technique to his colleagues.

Although he was unaware that the FBI recommended against the use of Mikrosil in casting barrels, Laskowski had to acknowledge that there were a variety of problems with this

particular compound, as described above. (RT 2141, 2148-2149, 2154-2155.) His ad hoc solutions – such as slicing and inserting a Q-tip into the sections of the mold – are hardly indicative of an established scientific methodology. (RT 2154-2157.) Bearing in mind that the typical length of a screw driver head or pry mark is perhaps an inch, or less, using Mikrosil for its accepted purpose – tool mark identification – would not present the same concerns as its use for barrel casting. Tool mark molds are usually one-sided and, for all practical purposes, two-dimensional. Thus, problems involving light absorption, shrinkage and rigidity would be minimal compared to their impact on the longer, three-dimensional casting of the interior of a gun barrel. (See, e.g., RT 2155-2156 [Laskowski: casting was limp and "kind of floppy;" no problem with "short, stubby casts;" "not rigid for longer casts;" two-inch gun barrel long enough to cause distortions].)

That none of the examiners Laskowski contacted told him that Mikrosil barrel-casting was not an acceptable technique, even if true, is far from a sufficiently affirmative endorsement for *Kelly-Frye* purposes. (RT 2153.) While the *Kelly-Frye* test does not require unanimity or even majority support within the relevant community, it nevertheless contemplates "a period of testing and study by the community of experts before a new scientific technique may be deemed 'generally accepted.'" (*Leahy*, *supra*, 8 Cal.4th at pp. 601-602.) It is clear from Laskowski's testimony, however, that this case constituted the first real experiment using Mikrosil for barrel casting. Laskowski was probably the first criminalist ever to testify regarding the procedure; certainly nothing in the record indicates anyone else had done so. As such, there was no rigorous or adequate empirical basis to support any community consensus with respect to Laskowski's methodology.

Here, the trial judge did exactly what *Kelly-Frye* counsels against: it substituted its own judgment for the "determinative voice" of the community of experts most qualified to assess the validity of Laskowski's procedures. (*Id.*, at p.595.) Instead of holding the prosecution to its burden of demonstrating the requisite scientific acceptance, the judge, in effect, shifted the burden to appellant to present affirmative evidence of community rejection. (See RT 2147.) However, even without his own witnesses, appellant had established through questioning Laskowski that the use of Mikrosil to cast the interior of a relatively long, cylindrical object was fraught with problems that did not affect the only verified and approved uses of this substance – tool mark and footprint identification. Thus, it was error for the judge to admit Laskowski's testimony with its misleading imprimatur of scientific expertise and certainty. (RT 2160.)

The prejudice resulting from such error was well-described in *Kelly*:

> Several reasons . . . support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials. We have acknowledged the existence of a ". . . misleading aura which often envelops a new scientific process, obscuring its currently experimental nature. [Citation] . . . . Thus, it is essential that the decision to admit such evidence is carefully considered.

(*Kelly*, *supra*,17 Cal.3d at pp. 31-32.)

That risk of prejudice was heightened in this case because the technique at issue is "generally accepted" for a different purpose– tool mark identification. The potential for misleading the jury is especially great in such circumstances, where the jury is allowed to believe that the technique has been authoritatively approved for all purposes, when, in fact, the appropriateness of its transfer to the new use has never been tested or confirmed.

The profound impact of the newly-developed forensic evidence on the outcome of this

case is readily discerned. As previously discussed (see Argument E3, *supra*), the prosecution's case against appellant was quite tenuous. Essential to its proof was the revised ballistics and fingerprint evidence linking appellant to the crime by ostensibly scientific methods. Yet, each resulting identification was unreliable for separate reasons, and both required elaborate rationalizations for prior, conflicting test results. Nevertheless, the combined effect of these two unreliable pieces of pseudo-scientific evidence would inevitably be to give the jurors a false sense of confidence in the conclusion that appellant was responsible for the Mercks' homicides. To a jury, it would seem too great a coincidence that both the fingerprint and the ballistics evidence independently pointed to appellant's guilt, even though the product of two unreliable hypotheses is less, not more, reliable than either hypothesis taken separately. Nor were these forensic tests truly independent, unlike the earlier examinations that had effectively eliminated appellant as the perpetrator of the homicides. Rather, later tests were biased in that they were undertaken for the express purpose of contradicting the prior forensic conclusions in order to convict appellant of the charged crimes.

Even if viewed strictly as state error, appellant's convictions must be reversed, as it is highly probable that the judgment would have been more favorable to appellant had Laskowski's ballistics testimony, with its misleading aura of scientific certainty, been properly excluded. (*Watson*, *supra*, 46 Cal.2d at p. 836.) However, the erroneous admission of such unreliable evidence also has a federal constitutional dimension in light of the heightened requirement for reliability at every stage of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638), in which case *Chapman, supra*, not *Watson* controls. Under either standard, the guilty verdicts in this case must be overturned.

H. THE TRIAL COURT ERRED IN EXCLUDING APPELLANT'S EVIDENCE TENDING TO ESTABLISH HIS DEFENSE BASED ON CONSCIOUSNESS OF INNOCENCE

1. Relevant Facts and Proceedings

Prior to recalling Sergeant Fraley as a witness, defense counsel sought a ruling on the admissibility of a taped conversation between appellant and the detective on February 14, 1985. (RT 2423.) That morning Sergeant Fraley had contacted Gerry Tags. (RT 2423.) After learning of the contact, appellant called Sergeant Fraley and offered to come down and speak with him "right now if you want me to." (RT 2423-2424.) When Sergeant Fraley indicated that he was not ready to talk to him, appellant responded, "I hope so pretty soon, because I don't like what is going around." (RT 2424.)

Counsel offered appellant's statement, showing his willingness to talk to Sergeant Fraley regarding the Mercks' case, under Evidence Code section 1250, arguing that the conversation evidenced appellant's lack of consciousness of guilt, inconsistent with malice aforethought.[76] (RT 2424, 2505.)

Appellant's statements to Sergeant Fraley were proffered, first, as non-hearsay – that is, circumstantial evidence of appellant's mental state – or, alternatively, as an exception to the hearsay rule under section 1250. (RT 2505.) Discerning no connection between the tendered

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[76] Evidence Code section 1250 provides: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at the time when it is itself an issue in the action, or; (2) The evidence is offered to prove or explain acts or conduct of the declarant." Section 1252 makes trustworthiness an additional criterion of admissibility of statements of mental or physical condition.

evidence and appellant's mens rea at the time of the offense, the court sustained the prosecution's objection. (RT 2505.) Appellant contends that the court's exclusion of evidence establishing his innocent frame of mind is contrary to both statutory and constitutional law.

2. Appellant's Offer to Talk to Sergeant Fraley was Probative Evidence of His Innocence in that He Acted Without Consciousness of Guilt

An accused's right to present a defense is a fundamental element of a fair trial and due process of law as guaranteed by the Sixth, Fifth and Fourteenth Amendments. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 ["the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense'"], cited in *People v. Woodward* (2004) 116 Cal. App.4th 821, 834; *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997 [granting federal habeas relief to California defendant for exclusion of potentially exculpatory hearsay evidence]; *United States v. Mack* (9th Cir. 2004) 362 F.3d 597, 601-602, citing *Taylor v. Illinois* (1988) 484 U.S. 400, 408-409; see also *People v. Adams* (2004) 115 Cal.App.4th 243, 253-54.)

In numerous opinions, the United States Supreme Court has consistently held that a State may not use its general rules of evidence or procedure to bar material testimony that is crucial to a criminal defendant's defense. (See, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 302, cited in *People v. Adams* (2004) 115 Cal. App.4th 243, 254.) Specifically, in both *Chambers,* 410 U.S. at p. 302, and *Green v. Georgia* (1979) 442 U.S. 95, 96-97, the Supreme Court held that the exclusion of potentially exculpatory evidence on hearsay grounds had deprived the respective defendants of their right to due process and a fair trial under the Fourteenth Amendment.

The prosecution's objection to the admission of appellant's offer to meet with Fraley was based on generic relevancy and hearsay considerations. (RT 2504.) Without further argument,

the trial judge sustained the objection because he was not persuaded that appellant's state of mind in February 1985 was relevant to proof of malice aforethought and deliberation at the time of the charged crimes, i.e., in the fall of the preceding year. (RT 2504.) Yet, we can be sure that the same judge would readily have admitted evidence of any false or misleading statements made by appellant to Sergeant Fraley *at any time* as probative of consciousness of guilt. (Cf., *People v. Green* (1980) 27 Cal.3d 1, 40; CALJIC 2.03.) This asymmetry in the treatment of appellant's conduct – exculpatory as opposed to inculpatory – also has constitutional ramifications.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Relevant evidence is defined in Evidence Code section 210 to mean (in pertinent part) " . . . evidence . . . having any tendency in reason to prove or disprove a disputed fact. . . ." "This definition of relevant evidence is intentionally broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th1838, 1843.) The defendant's guilt or innocence is perforce the ultimate issue in a criminal trial. Hence, any evidence, no matter how weak, that may tilt the balance toward a verdict of acquittal is relevant and should be admitted.

This Court and the Courts of Appeal have addressed the defense of consciousness of innocence in the context of absence of flight, only. (See, e.g., *Green, supra*, 27 Cal.3d at pp. 489-491; *People v. Williams* (1997) 55 Cal.App.4th 648.) In that line of cases, the defendants sought an instruction on absence of flight, paralleling Penal Code section 1127c, after the supporting evidence had already been admitted. Penal Code section 1127c provides that when the prosecution relies on evidence of flight by the defendant after a crime as tending to show consciousness of guilt, the jury should be instructed that it may consider that evidence in

deciding guilt or innocence and give it such weight as it deserves. (*Green, supra,* 27 Cal.3d at p. 489.)

Reaching back to *People v. Montgomery* (1879) 53 Cal. 576, this Court in *Green* concluded that, in effect, evidence that a suspect did not flee when he had a chance to do so was of little value because there are plausible reasons why a guilty person might also refrain from flight. (*Ibid.*) Nevertheless, the Court acknowledged that such evidence has some "tendency in reason" to prove that the defendant had an innocent state of mind, but found that the risk of misleading and confusing the jury was too great.[77] (*Id.*, at pp. 490-491, fn. 25, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244; Evid. Code, § 352.) While also recognizing that its converse, evidence of flight as proof of consciousness of guilt, is subject to the same ambiguities and complications for the jury, the Court believed it was constrained by Penal Code section 1127c, mandating a consciousness of guilt instruction if evidence of flight were admitted. (*Id.*, at p. 491, citing *Wong Sun v. United States* (1963) 371 U.S. 471, 483.)

The reasoning in *Green* does not control in the situation at hand. In the first place, volunteering to be questioned by a police officer, after learning that one is a suspect in a homicide investigation, is a far stronger demonstration of consciousness of innocence than

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[77]The clear trend in the United States Supreme Court has been in the direction of expanding the province of the jury to encompass what were once viewed as traditional areas of judicial discretion and decision-making. (See, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 124 S.Ct. 2531 [due process requires that any sentencing factor which may increase the penalty for a crime beyond the prescribed maximum must be presented to the jury and proved beyond a reasonable doubt]; *Ring v. Arizona* (2002) 536 U.S. 584 [Sixth Amendment requires that jury, not judge, find the existence of aggravating factors in a capital case beyond a reasonable doubt].) Thus, it is difficult to understand why jurors who have been qualified to make a life and death decision cannot be trusted to give evidence of lack of consciousness of guilt its appropriate weight, especially if properly instructed.

merely failing to flee or other such passive compliance. It is one thing to remain in the general vicinity of a crime, and quite another to affirmatively offer to present oneself to the officer investigating the crime for possible interrogation. Thus, in contrast to absence of flight, appellant's conduct in actively seeking to talk to the police had a significant, unambiguous "tendency in reason" to prove his innocent state of mind – the more so because appellant was not naive regarding the workings of the criminal justice system.

On the other side of the balance, there is little reason to project that the proffered "consciousness of innocence" evidence would create a substantial danger of confusing or misleading the jury, or entail a time-consuming mini-trial on a collateral issue. It should be noted that the prosecution did not mention section 352, and the court's ruling did not rest on, or even allude to that ground. (See *People v. Ford* (1964) 60 Cal.2d 772 [a silent record is insufficient to show that a court discharged its statutory duty of weighing prejudice against probative value].) Indeed, the only stated basis for the court's ruling excluding the proffered consciousness of innocence evidence was that the evidence was not relevant. That ruling is clearly erroneous; for even *Green* recognizes that such evidence has probative value. (See also *Williams*, *supra*, 55 Cal.App.4th at p. 652 [". . . nonetheless, we do not intend to proscribe the broad discretion of the trial court in giving appropriate instructions on the absence of flight when supported by the evidence and of sufficient relevance in the context of the case."].) Thus, the court's ruling fails as a matter of evidentiary law.

But there is also a constitutional dimension to appellant's complaint. In *Williams*, *supra*, the defendant claimed he was denied due process and equal protection by the trial court's failure to instruct sua sponte on the absence of flight. (*Id.*, at p. 651.) Analogizing to the United States

Supreme Court's decision in *Wardius v. Oregon* (1973) 412 U.S. 470, he argued that "a sense of balance and reciprocal parity constitutionally require an instruction on the *absence* of flight." (*Ibid.,* italics in original, [due process and fundamental fairness require reciprocal discovery rights for both prosecution and defense].)

The court in *Williams* rejected the analogy to *Wardius*, opining that, in contrast to the notion of reciprocal discovery rights, "flight and absence of flight are not on similar logical or legal footings." (*Id.*, at p. 653.) While it may be true that, by virtue of legislative and judicial decisions, consciousness of guilt and lack of consciousness of guilt have been rendered legally distinct, that begs the question: whether this differential treatment is constitutionally permitted. Moreover, as noted in *Green*, the United States Supreme Court has not discerned any logical or probative difference between these two categories of evidence. (*Green*, *supra*, 27 Cal.3d at p. 491, fn. 26.)

This Court has not specifically addressed the constitutional parity argument advanced in *Williams,* nor appellant's overarching Sixth Amendment claim. (*Adams*, *supra*, 115 Cal. App.4th at p. 179.) These concerns are squarely presented here, where the prosecution was allowed to bolster its case with a variety of hearsay testimony, including appellant's alleged admissions, while appellant was not permitted to use his own willingness to go to the police station and speak to Sergeant Fraley in aid of his defense to capital murder charges.

Because evidence of absence of flight ordinarily involves conduct, not statements, none of the above-cited cases had to consider the secondary hearsay issue which arises here. But in weighing the risk of prejudice against relevancy, none questioned that such a defense of lack of consciousness of guilt exists and might be demonstrated, in the proper context, by conduct or

statements made sometime after the commission of the charged offense. Thus, appellant's willingness to talk to Sergeant Fraley, when viewed correctly as circumstantial evidence of innocence – or as conduct inconsistent with consciousness of guilt – falls outside the scope of the hearsay rule entirely. (See *People v. Ortiz* (1995) 38 Cal. App.4th 377, 389 ["a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind is not hearsay"].) Alternatively, even if appellant's offer to Sergeant Fraley is found to be hearsay, his reported statements come within the exception to the hearsay rule for evidence offered to prove the declarant's state of mind "at that time *or at any other time when it itself is an issue in the action.*" (Evid. Code, § 1250 (italics added).)

In focusing too narrowly on the contemporaneous mens rea elements of the charged homicides (malice aforethought and premeditation), the trial court failed to appreciate that a defendant's conduct – or mental state – at a later time may still be helpful to the jury in determining his guilt or innocence, i.e., whether the defendant was involved in the charged criminality at all. Moreover, since there is no time limit on the admissibility of statements or conduct by a defendant which reflect a consciousness of guilt, there can be no time bar as to evidence, proffered by a defendant in his defense, that is consistent with the opposite inference, the absence of any consciousness of guilt. In short, whether the proffered evidence is more properly characterized as non-hearsay or as an exception to the hearsay rule, the conclusion is the same: it should have been admitted because it showed appellant acted like an innocent person at a most telling juncture: when he learned that he was the prime suspect in a homicide investigation.

Thus, the trial court plainly abused its discretion in excluding evidence highly probative

of appellant's innocence and essential to his defense. (*Adams*, *supra*, 115 Cal.App.4th at p. 253 [the trial court's determination whether evidence could raise a reasonable doubt as to the defendant's guilt is reviewed for abuse of discretion].) That error resulted, moreover, in a fundamentally unfair trial. That appellant's ability to defend himself was already seriously compromised by the twelve-year delay in bringing the case to trial magnifies the harm caused by the court's exclusion of what little favorable evidence had been preserved. Moreover, as previously explained (see Argument E3, *supra*), the prosecution's case against appellant was very tenuous. Accordingly, under either the *Chapman* or the *Watson* standard, the judgment must be reversed. (*Chapman*, *supra,* 386 U.S. at p. 24 (constitutional error); *Watson*, *supra,* 46 Cal.2d at p. 836 (state law error).)

