SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JOHN JOSEPH FAMALARO,** Defendant and Appellant.	S064306 **CAPITAL CASE**

Orange County Superior Court No. 94ZF0196
John J. Ryan, Judge

RESPONDENT'S BRIEF

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FILED
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DEATH PENALTY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	6
GUILT PHASE	6
June Of 1991, Orange County, California	6
July 13, 1994, Prescott, Arizona	9
Post-Mortem Of Denise Hubber's Body, July 14 & 16, 1994, Phoenix, Arizona	11
Search Of Famalaro's House, July 14-26, 1994, Prescott, Arizona	16
Search Of Famalaro's Warehouse, July Of 1994, Laguna Hills, California	21
Forensic Examination Of Evidence By The Orange County Crime Lab	22
Additional Prosecution Evidence Introduced At Trial In 1997	29
DEFENSE CASE	31
PENALTY PHASE	33
PEOPLE'S CASE	33
Penal Code Section 190.3, factor (b) Evidence	33
Victim Impact Evidence	36

TABLE OF CONTENTS (continued)

Page

DEFENSE CASE 39

ARGUMENT 57

I. THE TRIAL COURT PROPERLY DENIED FAMALARO'S MOTION FOR A CHANGE OF VENUE FROM ORANGE COUNTY 57

A. Famalaro Fails To Show That He Demonstrated To The Trial Court That There Was A Reasonable Likelihood He Would Receive An Unfair Trial 58

B. The Pre-Trial Publicity Does Not Support A Presumption Of Prejudice 69

C. Famalaro Fails To Meet His Burden Of Showing Prejudice From Being Tried In Orange County 70

1. Voir Dire Demonstrated The Lack Of Taint Of Jurors By Pretrial Publicity 72

2. The Juror Declarations Do Not Support A Finding Of Actual Prejudice 79

II. THE TRIAL COURT PROPERLY DENIED FAMALARO'S REQUEST FOR A SEQUESTERED JURY VOIR DIRE 80

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURORS WITH CALJIC NO. 2.06 86

IV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE PROSECUTION'S BURDEN OF PROVING EVERY ELEMENT OF THE CHARGED OFFENSES AND SPECIAL ALLEGATIONS

TABLE OF CONTENTS (continued)

		Page
	BEYOND A REASONABLE DOUBT DURING THE GUILT PHASE OF THE TRIAL	92
	A. CALJIC Nos. 2.01 And 2.02 Are Valid Instructions	93
	B. Standard Jury Instructions Did Not Result In The Jury Being Erroneously Instructed As To The Prosecution's Burden To Prove The Charges And Allegations Beyond A Reasonable Doubt	96
V.	**THE JURY WAS PROPERLY INSTRUCTED ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER**	102
VI.	**THERE WAS NO INSTRUCTIONAL ERROR BASED ON FAILING TO REQUIRE JURY UNANIMITY AS TO WHETHER FAMALARO WAS GUILTY OF PREMEDITATED MURDER AND/OR FELONY MURDER**	107
VII.	**THE VICTIM IMPACT EVIDENCE PRESENTED IN THE TESTIMONY OF DENISE HUBER'S PARENTS WAS PROPERLY ADMITTED BY THE COURT AND DID NOT VIOLATE EX POST FACTO PRINCIPLES**	111
	A. Admission Of Victim Impact Evidence Did Not Violate The Prohibition On Ex Post Facto Laws	114
	B. None Of Famalaro's Due Process Rights Were Violated By The Admission Of The Victim Impact Evidence	117
VIII.	**THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE USE OF**	

TABLE OF CONTENTS (continued)

		Page
	VICTIM IMPACT EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL	124
IX.	**THE TRIAL COURT PROPERLY EXCLUDED THE PROFFERED HEARSAY EVIDENCE BY FAMALARO'S SISTER**	129
	A. Famalaro Waived His Claim Of Constitutional Error	131
	B. Famalaro's Claim Of Error Of A Constitutional Magnitude Is Meritless	133
	C. Famalaro Was Not Prejudiced By The Exclusion Of The Proffered Hearsay	140
X.	**THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.27**	141
XI.	**NONE OF FAMALARO'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ADMISSION OF EVIDENCE OF HIS PRIOR CRIMINAL ACTS IN THE PENALTY PHASE OF HIS TRIAL**	145
XII.	**THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES DURING THE PENALTY PHASE OF HIS TRIAL**	153
	A. As Famalaro's Claims Were Not Presented To The Trial Court, They Are Waived	153
	B. Giving The Modified Versions Of CALJIC Nos. 8.85 and 8.88 Did Not Violate Famalaro's Constitutional Rights	157

TABLE OF CONTENTS (continued)

		Page
XIII.	CALJIC No. 8.88 PROPERLY INSTRUCTS THE JURY ON THE SCOPE OF ITS SENTENCING DISCRETION	158
XIV.	CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL	162
XV.	INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED	165
XVI.	CALIFORNIA'S DEATH PENALTY PROCEDURE DOES NOT VIOLATE INTERNATIONAL LAW, NOR DOES IT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION	166
XVII.	FAMALARO'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED	167
CONCLUSION		168

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. New Jersey
(2000) 530 U.S. 466
120 S.Ct. 2348
147 L.Ed.2d 435 105, 106, 108-111, 147, 148, 150, 163, 164

Blakely v. Washington
(2004) 542 U.S. 296
124 S.Ct. 2532
159 L. Ed.2d 403 108, 148, 150, 164

Booth v. Maryland
(1987) 482 U.S. 496
107 S.Ct. 2529
96 L.Ed. 2d 440 112-114, 119

Boyde v. California
(1990) 494 U.S. 370
110 L.Ed.2d 1190
108 L.Ed.2d 316 129

Cage v. Louisiana
(1990) 498 U.S. 39
111 S.Ct. 328
112 L.Ed.2d 339 95

Calder v. Bull
(1798) 3 U.S. 386
1 L.Ed. 648 115

California v. Brown
(1987) 479 U.S. 538
107 S.Ct. 837
93 L.Ed.2d 934 118

TABLE OF AUTHORITIES (continued)

	Page
Carmel v. Texas (2000) 529 U.S. 513 120 S.Ct. 1620 146 L.Ed.2d 577	114-116
Chapman v. California (1967) 386 U.S. 18 87 S.Ct. 824 17 L.Ed. 2d 705	141
Covarrubias v. Superior Court (1998) 60 Cal.App.4th 1168	82, 83
Cunningham v. California (2007) ___ U.S. ___ 127 S.Ct. 856 166 L.Ed.2d 856	148-150, 164
Dobbert v. Florida (1977) 432 U.S. 282 97 S.Ct. 2290 53 L.Ed.2d 344	112, 115
Furman v. Georgia (1972) 408 U.S. 238 92 S.Ct. 2726 33 L.Ed.2d 346	119
Green v. Georgia (1979) 442 U.S. 95 99 S.Ct. 2150 60 L.Ed.2d 738	135
Gregg v. Georgia (1976) 428 U.S. 153 96 S.Ct. 2909 49 L.Ed.2d 859	166

TABLE OF AUTHORITIES (continued)

	Page
Harris v. Pulley (9th Cir. 1988) 885 F.2d 1354	69, 70
Hovey v. Superior Court (1980) 28 Cal.3d 1	81, 82, 84
In re Stankewitz (1985) 40 Cal.3d 391	79
In re Walker (1974) 10 Cal.3d 764	103
Irvin v. Dowd (1961) 366 U.S. 717 81 S.Ct. 1639 6 L.Ed.2d 751	69-71
Lockett v. Ohio (1978) 438 U.S. 587	119
Mansfield v. State (Fla. 2005) 911 So.2d 1160	111
McCleskey v. Zant (1987) 481 U.S. 279 107 S.Ct. 1756 95 L.Ed.2d 262	166
Murphy v. Florida (1975) 421 U.S. 794 95 S.Ct. 2031 44 L.Ed. 2d 589	70
Nebraska Press Assn v. Stuart (1976) 427 U.S. 539 96 S.Ct. 2791 49 L.Ed.2d 683	70

TABLE OF AUTHORITIES (continued)

Page

Neill v. Gibson
(10th Cir. 2001) 278 F.3d 1044 116

Payne v. Tennessee
(1991) 501 U.S. 808
111 S.Ct. 2597
115 L.Ed.2d 720 111-114, 119-123

People v. Adcox
(1988) 47 Cal.3d 207 64

People v. Alcala
(1992) 4 Cal.4th 742 140

People v. Allen
(1986) 42 Cal.3d 1222 113, 150

People v. Andersen
(1994) 26 Cal.App.4th 1241 143

People v. Anderson
(1966) 64 Cal.2d 633 86

People v. Anderson
(2001) 25 Cal.4th 543 118, 146, 147, 163-165

People v. Arias
(1996) 13 Cal.4th 92 157

People v. Balderas
(1985) 41 Cal.3d 144 146, 151

People v. Barnett
(1998) 17 Cal.4th 1044 129

People v. Beardslee
(1991) 53 Cal.3d 68 97

TABLE OF AUTHORITIES (continued)

Page

People v. Beeler
(1995) 9 Cal.4th 953 — 86, 167

People v. Benavides
(2005) 35 Cal. 4th 69 — 109

People v. Benson
(1990) 52 Cal.3d 754 — 129

People v. Bittaker
(1989) 48 Cal.3d 1046 — 81

People v. Bolin
(1998) 18 Cal.4th 297 — 164

People v. Bonin
(1988) 46 Cal.3d 659 — 57, 58, 67

People v. Bonin
(1989) 47 Cal.3d 808 — 86, 154, 160

People v. Box
(2000) 23 Cal.4th 1153 — 82, 86, 108, 163

People v. Boyer
(2006) 38 Cal. 4th 412 — 146

People v. Boyette
(2002) 29 Cal.4th 381 — 150, 157, 160-162

People v. Breaux
(1991) 1 Cal.4th 281 — 161

People v. Brown
(1985) 40 Cal.3d 512 — 118, 135, 136, 158

People v. Brown
(2004) 33 Cal.4th 383 — 146, 150, 163, 166

TABLE OF AUTHORITIES (continued)

	Page
People v. Burgener (2003) 29 Cal. 4th 833	163, 165, 166
People v. Carpenter (1997) 15 Cal.4th 312	105, 106, 108, 163
People v. Carter (2005) 36 Cal.4th 1215	164
People v. Castillo (1997) 16 Cal.4th 1009	128
People v. Catlin (2001) 26 Cal.4th 81	113
People v. Chatman (2006) 38 Cal.4th 344	146
People v. Clair (1992) 2 Cal.4th 629	113
People v. Coddington (2000) 23 Cal.4th 529	90
People v. Coffman & Marlow (2004) 34 Cal.4th 1	68, 80, 161
People v. Coleman (1989) 48 Cal.3d 112	66
People v. Cooper (1991) 53 Cal.3d 771	67, 71, 80, 89
People v. Cornwell (2005) 37 Cal.4th 50	147
People v. Cox (2003) 30 Cal.4th 916	147

	Page
People v. Crew (2003) 31 Cal.4th 822	101
People v. Cudjo (1993) 6 Cal.4th 585	82
People v. Cunningham (2001) 25 Cal.4th 926	146
People v. Daniels (1991) 52 Cal.3d 815	163
People v. Davis (1994) 7 Cal.4th 797	114, 143
People v. Davis (1995) 10 Cal.4th 463	105
People v. Davis (2005) 36 Cal.4th 510	164
People v. Daya (1994) 29 Cal.App.4th 697	86, 154, 160
People v. De La Cour Soto (1883) 63 Cal. 165	103
People v. Demetrulias (2006) 39 Cal.4th 1	146
People v. Dennis (1998) 17 Cal.4th 468	58, 64, 66, 68, 80, 123, 163
People v. Dillon (1983) 34 Cal.3d 441	104, 108
People v. Douglas (1990) 50 Cal.3d 468	150

TABLE OF AUTHORITIES (continued)