I. THE TRIAL COURT ERRED BY ADMITTING GRUESOME POST-MORTEM PICTURES OF CLIFFORD AND ALMA MERCK AND AN UNDULY PREJUDICIAL PHOTOGRAPH OF ALMA MERCK WHILE ALIVE, THEREBY RENDERING THE TRIAL FUNDAMENTALLY UNFAIR AND THE VERDICT UNRELIABLE

1. Relevant Facts and Proceedings

Prior to jury selection, defense counsel filed an *in limine* motion making a "blanket" objection to the admission of all post-mortem photographs of the victims. (CT 1211, RT 53-54, 57-58.) In place of the photographs, counsel offered to stipulate as to the precise manner of death of the three decedents, as well as to their names, ages, identification, and the locations where they were found. (RT 54.) Alternatively, should the photographs be admitted, counsel requested that they be made black and white to reduce the prejudice from lurid coloration. (RT 54.)

Upon the prosecution's rejection of the stipulations, the court took the motion under submission while it examined numerous photographs – 50 or more – which included views of the crime scenes with the victims *in situ* and sympathetic photographs of Alma Merck while alive. (RT 55.) The prosecutor conceded that "some of the pictures are gory, some of them terribly gory," but maintained that the photographs were admissible to support its first-degree murder theory. (RT 56.) As defense counsel anticipated, none of the issues to which appellant had offered to stipulate was ultimately contested at trial, and these were the only issues as to which the proffered photographs were arguably relevant.

On returning to the issue, the court was particularly interested in the prosecution's justification for admitting the photographs of Alma Merck while alive. (RT 96.) The court could not fathom their relevance. (RT 98.) Both of the proffered photographs were group shots: the

first showing Alma Merck and another woman, the second showing Alma Merck, the other woman, and Clifford Merck. (RT 96-97.) In responding to the court's query, the prosecution acknowledged that the only possible relevance of the photos was to show that Mrs. Merck had worn a ring that resembled a ring allegedly later purchased from appellant. (RT 97.) "That's the only reason that those [photos] are being presented, is to show the fact that she did wear that ring." (RT 98.) However, while a ring was visible on Alma Merck's finger, it was too small to allow it to be distinguished clearly from any number of similar rings. (RT 99.) The prosecution also offered enlarged photographs of a recovered ring, to which the defense did not object. (RT 98-99.) But as to the "live" photos, defense counsel objected on the grounds that their minimal probative value was substantially outweighed by their prejudicial effect. (RT 99.)

Although the prosecution declined to identify the photographs it expected to introduce, the trial court overruled appellant's objection, without ascertaining the specific relevance of any of the proffered photos. (RT 99.) The most the court could say was that, in its experience with homicide cases, "one can come up with theories of relevance to make photos admissible." (RT 100). With respect to the "352" prejudice issue, the court acknowledged that it was "in the same quandary" because it could not determine the probative value of the photographs. Generally, the objectionable crime scene photographs showed the victims, in an advanced state of decomposition, bound with wire or chord and blood spattered around. (RT 101, 2261, 2262.) Nevertheless, because "these pictures do not have dismembered parts, these are people not laid out on a slide and cut up to show trajectories or probes inside the organs or body parts," the court found no undue prejudice. (RT 101-102.) Finally, the court rejected appellant's request that the pictures be converted from color to black and white. (RT 102.) The court emphasized that many

of the photographs were grainy and would lose their detail if shown without color. (RT 102.)

As a result of the court's ruling, extremely gruesome crime scene photos were shown to the jury. (RT 1606-1612, People's Exhibits 13, 15, 16, 17, 19, 26.) Also shown, in addition to the ring enlargements, was one of the pictures of Alma Merck while alive, looking, as the court observed, "grandmotherly." (RT 97, 1873; People's Exhibits 36, 37, 38.)

The gory crime scene depictions of Alma and Clifford Merck added nothing probative to the extended verbal description of the manner in which they died. (RT 1606-1615, 2261-2265; People's Exhibits 15.) The circumstances leading to their deaths, including the mode of restraint, were not disputed. The only seriously contested issue in the case, with respect to each of the charged homicides, was the identity of the perpetrator, not the degree or method of commission of the crime.

The photograph of the elderly Alma Merck in a pleasant family setting also was not germane to any contested issue at the trial. The only question for the jury was whether the ring in the photograph was in fact a ring that had been linked to appellant. However, the series of enlarged photographs of the recovered ring, which the defense did not challenge, were far more probative for this purpose. Insofar as the original, live photograph, would have been relevant to establish that Alma Merck wore a common ring that resembled the one seized, the point was not in dispute. The prejudice of admitting the offending photographs was heightened, moreover, by the stark contrast between the congenial picture of Alma Merck while alive with the gruesome photographs of her in death. Accordingly, appellant's objections to the unduly prejudicial post-mortem pictures of the Mercks and the photograph of Alma Merck taken while she was alive should have been sustained.

2. Appellant was Unfairly Prejudiced by the Erroneous Admission of Excessively Prejudicial Photographs of the Mercks

Evidence Code section 352 gives the trial court broad discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will " . . .create substantial danger of undue prejudice, of confusing the issue, or misleading the jury." "Moreover, the record must affirmatively show that the trial court did in fact weigh the prejudicial effect of the evidence against its probative value." *(People v. Karis* (1988) 46 Cal.3d 612, 637, citing *People v. Green* (1980) 27 Cal.3d 1, 25.) Here, the record does not show that the court performed the requisite weighing:

> THE COURT: [] First with regard to relevance, at this point not knowing how exactly Ms. Ryals intends to use each and every one of these pictures, I can't say for certain that any one is particularly relevant or irrelevant. It does appear to me, based, frankly, on my experience with homicide cases and cases involving serious injuries to others, that one can come up with theories of relevance that would make these photographs admissible.

(RT 99-100.) It is clear from these comments that the court addressed all of the proffered photographs *en masse*, without distinguishing their different categories. Consequently, its provisional reasoning was overbroad with respect to the crime scene photos, and was not applicable at all to the "live" photographs, whose relevancy, or lack thereof, had been fully explored. Thus, in effect, the record here is silent, and hence insufficient, to establish that the trial court carefully weighed probative value against prejudice with regard to these two distinct types of photographs. (*Karis, supra*, 46 Cal.3d at p. 637.) Rather, the court ultimately fell back on its own general impression that crime scene photographs are usually admitted in homicide prosecutions.

a. Gruesome Crime Scene Photographs

In addressing the issue of prejudice, the court relied on the analysis in *People v. Zapien, supra,* 4 Cal.4th at p. 958. *Zapien* distinguished the prejudice that "naturally flows from relevant, highly probative evidence" from the undue prejudice that risks having the jury "'prejudg[e]' [the defendant or his] cause on the basis of extraneous factors." (*Id.*)

However, contrary to the court's misconception, it does not require depictions of dismemberment or dissection to inflame a jury's emotions. A single graphic detail – such as the flies swarming around Clifford Merck's ankles or the closeup of the telephone dangling from the chord wrapped around Alma Merck's mouth – can be as potent a source of juror repugnance and prejudice as any of the grosser images the court described. (RT 1608.) By inundating all involved with "batch[es]" of photographs on the eve of trial, the prosecution made it practically impossible for the court to give each photo the attention needed to assess its prejudicial impact. As a result, the court ruled on the basis of a superficial impression that the prosecution's 50 or so photographs contained no depictions of the extreme insults to bodily integrity that the court considered uniquely inflammatory. At a minimum, the court should have deferred ruling until the prosecution had specified the photographs it intended to introduce and the court had a sufficient opportunity to examine these photographs in particular.

In short, the court's 352 analysis was deeply flawed on both sides of the balance. With respect to relevance, the court had no sound basis for assessing the probative value of the post-mortem pictures because it did not know which ones the prosecution intended to use; nor did it hold the prosecution to its burden to present a case-specific, concrete theory of relevance. Instead, the court relied on a vague generalization regarding homicide cases and an unduly

demanding standard of prejudice that disregarded very disturbing images calculated to sway the jury's emotions. Thus, to his substantial prejudice, appellant was denied the meaningful balancing of potential prejudice against relevance that the statute and the case law compel.

b. Prejudicial Photograph of Alma Merck at Home While Alive

Trial judges are given the least latitude to admit photographs of victims while alive. This Court has repeatedly cautioned against the admission of such photographs unless the prosecution establishes the *necessary* relevance of such evidence. (*People v. DeSantis* (1992) 2 Cal.4th 1210, 1230 [and cases cited therein]; *People v. Hendricks* (1987) 43 Cal.3d 584, 594.) Otherwise, as noted in *DeSantis*, "There is a risk that the photograph will merely generate sympathy for the victims. Indeed, our own inspection of the photographs in issue here suggests that it possibly did generate sympathy for the victims, *a harmless-and-congenial-appearing* elderly couple. (*DeSantis*, *supra*, 2 Cal.4th at p. 1230, italics added.)

Notwithstanding this conclusion, the Court in *DeSantis* declined to find error in the admission of a photograph of the victims on vacation, as the photograph was relevant to establish the ability of certain witnesses to identify the victims. As for the photograph's acknowledged prejudicial impact, it added only incrementally to the substantial sympathetic effect of the surviving victim's testimony, which could not have been excluded. (*Ibid.*) No similar rationale for admitting the highly prejudicial live photo of Alma Merck exists here.

Indeed, this Court has held it error to admit even a single such photograph where it is only marginally relevant. (See *People v. Kelly* (1990) 51 Cal.3d 931, 963 [error to admit photograph of victim while alive when not required to establish the identity of the victim, and only marginally relevant to show that the victim constituted no threat to the defendant].)

Nonetheless, such error has been deemed harmless where the evidence of the defendant's culpability was clear and uncontradicted. (See, e.g., *Kelly*, *supra*, 51 Cal.3d at pp. 963-964.) In this case, the photograph of Alma Merck while alive served no demonstrable purpose except to generate overwhelming sympathy for the victims. The relevancy of the photograph was minimal, at best. While the "grandmotherly" Alma Merck could clearly be seen in the photograph, the ring she wore, the ostensible reason for the photograph's admission, showed no distinguishing detail.

When shown the photograph (Exhibit 36), Mary Watts, Alma Merck's daughter, could say only that it looked like her mother's turquoise ring. (RT 1873.) However, when then shown a turquoise ring seized during the investigation, and enlarged photographs of the same ring (Exhibits 37 and 38), the witness was able to discern markings on the underside of the ring like those scratched on possessions by her step-father. (RT 1873-74.) The ring itself and the enlargements were admitted without objection. The photograph of Alma Merck alive was thus superfluous to the prosecution's proof.

Thus, the only possible effect of the photograph was to play on the jury's emotions and natural empathy for the elderly victims. Therefore, it was error to admit the photograph of Alma Merck while alive.

The court's compounding errors were not harmless. This was a close case, where the evidence of appellant's guilt was attenuated and contradictory. (See Argument F3, *supra*.) This was precisely the sort of case, therefore, in which sympathy for the victims and animosity toward their assailant could well have tilted the balance and led the jury to convict improperly. (Cf., *People v. Ramos* (1982) 30 Cal.3d 553, 578, revd. on other grounds *sub nom. California v.*

Ramos (1983) 463 U.S. 992.) Accordingly, the erroneous admission of the photograph warrants reversal on state-law grounds. (*Watson*, *supra*, 46 Cal.2d at p. 836.) Moreover, because the improper admission of the post-mortem and live photographs necessarily "diminish[ed] the reliability of the guilt determination," reversal of the guilty verdict and death sentence are required, in that appellant's federal due process and Eighth Amendment guarantees were also infringed. (See *DeSantis*, *supra*, 2 Cal.4th at p. 1231; *Beck v. Alabama* (1980) 447 U.S. 635, 637-638 ["The same reasoning must apply to rules that diminish the reliability of the guilt determination."]; but see *People v. Weaver* (2001) 26 Cal.4th 876, 930.)

J. THE TRIAL COURT ERRED IN ADMITTING GERRY TAGS'S FORMER TESTIMONY THAT SHE BELIEVED APPELLANT COMMITTED THE CHARGED MURDERS, AND, ALTERNATIVELY, IN FAILING TO INSTRUCT THE JURY THAT THE EVIDENCE WAS ADMITTED FOR A LIMITED PURPOSE

1. Relevant Facts and Proceedings

At the preliminary examination, appellant's former girlfriend, Gerry Tags, testified as a witness for the prosecution. During cross-examination by appellant's counsel, Tags admitted that she hated appellant. (PERT, 9/7/94, 154.) The following colloquy between appellant's counsel and Tags then took place.

Q. Why do you hate him?
A. Why is because the way he is.
Q. All right. Is that because he turned you out in the street as a prostitute?
A. Yes.
Q. And that – that's 'cause he used to beat you, too, right?
A. Yes.
Q. If you didn't bring in enough money, would he get down on you?
A. Yes, he would.
Q. And that's the reason you hate him, isn't that right?
A. Yeah, and other things.

(PERT, 9/7/94, 155.)

On redirect examination, the prosecutor asked Tags to explain the "other" reasons that she hated appellant. Tags responded: "[B]ecause me havin' it in my own mind that – what I think that he's done, you know; and other things too. [¶] And I can't say that he done it because I wasn't there or nothing; but, in my own mind, I would – I would always hate him, you know, because – he – man, I tell you, I always hate him." (PERT, 9/7/94, 169.) Tags then explained that she thought that appellant "hurt people that shouldn't have been hurted." (PERT, 9/7/94, 170.) Tags was next asked by the prosecutor if her testimony referred to the "people in this

case." Tags answered, "Yes," and then added that she was referring to "[b]oth of the cases." (PERT, 9/7/94, 170.) Counsel for appellant's co-defendant objected to Tags's answers on the ground that she did not have personal knowledge as to whether appellant committed the murders.[78] The magistrate overruled the objection, explaining that the testimony "won't be admitted for the truth." (PERT, 9/7/94, 170.)

Prior to appellant's trial, Gerry Tags, died of cancer. Pursuant to Evidence Code section 1291, the prosecutor sought to admit portions of Tags's testimony from the preliminary examination, including Tags's statement that she believed appellant committed the charged murders. Appellant repeatedly objected on the ground that, under Evidence Code section 352, the relevance of the evidence was substantially outweighed by the risk of undue prejudice. (RT 73-74, 113, 1833-1835.) Appellant's objections were overruled by the trial judge, who stated that, as at the preliminary examination, the evidence "won't be admitted for the truth," but only to show "the state of mind of the witness." (RT 125, 1834, 1835.) In light of the court's ruling, appellant requested that the jury be instructed about the limited purpose for which the evidence was being admitted. (RT 1835.) The court agreed, and directed that the reading of the former testimony to the jury include the magistrate's statement at the preliminary examination that the evidence would not be admitted for the truth of the matter stated. Additionally, the court stated, "Any other limiting instruction will be given the jury at the appropriate time." (RT 1835.)

Subsequent to the trial court's rulings, Tags's preliminary examination testimony was

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[78]The transcript of the preliminary examination states that David Torres, counsel for the co-defendant, made the objection. (PERT, 9/7/94, 170.) At trial, however, appellant's counsel, James Sprague, claimed that the transcript was in error and that he made the objection at the preliminary examination. (RT 113.)

read to the jury. However, the magistrate's statement limiting the purpose of Tags's testimony regarding her belief that appellant committed the murders was omitted from the reading. (RT 2385.) In addition, no other limiting instruction was given during the reading of the former testimony.

2. The Probative Value of Gerry Tags's Testimony That She Believed Appellant Committed the Charged Murders Was Substantially Outweighed by the Probability That its Admission Would Create Substantial Danger of Undue Prejudice

Evidence Code section 352 provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Here, a substantial danger of undue prejudice was created by admitting Tags's former testimony that she believed that appellant committed the charged murders. Even though Tags acknowledged that she was not present at the killings, the jury was likely to give this testimony great weight, and accept the testimony for the truth of the matter asserted. Because Tags was appellant's girlfriend at the time of the killings, the jury likely believed that Tags must have known whether appellant committed the murders, and that she had additional information, not revealed to the jury, that established appellant's guilt. Therefore, her insider's opinion that appellant was guilty was apt to greatly influence the jury's deliberations. The prejudice to appellant was analogous to the prejudice that occurs when a prosecutor improperly vouches for the credibility of a witness. "[T]here is substantial danger that jurors will interpret [the prosecutor's opinion] as being based on information at the prosecutor's command, other than evidence adduced at trial." (*People v. Fauber* (1992) 2

Cal.4th 792, 822, citations and internal quotations omitted.)

At the same time, the testimony had no probative value. The evidence was ostensibly not introduced by the prosecutor to prove appellant's guilt of the charged offenses, but only on the collateral – but irrelevant – issue of why Tags hated appellant. The defense theory was only that Tags had a pre-existing bias against appellant, regardless of the reasons why such bias existed. The testimony elicited on re-direct examination did nothing to undermine the defense premise that Tags was biased, and thus admission of the testimony added nothing to the prosecution's case. Her testimony that she believed that appellant committed the charged crimes should have been excluded under Evidence Code section 352.