	Page
People v. Duncan (1991) 53 Cal.3d 955	158, 161
People v. Dunkle (2005) 36 Cal.4th 861	143, 162, 164
People v. Earp (1999) 20 Cal. 4th 826	81, 157
People v. Edelbacher (1989) 47 Cal.3d 983	67
People v. Edwards (1991) 54 Cal.3d 787	66, 67, 69, 112, 113, 117, 118, 121, 135, 138
People v. Elliot (2005) 37 Cal.4th 453	157
People v. Farnam (2002) 28 Cal.4th107	157, 158
People v. Fauber (1992) 2 Cal.4th 792	70, 80
People v. Fitzpatrick (1992) 2 Cal.App.4th 1285	90
People v. Flood (1998) 18 Cal.4th 470	92
People v. Foster (1995) 34 Cal.App.4th 766	97
People v. Frazer (1999) 21 Cal.4th 737	116
People v. Frye (1998) 18 Cal.4th 894	100, 134, 141, 164

TABLE OF AUTHORITIES (continued)

	Page
People v. Fudge (1994) 7 Cal.4th 1975	137
People v. Gallego (1990) 52 Cal.3d 115	65
People v. Gammage (1992) 2 Cal.4th 693	99, 144
People v. Garceau (1993) 6 Cal.4th 140	137
People v. Gordon (1990) 50 Cal.3d 1223	113
People v. Gorshen (1959) 51 Cal.2d 716	103
People v. Gray (2005) 37 Cal.4th 168	163
People v. Guerra (2006) 37 Cal.4th 1067	137, 138, 146
People v. Gurule (2002) 28 Cal.4th 557	129, 160
People v. Hall (1986) 41 Cal.3d 826	137
People v. Hamilton (1989) 48 Cal.3d 1142	66, 67
People v. Hannon (1977) 19 Cal.3d 588	91
People v. Harris (1981) 28 Cal.3d 935	67, 71

	Page
People v. Harris (2005) 37 Cal.4th 310	137
People v. Hart (1999) 20 Cal.4th 546	63
People v. Haskett (1982) 30 Cal.3d 841	113, 114, 118
People v. Hawthorne (1992) 4 Cal.4th 43	163
People v. Hayes (1999) 21 Cal.4th 1211	72
People v. Heishman (1988) 45 Cal.3d 147	113
People v. Hillhouse (2002) 27 Cal.4th 469	92, 124
People v. Hinton (2006) 37 Cal.4th 839	146, 150, 158
People v. Holt (1997) 15 Cal.4th 619	163
People v. Horton (1995) 11 Cal.4th 1068	147
People v. Howard (1992) 1 Cal.4th 1132	119
People v. Hughes (2002) 27 Cal.4th 287	96, 105, 108, 157, 161
People v. Jablonski (2006) 37 Cal.4th 774	138

TABLE OF AUTHORITIES (continued)

	Page
People v. Jackson (1996) 13 Cal.4th 1164	90
People v. Jenkins (2000) 22 Cal.4th 900	58, 65
People v. Jennings (1991) 53 Cal.3d 334	66, 96
People v. Johnson (1992) 3 Cal.4th 1183	112, 117
People v. Johnson (1992) 3 Cal.4th 1183	87, 90, 121
People v. Jurado (2006) 38 Cal.4th 72	140
People v. Kipp (2001) 26 Cal.4th 1100	146
People v. Kipp (2001) 26 Cal.4th 1100	108
People v. Kirkpatrick (1994) 7 Cal.4th 988	119
People v. Kraft (2000) 23 Cal. 4th 978	138
People v. Lenart (2004) 32 Cal.4th 1107	157
People v. Lewis (1990) 50 Cal.3d 262	118
People v. Lewis (2001) 25 Cal.4th 610	108, 146, 166

	Page
People v. Livaditis (1992) 2 Cal.4th 759	138
People v. Lucero (2000) 23 Cal. 4th 692	157
People v. Manriquez (2005) 37 Cal.4th 547	162
People v. Martinez (2003) 31 Cal.4th 673	147
People v. Massie (1998) 19 Cal.4th 550	58, 64
People v. Maury (2003) 30 Cal.4th 342	95-98
People v. McPeters (1992) 2 Cal.4th 1148	110
People v. Medina (1995) 11 Cal.4th 694	146, 147
People v. Mendoza (2000) 24 Cal.4th 130	118
People v. Millwee (1998) 18 Cal.4th 96	165
People v. Mincey (1992) 2 Cal.4th 408	167
People v. Mitcham (1992) 1 Cal.4th 1027	113
People v. Monterroso (2004) 34 Cal.4th 743	163

TABLE OF AUTHORITIES (continued)

	Page
People v. Montiel (1993) 5 Cal.4th 877	99, 145
People v. Moon (2005) 37 Cal.4th 1	162
People v. Morrison (2004) 34 Cal.4th 698	133, 135, 149, 150, 158, 163
People v. Musselwhite (1998) 17 Cal.4th 1216	118
People v. Nakahara (2003) 30 Cal.4th 705	101, 108, 109
People v. Navarette (2003) 30 Cal.4th 458	86
People v. Noble (2002) 100 Cal.App.4th 184	92
People v. Noguera (1992) 4 Cal.4th 599	99, 100, 144
People v. Ochoa (1998) 19 Cal.4th 353	83, 163
People v. Ochoa (2001) 26 Cal.4th 398	128, 160
People v. Ortiz (1995) 38 Cal.App.4th 377	139
People v. Osband (1996) 13 Cal.4th 622	96, 146, 147
People v. Panah (2005) 35 Cal.4th 395	68, 80, 165

TABLE OF AUTHORITIES (continued)

	Page
People v. Partida (2005) 37 Cal.4th 428	146
People v. Perry (2006) 38 Cal.4th 302	157
People v. Phillips (2000) 22 Cal.4th 226	134, 135, 137
People v. Price (1991) 1 Cal.4th 324	66
People v. Pride (1992) 3 Cal.4th 195	58
People v. Prieto (2003) 30 Cal.4th 226	160, 163, 165
People v. Proctor (1992) 4 Cal.4th 499	58, 66
People v. Raley (1992) 2 Cal.4th 870	113, 121
People v. Raley (1992) 2 Cal.4th 870	112
People v. Ramos (2004) 34 Cal.4th 494	86, 135, 137, 166
People v. Ray (1996) 13 Cal.4th 313	96
People v. Riel (2000) 22 Cal.4th 1153	108
People v. Rodrigues (1994) 8 Cal. 4th 1060	107, 118, 124

TABLE OF AUTHORITIES (continued)

	Page
People v. Rodriguez (1999) 20 Cal.4th 1	137
People v. Rogers (2006) 39 Cal.4th 826	101
People v. Roldan (2005) 35 Cal.4th 646	166
People v. Russo (2001) 25 Cal.4th 1124	109
People v. Samayoa (1997) 15 Cal.4th 795	146, 165
People v. Scott (1991) 229 Cal.App.3d 707	105
People v. Silva (2001) 25 Cal.4th 345	108
People v. Sims (1993) 5 Cal.4th 405	147
People v. Smith (2005) 35 Cal.4th 334	150, 158, 165
People v. Smithey (1999) 20 Cal.4th 936	133, 135
People v. Snead (1993) 20 Cal.App.4th 1088	100
People v. Snow (2003) 30 Cal.4th 43	163
People v. Stanley (1995) 10 Cal.4th 764	165

TABLE OF AUTHORITIES (continued)

	Page
People v. Stitely (2005) 35 Cal.4th 514	82, 149
People v. Sully (1991) 53 Cal.3d 1195	66
People v. Taylor (2001) 26 Cal.4th 1155	160
People v. Taylor (2001) 26 Cal.4th 1155	112, 161, 162
People v. Thomas (1992) 2 Cal.4th 489	113
People v. Vieira (2005) 35 Cal.4th 264	57, 68
People v. Waidla (2000) 22 Cal.4th 690	82, 83
People v. Ward (2005) 36 Cal.4th 186	149, 164
People v. Watkins (1987) 195 Cal.App.3d 258	105
People v. Watson (1956) 46 Cal.2d 818	91, 140
People v. Weaver (2001) 26 Cal.4th 876	71, 81, 135, 140
People v. Webb (1993) 6 Cal. 4th 494	68
People v. Welch (1999) 20 Cal.4th 701	80, 163

TABLE OF AUTHORITIES (continued)

	Page
People v. Whitt (1990) 51 Cal.3d 620	138
People v. Williams (1997)16 Cal.4th 153	150
People v. Wilson (1992) 3 Cal.4th 926	96
People v. Witt (1915) 170 Cal. 104	104
People v.Sanders (1995) 11 Cal.4th 475	57, 58, 67, 72
Pulley v. Harris (1984) 465 U.S. 37 104 S.Ct. 871 79 L.Ed. 2d 29	165
Rideau v. Louisiana (1963) 373 U.S. 726 83 S.Ct. 1417 10 L.Ed.2d 663	69
Ring v. Arizona (2002) 536 U.S. 584 122 S.Ct. 2428 153 L.Ed.2d 556	147, 148, 150, 163, 164
Ristaino v. Ross (1976) 424 U.S. 589 96 S.Ct. 1017 47 L.Ed.2d 258	81

TABLE OF AUTHORITIES (continued)

Page

Rogers v. Tennessee
(2001) 532 U.S. 451
121 S.Ct. 1693
149 L.Ed.2d 697 114

Rosales-Lopez v. United States
(1981) 451 U.S. 182
101 S.Ct. 1629
68 L.Ed.2d 22 81

Schad v. Arizona
(1991) 501 U.S. 630
111 S.Ct. 2491
115 L.Ed.2d 555 109, 110

Skipper v. South Carolina
(1986) 476 U.S. 1
106 S.Ct. 1669
90 L.Ed.2d 1 135

South Carolina v. Gathers
(1989) 490 U.S. 805
109 S. Ct. 2207
104 L.Ed.2d 876 112-114, 119

Spears v. Mullin
(10th Cir. 2003) 343 F.3d 1215 111

State v. Lovelace
(Idaho 2004) 90 P.3d 298 111

State v. Tucker
(Ariz. 2003) 68 P.3d 110 110

Stogner v. California
(2003) 539 U.S. 607
123 S.Ct. 2446
156 L.Ed.2d 544 116

Page

Tapia v. Superior Court
(1991) 53 Cal.3d 282 116

Thompson v. Missouri
(1898) 171 U.S. 380
18 S.Ct. 922
43 L.Ed. 204 116

Tuilaepa v. California
(1994) 512 U.S. 967
114 S.Ct. 2630
129 L.Ed.2d 750 147

United States v. Booker
(2005) 543 U.S. 220
125 S.Ct. 738
160 L.Ed.2d 621 148, 150, 164

United States v. McVeigh
(10th Cir. 1998) 153 F.3d 1166 68, 70

Victor v. Nebraska
(1994) 511 U.S. 1
114 S.Ct. 1239
127 L.Ed.2d 583 95, 102

Zant v. Stephens
(1983) 462 U.S. 862
103 S.Ct. 2733
77 L.Ed.2d 235 118

Constitutional Provisions

California Constitution
art. I, § 9 116
art. I, §§ 7, 15, 16, & 17 107

TABLE OF AUTHORITIES (continued)

	Page
United States Constitution	
Fifth Amendment	148
SixthAmendment	81, 106, 107, 129, 131, 148
Eighth Amendment	81, 107, 129, 131, 148, 160, 165, 166
Fourteenth Amendment	81, 106, 107, 129, 131, 148, 165, 166

Statutes

Code of Civil Procedure	
§ 223	82
Evidence Code	
§ 140	137
§ 210	136, 137
§ 225	137
§ 250	137
§ 251	137
§ 350	137
§ 352	136
§ 353	146
§ 354	133
§ 355	137
§ 1150(a)	79
§ 1200	137
§ 1250, subd. (a)	138
§ 1252	138
Penal Code	
§ 187	102-104, 106, 107
§ 187, subd. (a)	4
§ 189	102, 104
§ 190.2 (a) (17) (11)	106
§ 190.2 (a) (17) (iv)	106
§ 190.2, subd. (a) (17) (ii)	4
§ 190.2, subd. (a) (17) (iv)	4

	Page
§ 190.3	117, 135, 153, 154, 162
§ 190.3, factor (a)	112
§ 190.3, factor (b)	144, 145, 152
§ 190.4, subd. (c)	147
§ 207	4, 106
§ 209	4, 106
§ 286	4, 106
§ 952	104
§ 995	4
§ 1033	5
§ 1118.1	90
§ 1176	86
§ 1176	154
§ 1192.7, subd. (c) (1)	4
§ 1259	86, 93, 143, 153
§ 1538.5	4

Other Authorities

CALJIC No	
1.01	97, 98
1.03	125
2.00	141
2.01	92, 93, 95, 96
2.02	92-94, 96
2.06	86-88, 90, 91
2.11	141
2.21	97
2.21.2	92, 96, 97
2.22	92, 98
2.27	92, 96, 98, 99, 141, 143, 144
2.51	92, 96, 99, 100
2.90	92, 95, 97, 98, 101, 102, 145
8.20	92, 96, 100, 101
8.21	99
8.83	93

TABLE OF AUTHORITIES (continued)

	Page
8.83.1	93, 94
8.84.1	124-128
8.85	124, 125, 127, 153, 154, 157
8.88	127, 128, 153, 154, 156, 157, 159-161

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN JOSEPH FAMALARO, Defendant and Appellant.	S064306 CAPITAL CASE

INTRODUCTION

In the early morning hours of June 3, 1991, 23-year-old Denise Huber was driving southbound on Highway 73 through Costa Mesa when one of the tires on her car blew out. The following evening, her Honda sedan was found parked on the shoulder of the freeway, but there was no sign of Denise.

In July of 1994, appellant, John Joseph Famalaro (Famalaro) was a self-employed house painter in Yavapai County, Arizona, just outside of Prescott. A sheriff's deputy was dispatched to Famalaro's residence to investigate a Ryder rental truck that had been parked on a side driveway next to the house for an extended period of time. A check of the Ryder truck's VIN and license plate numbers revealed that it had been reported stolen from Orange County, California. In anticipation of impounding the stolen vehicle, the deputy called a locksmith to unlock the truck so an inventory search could be conducted. A heavy duty electrical cord running from the back of the truck into Famalaro's garage had already been observed and, when the padlock on the back of the truck was removed and the door opened, it was discovered that the electrical cord provided power to a chest-type of freezer. After a padlock on the outside

of the freezer was removed, the nude body of a young woman in a semi-fetal position was discovered. The woman's body was inside three large garbage bags and her hands were handcuffed behind her back. The truck, the freezer, and its contents were towed to the coroner's office in Phoenix.

A pathologist discovered that the woman's head was covered by three white plastic trash bags. After the white trash bags were removed, the pathologist could see that the woman appeared to have been gagged and her eyes had been covered with duct tape. The woman's skull had been shattered into multiple pieces and bits of the white trash bags were embedded in some of the indentations in the skull. Through fingerprints, the body was identified as that of Denise Huber and the cause of death was determined to have been multiple skull fractures caused by blunt force trauma. Vaginal swabs revealed no evidence of a sexual assault, however anal swabs revealed the presence of some degraded sperm.

A search of the interior of Famalaro's cluttered house led to the discovery of boxes containing the clothing Denise had been wearing on the night she disappeared, as well as her shoes, her purse and its contents. A claw hammer and a nail puller, which were later established to be the murder weapons, were also found inside the boxes. Several copies of the Orange County Register containing articles about the disappearance and search for Denise Huber were found inside the residence.

The ensuing investigation led law-enforcement to a warehouse space in the Laguna Hills of Orange County where Famalaro had operated a painting business in 1991. By 1994, the warehouse was occupied by a new commercial tenant. Areas of the interior of the commercial space were sprayed with Luminal, which revealed possible blood stains in a corner. After portions of drywall in the corner were removed, wood framing was discovered that had

been saturated with blood. The DNA profile of the blood in the wood framing matched the DNA profile of Denise Huber.

An Orange County Grand Jury charged Famalaro with the first degree murder of Denise Huber. Two special circumstances, that the murder was committed during the commission of a kidnaping and that the murder was committed while engaged in the commission of the crime of sodomy, were also alleged. At trial, Famalaro's defense aggressively challenged the strength of the evidence supporting the kidnaping and sodomy allegations. An Orange County jury found Famalaro guilty of first degree murder and found both of the special circumstance allegations were true.

During the penalty phase of the trial, Denise Huber's parents testified about their suffering from her disappearance and murder. Two of Famalaro's former girlfriends testified about how he had handcuffed them before he attempted to sexually abuse or humiliate them. Neither woman reported the instances to authorities and Famalaro had no criminal record. Famalaro called 21 witnesses to present evidence about his dysfunctional family and childhood, his overly-controlling mother, and his emotional distress and physical illness in the days following the murder. On June 18, 1997, the jury determined the death penalty was appropriate and on September 5, 1997, the Honorable John J. Ryan sentenced Famalaro to the penalty recommended by the jury.

STATEMENT OF THE CASE

On September 27, 28, and 29, 1994, the Orange County Grand Jury heard testimony in the matter of *People v. John Joseph Famalaro*, Case No. 94ZF0196. (1 CT[1] 4-337.) On September 29, 1994, the Grand Jury issued an

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1. "CT" refers the eight volumes of the Clerk's Transcript; "Supp. CT" refers to the eleven volumes of the Supplemental Clerk's Transcript; "RT"

Indictment charging Famalaro with the first degree murder of Denise Huber in June of 1991 (Pen. Code, § 187, subd. (a)), which was alleged to have been a serious felony within the meaning of Penal Code section 1192.7, subd. (c) (1). As to that count, it was also alleged that the murder was committed during the commission of, or the attempted commission of, the crime of kidnaping (Pen. Code, §§ 207 and 209), and during the commission of, or the attempted commission of, the crime of sodomy (Pen. Code, § 286), within the meaning of Penal Code section 190.2, subdivisions (a) (17) (ii) and (a) (17) (iv), respectively. (1 CT 340-341.)

On April 1, 1996, Famalaro filed a Penal Code section 995 motion, and points and authorities in support thereof, in which he alleged insufficient evidence had been presented to the Grand Jury to support the kidnaping and sodomy special allegations. (4 CT 1339-1362.) After a hearing on June 7, 1996, the trial court denied Famalaro's Penal Code section 995 motion. (5 CT 1447.)

On November 7, 1996, Famalaro filed a motion to suppress evidence pursuant to Penal Code section 1538.5. (1 Supp. CT 1-16.) The trial court denied Famalaro's motion to suppress evidence on March 3, 1997. (5 CT 1727-1735.)

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refers to the 28 volumes of the Reporter's Transcript; and "CJQ" refers to the volume of Confidential Juror Questionnaires of the sitting jurors.

The appellate record also includes a 13-volume "Clerk's Supplemental Transcript" comprised of a large number of pleadings and transcripts concerning the applicable law on the admission of DNA evidence at the time of trial. As those pleadings involved another case involving DNA evidence pending before the Orange County Superior Court at the time of Famalaro's trial, and as the introduction of the DNA evidence in the People's case in chief in the instant matter is not at issue on appeal, there are no citations to that series of transcripts in Respondent's Brief on Appeal.

On March 20, 1997, Famalaro filed a Petition for Writ of Mandate with Division Three of the Fourth District Court of Appeal in Case No. G021332, challenging the trial court's denial of his motion to suppress evidence. (5 Supp. CT 1108-1182.) On April 17, 1997, the Court of Appeal denied the Petition for Writ of Mandate. (10 Supp. CT 2906-2907.)

On November 12, 1996, Famalaro filed a motion with the trial court for a change of venue. (Pen. Code, § 1033.) On February 28, 1997, the trial court denied the motion for a change of venue. (5 CT 1725-1726.)

On March 17, 1997, Famalaro filed a Petition for Writ of Mandate with Division Three of the Fourth District Court of Appeal in Case No. G021303, challenging the trial court's denial of his motion for a change of venue. (2 Supp. CT 211-323.) On March 18, 1997, the Court of Appeal denied Famalaro's Petition for Writ of Mandate in Case No. G021303. (5 CT 1769-1770; 4 Supp. CT 1106.)

On March 28, 1997, Famalaro filed a Petition for Review with this Court in Case No. S060074, challenging the Court of Appeal's denial of his Petition for Writ of Mandate concerning his motion for a change of venue. (10 Supp. CT 2746-2789.) On April 18, 1997, this Court denied Famalaro's Petition for Review. (11 Supp. CT 2908.)

Jury selection began on April 23, 1997. Twelve jurors and four alternate jurors were seated on May 7, 1997. (5 CT 1810-1811; 6 CT 1831-1835.) Before the first witness was called to testify, Famalaro renewed his motion for a change of venue, and the motion was again denied. (6 CT 1867-1869.) On May 22, 1997, the jury found Famalaro guilty of murder in the first degree. The jury also found the kidnaping and sodomy special circumstance allegations were true. (6 CT 1948-1949.)

The penalty phase of the trial began on May 29, 1997. (6 CT 1956-1957.) On June 18, 1997, the jury determined the appropriate penalty was death. (6 CT 2068.)

On August 28, 1997, Famalaro filed a motion for a new trial. (6 CT 2120-2149.) The trial court denied that motion on September 5, 1997. Also on September 5, 1997, the trial court denied Famalaro's application for a modification of the jury recommendation and sentenced him to death for the murder of Denise Huber. (6 CT 2185-2190.)

STATEMENT OF FACTS

GUILT PHASE

June Of 1991, Orange County, California

On the Sunday evening of June 2, 1991, a young man named Robert Calvert accompanied 23-year-old Denise Huber to a Morrisey concert at the Forum in Inglewood. The two tickets for the concert had been obtained by Denise's boyfriend, Steven Horrocks. (17 RT 4537-4538.) After Horrocks learned he had to work that night as a bartender at the Spaghetti Factory in Newport Beach, he asked Calvert, who was a friend of theirs, to escort Denise to the concert in his place. (19 RT 5067.) Horrocks had known Denise since 1988 or 1989 when she began working as a waitress at the Spaghetti Factory (19 RT 5069-5070), and, by 1991, they had been dating each other for less than six months. (19 RT 5066-5067.)

Denise lived with her parents on Vista Grande in Newport Beach. (18 RT 4621.) The plan that night was for Denise to drive her car to the concert. Denise picked Calvert up at his residence in Huntington Beach, then they stopped at a liquor store and picked up some orange juice, a small bottle of vodka, and a bag of pretzels before they got on the freeway. After parking at

the Forum at approximately 8:00 p.m., they stayed in the car where they each consumed four or five shots of vodka and some of the orange juice. Calvert described it as "getting a little partied up before the concert." (17 RT 4538-4539.) Calvert recalled the bottle as having been pint-sized and in the shape of a flask with one rounded side. (17 RT 4554.) During the concert, Calvert and Denise shared a 20-ounce glass of beer. The concert ended at 11:00 or 11:30 p.m. (17 RT 4540.) After the concert, they went to the El Paso Cantina on Pacific Coast Highway in Long Beach, where they stayed until closing time - between 1:30 and 2:00 a.m. While they were there, Denise drank two more glasses of beer. (17 RT 4540-4542.) After they left El Paso Cantina, they decided to "call it a night" because they both had to work the next day[2], so Denise drove Calvert back to his residence in Huntington Beach. (17 RT 4543.) After Denise dropped him off, Calvert noticed it was 2:05 a.m. (17 RT 4567.) Denise did not appear to be intoxicated. (17 RT 4542.) Calvert did not know what happened to the bottle of vodka they had purchased, but it would have still contained some vodka. (17 RT 4555.)

Denise had been "very dressed up that night" in a dress, black stockings, and high heels and she looked very attractive. (17 RT 4544, 4546.) Calvert had seen Denise wear the same shoes several weeks earlier. On the night of the concert, Calvert had not noticed any damage to Denise's shoes, nor did he notice her limping or hear the sound made when a tip is missing from a heel. (17 RT 4548, 4564.)