3. The Trial Court Further Erred in Failing to Instruct the Jury as to the Limited Purpose of the Testimony

The trial court also erred in failing to instruct the jury as to the limited purpose for which Tags's opinion testimony could be considered. "[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 154, citations and internal quotations omitted.)

Here, in ruling that Tags's opinion testimony was admissible, the trial court explained that the evidence was to be admitted for the limited purpose of establishing Tags's state of mind. (RT 1835.) Appellant then requested that an instruction explaining this limited purpose of the evidence be given to the jury. (RT 1835.) The court agreed with the request, and directed that the reading of the former testimony include the magistrate's statement that the testimony was not

being admitted to establish the truth of the matter stated. (RT 1835.) Additionally, the court stated, "Any other limiting instruction will be given the jury at the appropriate time." (RT1835.)

When Tags's former testimony was actually read to the jury, however, the magistrate's statement explaining the limited purpose of the opinion evidence was omitted by the reader. (RT 2385.) In addition, no instruction informing the jury of the evidence's limited purpose was given by the trial court at the time that the testimony was read. Thus, the jury had no understanding of the limited relevance of Tags's testimony that she believed appellant committed the killings.

This instructional error was compounded by the fact that at the conclusion of the evidence the trial court instructed the jury with CALJIC 2.09. That instruction stated that "certain [unspecified] evidence was admitted for a limited purpose," and that when it was admitted the jury was told that "it could not be considered . . . for any purpose other than the limited purpose for which it was admitted." (CT 1390; RT 2622-2633.) Since the jury was not so admonished when Tags's testimony was admitted, the jury was in effect instructed that Tags's opinion that appellant committed the killings was admissible for all purposes, i.e., to establish that appellant had, in fact, committed the murders of the Mercks.

4. The Trial Court's Errors in Admitting Gerry Tags's Former Testimony That She Believed Appellant Committed the Charged Murders, And in Failing to Instruct the Jury That the Evidence Was Admitted for a Limited Purpose, Require Reversal of the Judgment of Conviction

The trial court's errors in admitting Tags's former testimony that she believed appellant committed the charged murders, and in then failing to instruct the jury that the evidence was admitted for a limited purpose, violated appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution, and article I, section 13 of the

California Constitution. As the United States Supreme Court has observed, the erroneous admission of highly prejudicial evidence will render a trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

When, as here, a federal constitutional violation has occurred, the conviction must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In appellant's case, that standard has not been met. Indeed, even under the lesser standard for an error of state law it is "reasonably probable" that a result more favorable to appellant would have been reached had the trial court correctly excluded the former testimony concerning Tags's highly prejudicial belief that appellant committed the killings. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

As previously discussed, the prosecution's case against appellant was tenuous. (See Argument E3, *supra.*) It rested primarily on limited circumstantial evidence severely lacking in credibility. The jury's unlimited consideration of Tags's former testimony that she believed appellant to be guilty undoubtedly had a powerful influence on the verdict. Accordingly, appellant's convictions must be reversed.

5. The Trial Court's Errors in Admitting Gerry Tags's Former Testimony That She Believed Appellant Committed the Charged Murders, And in Failing to Instruct the Jury That the Evidence Was Admitted for a Limited Purpose Also Violated the Eighth Amendment Guarantee of a Reliable Penalty Determination And Provide a Basis for Vacating Appellant's Death Sentence

Independent of justifying reversal of appellant's convictions, the trial court's errors also rendered appellant's death sentence unconstitutional. The United States Supreme Court has repeatedly held that the Eighth Amendment's prohibition against cruel and unusual punishment,

made applicable to the states through the Fourteenth Amendment, mandates a greater degree of reliability in the determination that death is the appropriate punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 363-364; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Accordingly, a decision to sentence a defendant to death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, 887, fn. 24.)

In accordance with California law, the jury was instructed during the penalty phase that it should "consider all of the evidence which has been received during any part of this trial." (RT 2969.) In addition, the jury was told that it should consider evidence of other crimes of violence as aggravating circumstances if it found that the crimes were proven beyond a reasonable doubt.[79] (RT 2972, CT 1518.)

Here, Tags believed appellant to be guilty not only of the murders of the Mercks, but also of the murder of Jewell Russell. Although the jury ultimately deadlocked on whether appellant was guilty of murdering Russell, the court's instructions directed those jurors who voted for appellant's conviction to consider evidence relating to that crime in the penalty phase. Appellant was prejudiced because, in the absence of Tags's opinion testimony concerning appellant's guilt,

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[79]Appellant assumes for the purpose of this argument that the jury understood that the reasonable doubt instruction regarding other crimes evidence applied to the evidence of appellant's involvement in the Russell murder. The court's instruction, however, failed to specify the Russell murder as one of the other crimes of violence that had to be proven beyond a reasonable doubt in order to be considered as a factor in aggravation. The instruction listed only residential robbery, residential burglary and child abuse as the other criminal acts about which "[e]vidence ha[d] been introduced." (RT 2972, CT 1518.) Appellant contends that this omission of the Russell murder from the instruction was prejudicial error in Argument M.

the jurors who voted to convict appellant of the Russell murder may well have found that appellant's identity as Russell's killer was not proven beyond a reasonable doubt.

Indeed, the prosecution's case against appellant in the Russell case was very weak. The jury split nine to three in its deadlock, meaning that at least three jurors voted that appellant was not guilty of first degree murder. (RT 2771.) There was no eyewitness testimony identifying appellant as the killer, and appellant's fingerprints were not found at the scene of the crime. While circumstantial evidence provided by four witnesses – Emma Foreman, Ray Davidson, Gerry Tags and Mitzi Cowan – implicated appellant in the Russell murder, the credibility of each of these witnesses was highly suspect and their testimony was not persuasive.

Emma Foreman claimed that she heard appellant admit killing Russell during an argument he was having with Gerry Tags. (RT 2246.) In a prior interview with Sergeant Fraley, however, Foreman made no mention of overhearing such an admission. (RT 2515.) Additionally, the record contains evidence that Foreman was biased against appellant; she told Sergeant Fraley that she hated appellant with a "purple passion." (RT 2249.)

The incriminating testimony provided by Ray Davidson, who was Gerry Tags's step-uncle, was similarly lacking in credibility. Davidson testified that after Russell's death: he saw a knife and a blood-stained combat boot in appellant's car (RT 2254, 2255, 2272); he saw appellant with quite a bit of money and jewelry, including a watch that he thought was Russell's (RT 2272, 2273); and he heard appellant admit that he had "done away" with Russell (RT 2255).

A number of circumstances, however, cast doubt on the credibility of Davidson's testimony. During the time of his alleged observations, Davidson was a user of heroin and methamphetamine. (RT 2253, 2275, 2288.) He also had an extensive criminal record that

included an arrest for passing valium and codeine prescriptions that belonged to other people (RT 2275); jail incarcerations for possession of drugs, assault with a deadly weapon and being under the influence of drugs (RT 2252); and a 17-month prison sentence for a felony conviction (RT 2252). Finally, Davidson had a motive to gain favor with the prosecution. At the time that he first came forward with information about appellant, Davidson had just been arrested and was suffering from cramps and vomiting caused by withdrawal from his drug addiction. (RT 2277, 2282-2284.) Davidson wanted to obtain his release from custody in exchange for his cooperation with the prosecution. (RT 2277, 2280.) Moreover, according to defense expert, Dr. David Bird, a heroin addict undergoing withdrawal would do anything, including "lie, cheat, steal, borrow [or] swindle," in order to get himself free to use more heroin. (RT 2535.)

The third witness to incriminate appellant in the murder of Jewell Russell was Gerry Tags. According to Tags, she and appellant were visiting with Mitzi Culbertson and Gerald Cowan on the evening before she learned of Russell's death. (RT 2335-2336.) Tags and appellant had an argument, and Tags went upstairs to sleep. When Tags woke up early the next morning, appellant and Gerald were arguing. (RT 2339.) She noticed that appellant had changed his clothes from what he was wearing when she last saw him the evening before. (RT 2338, 2440.) About a week or two later, Tags again saw the clothes that appellant was initially wearing at Mitzi's home in the trunk of the car that she and appellant owned. (RT 2342-2343.) The clothes appeared to have blood on them, and they were wrapped around a knife that Tags claimed to have previously seen at Russell's house. (RT 2342-2344, 2371.) Finally, Tags testified that shortly after Russell's funeral, she, appellant and Gerald Cowan traveled out of state for two or three weeks. (RT 2348-2386.) During the trip, appellant admitted that he had cut

Russell's throat. (RT 2349, 2361, 2365-2366.)

The credibility of Tags's testimony was greatly damaged by evidence of her drug use, prior inconsistent statements she made to law enforcement officers and her bias against appellant. At the time of Russell's death, Tags was a heavy user of methamphetamine. (RT 2333, 2352.) She injected all of the methamphetamine she could find and was high most of the time. (RT 2352.) Her drug use caused her to stay awake for days, including one occasion when she remained awake for nine days. (RT 2353-2354.) Dr. Bird testified that Tags suffered from the usual effects of prolonged methamphetamine abuse. (RT 2525, 2541.) These consequences included impairment of language comprehension, memory, perception and visual motor control. (RT 2521-2522.)

Additionally, Tags made numerous statements to law enforcement officers that were inconsistent with her testimony. In an interview with Sergeant Fraley on February 14, 1985, Tags initially denied having any knowledge about Russell's killing. (RT 2370.) Later, in an interview with District Attorney Investigator Hillis on June 18, 1986, Tags provided information that contradicted many of the details given in her testimony. Tags, for example, stated that she was awake when appellant left Mitzi's apartment, and that appellant changed his clothes before leaving. When appellant returned the next morning, he was still wearing the same clothes. (RT 2495.) Tags also told Hillis that she had never before seen the knife that she found in the trunk of their vehicle. (RT 2497.) Finally, Tags told Hillis that the morning after appellant admitted cutting Russell's throat, appellant said to her that he actually had not killed Russell and had only claimed to have done so the night before because he was drunk. (RT 2497.)

That Tags was biased against appellant is also apparent from the trial record. Tags

admitted that she began hating appellant about a year or two after they got together and continued to hate him through the time that she testified at the preliminary examination. (RT 2373.) Tags's hatred of appellant was especially significant because, as Dr. Bird testified, a methamphetamine user's feeling of hatred for a person will taint the user's perception and recollection of events related to that person. (RT 2529.) That taint will result from the fact that methamphetamine use causes the development of a paranoid schizophrenic personality syndrome in the user. The user will then project her paranoid delusions onto the person she hates. (RT 2529.) As a result of this process, the user may imagine that the hated person has made certain statements or engaged in certain conduct that do not comport with reality. (RT 2530.)

The final witness relied upon by the prosecutor was Mitzi Cowan (formerly Mitzi Culbertson), who was both Gerald Cowan's wife and Russell's daughter. Her testimony, like that of the other witnesses, was far from persuasive. Like Tags, Mitzi testified about events that occurred one evening in early September, 1984, when appellant and Tags visited her and Gerald Cowan. According to Mitzi, appellant and Gerald left the apartment at about 5:00 p.m. (RT 2431.) Gerald returned alone at approximately 10:00 p.m., borrowed Mitzi's car, and left again. (RT 2432.) At 1:00 a.m., Gerald came back to the apartment by himself. He was carrying more than two hundred dollars in U.S. currency that was folded in half, similar to how Russell folded his currency. (RT 2429, 2440.) At about 3:00 a.m., appellant returned to the apartment. (RT 2441.) Gerald was angry that appellant had left him and demanded to know where appellant had gone. According to Mitzi, appellant was wearing clothes that were different from those he was wearing when he left the apartment. (RT 2442.)

Mitzi's testimony failed to provide strong support for the prosecution's contention that

appellant and his brother murdered Russell after they left together from Mitzi's apartment. Indeed, Mitzi was very confused about the date that appellant and Gerald had gone out. She testified that it could have been the third, fourth or fifth of September. (RT 2446.) Russell's body, however, was not discovered until the evening of September 7, 1984 (RT 2064), indicating that Russell may not have been killed until sometime after appellant came back to the apartment. Moreover, Mitzi never saw appellant in possession of any property belonging to her father (RT 2455), and never heard appellant make any statements that indicated he had any involvement in Russell's death (RT 2456).

Given these circumstances, if the trial court had correctly excluded Tags's opinion that appellant committed all of the charged murders, there may well have been fewer or even no jurors who believed beyond a reasonable doubt that appellant murdered Russell, and therefore, fewer or even no jurors who considered the Russell killing as an aggravating circumstance in the penalty phase. The absence of that aggravating circumstance, an entirely separate murder, would likely have resulted in a more favorable penalty determination. The penalty decision was a close one. The defense introduced significant mitigating evidence, and the jury returned a death sentence on only one of the two murder counts.

This mitigating evidence included testimony from Selma Yates, appellant's aunt, and Leroy Cowan, appellant's cousin, concerning appellant's troubled childhood. From age two to 14 or 15, appellant suffered brutal, unwarranted beatings from his alcoholic father. (RT 2889, 2890, 2891, 2906, 2907, 2914.) Appellant also witnessed his father inflict violence on his mother, and often had to intercede to protect her safety. (RT 2893, 2908.) In addition, as a result of his father's spending so much of his money on alcohol, there was little, if any, money left over

to buy food for the family or to pay for housing. (RT 2895, 2905.) Finally, appellant's father provided him with no guidance or advice, other than to take him to bars to show him how to get drunk. (RT 2898.)

Evidence of appellant's good character was presented by Brenda Hunt and three of her children. Hunt met appellant in 1993 and became his girlfriend. (RT 2920.) Appellant then moved in with Hunt, and he helped pay the bills, buy food and care for her five children. (RT 2921, 2923.) At appellant's suggestion, Hunt and appellant tried very hard to stop using drugs. (RT 2922, 2923.) Appellant also treated the children as if they were his own. (RT 2925.) He was kind to the children, helped them with their homework, and entertained them by singing and playing the guitar. He also took the children camping and fishing, and to the park to view fireworks on the Fourth of July. (RT 2926.)

On this record, the federal constitutional error that resulted from the erroneous admission of Tags's testimony cannot be found harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable possibility" that the erroneous admission of Tags's opinion that appellant murdered the Mercks, and Russell, affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Accordingly, appellant's death sentence must be set aside.

K. THE TRIAL COURT ERRED IN ADMITTING MITZI COWAN'S TESTIMONY THAT IN EARLY SEPTEMBER, 1984, GERALD COWAN RETURNED TO THE APARTMENT WITH MORE THAN $200 IN FOLDED U.S. CURRENCY

1. Relevant Facts and Proceedings

Mitzi Cowan, who at the time of the trial was married to appellant's brother, Gerald Cowan, testified about events that occurred one day in early September, 1984, when appellant and Tags visited her and Gerald at their apartment. After appellant and Tags arrived, appellant and Gerald left together from the apartment at about 5:00 p.m. (RT 2431.) Gerald returned alone at approximately 10:00 p.m., borrowed Mitzi's car, and left again. (RT 2432.) At 1:00 a.m., Gerald came back to the apartment by himself. (RT 2433.)

The prosecutor sought to elicit testimony from Mitzi that when Gerald returned, he had more than two hundred dollars in U.S. currency that was folded in half, similar to how Mitzi's father, Jewell Russell, folded his money. (RT 2429, 2440.) Defense counsel objected to this testimony on the ground that Gerald's statements and actions were irrelevant, since there was "no showing of a conspiracy or relationship between this defendant and his brother" in connection with the Russell murder. (RT 2433, 2434-2435, 2436.) The trial court overruled the objection, stating, "I think the fact that they left together, I think the financial situation of Gerald Cowan was established. It is apparent that something took place between 5:00 p.m. and 1:00 a.m. that allowed Mr. Gerald Cowan to come into possession of the money, and it would also, I think it is apparent that the two of them were involved doing something during that time frame, and I think the only reasonable inference to be drawn, given what I assume the testimony of this witness will be regarding the money and its connection with Mr. Russell, I think there is sufficient evidence to establish that, in fact, there was a conspiracy." (RT 2437.)

After defense counsel again argued that there was no evidence of a criminal conspiracy between appellant and his brother, the court added, "But the money is going to be identified as at least being very, very similar to the manner in which it was folded, to the way that Mr. Russell handled his money, and we have an individual [Gerald Cowan] who was in such desperate straits as to be on the verge of being evicted from his apartment." (RT 2438.) Defense counsel then moved for a mistrial, contending, "[I]t is extremely prejudicial. What the prosecution is attempting to do is show that Gerald Cowan, who is not on trial, may have engaged in some kind of suspicious activity and somehow they are trying to attribute that to this defendant without showing a prima facie conspiracy and the prosecution is going to argue that this defendant, R.C. Cowan, is guilty, and I think it is totally illegal, and I make a motion for a mistrial, because I don't think there is any way that prejudicial evidence could be cured." (RT 2440.) Appellant's motion for a mistrial was denied. (RT 2440.)

Mitzi then testified that when Gerald returned at 1:00 a.m., he "threw two hundred and some odd dollars on the bed." (RT 2440.) The currency was folded in half, similar to the way Russell carried his money. Later, at about 3:00 a.m., appellant returned to the apartment. (RT 2441.) Gerald rushed to the front door and yelled at appellant, "Where did you go? Where did you go? Why did you leave me?" Defense counsel's hearsay objection to Gerald's utterances was overruled, but the trial court limited the purpose for which the evidence could be considered, explaining that the evidence was "[n]ot coming in for the truth of the matter." Mitzi further testified that appellant was wearing clothes different from those he had on when he left the apartment. (RT 2442.)

2. Evidence That Gerald Cowan Returned with More than $200 In Folded U.S. Currency Was Irrelevant, Given the Prosecution's Failure to Prove the Existence of the Preliminary Fact That a Criminal Conspiracy Existed Between Appellant and His Brother

Under Evidence Code section 350, "No evidence is admissible except relevant evidence." Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) This Court has observed that, "'While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense.'" (*People v. Freeman* (1994) 8 Cal.4th 450, 491, quoting *People v. Slocum* (1975) 52 Cal.App.3d 867, 891.)

Here, the relevance of the prosecution's proffered evidence – that Gerald Cowan returned to the apartment with more than $200 in folded U.S. currency – depended on the existence of a disputed preliminary, or foundational, fact. (See Evid. Code, § 400 ["'preliminary fact' means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence"].) That disputed fact was whether Gerald's conduct was in furtherance of a criminal conspiracy that existed between Gerald and appellant. Absent such a criminal conspiracy, Gerald's possession of the folded money was not probative of whether appellant was involved in robbing and killing Jewell Russell.

The determination of the existence of a preliminary fact must be made in accordance with Evidence Code section 403. (Evid. Code, § 310, subd. (a).) Subdivision (a) of section 403

states, "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact . . . ." In *People v. Herrera* (2000) 83 Cal.App.4th 46, 61, the Court of Appeal clarified that "the correct standard of proof for a preliminary fact under Evidence Code section 403 is evidence sufficient to support a finding by a preponderance of the evidence. . . . Therefore, the proponent must offer evidence sufficient for the trier of fact to determine that the preliminary fact, the conspiracy, is more likely than not to have existed."

To establish the existence of a conspiracy, it must be shown that "one or more persons have the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act by one or more of the parties to such agreement in furtherance of the conspiracy." (*Id.*, at p. 64.) Additionally, a nexus must be established between the conduct at issue and the conspiracy. In other words, the proponent of the evidence must establish that: (1) the person committing the act at issue was participating in the conspiracy at the time the act was committed; (2) the act was done in furtherance of the objective of the conspiracy; and (3) at the time the act was committed the party against whom the evidence is offered was participating in the conspiracy. (*Ibid.*)

Finally, when the proffered evidence is the statement of an alleged co-conspirator, California courts require that the existence of the conspiracy be established by evidence independent of the proffered declaration. (*People v. Leach* (1975) 15 Cal.3d 419, 430.) This requirement of independent evidence should also apply when, as in this case, the proffered evidence is the conduct of an alleged co-conspirator. Here, the trial court erred by relying upon

Gerald's possession of the folded currency in determining that there was sufficient evidence of the conspiracy. (See RT 2437, 2438.) Absent evidence that Gerald possessed the folded money, the prosecution fell far short of meeting its burden of proving that it was more likely than not that appellant and Gerald conspired to kill and rob Russell. The evidence showed only that Gerald was in need of money; that appellant and Gerald left the apartment at the same time; that Gerald returned by himself at 10:00 p.m. and received permission to borrow Mitzi's car; that Gerald returned again by himself at 1:00 a.m.; that appellant returned at 3:00 a.m. wearing clothes different from those he had on when he first left; and that Gerald was angry at appellant because he believed that appellant had left him. Indeed, this evidence was so insubstantial that even if Gerald's possession of the folded currency was included as a factor for consideration, the existence of a conspiracy was still not proven by a preponderance of the evidence. The existence of a conspiracy between appellant and his brother was at best highly speculative. Accordingly, the trial court erred in finding a conspiracy, and in admitting the proffered evidence.

3. The Trial Court's Error in Admitting Mitzi Cowan's Testimony That in Early September, 1984, Gerald Cowan Returned to The Apartment with More than $200 in Folded U.S. Currency Requires Reversal of the Death Penalty

Appellant was prejudiced by the trial court's erroneous admission of Mitzi Cowan's testimony in the penalty phase. The United States Supreme Court has repeatedly held that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Fourteenth Amendment, mandates a greater degree of reliability in the determination that death is the appropriate punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 363-364; *Woodson v. North Carolina* (1976)

428 U.S. 280, 305.) Accordingly, a decision to sentence a defendant to death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, 887, fn. 24.)

In accordance with California law, the jury in appellant's case was instructed during the penalty phase that it should "consider all of the evidence which has been received during any part of this trial." (RT 2969.) In addition, the jury was told that it should consider evidence of other crimes of violence as aggravating circumstances if it found that the crimes were proven beyond a reasonable doubt.[80] (RT 2972, CT 1518.)

Thus, although the jury deadlocked on whether appellant was guilty of murdering Russell, the court's instructions directed those jurors who voted for appellant's conviction to consider evidence relating to that crime in the penalty phase. Appellant was prejudiced because, in the absence of Mitzi's testimony that Gerald returned with the folded money, the jurors who voted to convict appellant of the Russell murder may well have found that appellant's identity as the killer was not proven beyond a reasonable doubt.

Indeed, as previously explained, the prosecution's case against appellant in the Russell case was weak. (See Argument J5, *supra*.) The jury split nine to three in its deadlock, meaning that at least three jurors voted that appellant was not guilty of the first degree murder of Russell. (RT 2771.) In her summation, the prosecutor emphasized Gerald's possession of the folded currency in support of her argument that appellant was guilty of Russell's murder. (RT 2676.) Thus, if the trial court had correctly sustained appellant's objection to Mitzi's testimony, there

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[80]See footnote 9.

may well have been fewer or even no jurors who believed beyond a reasonable doubt that appellant murdered Russell, and therefore, fewer or no jurors who considered the Russell killing as an aggravating circumstance in the penalty phase. The absence of that aggravating circumstance would likely have resulted in a more favorable penalty determination. As explained above, the penalty decision was a close one, and appellant introduced mitigating evidence concerning his background and character. (See Argument J5, *supra.*)

On this record, the federal constitutional error that resulted from the erroneous admission of Mitzi's testimony was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable possibility" that the erroneous admission of Mitzi's testimony that Gerald returned to the apartment with more than $200 in folded U.S. currency affected the verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 447.) Accordingly, appellant's death sentence must be set aside.

L. IMPROPERLY ADMITTED VICTIM IMPACT TESTIMONY VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

1. Relevant Facts and Proceedings

On December 1, 1995, prior to the commencement of the trial, the prosecution filed a written notice of its intention to introduce the victim impact testimony of two witnesses, Alma Merck's son, Robert Johnson, and Jewell Russell's son, Danny Russell. (CT 1056-1061.) On June 11, 1996, the prosecution presented the testimony of three family members of Alma Merck: Denise Cox, Betty Turner and Terri Jones. Neither Robert Johnson nor Danny Russell gave victim impact testimony.

Denise Cox, Alma's granddaughter, testified that Alma had suffered from Parkinson's disease in the six to eight months before her death. (RT 2844-2845.) Learning of her grandmother's death was very difficult and a shock. It was extremely difficult for Cox when she and other family members cleaned out Alma's house a couple days after the bodies were found. (RT 2845.) Cox stated, "I will never forget the smell in the house, the smell of death and blood everywhere." Cox stated that fingerprint dust was everywhere, things were "turned upside down," and that "everything was in an upheaval and the nightmare for me, and I know for my family." (RT 2845.)

Cox explained that she continued to think in her own mind of what she believed Alma experienced just prior to her death. (RT 2845.) "And it goes over and over in my mind what she must have experienced just minutes prior to her death. I can only imagine her pleading for her life, the terror, the fear of this evil people or person in this house, and I envision her hearing her husband, my grandfather, being murdered in the other room knowing that her life . . . ." (RT

2845-2846.) Cox emphasized that Alma and Clifford were older people, who could not hear or see well, and were defenseless and helpless. (RT 2846.) She could understand someone robbing and tying them up, but not someone brutally murdering them.

Cox added that her entire family and their friends had been affected by Alma's death. (RT 2846.) She stated, "I pray for Mr. Cowan because right now I believe his heart is hard and he has no remorse, and he does not realize what he has done." She prayed that his "heart softened" so that he would feel the pain and guilt of what he had done. She then stated, "[A]nd yes, we're asking for the death penalty, and it is not out of revenge. We're not vengeful people. It is out of justice and fairness. An eye for an eye, tooth for a tooth. He made the choice. He should suffer the consequences, and thank you for listening to me." (RT 2847.)

Betty Turner testified that she was the youngest of Alma's four children. She identified People's Exhibit 70 as a photograph of her mother and Clifford Merck. According to Turner, Alma and Clifford were married for almost 33 years, and Clifford was not considered simply a stepfather but a family member. Family was very important to Alma and Clifford. Alma always greeted Turner with a big hug and told her that she missed her. Clifford loved to tell stories and was easy going, although opinionated at times. They were quiet, loving people who stayed to themselves. (RT 2849.)

Turner further testified that she would never forget when she received the telephone call informing her that Alma and Clifford had been killed. She knew that Clifford had tried his best to protect her mother. She also knew that her mother was terrified and had gone through pure hell before her death. Turner added that she has no sympathy for anyone who takes the innocent life of another. (RT 2850.)

Terri Jones, another of Alma's granddaughters, testified that she would never forget the pain caused by the death of Alma and Clifford. Jones recalled the last conversation she had with her grandmother. Alma was crying. She was sick, suffering from Parkinson's disease, recovering from a broken hip and could not do much. Jones went into shock after learning of the killings and was unable to attend the funeral. The killings also caused pain for Jones's mother and Jones's two children. (RT 2852.)

Defense counsel objected to Cox's testimony imagining what Alma Merck must have experienced before her death as unduly prejudicial and not constituting proper victim impact evidence. (CT 1620-1622; RT 2846.) The prosecutor responded, "I believe this is how she feels." (RT 2846.) The trial court overruled the objection and stated, "I think the jury understands that. It is impact-type testimony, and it is not to be considered by the jury." Obviously this witness was not a percipient witness. You may proceed with that understanding." (RT 2846.) Cox's testimony continued over two further objections by the defense. (RT 2846-2847.)

Defense counsel similarly objected to the portion of Betty Turner's testimony where she stated that she knew Clifford had tried to protect Alma but was unable to do so, and that Alma had gone through pure hell before her death. (RT 2849.) The objection was overruled with a comment by the trial court that it would be discussed at the noon recess. (RT 2849-2850.)

At the recess, appellant moved for a mistrial. Defense counsel argued that the testimony of Cox and Turner went far beyond that permitted by the Supreme Court as victim impact testimony. (RT 2861.) The trial court indicated that it had informed the jury that the witnesses were not percipient and that they were being presented only for the purpose of explaining how

the family was impacted. The court then denied the mistrial motion and indicated it would consider giving a further limiting instruction. Correctly explaining that the harm would not be cured by a limiting instruction, counsel stated that the defense would not request one. (RT 2862.) Despite its suggestion that it would give a limiting instruction to guide the jury in the proper use of this testimony, the court gave the jury no further instruction or admonition on the subject.

On August 5, 1996, appellant moved for a new trial of the penalty phase as to Count Two of the Information or, alternatively, for a modification of the capital verdict to a sentence of life without the possibility of parole, based on the improper victim impact evidence. (CT 1586-1597.) Appellant asserted that the admission of this testimony resulted in the denial of his rights under the Eighth and Fourteenth Amendments, and that it constituted error under *Griffin v. California* (1965) 380 U.S. 609, and under *People v. Boyd* (1985) 38 Cal.3d 762. (CT 1586-1597.) The trial court denied the motion. (CT 1628.)

2. The Trial Court Erred by Overruling Appellant's Objections To Portions of the Victim Impact Testimony and Allowing the Jury to Consider Improper Evidence.

a. Eighth and Fourteenth Amendment Violations

It is well-settled that a jury's discretion to impose a death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, J., Powell, J. and Stevens, J.), cited in *People v. Brown* (1985) 40 Cal.3d 512, 539; *People v. Harris* (1984) 36 Cal.3d 36, 62; *Keenan v. Superior Ct.* (1981) 126 Cal.App.3d 576, 589; see also *Gardner v. Florida* (1997) 430 U.S. 349, 358 ["[A]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'"].) Specifically, the United States Supreme

Court has said that a jury must make an "individualized determination" whether the defendant in question should be executed based on "the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879, emphasis omitted.) Moreover, although the United States Supreme Court has never limited sentencing considerations to only "defendant's record, characteristics, and circumstances of the crime," the Court has carefully scrutinized state statutes and procedures to ensure that evidence admitted at the penalty phase of a capital trial has sufficient bearing on the defendant's "personal responsibility and moral guilt." (*Booth v. Maryland* (1987) 482 U.S. 496, 502, citing *Enmund v. Florida* (1982) 458 U.S. 782, 801.) "To do otherwise would create the risk that a sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" (*Id.*, at p. 502, quoting *Zant*, *supra,* 462 U.S. at p. 485.)

Accordingly, the United States Supreme Court held in *Booth* that the admission of victim impact evidence violated fundamental Eighth Amendment principles. In *Booth*, the jury at the sentencing phase was provided with a presentence report which included, as required by state law in all felony cases, a victim impact statement (VIS), describing the impact of the crime on the victim or the victim's family. (*Booth, supra,* 482 U.S. at p. 499.) The VIS in *Booth* provided the jury with two-types of emotionally-charged information. First, it described the victims' outstanding personal qualities and the grievous emotional impact of the crimes on the family. (*Id.*, at pp. 499-500, 502.) Additionally, the VIS set forth family members' opinions and their incensed characterizations of the crime and the defendant. (*Id.*, at p. 502.) Concluding that such evidence was inherently irrelevant and inflammatory, the Supreme Court held that the admission of VIS at the penalty phase of a capital murder trial constituted a per se violation of

the Eighth Amendment. (*Id.*, at p. 509.)

Subsequently, the Supreme Court revisited the victim impact issue, and partially reversed course, in *Payne v. Tennessee* (1991) 501 U.S. 808. While affirming that the admission of prejudicial victim impact evidence could violate the Due Process Clause of the Fourteenth Amendment, *Payne* held, contra to *Booth*, that the Eighth Amendment erects no per se bar to the admission of evidence relating to a victim's personal characteristics and the emotional impact of the murder on the victim's family. (*Id.*, at p. 827.)

In *Payne,* the defendant had been convicted of the murder of a mother and her daughter, and the attempted murder of a son by multiple stab wounds. The son, who barely survived the stabbings, had also witnessed the killing of his mother and baby sister. Under these circumstances, the Court found no constitutional prohibition against admission at the penalty phase of evidence concerning the impact of these crimes on the son.

The Supreme Court expressly limited its decision in *Payne* to the first type of evidence considered in *Booth*. (*Id.*, at p. 830, fn. 2.) It did not reach the question of the constitutionality of the other common kind of victim impact evidence – "opinions of the victim's family about the crime, the defendant, and the appropriate sentence." This Court has followed *Payne* in categorizing admissible victim impact evidence. (See, e.g., *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-72 [admitting evidence regarding injuries suffered by murder victim's husband in the same attack].) Further, a number of federal appellate courts have expressly recognized that the portions of *Booth* not addressed by *Payne* survived that decision and remain valid. (See *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1239 and cases cited therein; *United States v. Bernard* (8th Cir. 1999) 299 F.3d 467, 480; *Parker v. Bowersox* (8th Cir. 1999) 188 F.3d 923, 931.)

The penalty phase in this case was rendered fundamentally unfair and unreliable by the unchecked admission of prejudicial victim impact evidence. Cox's and Turner's embroidered descriptions of the crime and pleas for execution diverted the jury from a dispassionate determination of appellant's blameworthiness. Cox's and Turner's testimony fell into four categories: (1) their description of the lingering effects of Alma Merck's killing on their emotional well-being, (RT 2849 ["September 4th, 1984, I'll never forget that day so long as I live. . . . Maybe now, when it is all over with, we can move on and have lots of loving memories of them and I always carry them in my heart. "]); (2) their worst conjectures as to Alma Merck's experiences and extreme suffering during the crime, (RT 2845-46 ["I can only imagine her pleading for her life, the terror, the fear of this evil people or person in this house, and I envision her hearing her husband, my grandfather, being murdered in the other room knowing that her life. . ."]); (3) their speculation as to appellant's presumed lack of remorse, (RT 2847 [" . . . I believe [Cowan's] heart is hard and he has no remorse"]); and (4) an appeal by the family that the jury return a death verdict with biblical sanction. (RT 2847 ["and yes, we're asking for the death penalty . . . . [a]n eye for an eye, a tooth for a tooth]."")