Denise never returned home after the concert. (18 RT 4619.) On Monday, at approximately 6:00 p.m., Denise's mother, Ione Huber, called one of Denise's friends, Tammy Brown. Brown then called several other friends,

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2. At the time, Denise was working two jobs. One job was as a waitress at the Cannery Restaurant in Newport Beach, and the other job was as a sales clerk in the Broadway store in the Fashion Island shopping center in Newport Beach. (18 RT 4624-4625.)

including Calvert in Huntington Beach, but no one had heard from Denise that day. Brown got into her car and drove up to Huntington Beach. On her way back to Newport Beach, Brown spotted Denise's Honda parked on the shoulder of southbound Highway 73, just north of the Highway 55 turn off to Newport Beach. Brown recognized the Honda by its license plate (beginning with "2JVV"), and saw that the rear passenger tire was flat. Brown drove to a pay phone to call Denise's parents. (17 RT 4599-4600.) It was approximately 10:00 p.m. (17 RT 4604.)

After receiving Brown's telephone call, Ione and Dennis Huber found Denise's car on the shoulder of southbound 73, right where Brown had said it was. No lights were on in the car, inside or out. They opened the passenger door and looked inside, but they did not touch anything else. There were no keys in the Honda and they did not have a spare key. Ione Huber could not recall if the inside dome light turned on when they opened the door, but there was sufficient light from the outside to see the interior. (18 RT 4627-4629.)

Ronald Allen Smith was the Costa Mesa Police Department Sergeant in charge of Denise Huber's disappearance in 1991. (17 RT 4572.) The location where Denise's car was found was on an elevated portion of the Corona del Mar Freeway and the nearest telephone would have been 2/10s of a mile away near the intersection of Bear and Bristol Streets in Costa Mesa. (17 RT 4576.) The area was well-lit at night and several emergency call boxes on the roadway were visible from the location of the car, including one on the nearby transition road to Highway 55 towards Newport Beach. (17 RT 4579-4580.) An aerial photograph depicted the exact location of Denise's car in green paint (the paint had been touched up over the years to memorialize the exact location), as well as the skid marks that came from the right rear tire. (17 RT 4584-4585.) Smith first saw the Honda after it had been towed from the freeway. A pair of

women's hosiery had already been collected from the front passenger seat.[3] (17 RT 4586-4587.)

July 13, 1994, Prescott, Arizona

Prescott, Arizona is about 100 miles north of Phoenix, the state capital. (18 RT 4640.) On July 13, 1994, Yavapai County Deputy Sheriff Joseph Michael DiGiacomo was on patrol when he received a radio call about a possible stolen vehicle. The vehicle was a 24-foot Ryder rental truck that was parked on the side of a house located at 685 Cochise Drive inside the Prescott Country Club. The house was situated on the corner of Navajo and Cochise Drives, and the truck was parked on a side driveway near the Navajo Drive side of the residence. (18 RT 4641-4642.) DiGiacomo ran the license plate and vehicle identification number on the truck (18 RT 4642-4643), and learned the truck had been reported stolen from Orange County, California in January of 1994. (18 RT 4650.)

The normal procedure was to secure a stolen vehicle, conduct an inventory of its contents, and have the vehicle towed away. (18 RT 4643.) Since the truck was locked, DiGiacomo first had to call for a locksmith. The locksmith wore gloves so as to not interfere with any fingerprints, then he unlocked the front and rear of the truck. After the back of the truck was opened, DiGiacomo saw a chest-type of freezer and a lot of painting equipment including paint cans, rollers and canvas. The freezer had a lock on it and was sealed with a significant amount of tape. It was plugged into a red extension cord that ran out of the back of the truck and over the back fence. (18 RT 4645-4646.) The other end of the extension cord was plugged into the house.

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3. Denise used to wear thigh-high hosiery and she had a habit of slipping them off whenever she was on her way home because they were uncomfortable. The thigh-high hosiery had elastic around the top and the longer they were worn, the more uncomfortable they became. (17 RT 4605.)

(18 RT 4706.) Because of the freezer and all of the five-gallon cans in the truck, many of which were unmarked, DiGiacomo became concerned that they might have discovered a clandestine lab for the manufacture of methamphetamine. He called for assistance from the Prescott Area Narcotics Task force (PANT). (18 RT 4646-4647.)

When PANT investigators arrived, they did not think the cans indicated drug manufacturing activity, but they were concerned about the electrical cord and the freezer. It was decided to continue to treat the scene as a possible mobile drug lab until they completed the inventory search. The fire department was called to the scene in case of booby traps or other safety hazards. (18 RT 4647.)

A couple of narcotics investigators donned gloves and the lock on the freezer was cut off. When the investigators started pulling the tape off of the outside of the freezer, they immediately detected a foul odor that DiGiacomo recognized as that of a dead animal or body. After they opened the freezer, one of the narcotics officers reached inside and felt what he believed was a human shoulder and something metal. At that point, DiGiacomo took everyone off of the scene, put up crime scene tape, and called the person in charge of the homicide and major crimes unit, Lieutenant Supervisor Scott Mascher. (18 RT 4648.)

When Lieutenant Mascher arrived at the residence, he observed the Ryder rental truck backed into the side driveway, with a white Dodge pickup truck parked next to it. (18 RT 4661-4662.) Lt. Mascher and another detective, Detective Brown, opened the freezer and observed a black plastic bag in the lower left side of the freezer. The freezer, which was operating and cold, was empty except for the black garbage bag and its contents, and some ice crystals. They could see what appeared to be frozen blood or bodily fluids on the bottom of the freezer. (18 RT 4663-4664.) Ice crystals and frost inside the

freezer were consistent with something having been in the freezer for a long time. (18 RT 4705.)

Lt. Mascher could not see into the bag, which looked like the big trash bags used for lawn clippings. From the odor, something had clearly been decomposing inside the freezer. (18 RT 4664.) Detective Brown cut open one side of the bag, then through another bag, and then another bag - three black bags in all. When part of the bags were peeled back, Lt. Mascher saw a human shoulder and some decomposing flesh, then he saw that the hands were secured behind the back with steel handcuffs around the writs. They opened the bag a little bit more in a vain attempt to see if there was anything to identify the body. They did not see any clothing. (18 RT 4665.) The body was in kneeling position and curled over with the head bent way down and tucked under the chest. (18 RT 4667.) As they found nothing to help them establish the identity of the person, Lt. Mascher looked for blood splatter or anything else to indicate if the person had been killed in the freezer. He did not see anything, so he decided to seal up the freezer and have everything - including the truck - taken directly to the crime laboratory in Phoenix. (18 RT 4668.) The Yavapai County Sheriff's Department had a contract with Forensic Pathologists in Maricopa County, so Lt. Mascher arranged for a tow truck to take the truck to Phoenix. (18 RT 4668-4669.)

Post-Mortem Of Denise Hubber's Body, July 14 & 16, 1994, Phoenix, Arizona

Ann Bucholtz, M.D., Medical Examiner in Phoenix, Arizona, witnessed the opening of the freezer in Phoenix and saw the remains inside, but she had to wait until the exterior of the freezer was processed by investigators before the body could be removed. (19 RT 4972, 4976.) The body in the freezer was frozen solid. The body, and the black plastic bag enshrouding the body, were

stuck to the bottom of the freezer where there was a frozen layer of liquid. (19 RT 4977.)

On July 14, 1994, after the body was removed from the freezer and placed into a body bag, it was transported to Dr. Bucholtz's office. Dr. Bucholtz's first concern was to obtain any evidence she could find before it could be destroyed by the thawing process. Dr. Bucholtz was also interested in identifying the woman. (19 RT 4977.)

The handcuffs around the wrists were so tight that Dr. Bucholtz could not pass her fingers underneath the cuffs and move them. The handcuffs were removed with bolt cutters. Dr. Bucholtz looked for any trace evidence on the outside of the body, and evaluated the hands and took fingernail cuts and scrapings. (19 RT 4978.) After the handcuffs were removed, fingerprints were taken. (19 RT 4984.) Through those fingerprints, the body was subsequently identified as that of Denise Huber. (19 RT 5047-5048.)

Dr. Bucholtz was concerned about gathering evidence of a sexual assault, just as she would have been for any woman's body found under similar conditions. The body was bent at the hip with the knees next to the chest area, so the anal orifice was initially the easiest to observe. There was some frozen water that had pooled in the rectal region on the exterior of the body. She scraped some of that into a jar in an attempt to make a rape collection. (19 RT 4978-4979.) Dr. Bucholtz explained that she obtained a sample from the opening of the anal orifice by using the rounded handle of a clean scalpel and scraping the frozen fluid directly into a jar. (19 RT 4979-4980.) On that date (July 14, 1994), Dr. Bucholtz was only able to insert the handle of the scalpel about one inch into the anal orifice because, except for the edges, the body was still frozen solid. (19 RT 4980.)

In order to complete as much of the sexual assault collections as possible on July 14, 1994, Dr. Bucholtz had to thaw portions of the body to get to the

face and vaginal area. To speed up the process, she used a hair dryer to thaw the arms and head enough so they could be moved. It was at that point that Dr. Bucholtz discovered the head was covered with three white kitchen garbage bags. (19 RT 4980.) When she removed the white bags, Dr. Bucholtz saw a piece of grey tape that extended from the area of the upper lip to the upper eyelids. The tape covered the eyes like a blindfold, and covered the face from the mouth to the eyelids. Dr. Bucholtz collected some swabs from the mouth first, then scraped some watery material out of the mouth into a clean jar. (19 RT 4981.) An unusual aspect about the mouth was that it was open. Usually, when a person dies, the mouth is closed. In this case, the open mouth was round in shape. Everything was photographed and documented, and all of the tape was collected. (19 RT 4981.) In preparation for saving the bags, a technician who assisted Dr. Bucholtz in collecting some of the evidence shook the bags and a wadded mass of cloth fell out. The cloth was in a rounded configuration and it appeared to have been soaked with blood. (19 RT 5049.) The shape of the wadded up cloth was consistent with the shape of the mouth. (19 RT 5011.)

Dr. Bucholtz wanted to obtain a vaginal collection before any liquid inside could seep out. (19 RT 4981.) She worked on thawing the body enough to visualize the vaginal opening. The swabs were directed into that area, and secretions and pooled specimens near the vaginal area were again collected by being scraped into a jar. Dr. Bucholtz could not obtain a collection from the inside of the vagina at that time because of the frozen condition of the body. (19 RT 4982.) Two days later (on July 16, 1994), after the body was completely thawed, Dr. Bucholtz obtained the internal sexual assault collections from the rectum and vagina. (19 RT 4982-4983.) She used clean gloves for collecting evidence from each orifice. The swabs were inserted approximately

four inches, then placed in a drying unit before being put inside sterile containers. (19 RT 5011-5012.)

Adhering to the body was some bloody fluid, much of it in the armpit area. There was also some frozen fluid in the bottom of the bag. Out of concern that there might not be any internal portion of the body amenable to toxicology testing in light of the state of decomposition, fluid external to the body from the bottom of the bag was collected. (19 RT 4985-4986.)

Dr. Bucholtz observed a number of external injuries to the head, and she prepared a diagram to document those injuries (People's Exhibit 100). (19 RT 4976.) Dr. Bucholtz assigned letters to each of the injuries, but there was no pattern or significance to her lettering. "A" was a large gaping laceration over the scalp above the left eye that extended into the hairline. Bone and skull fractures could be seen at the bottom of the laceration. "B" was a laceration a little bit higher and more towards the middle of the head than "A," and it also had visible bone fractures in the depths of the wound. "C" was on the left side of scalp and had a T-shaped appearance, although it was oval around the edge and had a 3/4" x 3/4" discoloration. "D" was a curved tear above left the ear. (19 RT 4987-4988.) "E" was slightly in back of "D" and had a c-shaped curved edge. It also had tearing of the skin and visible bone. Just below that were some smaller lacerations. "F"was a large, irregular tear over the left side of the back of the head that also had visible bone fractures. "G"was in the same area as "F," and it also had a large tear and visible bone fractures underneath. "H"was on the right side of the head, above the ear, with large stellate - three inches by three inches. Grey matter, which was the brain itself, could be seen though the skull fractures. "I" was on the right side of the head at the hairline near the temple, with adjacent tearing. "J" was just in front of the ear and was oval or round in shape with adjacent tearing. "K" was posterior to the right ear and was a curved laceration. "L" was a laceration on the right

cheek. (19 RT 4989.) All of the above injuries were documented before any tissue was removed. (19 RT 5001.) Dr. Bucholtz decided to have the skull reconstructed, and she utilized the assistance of Dr. Laura Fulginiti and Dr. Water Birkby, both of whom had experience in reconstructing human remains from bone components. (19 RT 4996.) The skull was "basically shattered." They glued it together as best they could, but there were some gaps they could not reconstruct, either because the remaining pieces would not fit or because they were missing. (19 RT 4998.)

In some of the fractures there were dents or divots that did not go all the way through the skull. Dr. Bucholtz described these as glancing blows. Caught in some of those divots were little pieces of tissue and hair, as well as some bits of the white plastic bags that had covered the head. (19 RT 4999.) The white bags also had small holes, or little slit-like tears in them that were associated with the injuries inflicted. (19 RT 5007.) This established that the plastic bags were in place when the blows were struck. (19 RT 5000.)

Dr. Bucholtz could not determine exactly how many blows were inflicted, but she was able to determine the minimum number of blows required to inflict the injuries detected. This was done by examining the skull both before and after the tissue was removed. She discerned a minimum of 14 direct blows, and 17 glancing blows, for a minimum of 31 blows. (19 RT 4990.) While 31 was the minimum number of blows required to inflict the injuries observed, there was no way to know exactly how many blows were struck, or the maximum possible number of blows, because there could have been fractures on top of fractures. (19 RT 4998.)

Laceration "C" had a central tear that looked T-shaped. Surrounding that tear was a round or slightly oval discoloration. (19 RT 4991.) Dr. Bucholtz had the opportunity to look at a hammer and nail puller (Exhibits 74

and 75 [4])when she was examining the skull, so she was able to compare each instrument to each of the injuries. (19 RT 4992.) Dr. Bucholtz formed the opinion that the injuries she observed were consistent with those two instruments. (19 RT 5002.)

The internal examination of the body from the neck down showed nothing unusual. All of the organs were free of disease and there were no lacerations or evidence of bruising. In some cases, physical trauma may result from a sexual assault, but not always. Dr. Bucholtz found none in this case. Dr. Bucholtz also incised the wrist areas to see if there was any bruising, but did not find any. (19 RT 5008-5009.) Dr. Bucholtz did not observe any defensive wounds on the body. (19 RT 5016.)

Dr. Bucholtz determined the cause of death was blunt force trauma. (19 RT 5010.) The scalp has a lot of blood vessels. A living person with that many head injuries would bleed profusely. After death, the bleeding would decrease because the heart would stop beating. (19 RT 5011.)

Search Of Famalaro's House, July 14-26, 1994, Prescott, Arizona

John Joseph Famalaro was the owner and occupant of the house on Cochise Drive in Prescott, Arizona, and he was identified in court by Lieutenant Lt. Mascher. (18 RT 4669.) A search warrant for the house was obtained on July 14, 1994, and Famalaro's cluttered house was searched, in shifts, until July 26, 1994. The house had three bedrooms, but only one bedroom was being utilized for sleeping. All of the clothing in the bedroom was of the same size and was for a man. (18 RT 4670.) Lt. Mascher supervised the search and, at some point, the Costa Mesa Police also became involved. (18 RT 4671.) On

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4. The hammer and nail puller had been recovered by law enforcement during a search of Famalaro's house. (18 RT 4696.)

one side of Famalaro's backyard was his mother's house. The electrical cord to the freezer had been plugged into Famalaro's house. (18 RT 4706.)

Famalaro's house contained a lot of items, but it was all organized in boxes and stacks. It was an unusual search scene due to the volume of material inside. There were probably hundreds of thousands of pieces of paper which included receipts dating back to the 1970s. There were also a lot of magazines, but Lt. Mascher did not recall any individual, clipped-out articles in the house. (18 RT 4707-4708.) The house had lots of boxes that basically appeared to have not been unpacked. (18 RT 4737.)

Included in the items seized during the search were two large cardboard boxes and their contents. The two boxes, which were approximately two feet by two feet in size, were found next to each other on a shelf in the garage and were identified by investigators as boxes 212 and 213.[5] (18 RT 4672.) On the outside of both of the boxes were shipping labels addressed to Dragon Fly, 23192 Verdugo, No. D, Laguna Hills, CA, 92653. (18 RT 4677, 4685.) Both boxes also had the word "Christmas" marked on the outside with Magic Marker. (18 RT 4672, 4696.)

When Lt. Mascher opened box 212, there was a backpack on top of a big black garbage bag that looked like the garbage bags enshrouding the body in the freezer. Inside that bag were more boxes that contained a number of items, including a woman's jacket, a dress, a hammer, and some car keys. (18 RT 4712.) The hammer had blood on it (18 RT 4696), as did the jacket. (18 RT 4682.) The right shoulder strap of the dress had been torn off and was frayed in back. (18 RT 4673.) A piece of chewed gum was stuck to the back of the jacket's collar, and there was a pack of chewing gum in one of the

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5. Although photographs of the boxes were identified at trial as People's Exhibits 16 and 42 (18 RT 4672, 4685), the boxes themselves were identified as boxes 212 and 213 by witnesses.

pockets. (18 RT 4827.) The chewed gum was the same color as the gum in the pack. (18 RT 4835.) Another box found inside box 212 contained another large black garbage bag that held a black leather wallet with numerous credit cards, personal notes, a AAA card, a checkbook with Denise Huber's name, and a purse. (18 RT 4674-4675.) The wallet also contained a Yellow Taxi card with a phone number for the company. (18 RT 4680.)

Another box found inside box 212 had the words "Ameritone Paint" on top. Inside the Ameritone box was a smaller box that contained a makeup mirror/compact, a set of keys that included a Honda key, a pen, a little black lipstick pouch, and a pair of black, high-heeled pumps. (18 RT 4675-4676.) The backs of both of the heels on the shoes were severely scraped. (20 RT 5298.) The Ameritone Paint box had stains that appeared to be blood. There were also blood stains on the inside of one of the shoes, on the key ring, and on the wallet and checkbook. (18 RT 4678-4679.) Lt. Mascher observed some mold on the blood on the key ring. Lt. Mascher knew mold would grow on blood as it deteriorates. He vividly remembered that the box had a "pretty foul smell." He first noticed the smell when he opened the box, but the odor became much stronger as soon as he opened the large garbage bag. (18 RT 4713.)

Box 212 also contained a pair of stone-washed blue jeans with blood stains on them. The jeans had a 32" waist and 32" inseam- the same size as other men's stone-washed jeans found inside Famalaro's house. (18 RT 4681.) A Lake Wobegone sweatshirt found inside the same box was also covered in blood. (18 RT 4682-4683.) A pair of surgical gloves found in the box were inside out, as if someone had worn them and taken them off. (18 RT 4683-4684.) Some rags found inside box 212, as well as the broken down cardboard of the box itself, were stained with blood. The rags were marked "cotton," and a number of them were crumpled and "fused together" from apparent blood

soaking and drying. (18 RT 4684.) The rags appeared to be the left-over scraps from die cut fabrics. (18 RT 4687.)

Blood was visible on the inside of the flaps of box 213. Inside that box were more cloth rags with blood on them, an empty box for handcuffs, a roll of silver duct tape, a nail puller (also called a nail pry bar), and a white plastic garbage bag with yellow draw strings. Lt. Mascher recognized the white bag as being like the three white bags that had covered Denise's head. (18 RT 4685-4686.) There was dried blood on the nail puller. (18 RT 4696.) Inside the white plastic bag was a grey tarp that measured five feet by fifteen feet. There was a lot of dried blood on the tarp and the tarp was rolled up, with more rags inside. (18 RT 4690.) The roll of duct tape found in box 213 was the same type of tape that had been found on Denise's eyes and face. (18 RT 4688.)

In a nearby corner of the garage was another box containing a tarp with blood stains all over it. (18 RT 4691.) The box that tarp had been in appeared to have rotted away due to the blood on it. (18 RT 4694.) Rolled inside the tarp was another shirt, that also had blood on it. (18 RT 4693.) A couple of handcuff keys were found in a little brown coffee cup inside a desk drawer inside Famalaro's house. Lt. Mascher later discovered the keys unlocked the handcuffs that had been found around Denise's wrists. (18 RT 4694-4695.) Downstairs in the house were two stacks of newspapers, approximately 20 inches high. (18 RT 4722-4723.) On the top of one stack was an Orange County Register dated June 7, 1991, with the headline: "Newport Woman Still Missing, Officers Stymied, Family Offers $5,000." (18 RT 4701-4703.) He could not recall if all of the papers were from the Orange County Register, but he did notice that they were all California newspapers.[6] This was significant

6. Some Arizona newspapers were found in the garage. (18 RT 4746.)

at the time of their discovery because investigators were still trying to identify the murder victim. (18 RT 4723.) Lt. Mascher could not remember the dates of all of the newspapers, but the one with the story about Denise Huber's disappearance had been right on top. (18 RT 4724.)

On a closet shelf in a spare bedroom upstairs were two more Orange County Register newspapers. The headline on one of the newspapers read, "Hubers Refuse To Stop Hoping For Return Of Their Daughter." A headline on the other paper read, "Family Of Missing Woman Gets Solace From Faith And Friends." The newspapers were dated Friday, June 14, 1991, and Wednesday, July 3, 1991, respectively, and were found in a six or seven inch tall stack of newspapers from approximately the same dates. (18 RT 4700.) On the floor of that bedroom closet was a newspaper dated June 4, 1992, bearing the headline, "Painful Anniversary." That article had a photo of Denise Huber's parents, Dennis and Ione Huber, standing in the location where Denise's car had been found on Highway 73. In the background was a banner or billboard with a photo of Denise that said, "Have You Seen? Denise Huber - Call ...." (18 RT 4703-4704.)

A receipt for the chest freezer was also found inside Famalaro's house. The receipt indicated the freezer had been ordered from Montgomery Ward's on June 10, 1991, and had a scheduled delivery date of June 12, 1991.[7] (18 RT 4698-4699.) The key to the lock on the freezer was found inside the rental truck. (18 RT 4696.)

There were a lot of videotapes in the house, perhaps 50 or more. (18 RT 4708.) Most of the video-tapes were in a box in the downstairs den, but a few videos were on a shelf in a spare bedroom that was used as an office. (18 RT

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7. The parties later stipulated that the freezer in which Denise Huber's remains had been found was delivered to Famalaro on June 11, 1991, i.e., eight days after Denise disappeared. (29 RT 5210.)

4697-4698.) At the beginning of one of the video tapes found on the shelf in the office was a story about Denise Huber's disappearance that had aired in a television show called *Inside Edition*. (18 RT 4714.) The story about Denise Huber was just one segment of the show, which usually had three or four segments per episode, and was the only portion of *Inside Edition* that had been recorded. (20 RT 5247-5248.) Some other things had also been recorded on the video tape, including a basketball game and part of a movie. (20 RT 5245-5246.)

Search Of Famalaro's Warehouse, July Of 1994, Laguna Hills, California

According to a former girlfriend of Famalaro's, Nanci Lynn Rommel (née Gowan), Famalaro owned and operated a painting business in a warehouse on Verdugo Drive in Laguna Hills, California in 1991. Famalaro was also living in the warehouse at that time. The warehouse had a two-room office area and Famalaro used one of those rooms as his bedroom. He kept that room padlocked. (18 RT 4633-4635.)

On July 18, 1994, Laurie Crutchfield, a forensic scientist with the Orange County Crime Lab, participated in the forensic investigation of the inside of the warehouse space on Verdugo Drive. (18 RT 4752-4754.) Crutchfield observed indications of blood inside of the warehouse, so she sprayed Luminal over the area. She obtained a positive result for blood in the southwest corner of the warehouse when the area luminesced. (18 RT 4754.)