At most, only the first type of challenged testimony – the impact of Alma Merck's murder on her family – is arguably permissible under *Payne*. (See *People v. Brown* (2004) 33 Cal.4th 382, 396-398 [testimony of surviving victims and family members as to the immediate effects or more lasting impact of the murder admissible victim impact evidence].) *Payne* does not speak to the other kinds of victim impact testimony allowed here, nor does it disavow *Booth*'s categorical exclusion of such evidence under the Eighth Amendment.

With respect to the family members' wrenching and vivid descriptions of Alma Merck's

supposed actions and state of mind just prior to her death, the testimony was pure speculation. (Cf., *People v. Sanders* (1995) 11 Cal.4th 475, 550 [challenge to argument referring to facts outside record]; *People v. Raley* (1992) 2 Cal.4th 870, 916 [same].) As recognized by the trial court, neither Cox nor Turner were percipient witnesses to the crimes. As such, there was no conceivable relevance in the witnesses' torturous conjectures regarding Alma Merck's last minutes alive. This was not evidence of the circumstances of the offense, but untethered speculation as to what conceivably might have happened during its commission. This testimony is unquestionably improper under the guidelines set forth in both *Payne* and *Booth,* as it constitutes the precise sort of "opinions and characterizations of the crimes" proscribed on Eighth Amendment grounds by the Supreme Court.

This powerful, yet wholly speculative, testimony also fails to pass muster under *Payne*'s due process analysis. A defendant's due process rights are infringed when victim impact evidence is so inflammatory and unduly prejudicial that it renders the trial fundamentally unfair. (*Payne, supra,* 501 U.S. at p. 825; see *People v. Boyette* (2003) 29 Cal.4th 381, 444; *People v. Raley* (1992) 2 Cal.4th 870, 916; *United States v. Nelson* (8th Cir. 2003) 347 F.3d 701, 713.)

This Court has emphasized that allowing victim impact evidence pursuant to section 190.3 "does not mean there are no limits on emotional evidence and argument . . . . '[T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the

other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites irrational, purely subjective response should be curtailed.'" (*People v. Edwards* (1991) 54 Cal.3d 787, 835.)

In the instant case, the combined effect of the testimony of Cox and Turner was to sway the jury with highly emotional, inflammatory "opinions and characterizations" about appellant, the crime and the crime scene. In *People v. Love* (1960) 53 Cal.2d 843, the Court reversed a death sentence based on the improper admission of a photograph of a victim in death along with a tape recording of her groaning in pain and talking in a failing voice before she died. Finding the inflammatory nature of the evidence outweighed its probative value, the Court stated, ". . . even if [proof of her unusual pain was] relevant and material, Mrs. Love's pain was more than adequately described by the doctor. There was no need to show the jurors the expression of her face in death or to fill the courtroom with her groans." (*Love, supra,* 53 Cal.2d at pp. 856-857.) Similarly, the courtroom here should not have been filled with Cox's and Turner's graphic descriptions as to what they imagined Alma Merck had gone through. This testimony tainted the fairness of the penalty phase and thus violated appellant's right to due process of law.

The admission of Cox's characterization of appellant as lacking in remorse and her exhortation on behalf of the family to return a death verdict separately violated appellant's Eighth Amendment rights. (See *Hain, supra*, 287 F.3d at p. 1239.) In *Hain*, four victim impact witnesses expressed or implied their view that death was the appropriate penalty. (*Ibid.*) Three of these witnesses, as well as an additional witness, also commented on the defendant and the crime, stating it was hard "to imagine that anyone could have that much hate and meanness in them," criticizing Hain for being "fully aware that he was taking the life of two young and

beautiful people," for returning to the car "to make sure it was going to do the job and make sure that Michael and Laura Lee would die," and for failing to do anything "to stop the horrible set of events which he had set into motion." (*Ibid.*) *Hain* held that this testimony "was contrary to *Payne* and *Booth* and violated [the defendant's] Eight Amendment rights." (*Ibid.*; see also *Bernard*, 299 F.3d at 480 [plain error under *Booth* to admit statement by a victim's mother, "I'm sorry for you, for your heart to be so hard, you couldn't even see the innocence of the two you've killed."].)

In *People v. Johnson* (1992) 3 Cal.4th1183, 1246, this Court upheld the admission of victim impact evidence over a challenge that its admission violated the viable portion of *Booth.* The Court held that the tape recording of a family member weeping and telling the police, "I want to finish this, because I want this to stick in court. I want them to pay for what they done to my family," "merely expressed the desire that the perpetrators pay for their wrongdoing" and did not run afoul of the rule set out in *Booth.* (*Johnson, supra,* 3 Cal.4th at p. 1246.)

However here, unlike in *Johnson*, Ms. Cox unequivocally asked the jury to return a verdict of death. Her statement, "We're asking for the death penalty . . . . An eye for an eye, tooth for a tooth. He made the choice. He should suffer the consequences, and thank you for listening to me," went far beyond expressing a desire for appellant to pay for his wrongdoing. The testimony sent a direct message to the jury that the death penalty was the only punishment that would satisfy the family and mitigate the family's pain. Her invocation of the biblical doctrine of retribution was an additional impermissible appeal to the jury, not found in *Johnson.* (Cf. *People v. Slaughter* (2002) 27 Cal.4th 1187, 1210; *People v. Wrest* (1992) 3 Cal.4th 1088, 1105-1107 [condemning practice of making biblical references as tending "to diminish the jury's

sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions"].) Here, the victim's family was permitted to inject biblical law into the penalty determination in a way that clearly would have been inadmissible if the prosecutor had attempted to do so directly. (*People v. Sandoval* (1992) 4 Cal.4th 155, 192-193.) The error in admitting this cumulatively prejudicial victim impact testimony – in effect, a biblical injunction to return a death verdict – is plain.

b. *Boyd* Error

At the penalty phase of a capital murder case, the prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 771-776, 778.) Specifically, evidence of a defendant's lack of remorse after the time of the offense does not relate to any mitigating or aggravating factor in section 190.3. (*People v. Jones* (2002) 29 Cal.4th 1229, 1265 [evidence of remorselessness at the time of the offense relates to circumstances of crime and is admissible; post-crime remorselessness evidence does not relate to statutory factor and is inadmissible]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 [same].) Thus, it is clear that the post-crime remorselessness evidence presented here was inadmissible. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1184; *Boyd, supra,* 38 Cal.3d at pp. 771-776.)

In the instant case, Denise Cox was allowed to testify: "I pray for Mr. Cowan because right now I believe his heart is hard and he has no remorse, and he does not realize what he has done." (RT 2847.) Cox's mere supposition that appellant was without remorse, years after the offense, was irrelevant, but doubtless deeply affecting to the jury. Cox's statement was not directed to appellant's lack of remorse at the time and place of the crime, nor was it offered in

rebuttal to any defense evidence. Rather, it was the foundation for Cox's plea for retribution. The admission of this evidence unquestionably constituted *Boyd* error. (*Boyd, supra,* 38 Cal.3d at pp. 771-776.)

Although, *Boyd,* on its face, rested on an interpretation of state law – the 1978 initiative, the Court's analysis was rooted in federal constitutional principles. The Court explained that its limitation on the evidence that may be offered by the prosecution at the penalty phase was a necessary corollary of the Court's reasoning in sustaining the constitutionality of the 1978 law: "The reasoning we used to sustain the validity of the 1978 initiative *necessarily presumes* that the jury can only consider evidence that bears on a listed factor." (*Id.*, at p. 776, italics added, citing *Lockett v. Ohio* (1978) 438 U.S. 586, *Eddings v. Oklahoma* (1982) 455 U.S. 104, and *Zant v. Stephens, supra,* 462 U.S. 862; see also *United States v. Brown* (1987) 479 U.S. 538, 542-543 [proper to admonish jury to ignore extraneous emotional responses not rooted in aggravating and mitigating factors].) Thus understood, the admission of Cox's irrelevant testimony also violated appellant's rights to due process of law and a reliable penalty determination under the Eighth and Fourteenth Amendments to the federal Constitution. (See also *Payne, supra,* 501 U.S. at pp. 825, 830, fn. 2; *Booth, supra*, 482 U.S. at p. 508.)

3. The Trial Court's Error in Allowing the Improper Victim Impact Evidence Requires Reversal of Appellant's Death Sentence

The emotionally-charged victim impact testimony, which overshadowed all the other evidence in the penalty phase, was undoubtedly pivotal in the jury's return of a death verdict with respect to Alma Merck, only. All of the witnesses testifying to victim impact were members of Alma Merck's family. All of these witnesses' horrid imaginings of the crime and the crime

scene focused solely on Alma Merck's last-minute suffering. Apart from this evidence, the same aggravating or mitigating circumstances were germane to the penalty determination with respect to both victims. Yet, tellingly, the jury returned a death verdict as to Alma and a life-without-parole verdict as to Clifford Merck.

Without denying the aggravated aspects of the Mercks' killings, this was not a case in which a death verdict was a foregone conclusion. (See Arguments J5, N3.) Two of the proffered aggravating factors related to a single incident (see Argument O), the third such allegation was vigorously disputed, and the defense introduced significant mitigating evidence.

This mitigating evidence included compelling testimony concerning appellant's troubled childhood. From age two to 14 or 15, appellant suffered brutal, unwarranted beatings from his alcoholic father. (RT 2889, 2890, 2891, 2906, 2907, 2914.) Appellant also witnessed his father inflict violence on his mother, and often had to intercede to protect her safety. (RT 2893, 2908.)

Evidence of appellant's good character and the impact of his execution on others was presented by Brenda Hunt and three of her children. Hunt met appellant in 1993 and became his girlfriend. (RT 2920.) Appellant then moved in with Hunt, and he helped pay the bills, buy food and care for her five children. (RT 2921, 2923.) Together, Hunt and appellant tried very hard to stop using drugs. (RT 2922, 2923.) Brenda Hunt testified that she would be devastated if appellant were executed. (RT 2928.)

In direct contradiction of the contested allegation of abusive discipline, the Hunt children testified that appellant never beat them. (RT 2923-2925, 2933-2934, 2941, 2949.) Appellant was kind to Hunt's children and treated the children as if they were his own. (RT 2925, 2930, 2940, 2948.) The children called him "dad." (RT 2925, 2931, 2940.) The two younger children

testified that they would feel sad if appellant were executed. (RT 2944, 2950.) The oldest son, Robert, testified that if defendant were executed, he would feel the same as though his mother had been killed because of his closeness to appellant. (RT 2937.)

Thus, judging by the life-without-parole verdict as to Clifford Merck, among other considerations, none of the regular evidence presented at the penalty phase would have led a jury to conclude unanimously that appellant was so incorrigibly violent or unredeemable that he deserved to die. As such, the Court cannot exclude the probability that jurors were unduly swayed by the highly emotional victim impact testimony – imploring them to vote for death – and that, absent this testimony, the jury might have voted for life without the possibility of parole as to Alma Merck as well. (*Brown*, *supra*, 479 U.S. at p. 543 [extraneous emotional factors are far more likely to turn the jury against a capital defendant than for him]; see *Chapman, supra,* 386 U.S. at p. 24 [federal constitutional error in admitting improper victim impact testimony cannot be found harmless beyond a reasonable doubt].)

M. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT IT COULD NOT CONSIDER THE MURDER OF JEWELL RUSSELL AS AN AGGRAVATING FACTOR IN THE PENALTY PHASE UNLESS IT FOUND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THE CRIME

1. Relevant Facts and Proceedings

During the guilt phase, the jury was unable to reach a unanimous verdict concerning the charge that appellant murdered Jewell Russell. (CT 1458, RT 2770-2778.) On its final ballot, the jury split was nine to three. (RT 2771.)

Prior to the penalty phase, defense counsel moved to empanel a new jury to decide the penalty. Defense counsel argued that the guilt phase jurors who believed that appellant was guilty of murdering Jewell Russell would be biased in deciding the appropriate punishment. (RT 2806.) Appellant's motion was summarily denied. (RT 2806.)

At the conclusion of the penalty trial, the jury was instructed that it "must determine what the facts are from the evidence received during the entire trial unless [it was] instructed otherwise" (RT 2959-2960; CT 1492), and that "[i]n determining which penalty is to be imposed . . . [it] shall consider all of the evidence which has been received during any part of the trial of this case" (RT 2969; CT 1514). In addition, the jury was told that evidence of certain other crimes evidence could not be considered as an aggravating factor unless it was proven beyond a reasonable doubt that appellant had committed the criminal acts. The instruction, however, did not include the murder of Jewell Russell as one of the crimes that had to be proven beyond a reasonable doubt. (RT 2972; CT 1518.) The following instruction was read to the jury:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts. One, residential burglary, two, residential robbery, and three, child abuse which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating factor, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts. A juror may not consider any evidence of any other criminal act as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider the evidence for any purpose.

(RT 2972, CT 1518.)

During the penalty phase deliberations, the jury asked for a readback of Dr. Armand Dollinger's testimony concerning the Jewell Russell autopsy. (RT 3011; CT 1580.) Defense counsel objected to the readback and moved for a mistrial, arguing that the autopsy evidence was both irrelevant and prejudicial since the jury did not convict appellant of murdering Russell. (RT 3012, 3014.) The trial court allowed the readback and denied appellant's mistrial motion. In so ruling, the court agreed with the prosecutor that any juror who believed beyond a reasonable doubt that appellant murdered Russell could consider that crime as a circumstance in aggravation in the penalty phase. (RT 3012-3016.) As the court explained, "Either three of them or nine of them who were convinced beyond a reasonable doubt, and given the fact that the jury does not have to unanimously agree on any particular circumstance involving aggravation during this phase, I believe that whatever the case may be, whether it be the three of them or the nine of them, can consider that murder as a violent act of the defendant which can be appropriately considered." (RT 3015-3016.)

2. The Trial Court Must Instruct Sua Sponte That Other Crimes of Violence May Not Be Considered as Circumstances in Aggravation Unless the Jury Finds That the Crimes Have Been Proven Beyond a Reasonable Doubt

Pursuant to factor (b) of Penal Code section 190.3, the existence of other violent criminal activity by the defendant may be considered as an aggravating circumstance in the jury's determination of penalty if the jury finds beyond a reasonable doubt that the defendant actually committed the other crimes. The trial court must instruct sua sponte on this standard of proof. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54; *People v. Phillips* (1986) 41 Cal.3d 29, 83; *People v. Yeoman* (2003) 31 Cal.4th 93, 132.) In addition, such an instruction must be given even when the other violent crimes evidence to be considered by the jury was introduced during the guilt phase of the trial. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 53 [at the guilt phase the prosecution introduced evidence that the defendant had committed other violent crimes in the past, but no additional evidence of other crimes was presented at the penalty phase]; *People v. Champion* (1995) 9 Cal.4th 879, 948 [at the guilt phase the prosecution introduced evidence of two uncharged murders].) The instruction is "vital to a proper consideration of the evidence" (*People v. Stanworth* (1969) 71 Cal.2d 820, 841), as application of the "reasonable doubt standard ensures reliability; and the evidence [of other crimes] is thus not improperly prejudicial or unfair" (*People v. Balderas* (1985) 41 Cal.3d 144, 205, fn. 32).

This Court further explained in *Robertson* that "[i]n order to avoid potential confusion over which 'other crimes' – if any – the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction . . . can then be directly addressed to these designated other crimes,

and the jury should be instructed not to consider any additional other crimes in fixing the penalty. Without such a limiting instruction, there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind, because . . . the jury is instructed in the penalty phase that in arriving at its penalty determination it may generally consider evidence at all phases of the trial proceedings. [Citation.]" (*People v. Robertson*, *supra*, 33 Cal.3d. at p. 55, fn. 19.)

In the present case, the trial court did give a limiting "reasonable doubt" instruction that directly addressed the jury's consideration of three other crimes. These other crimes were identified as "residential burglary," "residential robbery," and "child abuse." (RT 2972.) The court, however, failed to include the Russell murder as one of the other crimes that the jury could rely upon as an aggravating circumstance only if proven beyond a reasonable doubt. That omission was error. Given that the jury was instructed to base its decision on "the evidence received during the entire trial" (RT 299-2960), the jury may well have believed that the omission of the Russell murder from the limiting instruction meant that the instruction was not applicable to that crime. Indeed, why else would that crime have been excluded from the reasonable doubt instruction? This omission conveyed to the jury that since the Russell murder was one of the guilt phase charges against appellant, evidence of that crime was to be considered under a different, and lower, standard than the other crimes evidence that was presented in the penalty phase and included in the reasonable doubt instruction.