Crutchfield then performed a presumptive test for human blood (LMG). That test was positive. After removing some drywall, part of the wooden framing was removed, particularly the lower portion of the framing that made contact with the concrete floor. A portion of that wood framing was a deep maroon color. A presumptive test on the maroon-colored wood, and on what appeared to be blood on the concrete floor itself, were both positive for human

blood. (18 RT 4756-4757.) Crutchfield took the piece of wood with blood on it back to the Orange County Crime Lab for further testing. (18 RT 4758.)

Forensic Examination Of Evidence By The Orange County Crime Lab

In addition to processing the warehouse space in Laguna Hills, Crutchfield also collected samples from other items related to this case, including the nail puller and hammer that had been found inside the two boxes in Famalaro's garage. Crutchfield examined them and swabbed small areas on each with distilled water and cotton swabs. She did the same with a couple of the tarps, a blue shirt that had been inside one of the tarps, and one of the boxes. All of the swabs she collected were released to forensic scientist Mary Hong for further testing. (18 RT 4759-4760.)

Mary Hong's duties included examining evidence for biological fluids and conducting DNA analysis. Hong participated in examining the wooden board taken from the warehouse. She observed stains that looked like blood, so she scraped away the stain and put it into a small tube, then added some chemicals to break open the cell membranes to extract the DNA. Additional chemicals were added to clean up the proteins, essentially leaving pure DNA extract. (18 RT 4767-4768.) Hong provided some of the DNA she extracted to another forensic scientist in the lab, Lisa Thompson Arnell. (18 RT 4776.)

DNA is unique to every person - except identical twins. The Orange County Lab has done its own DNA testing since 1990 and uses the same procedures utilized by other labs. (18 RT 4773-4774.) One procedure was RFLP testing (Restriction Fragment Length Polymorphism), and the other procedure was PCR testing (Polymerase Chain Reaction), which was Hong's area of expertise. The RFLP and the PCR testing was done in different areas of the lab. (18 RT 4774.) PCR testing has the advantage of requiring much

smaller samples for testing. The Orange County lab was set up to test small quantities of biological material. (18 RT 4795-4796.)

Hong displayed a chart of the DNA profiles of Famalaro and Denise Huber to illustrate how they differed from each other. Hong used those results to compare against DNA found on various pieces of evidence. (18 RT 4778-4779.) The blood found on the wooden framing board taken from the warehouse could have come from Denise, but could not have come from Famalaro. Likewise, the blood on the nail puller, the Ameritone paint box, the Honda key, and the wallet, could have come from Denise, but not from Famalaro. Hong did not detect any DNA on the hammer. (18 RT 4779-4780.)

Similar results were obtained from blood found inside Denise's shoe, on her purse, on a roll of duct tape, on an empty white plastic bag, on a Girl Scout Cookie box, on the box that had contained the empty handcuff box and some cloth strips, on the cloth strips, and on a tarp. (18 RT 4787-4789.)

Most of the blood from the stains on the Levis could have come only from Denise, but a couple of the stains on the Levis contained a mixed sample that could have come from both Denise and Famalaro. (18 RT 4786.) That did not mean Famalaro's DNA came from his blood. (18 RT 4792-4793.) Hong could only say that Famalaro's DNA was present. She could not say if the DNA came from his blood, saliva, or something else. DNA might well be found on any piece of clothing worn by a person. (18 RT 4794.)

Hong performed PCR testing on samples obtained from the anal swabs. DNA was found, but it was mostly from Denise, although sperm visually detected by another forensic scientist in the lab, Lisa Arnell, obviously came from a male. The test results for the DNA of the donor of the spermatozoa were inconclusive.[8] (18 RT 4769-4770.) The reasons for such inconclusive

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8. Although Steven Horrocks and Denise had been dating each other for several months at the time of Denise's disappearance, Horrocks testified they

results could be because there were not enough sperm to successfully test for a type; that the DNA was too degraded to obtain a type; or that the process of separating the female DNA from the DNA in the spermatozoa was not complete - which would result in only detecting the victim's type. (18 RT 4770.)

In forensic testing, DNA samples were sometimes simply too degraded. When that happens, i.e., when the sample has been subjected to time or heat or bacteria, the DNA gets chopped up into smaller pieces that are too small to successfully test. Generally, DNA evidence from a crime scene can be very useful and may survive under the right conditions. A biological sample from a sidewalk, wall, or a vaginal swab, if dried and stored properly, may last a long time. (18 RT 4772.)

Lisa Arnell had been employed as a forensic scientist since August of 1988 and specialized in RFLP testing of DNA and the analysis of sexual assault evidence. (19 RT 4851-4852.) Arnell examined a rape kit containing collections from the victim's body, including vaginal, anal, and oral swabs. (19 RT 4863-4864.) No spermatozoa were detected in any of the oral or vaginal swabs. (19 RT 4877.) In preparation for examining and testing the anal swabs, Arnell cut off the cotton portion of the swab, extracted it with water, then put it into a centrifuge that quickly pellets any cellular material at the bottom. Arnell then put a portion of the pelleted material on microscopic slides and added a stain to them. (19 RT 4865.) The stain Arnell used was commonly called the Christmas Tree stain and was comprised of nuclear fast red (a reddish color) and the picro indigo carmine (a green color). (19 RT 4891.) Arnell covered the slides with additional pieces of glass called cover slips before she looked at the slides through a microscope. (19 RT 4865.) The views were

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had never engaged in vaginal or anal intercourse. (19 RT 5066-5067.) Likewise, Robert Calvert, the friend who escorted Denise to the concert on the night of her disappearance, testified he never had any sexual contact with Denise (17 RT 4543-4544.)

highly magnified and, in her field of vision, Arnell saw one spermatozoa on one of the slides, and one spermatozoa on another slide. She took color photographs of the magnified slides. (19 RT 4869-4870.)

Characteristic of spermatozoa are their tendency to stain a dark reddish color on one end of the cell, while the other end of the cell remains light in color. Arnell described this as differential staining. In her career as a forensic scientist, Arnell has seen such spermatozoa and differential staining "very many" times. (19 RT 4870-4871.) There were other cells that would take the red stain, but they would take the stain equally throughout the cell. Arnell was not aware of any other cells that stained differentially. Things such as pollen and yeast cells do not stain differentially. (19 RT 4916-4917.)

Arnell also saw some other things in the anal swabs that appeared to be spermatozoa as they had many of the characteristics described above, but they did not have complete cells. They seemed to have most of a cell, but "not to the point where [Arnell] felt comfortable going beyond just calling them apparent." That was her subjective call as a scientist and Arnell believed she was being conservative in that regard. (19 RT 4872-4873.) In her notes as in her testimony, Arnell called the two spermatozoa she identified "sperm," but called the others, including a cluster of three, "apparent spermatozoa." (19 RT 4873.) Photos of the apparent spermatozoa were also taken. For comparison purposes, a photograph of a microscopic slide of a fresh semen sample depicting spermatozoa (that had been obtained from a recent donor) was shown to the jury. (19 RT 4874-4875.) In that comparison photograph, some of the spermatozoa had tails, while others did not. Some of the spermatozoa also had a slightly irregular form. (19 RT 4876-4877.)[9]

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9. The photographs of the microscopic slides depicting the spermatozoa detected by Arnell were identified as People's Exhibits 95 and 96, and the photographs depicting the apparent spermatozoa were identified as People's Exhibits 97 and 98. The microscopic slide of the comparison semen sample

In a living person, spermatozoa may survive for up to six days in the vagina. As the rectal environment would be more hostile to spermatozoa due to the bacteria content, spermatozoa would tend to last less time. There was also the normal movement of waste material through the body to be considered. (19 RT 4878-4879.) In a deceased person, it was difficult to determine how long a spermatozoa could survive in the rectum. There were a number of factors to be considered in making any kind of an estimation. (19 RT 4879.) Bacteria in the rectum would eat away at the spermatozoa, and the temperature of the body would also be a factor. (19 RT 4880.)

Spermatozoa have an ovoid body and, if the sample is fresh, a tail can be seen making it look like a tadpole. The tails come off very commonly and a spermatozoa may still be identified as a spermatozoa without the tail. (19 RT 4871.) The protocol of the Orange County lab allowed the forensic scientists to "make a call" that something was a spermatozoa even if no tail was attached. Arnell was aware that the protocol of the F.B.I. lab in Washington, D.C., was different in that scientists working in that lab were not allowed to call something a sperm unless it had an attached tail. (19 RT 4892-4893.) Arnell knew of no other labs that required a tail to be present before something could be identified as a spermatozoa. (19 RT 4926.) One of the scientists who helped write the F.B.I.'s protocols, Dr. Samuel Baechtel, was of the opinion that such determinations could be made without attached tails. (19 RT 4894.) To Arnell's knowledge, Dr. Baechtel had held that opinion since at least 1990. (19 RT 4926-4927.) Moreover, Arnell testified she would have been "shocked" to have found a tail on a spermatozoa that had been stored the way the victim's body had been stored for all those years. (19 RT 4925.)

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depicting known spermatozoa was identified as People's Exhibit 99. (19 RT 4875.)

Arnell also conducted a P30 test to detect seminal fluid on part of the sample obtained from the anal swabs, but the test had negative results. (19 RT 4908.) Arnell did not assign much value to the P30 testing because it only tested for a protein, and proteins degrade much faster than cellular material. (19 RT 4919.) Arnell did not know exactly how old the sample was, so she had done the P30 testing just in case, even though she had not expected to obtain a positive result. (19 RT 4920.)

Hypothetically, drainage from vaginal intercourse could explain spermatozoa in the rectum. The vagina is a kinder environment for spermatozoa than the rectum, so there is a better chance of spermatozoa surviving in the vagina. (19 RT 4922-4923.) However, the results found in this case, particularly the lack of spermatozoa in the vaginal swabs, did not support the drainage theory advanced by the defense and did not change Arnell's opinion that the spermatozoa was originally deposited in the rectum. (19 RT 4921-4922.)

In the one case study Arnell had read about, spermatozoa had lasted 16 days in a dead body that had been stored in almost freezing temperatures. (19 RT 4935-4936.) The average daytime temperatures for those 16 days had been 48°F, and the average nighttime temperature had been 32.5°F. There was no way of knowing how much longer the spermatozoa could have lasted. (19 RT 4936.)

Edwin Jones, a criminalist with the Ventura County Sheriff's Department Laboratory, examined the slides taken from anal swabs in this case to look for the presence of spermatozoa. (19 RT 4943-4944.) Jones formed the opinion that human spermatozoa were present in the slides in which Arnell had identified two spermatozoa (Exhibits 95 & 96), as well as in the slides Arnell had only identified as "apparent spermatozoa" (Exhibits 97 & 98). (19 RT 4945-4946.)

Jones had conducted thousands of microscopic examinations for spermatozoa in his career. Jones was also familiar with other things that could look like human spermatozoa, including pollens and yeast. Jones had no problem differentiating the spermatozoa in these photos from pollens and yeast. (19 RT 4945-4946.) The red stain binds itself to nucleic acids, but Jones had never heard of the red stain binding itself to calcium. (19 RT 4949-4950.) The red stain would not stain pollen and it was easy to differentiate pollen from spermatozoa under a microscope because pollen usually had a decorative exoskeleton, while sperm were quite smooth. (19 RT 4952.) As for the defense suggestion that the items identified might have been yeast, Jones explained that yeast did not look like spermatozoa. Yeast may take on many different forms through their life cycles. One type of yeast, candidus, have a brief period in their life cycle in which they go through a budding process and have a "polar-type structure" that is similar to spermatozoa. However, the yeast are always in pairs during the budding process and never split apart. (19 RT 4953.) Jones has seen such yeast on other occasions. They were not present in the microscopic slides in this case. (19 RT 4953-4954.)

The protocol of the lab in Ventura County allowed a spermatozoa to be called a spermatozoa even without a tail, but Jones was aware that other labs used a different policy. (19 RT 4946-4947.) Jones pointed out that in Exhibit 99 (the photograph of the fresh semen sample used for comparison purposes), the F.B.I. lab would only call the spermatozoa with tails spermatozoa - even though the ones without tails were obviously spermatozoa as well. (19 RT 4960.) Jones was familiar with Dr. Sam Baechtel of the F.B.I. lab, and knew since 1990 that Baechtel had held the opinion that spermatozoa do not need tails to be identified as spermatozoa. (19 RT 4961.)