To the extent that defense counsel had an obligation to point out the omission of the Russell murder from the instruction, counsel's failure to make such an objection constituted ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the

United States Constitution and article I, section 15 of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) While claims of ineffective assistance of counsel are usually more appropriately decided in habeas corpus proceedings, that is not the case when the appellate record discloses "'no conceivable tactical purpose'" for counsel's act or omission. (*People v. Hines* (1997) 15 Cal.4th 997, 1065, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 558.) Here, trial counsel could not have had a strategic reason for failing to request that the Russell murder be included in the reasonable doubt instruction, especially since he vigorously objected to the readback of Dr. Dollinger's testimony and moved for a mistrial based on the jury's consideration of the Russell murder in the penalty phase.

3. Appellant Was Prejudiced by the Omission of the Russell Murder from the Limiting Instruction Regarding the Consideration of Other Crimes Evidence

Appellant acknowledges this Court's holding that the proof beyond a reasonable doubt requirement for the jury's consideration of other crimes evidence is not based on the federal constitution. (*People v. Brown* (1988) 46 Cal.3d 432, 446; *People v. Miranda* (1987) 44 Cal.3d 57, 98.) Appellant, however, respectfully disagrees, and urges this Court to reconsider.

By mandating sua sponte instructions on the requirement that other crimes evidence be proven beyond a reasonable doubt and precluding aggravation of sentence upon the basis of alleged violent criminal activity unless proven to that level of certainty, California law has created a Fourteenth Amendment due process liberty interest that is violated by a trial court's failure to so instruct. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522; *Rust v.*

Hopkins (8th Cir. 1993) 984 F.2d 1486, 1494.) Further the defendant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment, his right to a trial by jury under the Sixth Amendment as well as his right to a reliable penalty determination under the Eighth Amendment are violated by the failure to instruct on the "reasonable doubt" requirement.

The death sentence must be reversed because the error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable (i.e., realistic) possibility" that the misinstruction affected the verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 448 ["we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial"].)

As this Court observed in *People v. Robertson*, *supra*, 33 Cal.3d at p. 54, "[T]he potential for prejudice [is] particularly serious" when an error relates to the jury's consideration of other crimes evidence. It has long been recognized that such evidence "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*Ibid.*, quoting *People v. Polk* (1965) 63 Cal.2d 443, 450.) Moreover, it is apparent from the readback requested during deliberations that the jury considered the circumstances of the Russell murder in reaching its death verdict. Additionally, the jury's inability to reach a verdict in the guilt phase meant that either three or nine jurors did not find beyond a reasonable doubt that appellant murdered Russell. Under these circumstances, there was at least a reasonable possibility that had the jury been properly instructed to consider the Russell murder only if proven beyond a reasonable doubt, rather than led to believe a lesser standard applied, the jury would not have

reached a unanimous verdict for death. One can readily envision a colloquy between the jurors who voted to convict appellant of the Russell murder and those who did not, in which the former convinced the latter to consider the Russell murder in support of a death verdict because it was no longer subject to the proof beyond a reasonable doubt standard of the guilt phase – pointing to its conspicuous omission from the other crimes expressly covered by the beyond a reasonable doubt instruction. Such logic would have been quite persuasive, and there is no assurance that lay jurors did not invoke it or succumb to it.

The additional crimes introduced by the prosecution in the penalty phase were far less serious and not likely to have influenced the jury as much as the Russell murder. At the same time, appellant made the penalty decision a close one by presenting mitigating evidence about his character and background.

This mitigating evidence included testimony from Selma Yates, appellant's aunt, and Leroy Cowan, appellant's cousin, concerning appellant's troubled childhood. From age 2 to 14 or 15, appellant suffered brutal, and unwarranted, beatings from his alcoholic father. (RT 2889, 2890 , 2891, 2906, 2907, 2914.) Appellant also witnessed his father inflict violence on his mother, and often had to intercede to protect her. (RT 2893, 2908.) In addition, as a result of his father's spending so much of his money on alcohol, there was little, if any, money left over to buy food for the family or to pay for housing. (RT 2895, 2905.) Finally, the primary guidance appellant's father provided him was to take him to bars to show him how to get drunk. (RT 2898.)

Evidence of appellant's good character was presented by Brenda Hunt and three of her children. Hunt met appellant in 1993 and became his girlfriend. (RT 2920.) Appellant then

moved in with Hunt, and he helped pay the bills, buy food and care for her five children. (RT 2921, 2923.) At appellant's suggestion, Hunt and appellant tried very hard to stop using drugs. (RT 2922, 2923.) Appellant also treated the children as if they were his own. (RT 2925.) He was kind to the children, helped them with their homework, and entertained them by singing and playing the guitar. He also took the children camping and fishing, and to the park to view fireworks on the Fourth of July. (RT 2926.)

Given this record, appellant was prejudiced by an instructional error that tipped the jury's weighing process heavily and unlawfully in favor of aggravation. Appellant's death sentence must be set aside.

N. THE TRIAL COURT ERRED BY NOT DEFINING REASONABLE DOUBT WHEN INSTRUCTING THE JURY THAT APPELLANT'S COMMISSION OF THE CRIMES OF ROBBERY, BURGLARY AND CHILD ABUSE MUST BE PROVEN BEYOND A REASONABLE DOUBT BEFORE THEY COULD BE CONSIDERED AS AGGRAVATING CIRCUMSTANCES IN THE PENALTY PHASE

1. Relevant Facts and Proceedings

During both the guilt and penalty phases, evidence was introduced of several other criminal acts allegedly committed by appellant. In the guilt phase, the jury heard evidence concerning the murder of Jewell Russell; in the penalty phase, evidence was presented concerning the robberies of James Foster and Jessie Cruz (RT 2853-2859), and the assaults on two children, Robert and Michael Hunt. (RT 2864-2869.)

Prior to penalty phase deliberations, the jury was instructed by the trial court as to the applicable law and evidence. Pursuant to CALJIC 8.84.1, the jury was told that it would "now be instructed as to all of the law that applies to the penalty phase of this trial." (RT 2960; CT 1492.) Included in that instruction was the requirement that the jury "[d]isregard all other instructions given to [it] in other phases of this trial." (RT 2960; CT 1492.) Regarding the evidence of appellant's other criminal activity, the jury was instructed with CALJIC 8.87 that such offenses, with the glaring exception of the Russell murder, had to be proven beyond a reasonable doubt before they could be considered as aggravating circumstances. (RT 2972; CT 1518.) The jury, however, was not instructed on the definition of the term "reasonable doubt."

2. The Trial Court Erred in Not Instructing the Jury With The Definition of "Reasonable Doubt"

As previously explained in Argument M2, *supra*, this Court has long held that a jury must be instructed sua sponte that it may not consider other crimes evidence as aggravating

circumstances unless it first finds that these crimes have been proven beyond a reasonable doubt. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 53; *People v. Phillips*, *supra*, 41 Cal.3d at p. 83.) Application of "the reasonable doubt standard ensures reliability; and the evidence [of other crimes] is thus not improperly prejudicial or unfair." (*People v. Balderas*, *supra*, 41 Cal.3d at p. 144, fn. 32.)

Here, when instructing the jury about the standard of proof for considering other crimes as circumstances in aggravation, the trial court failed to define the term "reasonable doubt." (Compare *People v. Hawkins* (1995) 10 Cal.4th 920, 963 [trial court instructs jury with definition of "reasonable doubt" in penalty phase].) That omission was error.

A trial court must give sua sponte clarifying instructions when the terms used in an instruction are not "commonly understood," but have a "technical meaning peculiar to the law." (*People v. McElheny* (1982) 137 Cal.App.3d 396, 403; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393.) The legal definition of "reasonable doubt" is not one commonly understood by jurors. Indeed, in the context of noncapital cases, the failure of the trial court to give an instruction defining "reasonable doubt" has repeatedly been found to constitute reversible error. (*People v. Phillips* (1998) 59 Cal.App.4th 952, 953 [failure to define reasonable doubt "compels reversal per se"]; *People v. Crawford* (1998) 58 Cal.App.4th 815, 817 [failure to instruct on reasonable doubt "is constitutional error that requires per se reversal of the judgment"]; *People v. Elguera* (1992) 8 Cal.App.4th 1214; *People v. Vann* (1974) 12 Cal.3d 220.)

The trial court's error in not defining "reasonable doubt" in the penalty phase instructions was not remedied by the fact that the jury had been instructed with CALJIC 2.90 in the guilt

phase. That instruction was given on June 3, 1996 (CT 1364), nine days prior to the penalty phase deliberations that began on June 12, 1996 (RT 3004). The jurors were thus unlikely to have remembered the exact definition provided to them at that time.

The same conclusion was reached in a related context in *People v. Elguera*, *supra*, 8 Cal.App.4th at pp. 1221-1223. In *Elguera*, an instruction on "reasonable doubt" was not included in the instructions given to the jury prior to guilt deliberations. During voir dire, however, the jury had heard virtually the full standard instruction on the subject and the "reasonable doubt" requirement had been repeatedly referred to in the examination of the prospective jurors. (*Id.*, at p. 1221.) The trial lasted only one day and the jury began deliberations only five and one-half hours after the "reasonable doubt" requirement had been explained during voir dire. In an opinion authored by Justice Werdegar, the Court of Appeal nonetheless concluded that the error in omitting the "reasonable doubt" instruction from the charge to the jury had not been remedied by the trial court's discussion of "reasonable doubt" during voir dire. The court pointed out that the jurors were "unlikely to [have] remember[ed] the exact definition read to them five and one-half hours earlier," and that "[i]f a juror had any question as to its meaning, there was nothing in the oral or written charge to enlighten him or her." (*Id.*, at p. 1223.)

Even more significant that the nine day time lapse was the fact that the jury was expressly instructed to "[d]isregard all other instructions given to [it] in other phases of this trial." (RT 2960; CT 1492.) The jury could only have understood this instruction to mean that the definition of "reasonable doubt" given in the guilt phase was not applicable to its consideration of other crimes evidence in the penalty phase, and that some other unspecified definition of the term

should be utilized. The danger that followed was twofold. First, each juror was left to devise his or her own definition of "reasonable doubt," resulting in a lack of uniformity in the way the "reasonable doubt" requirement was applied to the other crimes evidence. Second, the definitions arrived at by the lay jurors were likely to have been legally incorrect. As recognized in *People v. Elguera*, *supra*, 8 Cal.App.4th at p. 1223, the definition of "reasonable doubt" contained in CALJIC 2.90 and Penal Code section 1096 is extremely precise. Even the slightest departure from the language contained in the definition has been found to be error. (*Ibid.*)[81] Furthermore, the jurors' inevitable confusion regarding the applicable standard was undoubtedly compounded by the conspicuous omission of the Russell murder from the crimes specified in the other crimes instruction – leaving the jurors adrift as to how to consider the other crimes evidence put before them.

3. The Trial Court's Failure to Instruct the Jury on the Definition of "Reasonable Doubt" Requires Reversal of Appellant's Death Sentence

In the context of a guilt trial, the failure to instruct on the definition of "reasonable doubt" has been found to be a violation of both the Fifth Amendment's requirement that criminal charges be proven beyond a reasonable doubt and the Sixth Amendment's guarantee that a defendant receive a jury trial. (*People v. Phillips* (1997) 59 Cal.App.4th 952, 956, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275.) Such constitutional error is a structural defect to which harmless error analysis does not apply. (*Ibid.*) A trial court's error in not instructing on the definition of "reasonable doubt" in the penalty phase is similarly of constitutional magnitude. By

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[81]Unlike *People v. Champion* (1995) 9 Cal.4th 879, 949-950, the instructional error was not remedied by the closing arguments of counsel. Neither counsel addressed the "reasonable doubt" standard for consideration of other crimes evidence or the definition of that term.

mandating sua sponte instructions on proof beyond a reasonable doubt and precluding aggravation of sentence upon the basis of alleged violent criminal activity unless proven to that level of certainty (*People v. Robertson*, *supra*; *People v. Phillips*, *supra*), California law has created a Fourteenth Amendment due process liberty interest that is violated by a trial court's failure to instruct on the meaning of "reasonable doubt" (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Fetterly v. Paskett*, *supra*, 997 F.2d at p. 1300; *Campbell v. Blodgett*, *supra*, 997 F.2d at p. 522; and *Rust v. Hopkins*, *supra*, 984 F.2d at p. 1494). Further, the defendant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment, as well as his right to a reliable penalty determination under the Eighth Amendment, are violated by the failure to define that crucial concept. Appellant is therefore entitled to automatic reversal of his death sentence.

However, if automatic reversal is not required, the death sentence must be reversed because the error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is certainly a "reasonable possibility" that the failure to define reasonable doubt affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) As previously discussed in Argument M3, *supra*, an error relating to the jury's consideration of other crimes evidence is especially likely to prejudice the determination of penalty. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.)

Here, the prosecution's case in aggravation was based in large part on other crimes evidence specified in the modified version of CALJIC 8.87 given to the jury. While appellant conceded the crimes related to Foster and Cruz (RT 2839, 2874-2875), he vigorously disputed the allegation that he had abused Robert and Michael Hunt. The children testified that appellant

never beat or hurt them, and their testimony was corroborated by their mother, Brenda Hunt. (RT 2923-2925, 2933-2934, 2941, 2949.) Robert Hunt further explained that although appellant was arrested for abusing him, appellant did not actually strike him; rather appellant merely picked Robert up after Robert tripped on a tree stump in the front yard. (RT 2933-2934.)

Thus, the prosecution's case concerning the prior child abuse was strongly disputed, and the defense evidence may well have raised doubts in the jurors' minds concerning the truth of the allegations. The jurors were left to evaluate those doubts without the benefit of an instruction defining "reasonable doubt." On this record, there was at least a reasonable possibility that providing a legally accurate "reasonable doubt" instruction would have made a difference. The jury may well have found that the child abuse alleged to have been committed by appellant had not been proven beyond a reasonable doubt and therefore was not an aggravating circumstance. Given the high likelihood that the jury would have been influenced by other crimes evidence involving children as victims, exclusion of such evidence from the deliberation process may well have resulted in a more favorable verdict for appellant.

Accordingly, appellant's death sentence must be reversed.

O. THE TRIAL COURT ERRED IN LISTING BOTH RESIDENTIAL BURGLARY AND RESIDENTIAL ROBBERY AS OTHER VIOLENT CRIMES COMMITTED BY APPELLANT BECAUSE THE INSTRUCTION LED THE JURY TO BELIEVE THAT IT SHOULD CONSIDER EACH CRIME AS A SEPARATE AGGRAVATING CIRCUMSTANCE

1. Relevant Facts and Proceedings

During the penalty phase, the prosecution introduced evidence of crimes that appellant had previously committed against James Foster and Jessie Cruz on October 24, 1985. Foster testified that he and Cruz went to Foster's apartment, where they found appellant armed with a gun. Appellant forced them to lie down and bound their hands and feet. Appellant threatened to kill them and then took several items from the apartment before leaving. (RT 2853-2857.)

After the penalty phase evidence was completed, the trial court instructed the jury that it must find beyond a reasonable doubt that appellant had committed a particular criminal act before it could consider appellant's commission of that crime as an aggravating circumstance. The trial court further explained that the other crimes evidence presented by the prosecution had been introduced for the purpose of showing that appellant had previously committed the violent crimes of residential burglary, residential robbery and child abuse. (RT 2972; CT 1518.) The burglary and robbery evidence referred to by the court was the testimony given by Foster.

2. The Residential Burglary and Residential Robbery Committed by Appellant Should Not Have Been Considered as Two Aggravating Circumstances since Both Crimes Were Based on the Same Act of Violence

It is well settled that the prosecution's case for aggravation in the penalty phase must be limited to evidence relevant to the aggravating circumstances listed in Penal Code section 190.3. (*People v. Boyd, supra,* 38 Cal.3d a p. 775.) Thus, although any prior felony conviction is admissible as a factor in aggravation, actual evidence of "criminal activity" is admissible only if

the crimes "involved the use or attempted use of force or violence or the express or implied threat to use force or violence" against a person. (Pen. Code, § 190.3, subds. (b) and (c); *People v. Roybal* (1998) 19 Cal.4th 481, 527; *People v. Boyd, supra*, 38 Cal.3d at pp. 776-777.)

The use of violence is not an element of the crime of residential burglary, which is defined as entry into a residence with the intent to commit a felony. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 183, fn. 2.) In appellant's case, however, appellant's burglary of Foster's residence was considered a crime of violence because after entering the residence appellant used a gun to rob the victims. This use of force by appellant that rendered the burglary a crime of violence was the same conduct that was the basis of the residential robbery. In other words, appellant committed one act of violence that resulted in a residential robbery and a residential burglary that involved the use of force. Under these circumstances, appellant's criminal conduct should have been considered as only one aggravating circumstance. The court's instruction, however, indicated to the jury that it should view the residential burglary and residential robbery as two, separate aggravating circumstances in determining penalty, thus permitting multiple use of the same act of violence. This double use of both the residential burglary and residential robbery as aggravating circumstances artificially inflated the prosecution's case for the death penalty.