Jones testified that identifying spermatozoa without tails is a fairly common practice among criminalists. Jones said he had no problem identifying

any of the spermatozoa in this case. The absence of a positive result on the P30 test did not surprise him given the age and the manner in which the body was stored. (19 RT 4951-4952.) Looking at Exhibits 95, 96, 97, and 98, Jones saw one spermatozoa in No. 95, one in Exhibit 96, four in Exhibit 97, and one in Exhibit 98, for a total of seven spermatozoa between the four slides. Jones had no doubt that they were spermatozoa. (19 RT 4954-4955.)

Additional Prosecution Evidence Introduced At Trial In 1997

In addition to the testimony and evidence set forth above, enlarged Thomas Brothers guide maps were used to display the locations of Denise's abandoned Honda on Highway 73, Calvert's house in Huntington Beach, the home where Denise lived with her parents on Vista Grande in Newport Beach, and Famalaro's warehouse at 23192 Verdugo in Laguna Hills. (17 RT 4574.)[10]

Robert Calvert identified the jacket and dress found in Famalaro's garage as the jacket and dress Denise had worn to the concert on June 2, 1991. (17 RT 4545-4546.) The purse looked like the one Denise had carried, and the shoes looked like the shoes Denise had worn, but without the damage. Calvert also recognized Denise's Hawaii key chain. (17 RT 4547-4548.)

Ione Huber recognized Denise's Hawaii key chain, checkbook and checks, credit cards, wallet, and handwriting, as well as her dress and jacket.

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10. In his closing argument, the prosecutor used the map to show Denise was on her way home to Newport Beach from Huntington Beach when her car became disabled. (22 RT 5517-5518.) The prosecutor argued Denise would not have voluntarily entered Famalaro's vehicle because she was in a familiar area close to home, with telephones a two-minute walk away, and "had a wallet full of help" in the form of credit cards, a AAA card, and a list of telephone numbers including the number for Yellow Cab. (22 RT 5520.) He also argued that it was impossible for Denise to have voluntarily gone all the way to Laguna Hills with Famalaro, which, from the location of her abandoned car, was in a direction away from her home in Newport Beach. (22 RT 5521-5522.)

Some underwear found with the other clothing was similar to the kind of underwear Denise used to wear. (18 RT 4620-4621.) Ione Huber also recognized the Nine West shoes as belonging to Denise, but she had never seen the shoes in such a condition. Denise's shoes were not damaged and Denise would "absolutely not" have gone out in public in shoes with tearing on the back of the heels and missing a heel tip. (18 RT 4623-4624.)

During the years Tammy Brown and Denise had been close friends, they often went places together. (17 RT 4601.) Denise had been a very neat dresser and Brown recognized the pair of Nine West shoes found in Famalaro's garage as belonging to Denise, but the backs of the shoes were not scraped up like they were in court. Brown never saw Denise wear any shoes in that condition. (17 RT 4602-4603.)

Steve Parmentier owned and operated an apparel manufacturing business in an industrial warehouse building on Verdugo Street in Laguna Hills. In 1991, Parmentier utilized two of the four suites in the building, units C and D. Famalaro occupied unit B. (19 RT 5079-5080.) Parmentier knew Famalaro for about a year and spoke to him occasionally. He gave Famalaro some waste products from his manufacturing business, mostly scraps left over after garments had been cut out of the fabric. (19 RT 5080-5081.) Parmentier identified some rags as looking like the kind of rags he had given to Famalaro. He recognized the letters "GHA" on a tag attached to one of the pieces because it was part of the word "SHANGHAI," which was where the fabric was made. (19 RT 5081.) When he gave the rags to Famalaro, they were not decomposed like the rags depicted in the photographs. Parmentier also recognized the shipping label on the outside of boxes 212 and 213 as his address on Verdugo Drive in Laguna Hills. "Dragon Fly" was the name of his company and he could tell from the shipping label that it had been mailed to him from his supplier in San Francisco. (19 RT 5082-5083.)

DEFENSE CASE

The defense presented the testimony of Costa Mesa Police Officers to show there were no signs of a struggle in Denise's car or around where it was found. (20 RT 5131-5136, 5182-5184.) A newspaper carrier who had been on her way to pick up newspapers at 2:25 on the morning of June 3, 1991, testified she had observed a blue Honda with flashing emergency lights parked on the shoulder of the freeway. She had not seen anyone standing near the vehicle or walking on the roadway. (20 RT 5146-5149.)

A man who had hired Famalaro to paint his house on June 1, 1991, testified that he saw Famalaro within hours of Denise's disappearance on June 3, 1991, and observed no change in his demeanor. (20 RT 5151-5154, 5158-5163.) He had not been able to reach Famalaro from June 4th through the 6th. When he next saw Famalaro on June 7th, Famalaro looked haggard. Famalaro told him he had been sick in bed with pneumonia. (20 RT 5158-5160.) Records indicated Famalaro had sought medical attention for his illness on June 5th and June 9th, 1991. (20 RT 5250.)

Famalaro's white truck had been processed by a forensic scientist with the Orange County Sheriff's Department and no indication of blood was found.[11] (20 RT 5194-5197.) The defense had an investigator photograph the location where Denise's car had been found, as well as a nearby apartment complex, and freeway overpass at Bristol Street. (20 RT 5211-5212.) The investigator testified it was 64 feet from the elevated freeway to the bottom of the embankment leading down to street level, and that while the slope was steep, it was "manageable." (20 RT 5218-5219.) The investigator observed a portion of fencing along the sidewalk on Bear Street that had been patched and speculated there may have been an opening in that portion of the fence at one

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11. Famalaro had a second work vehicle and he frequently rented other cars, like sports or luxury cars, for various occasions. (18 RT 4637-4638.)

time. The patched portion of the fence was 334 feet down the freeway from where Denise's Honda had been found. The investigator did not know if that portion of the fence was visible from the location of the car at night. (20 RT 5221, 5240, 5243.)

Another defense investigator testified to locating a pair of shoes similar to the Nine West shoes worn by Denise the night of her disappearance. (21 RT 5381-5382; Defense Ex. JJ.) The investigator observed the wife of one of Famalaro's defense attorneys as she wore the shoes as she walked down and back up the freeway embankment. (21 RT 5385-5387.) The investigator conceded the walk on the embankment had caused less damage to the test shoes than the damage found on the backs of the shoes worn by Denise on the night she disappeared. The investigator also acknowledged she did not know what the embankment looked like when Denise disappeared in 1991. (21 RT 5396.)

Based upon Denise's drinking pattern the night she disappeared, the parties stipulated Denise's blood alcohol level would have been between .08% and .11% at 2:15 a.m., and that a person was considered impaired at .08%. Since testing was done on bodily fluids found outside of her body, the toxicology finding that Denise had a blood alcohol level of .07% was unreliable evidence of her exact blood alcohol level. (20 RT 5208; 6 CT 1889.)

Pathologist Charles A. Sims testified he could not conclusively identify any of the items in the magnified slides of matter recovered from the anal swabbing from Denise's body as actually being spermatozoa. (20 RT 5258.) Sims had never testified as an expert witness in a criminal case before testifying for Famalaro. (20 RT 5264.) Sims was not a forensic pathologist, an area of pathology that specializes in this type of analysis, and conceded such determinations should normally be left to forensic pathologists. (20 RT 5266.)

William Joe Collier was a criminalist and was the former director of the City of Phoenix Crime Lab in Phoenix, Arizona. (21 RT 5312.) Collier viewed

the slides prepared by Arnell. (21 RT 5316.) Collier testified he could not conclusively identify anything on the slides as spermatozoa. (21 RT 5319.) During the time Collier had been the director of the City of Phoenix lab, the lab was not accredited by the American Crime Lab Director's Association which mandates that they perform tests in a certain manner. (21 RT 5340.) He had not been proficiency tested on the identification of spermatozoa in more than 20 years. (21 RT 5338.)

PENALTY PHASE

PEOPLE'S CASE

Penal Code Section 190.3, Factor (b) Evidence

Cheryl West met and became friends with Famalaro in 1984, and they began dating each other in the spring of 1987. (23 RT 5857.) That year, they took a trip to New York City together over the 4th of July to celebrate West's birthday. While there, they stayed in a hotel facing Time Square. (23 RT 5848-5849.) They had seen a couple of plays while they were there, and they had plans to attend another play on Sunday afternoon. 923 RT 5849-5850.) When they awoke on Sunday morning, Famalaro seemed very happy and began tickling and roughhousing with West. Famalaro was laughing and West's nightgown began slipping down, then the tickling grew more vigorous. When West tried to pull away and get out of the bed, things suddenly got out of hand and the next thing West knew was that she was handcuffed, by both wrists, to a bar across the window. (23 5850-5851.) At first West laughed nervously because she hoped it was a joke, but then Famalaro ripped off her nightgown, opened the curtains on the window, and laughed as he walked out of the hotel room. (23 RT 5832-5853.)

While she was alone, naked, and handcuffed to the hotel window, West repeatedly tried to get her hands out of the cuffs, but she was unable to do so. Both of her wrists wound up covered with scabs from her struggle. She also kicked the wall in a vain attempt to get someone's attention. (23 RT 5856.) When Famalaro returned to the hotel room several hours later, he was still laughing. After he released her hands from the cuffs, West grabbed a sheet from the bed to cover herself, then curled into a fetal position and was unable to speak. (23 RT 5853-5854.) Famalaro attempted to become amorous with her by kissing her neck and fondling her, but West did not respond. After a long while, Famalaro finally seemed to realize how upset she was and tried to calm her down. West quickly responded to his apparent efforts to console her because she instinctively felt that was the best way for her to play along with the situation. The only thing she could think of was getting back to California. After they returned to California, West told Famalaro she did not want to see or speak to him again. (23 RT 5854-5855.)[12]

In March or April of 1989, Nanci Lynn Rommel had been dating Famalaro for about a year when she stopped by the house where he lived in Lake Forest. (23 RT 5906.) Some of his workers were in his garage, so she and Famalaro went upstairs to his bedroom for a few minutes to talk about something. While they were in his bedroom, they kissed a couple of times, but Rommel told him she was in a hurry and had to leave. Famalaro suddenly pushed her down onto his bed and caused Rommel to hit her head, back and

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12. West did not see Famalaro again until August of 1991, when she ran into him while she was taking a walk. At that time, they slowly renewed their dating relationship. (23 RT 5870-5871.) When Famalaro moved the last of his things to Arizona in January of 1994, West, her youngest son, and some of her son's friends helped Famalaro load a Ryder rental truck with things he had in a storage facility in San Clemente. West saw a locker type of freezer inside Famalaro's storage unit and remembered climbing on top of the freezer to reach something above it on a shelf. (23 RT 5882-5883.)

shoulder on the bookcase behind the bed. (23 RT 5906-5907.) Rommel thought he was just playing at first, but then he got on top of her with the full weight of his body and a struggle began. (23 RT 5908.)

Rommel was wearing a pair of shorts, and Famalaro was trying to pry her legs apart with one of his legs. Famalaro managed to unbutton and unzip her shorts, and he sat on top of her chest and pinned her arms down with his knees. (23 RT 5908-5909.) Somehow, Famalaro crossed her hands above her head and secured her wrists with a pair of handcuffs he normally kept hanging on the bedpost. Once her hands were cuffed, Famalaro pulled her shorts down, then used his foot to push them all the way off. Rommel was very frightened and saw a look in his eyes she had never seen before. He was looking at her with an intense stare. (23 RT 5910.) At that point, Rommel began to cry. She told him to go ahead and do it, but that it would be considered date rape when she reported it to the police. Famalaro's demeanor immediately changed, and he got off of her and re-fastened his pants. As he left the room he yelled at her, called her a bitch, and said she had brought it on herself. Rommel put her clothes back on and left. (23 RT 5911-5912.)