The court's error was of constitutional dimension. The Eighth and Fourteenth Amendments to the United States Constitution require that a death penalty statute provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 236, 313 (conc. opn. of White, J.). In other words, the state must "establish rational criteria that narrow the decision

maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for a death sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306.) The possibility that a death sentence will be arbitrarily and capriciously imposed must be eliminated by the state's capital punishment procedure. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Further, the defendant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment is violated by the jury's double counting of a single act of violence.

Finally, separate consideration of the residential burglary and residential robbery at the penalty phase violated the principles underlying California's prohibition of double punishment. Penal Code section 654 provides that an act made punishable in different ways under different statutes may be punished only once. In a related context in *People v. Melton* (1988) 44 Cal.3d 713, this Court stated that a single criminal act that is both a circumstance of the capital crime and a statutory special circumstance cannot be counted twice in the penalty determination. It follows that when two other crimes of violence are both based on the same violent act, these other crimes are to be considered as only one aggravating circumstance.

3. Appellant Was Prejudiced by the Jury's Consideration of Both the Residential Burglary and Residential Robbery as Circumstances in Aggravation

Appellant's death sentence must be reversed because the error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable possibility" that the misinstruction affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) As previously discussed, the penalty decision was a close one (see Argument J5, *supra*), and, thus, the jury's finding of an additional, but erroneous, aggravating circumstance involving a prior crime of

violence may well have tipped the scale in favor of death. At the very least, the error compounded the other penalty phase errors that similarly skewed the penalty determination.

P. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE FINDING OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES WAS NOT ITSELF AN AGGRAVATING FACTOR IN THE DETERMINATION OF PENALTY

1. Relevant Facts and Proceedings

Appellant proposed that the trial court instruct the jury as follows:

> You may not treat the verdict and finding of first degree murder committed under [a] special circumstance[s], in and of themselves as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without possibility of parole.
>
> Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the underlying facts of the crime bear on aggravation or mitigation.

(CT 1541.) The trial court refused to give appellant's proposed instruction. (RT 2831.)

2. Instructing the Jury That the Finding of First Degree Murder with Special Circumstances Was Itself Not an Aggravating Circumstance Was Necessary to Avoid Erroneous Inflation of the Case in Aggravation

Pursuant to factor (a) of Penal Code section 190.3, the trial court instructed the jury that, in determining penalty, it shall consider "[t]he 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." (RT 2969; CT 1514.) That instruction was misleading. It suggested that the jury could consider the fact of appellant's first degree murder conviction with special circumstances as an aggravating "circumstance[] of the crime," because the defendant's conviction could certainly be viewed as a "circumstance[] of the crime," and the special circumstance findings established the "existence of any special circumstance found to be true." Appellant's proposed instruction

removed this misdirection by explaining to the jury that it could examine only the facts and circumstances of appellant's criminal conduct, not the conviction and finding of special circumstances in themselves. The denial of appellant's proposed instruction was error.

In *People v. Berryman* (1994) 6 Cal.4th 1048, 1102, appellant proposed an instruction that would have told the jury only that "The fact that defendant . . . has been found guilty of first degree murder is not itself an aggravating factor." This Court found that the trial judge did not abuse its discretion in refusing to give the instruction. It reasoned that the trial judge could reasonably have concluded that the special instruction was confusing "inasmuch as it might have interfered with the altogether permissible and in fact mandatory 'consideration' of the 'facts and circumstances of the conviction in this case.'" (*Ibid.*) Appellant's instruction, however, did not suffer from the same infirmity because it explicitly included language that reiterated the jury's duty to consider the underlying circumstances of the crime in determining penalty.

In *Odle v. Vasquez* (N.D.Cal. 1990) 754 F.Supp. 749, 761, the federal district court discussed the importance of the trial judge's having instructed the jury, "The fact that you have previously found Mr. Odle guilty beyond a reasonable doubt of the crimes of murder in the first degree is not in itself an aggravating circumstance." According to the district court, this instruction clarified any ambiguity arising from the bare language of section 190.3(a) as to whether the jury was to view the defendant as having an aggravating circumstance against him simply as a result of the guilty verdict. Appellant, however, was denied such an instruction even though he requested it.

3. Appellant Was Prejudiced by the Instructional Error

The court's error in refusing appellant's proposed instruction was of constitutional dimension. The Eighth and Fourteenth Amendments to the United States Constitution require that a death penalty statute meaningfully distinguish between those few cases in which a death sentence is appropriate and the many cases in which it is not. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (conc. opn. of White, J.); *McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306; *Godfrey v. Georgia*, *supra*, 446 U.S. at p. 428.) Further, the defendant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment is violated by the jury's consideration of irrelevant evidence in support of aggravation.

Appellant's death sentence must therefore be reversed because the instructional error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable possibility" that the misinstruction affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) As previously explained in Argument J5, *supra*, the penalty decision was a close one, and thus the jury's finding of an additional, but erroneous, aggravating circumstance may well have tipped the scale in favor of death.

Q. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT IT MUST CONSIDER THE DEATH PENALTY AS A MORE SEVERE PUNISHMENT THAN LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE

1. Relevant Facts and Proceedings

Appellant proposed two special instructions that would have required the jury to consider the death penalty as a more severe punishment than life without possibility of parole. The first special instruction stated in pertinent part:

> You are instructed that, for the purpose of your decision in this case, you must consider the death penalty to be the most serious penalty that can be imposed and life without possibility of parole to be a less serious punishment.

(CT 1540.)

The second special instruction stated that:

> Some of you expressed the view during jury selection that the punishment of life in prison without possibility of parole was actually worse than the death penalty.
>
> You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without possibility of parole.
>
> It would be a violation of your duty, as jurors, if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties.

(CT 1555.) The trial court refused to give either of appellant's proposed instructions. (RT 2830-2832.)

2. The Jury Should Have Been Instructed That Life in Prison Without Possibility of Parole Is a More Severe Punishment than Death in Order to Ensure a Reliable Penalty Determination

"[T]he trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles

closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Breverman, supra,* 19 Cal.4th at p.154, citations and internal quotations omitted.) Under the California death penalty law, death is deemed to be a worse punishment than life in prison without possibility of parole. (*People v. Memro* (1996) 11 Cal.4th 786, 879 ["the prosecutor's comment that life imprisonment without possibility of parole was 'legally not worse' than death was accurate as a *legal* matter"]; *People v. Hernandez* (1988) 47 Cal.3d 315, 362-363.)

That death is the more severe punishment, however, is not necessarily apparent to all jurors. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1223, fn. 7 ["While qualitatively different from the death penalty, the punishment of life without hope of release has been regarded by many as equally severe"]; *Holman v. Page* (7th Cir. 1996) 95 F.3d 481, 487 ["Natural life imprisonment is a stern punishment, for some perhaps worse than death"]; *Holland v. Donnelly* (S.D.N.Y. 2002) 216 F.Supp.2d 227, 242 ["Life imprisonment without any hope of parole or other release is a particularly harsh sentence, thought by some to be a fate as bad as, or possibly even worse than, death itself"].) Thus, the appellant's proposed instructions should have been given in order to ensure the jury's understanding of the pertinent law.

In the absence of an instruction that execution was the more severe punishment, some jurors may well have voted for death in the mistaken belief that such a sentence was, under California law, more lenient, thereby rendering appellant's death sentence unreliable. The Eighth and Fourteenth Amendments to the United States Constitution require that a death penalty statute meaningfully and rationally distinguish between those few cases in which a death sentence is appropriate and the many cases in which it is not. (*Furman v. Georgia, supra,* 408 U.S. at p.

313 (conc. opn. of White, J.); *McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306; *Godfrey v. Georgia*, *supra*, 446 U.S. at 428.) Further, the defendant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment is violated when the jury is not in agreement that death is the more severe punishment.

3. Appellant Was Prejudiced by the Instructional Error

Appellant's death sentence must be reversed because the instructional error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable possibility" that the misinstruction affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) The penalty decision was close, and the jury's verdict of death may not have reflected a unanimous finding that the defendant deserved the most extreme punishment.

R. THE TRIAL COURT ERRED IN PERMITTING DEPUTY SHERIFF MICHAEL RASCOE TO TESTIFY ABOUT A PRIOR STATEMENT MADE TO HIM BY MICHAEL HUNT CONCERNING APPELLANT'S ABUSE OF MICHAEL HUNT'S OLDER BROTHER

1. Relevant Facts and Proceedings

During the prosecution's penalty phase case, Betty Abney, who lived next door to appellant and Brenda Hunt, testified that on April 9, 1993, at about 1:00 p.m., she saw the defendant lift Brenda's son, Robert, by his hair and throw him on the ground. (RT 2866.) This accusation, which resulted in appellant's arrest, was disputed by the defense. Brenda Hunt testified for the defense that appellant did not abuse Robert, that Robert did not complain of any problem with appellant, and that she observed no injuries on her son's person. (RT 2923, 2925.) Robert denied that he had been abused or hurt by appellant; he explained that he had tripped over a stump in the front yard and that appellant then picked him up. (RT 2933-2934.)

The defense also presented the testimony of Robert's younger brother, Michael Hunt, during the penalty phase. Michael gave no testimony about the incident on April 9, 1993. Instead, Michael testified that the children referred to appellant as "Dad" (RT 2940), that appellant treated the children well and took them places (RT 2940-2941), that appellant never hurt Michael, although he spanked him when Michael did not respect his mother (RT 2941-2942), that appellant was making a guitar for Michael and teaching him to play the instrument (RT 2942-2943), that Michael would visit and write to appellant in prison (RT 2943-2944), and that Michael loved appellant and would feel sad if appellant were executed (RT 2944).

In the prosecution's rebuttal case, Kern County Deputy Sheriff Michael Rascoe testified about statements previously made to him by Robert and Michael Hunt concerning appellant's

abuse of Robert. According to Rascoe, Robert said that appellant became mad because appellant believed that Robert was playing on a parked van. Appellant grabbed Robert by the hair and pushed him to the ground. (RT 2954.) When the prosecutor asked Rascoe if he had spoken with Michael about the incident, defense counsel objected on the ground of "lack of foundation." (RT 2954.) The following colloquy took place:

> THE COURT: Is the witness out in the hallway. ¶ I don't think he was released. He is subject to recall, correct?
> MR. SORENA: He was released.
> THE COURT: By Whom?
> MR. SORENA: Well, we said that you can go. I didn't specifically release him. No one told him to stay.
> THE COURT: Overrule the objection. He is subject to recall.

(RT 2954.) Rascoe then testified that he had been told by Michael that appellant grabbed Robert by the hair and threw Robert backwards, causing Robert to fall on his back. (RT 2955.)

2. Michael Hunt's Statement to Deputy Sheriff Michael Rascoe Was Inadmissible Hearsay Because it Was Not Inconsistent with Michael's Trial Testimony

Under Evidence Code section 1235, evidence of a prior statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with the witness's testimony at trial and is offered in compliance with Evidence Code section 770.[82] A prior inconsistent statement admitted under section 1235 is admissible not only to impeach the witness's credibility but also to prove the truth of the matters asserted therein. (*People v. Green*, *supra*, 3 Cal.3d at p. 985; *People v. Johnson, supra,* 3 Cal.4th at p. 1219.)

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[82]Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action"

"The 'fundamental requirement' of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony." (*People v. Sam, supra,* 71 Cal.2d at p. 210.) "Inconsistency in effect, rather than contradiction in express terms, is the test for" admissibility of the prior statement. (*People v. Green, supra,* 3 Cal.3d at p. 988.) A court may find inconsistency in effect by considering what the witness says and omits to say in his or her trial testimony. The prior statement is admissible if it has "'. . . a tendency to contradict or disprove the [trial] testimony or any inference to be deduced from it.'" (*People v. Spencer, supra,* 71 Cal.2d at p. 942.)

In the present case, Michael gave no testimony concerning the incident involving appellant and Robert on April 9, 1993. Nor did Michael deny that appellant had ever pulled Robert by his hair and pushed him to the ground. Michael's extrajudicial statement to the deputy sheriff was thus not inconsistent with his trial testimony. The trial court's admission of the statement was error, even though Michael had not been excused from giving further testimony.[83]

3. The Trial Court's Error in Admitting Michael Hunt's Prior Statement That Appellant Grabbed Robert Hunt's Hair and Pushed Him to the Ground Requires Reversal of the Death Sentence

The erroneous admission of Michael Hunt's prior statement to Deputy Sheriff Rascoe violated appellant's constitutional right to a reliable penalty determination under the Eighth and Fourteenth Amendments, to due process of law under the Fourteenth Amendment, and to

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[83]The trial court apparently interpreted defense counsel's "lack of foundation" objection as a claim that Michael Hunt had been excused from giving further testimony and therefore could not be impeached with a prior inconsistent statement. (RT 2954.) A "lack of foundation" objection, however, also includes the ground that the prosecution did not establish that the extrajudicial statement was inconsistent with the witness's trial testimony, and the issue is therefore properly preserved.

confrontation under the Sixth and Fourteenth Amendments. One purpose of the confrontation requirement is to ensure the reliability of the witness's testimony by means of the oath. (*California v. Green, supra,* 399 U.S. at p.158.) Thus, "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, ... " (*Id.*, at p. 164.) Here, however, Michael Hunt never admitted that he made a prior statement to Deputy Sheriff Rascoe, and therefore there existed a danger that he did not in fact make such a statement. (Contrast *People v. Green*, *supra*, 3 Cal.3d at p. 989 [admission of a prior inconsistent statement did not violate the confrontation clause where witness admitted under oath that he had made a prior statement to the police officer concerning the subject of acquiring and selling marijuana].)

When, as here, a federal constitutional violation has occurred, the death sentence must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) In appellant's case, that standard has not been met. Indeed, even under the lesser standard for an error of state law, there is a "reasonable possibility" that the erroneous admission of the prior statement affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) The penalty decision was a close one, (see Argument J5, *supra*), and a critical issue for the jury to decide was whether appellant had committed an additional crime of violence by abusing Robert Hunt. The defense strongly disputed the prosecution's case, presenting testimony from Brenda and Robert Hunt that appellant had not committed the abuse. That testimony was greatly undermined by the admission of Michael's prior statement. Had Michael's statement been excluded, as it should have been, the jury may well have found that the claim of child abuse was not proven beyond a reasonable doubt. Absent that aggravating factor, there is a "reasonable

possibility" that the jury would have reached a more favorable verdict in the penalty phase.

S. THE TRIAL COURT FAILED TO ADEQUATELY INVESTIGATE JURY MISCONDUCT DURING THE PENALTY PHASE DELIBERATIONS

1. Relevant Facts and Proceedings

The jury began penalty phase deliberations on June 12, 1996, at 3:35 p.m. (CT 1483.) The jury continued deliberating for the entire day of June 13, and recommenced on the morning of June 14. (CT 1487,1573.) At 8:50 a.m., on June 14, a note was submitted by the jury foreperson stating that Juror 040149 wanted to speak with the court.[84] (RT 3017; CT 1577.)

Juror 040149 was then summoned to meet with the trial court in the presence of counsel and appellant. (RT 3018.) The court explained to the juror that he should feel free to tell the court what he wanted the court to know. Juror 040149 then complained to the court about a fellow juror, later identified as Juror 045829:

> We have a juror that was very adamant in her decisions in all three verdicts and, you know, which is fine, everybody is. Now she is adamant in her verdict now, but she is claiming that she has some kind of second thoughts about her original verdict in the two convictions, and I – yesterday, I don't know exactly when it was, it was on return back to the courthouse, she was sitting right next to two of Mr. Cowan's relatives, his aunt and then another – another person. I was over at the stairs. So when her head was turned all I could see is the back of her head. I don't know if she was conversing with them. I did note that they were talking and it was maybe purse room between the three. I don't know if maybe she heard something that she is now, you know, holding up or trying to recant or whatever. I just feel that that needs to be brought to the Court's attention.

(RT 3018-3019). When Juror 040149 completed his statement, the trial court asked if there was anything else he wished to bring to the court's attention. The juror said he had nothing to add, and the trial court did not ask any follow-up questions. Juror 040149 was then sent back to the

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[84]The time written on the note itself was 9:50 a.m. (CT 1575.) The trial court pointed out that the recorded time was off by an hour since the note was actually received at 8:50 a.m. (RT 3017.)

jury room. (RT 3019.)

At 9:30 a.m., the trial court received another note, stating that Jurors 045829 and 024178 wanted to speak with the court. (CT 1576, RT 3020-3021.) Juror 045829 was first summoned to speak. The trial court invited the juror, in the presence of counsel and appellant, to state what she wanted the court to know. Juror 045829 began: "Well, the other juror said I was talking, he thought that I was talking to the –." (RT 3021.) The juror was then interrupted by the judge, who stated that the other juror had said only that he saw her sitting next to members of appellant's family, and had not actually said that she was speaking with the family members. (RT 3021-3022.)

Juror 045829 explained that in the jury room the other juror had accused her of speaking with appellant's family. The trial court responded:

> I don't know what was said in there. I don't want to know what was said in there. I can only tell you that the Court wasn't going to take any further action as a result of anything that was told or spoken to the Court by that juror because there wasn't anything indicated by that juror that would have suggested any impropriety on your part.

(RT 3022.) Juror 045829 was then asked if there was anything else that she wanted to discuss with the court. The juror answered that there was not, and she was sent back to the jury room. (RT 3022.)

Juror 024178 was then brought in to speak with the court. Upon meeting with the court, however, the juror stated that she was now fine and no longer had anything to say. (RT 3022-3023.) The jury resumed deliberations, and returned a death verdict on Count II (murder of Alma Merck) later that day, at 2:10 p.m. (CT 1574.) A verdict of life without possibility of parole was returned for Count I (murder of Clifford Merck). (CT 1574.)

2. The Trial Court Erred by Failing to Conduct a Hearing Adequate to Ascertain Whether Other Jurors Coerced Juror 045829 to Vote for Death

In *People v. Keenan* (1988) 46 Cal.3d 478, 532, this Court "emphasize[d] that when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud. The law is clear, for example, that the court must investigate reports of juror misconduct to determine whether cause exists to replace an offending juror with a substitute." The "grounds for investigation or discharge of a juror may be established by [a juror's] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." (*Ibid.*) Moreover, the failure to make an adequate inquiry is an abuse of the trial court's discretion. (*People v. Burgener* (1986) 41 Cal.3d 505, 519 ["an inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist"]; *People v. McNeal* (1979) 90 Cal.App.3d 830, 839.)

Here, the trial court was put on notice of the possibility that jurors were engaging in misconduct. The first possibility of misconduct was that Juror 045829 had unauthorized communications with trial witnesses. The trial court's statement to Juror 045829 that "there wasn't anything indicated by [Juror 040149] that would have suggested any impropriety" (RT 3022) was incorrect. Although, Juror 040149 claimed that he could not see if Juror 045829 was actually speaking with appellant's family members, he also observed that Juror 045829 was very close to the family members and that "*they* were talking." (RT 3019, italics added.) Juror 040149 did not clarify the identity of the persons whom he observed speaking. If Juror 045829 did

participate in a conversation with appellant's family members who were penalty phase witnesses, she committed misconduct. Unauthorized contact between and a witness is improper. (*People v. Hardy* (1992) 2 Cal.4th 86, 175; Pen. Code § 1122, subd. (a).) Juror 045829's competence was thus sufficiently called into question to require that the trial court conduct a hearing to determine the facts. The trial court, however, failed to do so. The trial court did not have Juror 040149 clarify what he had seen, and did not ask either Juror 045829 or appellant's family members if there had been any communication between them.

A second possibility of misconduct was that Juror 045829 was coerced by the other jurors to change her vote. The reasonable inference to be drawn from Juror 040149's comments to the court was that Juror 040149 was upset at Juror 045829 because he believed that she was holding out against a death verdict. Moreover, he believed that the basis for Juror 045829's opposition to the death sentence was improper, i.e., that she had heard something from appellant's family members that caused her to feel sympathy for appellant. As Juror 040149 stated to the court, "I don't know if maybe she heard something that she is now, you know, holding up or trying to recant or whatever." (RT 3019.) Juror 045829, in turn, reported to the court that during deliberations Juror 040149 falsely accused her of talking to appellant's family. (RT 3021.)

These statements of the jurors should have suggested to the trial court that other jurors may have engaged in misconduct by berating Juror 045829 in order to coerce her into voting for death on Count II. The court should have conducted an adequate investigation into the possibility of such misconduct, but failed to do so. Indeed, the trial court refused to allow Juror 045829 to explain the possibly coercive statements that other jurors had made to her during deliberations. The juror was specifically told that the court did not "want to know what was said

in there." (RT 3022.) The court also did not ask Juror 040149 about any statements he or other jurors had made to Juror 045829, and did not question any other jurors.

3. The Trial Court's Failure to Adequately Investigate the Possibility of Juror Misconduct Requires Reversal of the Death Sentence

The failure of the trial court to adequately investigate the possibility of juror misconduct violated appellant's rights to a reliable penalty determination under the Eighth and Fourteenth Amendments, to due process of law under the Fourteenth Amendment, and to trial by a fair and impartial jury under the Sixth and Fourteenth Amendments. When, as here, a federal constitutional violation has occurred, the death sentence must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) In appellant's case, that standard has not been met. Indeed, even under the lesser standard for an error of state law, there is a "reasonable possibility" that the trial court's failure to adequately investigate the possibility of juror misconduct affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.)

As discussed above, the penalty decision was a close one, (see Argument J5, *supra*), and the record reasonably suggests that Juror 045829 was coerced into voting for death on Count II. When Juror 040149 reported to the court that Juror 045829 was holding out in the penalty phase deliberations, the jury was beginning its third day of deliberations. Yet four hours later the jury reached a unanimous verdict. No additional readback was heard by the jury during that time, and a plausible explanation is that Juror 045829 was a beleaguered dissident who succumbed to the continued coercion of her fellow jurors. In the absence of the trial court conducting an evidentiary hearing establishing the contrary, appellant's death sentence must be reversed.

T. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer

eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

1. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As this Court has recognized, "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, 313-314 (conc. opn. of White, J.); accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 (plur. opn.).)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty: "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at p. 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak

death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7," emphasis added.)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).) It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders. (*Ibid.*) Section 190.2,

rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international

law. (See section 5 of this Argument, *post.*)

2. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence, or had a "hatred of religion," or threatened witnesses after his arrest, or disposed of the victim's body in a manner that precluded its recovery.

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been

used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds or because the defendant killed with a single execution-style wound.

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification) or because the defendant killed the victim without any motive at all.

c. Because the defendant killed the victim in cold blood or because the defendant killed the victim during a savage frenzy.

d. Because the defendant engaged in a cover-up to conceal his crime or because the defendant did not engage in a cover-up and so must have been proud of it.

e. Because the defendant made the victim endure the terror of anticipating a violent death or because the defendant killed instantly without any warning.

f. Because the victim had children or because the victim had not yet had a chance to have children.

g. Because the victim struggled prior to death or because the victim did not struggle.

h. Because the defendant had a prior relationship with the victim or because the victim was a complete stranger to the defendant.

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 (discussing the holding in *Godfrey v. Georgia, supra*, 446 U.S. at p. 420).)

3. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written

findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

a. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating

factors . . . ." But these interpretations have been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and *Ring v. Arizona* (2002) 536 U.S. 584. (See also *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 2531.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (530 U.S. at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

1. In the Wake of *Ring*, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions. Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th 1223; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors. According to California's "principal sentencing instruction" (People v. *Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88 (2003).)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section

190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43, and *People v. Prieto* (2003) 30 Cal.4th 226: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subdivision (a), indicates, the maximum penalty for any first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail: "In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' [Citation omitted]. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' [Citation omitted.]" (*Ring*, *supra*, 536 U.S. at p. 586.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole

("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death may actually be imposed unless the jury finds a special circumstance (Pen. Code, § 190.2). Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Pen. Code, § 190.3; CALJIC 8.88.) It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a mitigating circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 863-864 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency, while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances. There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before

determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate."

(*Prieto*, *supra*, 30 Cal.4th at p. 263.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring*, *supra*, 536 U.S. at pp. 601-604.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto*, *supra*, 30 Cal. 4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

"Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents 'no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.' The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in

proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence." (*Ring*, *supra*, 536 U.S. at p. 606, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated, "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring*, *supra*, 536 U.S. at p. 589.) "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (*Id.*, at p. 609.)

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719,

749; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The United States Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*, 536 U.S. 584.)

These protections include jury unanimity. The United States Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi, supra,* 486 U.S. at p. 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, *supra*, 536 U.S. at p. 609). (See section 4 of this Argument.)

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because

[in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed – particularly in a case like appellant's case, where one of the chief reasons presented to the jury for imposing a death sentence were various forms of misconduct that were not part of the commitment offense.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

"The statute's word 'violations' covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless

required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." (*Richardson*, *supra*, 526 U.S. at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th 43; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

b. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend

upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Stantosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," (*Speiser*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra*, 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process

by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," the United States Supreme Court reasoned: "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'" (*Stantosky*, *supra*, 455 U.S. at pp. 755-756.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Stantosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Stantosky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use

of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California, supra,* 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the United States Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' (*Monge v. California, supra*, 524 U.S. at p. 732.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that not only are the factual bases for its decision true, but that death is the appropriate sentence.

c. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation)

are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 343.)

Accordingly, appellant respectfully suggests that *People v. Hayes, supra*, 52 Cal.3d at p. 643 and other cases – in which this Court did not consider the applicability of section 520 – were erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 281-282.) That should be the result here, too.

d. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to

ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

e. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. *(Sullivan v. Louisiana, supra,* 508 U.S. 275.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the

instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.)

f. 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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra,* 428 U.S. at p.195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances *(People v. Fairbank, supra*, 16 Cal.4th 1223), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. *(People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that

he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, at p. 267.) The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; see also Pen. Code, § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring*, *supra*, 536 U.S. 584), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. at p. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state

procedure. (See, e.g., *id.*, at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

g. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida, supra,* 428 U.S. at p. 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris, supra*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*, 408 U.S. 238. (See section 1 of this Argument.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section 3 of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section 2 of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, s*upra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The United States Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 315-316; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida, supra,* 458 U.S. at p. 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to

those sentences imposed in similar cases." (Ga. Stat. Ann., § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in Furman [*v. Georgia* (1972) 408 U.S. 238,] . . . ." (*Gregg v. Georgia, supra,* 428 U.S. at p. 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida, supra,* 428 U.S. at p. 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty

scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra,* 408 U.S. at p. 313 (White, J., Conc. Opn.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

h. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at p. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses. (RT 2853-2860, 2864-2870, 2982-2984.)

The United States Supreme Court's recent decisions in *Ring* and *Apprendi* confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See Section 3a-3b in this Argument.) The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the

existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See Section 3a-3b in this Argument.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

i. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

Penal Code section 190.3, factor (d) permits the jury to consider "whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance;" factor (f) permits the jury to consider "whether or not the offense was committed under circumstances which the defendant *reasonably believed* to be a moral justification or extenuation for his conduct" and factor (g) permits the jury the consider "whether or not the defendant acted under *extreme* duress or under the substantial domination of another person." (Italics added.)

Adjectives such as "extreme"and "reasonably believed" in the list of mitigating factors inform the jury that lesser degrees of duress and mental disturbance, and an unreasonable belief of moral justification cannot be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. at p. 367; *Lockett v. Ohio, supra,* 438 U.S. at p. 586.) These instructions are plainly inconsistent with the federal constitutional requirement that the jury must

consider mitigating evidence concerning the offender or the offense, (*Lockett v. Ohio*, *supra*, 438 U.S. 586), and the state law requirement, guaranteed by the federal due process clause, (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.), that the jury determine whether death is the appropriate penalty (*People v. Brown, supra,* 40 Cal.3d at p. 512). Such wording also renders these factors unconstitutionally vague, arbitrary, capricious, and/or incapable of principled application. (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-364; *Godfrey v. Georgia, supra,* 446 U.S. at pp. 420, 433.) The jury's consideration of these vague factors, in turn, introduces impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Cases holding that the word "extreme" need not be deleted (see, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308; *Hendricks v. Vasquez* (9th Cir. 1993) 974 F.2d 1099, 1109; *People v. Benson* (1990) 52 Cal. 3d 754, 803-804), are based on the assumption that a jury will understand that, despite the reference to "extreme" in factor (f), duress to a lesser degree may be considered under factor (k). Empirical research demonstrates that this assumption is wrong. A survey conducted by Professor Hans Zeisel tested the understanding of the Illinois standard penalty phase jury instructions among a pool of prospective jurors. Seven of eighteen questions concerned mitigating factors other than those listed in the instructions. Between 38.9 and 67.7 percent of the respondents answered these instructions incorrectly, concluding that a juror could not rely on unlisted mitigating factors to vote for a sentence less than death. On most of these questions, more than half of the respondents answered incorrectly. (See *United States ex rel. Free v. Peters* (1994) 806 F. Supp. 705, 723 (N.D. Ill. 1992), reversed, (7th Cir. 1993) 12 F. 3d 700.)

Another barrier to the jury's consideration of mitigation is the language of factor (h),

which asks the jury to consider "whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired" by mental disease or defect or intoxication. (Pen. Code, § 190.3, subd. (h).) It is all too likely that the jury improperly interpreted the word "impaired" to mean that the illness or intoxication must have caused the crime. In *People v. Lucero* (1988) 44 Cal. 3d 1006, 1029-31, this Court held that a defendant was entitled to have the jury consider his psychological disorder as a factor in mitigation, whether or not the mental condition caused him to commit the crimes, and whether or not the condition was operative at the time of the offense. (See also *Penry v. Lynaugh* (1989) 492 U.S. 302, 317-318, 328.) The inclusion of this language thus prevented the jury from considering mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. at p. 367; *Lockett v. Ohio, supra,* 438 U.S. at pp. 604-06.)

j. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1034; *People v. Lucero, supra,* 44 Cal.3d at p. 1031, fn.15; *People v. Melton, supra,* 44 Cal.3d at pp. 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free

to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p.304; *Zant v. Stephens, supra,* 462 U.S. at p. 879; *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra,* 512 U.S. at p. 973 quoting *Gregg v. Georgia, supra,* 428 U.S. at p. 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra,* 455 U.S. at p.112.)

4. <u>The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants</u>

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place

in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a death sentence more reliable.

In *Prieto*, *supra*, 30 Cal.4th 226, as in *Snow*, *supra*, 30 Cal.4th 43, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See Section 3a-3e in this Argument.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See Section 3f in this Argument.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) T here is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court

was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *Allen*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

First, the Court distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, supra, 42 Cal. 3d at p. 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp, supra,* 481 U.S. at p. 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida, supra,* 458 U.S. at p. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*, (2002) 536 U.S. 304.) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the

decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, § 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the determinate sentencing law than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287.) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation omitted). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only

a year or two." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia, supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida, supra,* 430 U.S. at pp. 357-358; *Lockett v. Ohio, supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama, supra,* 447 U.S. at p. 637; *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994; *Monge v. California, supra*, 524 U.S. at p. 732.) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the determine sentencing law on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 105-106.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 304.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at p.186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring*, *supra*, 536 U.S. at p. 584.) California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth

Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d at p. 421; *Ring, supra*, 536 U.S. at p. 584.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra*, 524 U.S. at p. 721.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

5. 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

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former apartheid regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions."[85] (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 705 N.E.2d 824,185 Ill.2d 179, (dis. opn. of Harrison, J.).)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.);

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[85] Since this article, in 1995, South Africa abandoned the death penalty.

Thompson v. Oklahoma, supra, 487 U.S. at p. 830 (plur. opn. of Stevens, J.).) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.); *Hilton v. Guyot*, (1895) 159 U.S. 113 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 (dis. opn. of Powell, J).) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 315-317.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are

antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia*, *supra*, 536 U.S. at p.316, fn. 21.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*,1536 U.S. at pp. 315-316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.") Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf., *Ford v. Wainwright, supra,* 477 U.S. at p. 399; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 304.)

Thus, the very broad death scheme in California and death's use as regular punishment

violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

V. CUMULATIVE ERROR

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Herring* (1993) 20 Cal.App.4th 1066,1074; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.)

In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, appellant has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right to confront the evidence against him, of a fair and impartial jury, and of fair and reliable guilt and penalty determinations in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of appellant's conviction and/or death sentence. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

VI.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that appellant's conviction for first degree murder and the special circumstance finding be reversed, and that appellant's death sentence be set aside.

Respectfully submitted,

Dated: August 30, 2004

MARK GOLDROSEN

WEINBERG & WILDER

Dated: August 30, 2004

By: _____
NINA WILDER

Attorneys for Defendant-Appellant
ROBERT WESLEY COWAN

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 523 Octavia Street, San Francisco, California 94102; and that on date set forth below, I served a true copy of **APPELLANT'S OPENING BRIEF** on the parties addressed below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California as follows:

Clerk of the Superior Court Kern County 1415 Truxton Avenue Bakersfield, CA 93301 ATTN: Hon. Lee P. Felice	California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105
John A. Thawley Deputy Attorney General 1300 I Street, Suite 125 Sacramento, CA 94424	James Sorena Attorney at Law 200-18th Street Bakersfield, CA 93301
Lane Liroff Assistant District Attorney 70 West Hedding Street San Jose, CA 95110	Robert Wesley Cowan K-18501 California State Prison at San Quentin San Quentin, CA 94964

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

Executed September 1, 2004 at San Francisco, California.

Grace Aguirre

GRACE AGUIRRE