The struggle with Famalaro had lasted ten to fifteen minutes. (23 RT 5912.) Afterwards, Rommel had red marks on both of her wrists that later developed scabs. She showed her injuries to her roommate at the time, Veronica Lopez. (23 RT 5914.) Lopez testified that the insides of Rommel's wrists looked like they had been skinned and were red and raw. Later on, scabs developed. (23 RT 5928-5929.)

After that incident in 1989, Rommel did not see Famalaro for three or four months, but they eventually got back together. Rommel said Famalaro was "a very good speaker." He told Rommel he had not expected her to take it the way she had, and that she "just obviously didn't know mature sex games." (23 RT 5912-5913.)

Rommel continued to see Famalaro off and on, and they even became engaged in early 1991. (23 RT 5919-5920.) However, she called off their engagement in May or June of 1991. (23 RT 5920.) Rommel saw Famalaro sometime around his June 10th birthday in 1991 to give him a card.[13] While she did not remember exactly what date it was that she saw him, his demeanor was "[j]ust the same as normal." (23 RT 5913.)

Victim Impact Evidence

Ione Huber testified she had initially been frantic when Denise failed to come home, then, after Denise's car was found, she felt like she had been kicked in the stomach. She was in shock and felt helpless, and could not eat or sleep for several days. Her world turned upside down. She did not know what had happened to Denise, if she was alive, if she was being held somewhere, or if she was being tortured. As time went by, Mrs. Huber and her husband began sending fliers out to lots of businesses and newspapers across the country, and did a lot of television interviews. About four months later, Mrs. Huber returned to work, but only on a part time basis. (23 RT 5928-5929.)

Denise's birthday was the same week as Thanksgiving, and it was very painful for them to not have her with them. When Christmas arrived, they could not put up a tree or buy any presents, and they did not put up a Christmas tree for the next three years. Denise's parents left her bedroom untouched for three years. (23 RT 5929.)

During the three years Denise was missing, several weddings they attended also brought pain because Mrs. Huber would think about Denise. When they found out Denise had died, so many of her dreams for Denise died as well. In a letter Denise had written to herself when she had graduated from high school, Denise had described some of her own dreams about having a

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13. Famalaro was born on June 10, 1957. (6 CT 1251-1.)

career, and about getting married and having a family. Mrs. Huber had many memories of things she and Denise used to do together like going out to lunch, going to the beach or the pool, and cooking together, but they could not do those things anymore. (23 RT 5930-5931.)

Mrs. Huber underwent several surgeries, including cancer surgery, and she believed the stress from Denise's disappearance and murder contributed to her ill health. Their lives were never the same. Mrs. Huber displayed a photograph of "the real Denise," with her smile and sense of humor. Denise had been sensitive, caring, and compassionate. Mrs. Huber missed everything about Denise and felt she could not adequately explain it all. (23 RT 5931-5932.)

In trying to describe what it was like after his daughter disappeared, Dennis Huber said his world had been totally turned upside down. The daughter he loved so much was not there, and they did not know where she was for three years. He felt like he had been kicked in the stomach. He could not eat or think of anything except Denise. (23 RT 5932-5933.) Things got worse every time a body or human bones were found. He remembered a weekend trip they had taken to Palm Springs in the fall of the year Denise had disappeared. They had worked so hard trying to find Denise that someone had encouraged them to just relax and get away from it for a little while. However, as soon as they got to Palm Springs, they heard a body had been found in the desert. "Immediately it was like that same kick in the gut." They turned around and drove back home because they thought it would be better for them to be there. Mr. Huber felt like he could not breathe that weekend because he had been convinced that it was Denise. They did not learn it was not Denise until the following Monday. (23 RT 5933-5934.)

Mr. Huber also had a lot of health problems he attributed to the stress and his doctor described him as a walking time bomb. He was supposed to

open his own business on the very day Denise disappeared, but he never did because, with Denise missing, he could not think about business. He simply could not describe what the three years of "not knowing" were like. (23 RT 5934.)

Mr. Huber remembered coaching Denise in softball. When Denise was a junior in high school, they began having dates every Friday morning to sit down together for breakfast, just the two of them, to talk about things and spend quality time together. Their Friday breakfasts went on for years. (23 RT 5935-5936.) They had shared a special bond. Denise had the ability to cheer him up. She was happy, and her smile and her "Hi, Dad," made even bad days better. A day or two before she disappeared, Denise left a note on his computer screen at home that said, "Hi, Dad. I love you. Have a great day. Love, Denise." She had also signed it with a happy face, like she used to do. Mr. Huber said he would not take a million dollars for that little piece of paper. He will cherish it always. (23 RT 5936.)

Mr. Huber said he felt like there was a hole inside of him, and he did not think that hole would ever get filled up. He had loved Denise so much that her friends had teasingly called her "Daddy's little girl." After her body was found, he knew "Daddy's little girl" was never coming home again. They buried Denise in South Dakota and her headstone was inscribed with the words "You will always be loved." (23 RT 5935-5936; 27 RT 6641.)

DEFENSE CASE

Famalaro's mother, Ann Famalaro, testified at length.[14] (24 RT 5984-6101.) When Famalaro was about a year old, the family moved to Santa Ana from New York because her husband was planning to set up a manufacturing plant in Garden Grove. (24 RT 5987-5988.) Ann was a stay-at-home mother. (24 RT 5990.) While Famalaro did not have any health problems after he was born, he was rather hyper as a small child, which was different from the way his siblings had been. (24 RT 5989.) He attended St. Joseph's elementary school until he was expelled in the fourth or fifth grade. Ann said she never knew what he had done to merit expulsion. (24 RT 5991-5992.) After that, Famalaro attended a private school in Anaheim.[15] (24 RT 5996.)

Ann testified that while the children were growing up, she and her husband often took all three of their children and their closest friends to places like Disneyland, Knotts Berry Farm, or to the movies. There were not a lot of other children on their street, but she particularly remembered two girls up the street and a boy named L.J. who was friends with Famalaro and his older

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14. As part of their strategy, defense counsel intentionally failed to prepare her for her penalty phase testimony. (23 RT 5802-5803.) During an in camera hearing, defense counsel asked the trial court to exclude news media from the courtroom during their opening statement in the penalty phase because they did not want Ann Famalaro to learn what they had to say about her out of fear that she would refuse to testify. (23 RT 5796, 5798.) Counsel described Ann Famalaro as "a sick human being who ran the family, a mentally ill human being who could disguise it very well, who warped her sons so badly that one of them became a sex offender; another one of them became a murderer and sex offender," and who had extreme political, moral and religious beliefs. (23 RT 5797.) The trial court denied the request to exclude the media. (23 RT 5806.)

15. Records from St. Joseph's school indicated Famalaro had been withdrawn from the school in June of 1967 due to the wishes of his parents. (26 RT 6531.)

brother, Warren. Ann referred to all of the children as "our little pack."[16] (24 RT 5990-5991.) Ann did not remember Famalaro having any problems with his schoolwork. She had read to all of her children and Famalaro had done just as well in reading as his brother and sister. The most noticeable difference between the children was that Famalaro was sometimes "kind of moody" and sulked. (24 RT 5992-5993.)

Ann's mother lived with the family and would sometimes override Ann's decisions about the children. The grandmother was particularly close to Famalaro, and Ann thought it was because Famalaro was the baby in the family. (24 RT 5994.) The family was Catholic and the children all attended Catholic schools. They also attended church every Sunday, and every day during Lent.[17]

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16. Ann Famalaro's testimony on several points contrasted with that of other witnesses. For example, Sharon Murphy and her family lived next door to the Famalaros in Santa Ana from 1964 until approximately 1980, when Famalaro's parents moved away. (24 RT 5942, 5950.) Ann Famalaro had sometimes sprayed Murphy's children with water while she was watering her yard, and Murphy never saw children playing at the Famalaro residence. (24 RT 5948-5949.) Famalaro never played with Murphy's son, even though they went to school together. (24 RT 5956.) Her son, Daniel Murphy, confirmed that he and Famalaro never played together. (24 RT 6102.)

Jane Dresser attended St. Joseph's with Famalaro and lived four houses away from his as they were growing up, but she did not know him very well. Famalaro did not play with the other kids in the neighborhood and he seemed to be a loner. (24 RT 5959-5960.)

Alice Stauffer and her family also lived near the Famalaros in Santa Ana. (24 RT 5970.) Stauffer said the neighborhood children never played at the Famalaro house and she did not remember ever seeing Famalaro's parents at school functions. (23 RT 5975-5976.)

Roger Harvey attended elementary school with Famalaro and said Famalaro was quiet and kept to himself. (24 RT 5979.) He did recall some kids calling him "Femalaro" because he was more meek than the other children. (23 RT 5982.)

17. Another witness called by the defense, Sharon Diaz, attended St. Joseph's School with Famalaro, but was only casually acquainted with him. (24

On Fridays, after the children had three hours of church, Ann would take them for a treat at Buffum's to reward and encourage them. (24 RT 5995-5996.)

When Ann was in her 30s, she started becoming very active politically. She said she got into politics because of religion when she saw what she perceived as a strong assault against Christianity. Ann wanted to "save the world for all these people and for [her] kids." She realized crime was a terrible problem and she supported Brad Gates for sheriff and Michael Capizzi [for District Attorney]. (25 RT 5998-5999.) She found it particularly ironic when the news of her oldest son's arrest for child molestation was on the same front page of a newspaper as her announcement that she was a candidate for a seat on the Santa Ana City Council. Ann believed pornography was contaminating society and leading to violence, so she had organized pickets against the Mitchell Brothers' theater in Honer Plaza. (24 RT 6000.) Despite her efforts, pornography got into her own family, so it was like she had been hit with her "own bullet." (24 RT 6011.)

Ann was asked about the time period when Warren was attending the chiropractic college in Iowa. Ann said he was "free loving" there and that she had tried to put a stop to it. (24 RT 6038.) By "free loving"she meant "not getting married and doing the things you do when you're married." When she was asked what she had done when she "found out that Warren was free loving with some woman in a motel," Ann responded that she went to the motel and walked into the room, and "there they were." She said she took a clock and banged it down, as if to make time stand still. Although she never made any

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RT 5964.) Diaz sometimes saw the Famalaro family at church and said they always appeared to be very focused in their prayers during mass. (24 RT 5966.)

threats, the police were called. Ann said they at least had "enough conscience to tell the police [she] didn't do anything." (24 RT 6057-6058.)[18]

Famalaro had lived at home until he started attending St. Michael's boarding school when he was 13 or 14 years old. He was home on the weekends and Ann believed Famalaro did very well at that school. (24 RT 6018.) She thought it had been good that he was out of the house because she was having a lot of conflicts with Warren at that time and Famalaro was often caught in the middle. (24 RT 6019.) When Famalaro graduated from St.

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18. To impeach Ann's testimony on this point, Warren's former fiancée, Mary Martin, was called to the stand. Martin and Warren began dating when they were attending a chiropractic school in Davenport, Iowa. They became engaged, but Martin called off the engagement after Warren returned to California in 1974. (24 RT 6206.)

In early 1975, after Warren sent her flowers and cards, Martin visited California to see if they could get back together and Warren arranged for her to stay at a motel. (24 RT 6207.) One night, after going out to dinner with Ron and Jenny Berman (Warren's business partner and his wife), Warren took Martin back to her room. About half an hour after Warren left, there was a knock on the door and a woman said, "Quick, quick, let me in, someone is after me. It is Jenny." (24 RT 6208.) Although Martin was not convinced that it was Jenny Berman, she opened the door a crack. Ann Famalaro "banged the door in"and began making explicit comments about what she believed Martin and Warren had been doing in the room. The more Ann spoke, the more agitated she became. Ann slapped her across the face and told Martin she was not going to have her son and that she was going to die that night. Ann also started talking about religion and the Virgin Mary. (24 RT 6209-6210.) At one point, Ann lunged at Martin and began choking her. Martin managed to push Ann off of her, then ran out the door and down the stairs to the motel manager. When Martin told him to call the police because someone was trying to kill her, the man said, "'No, no, . . . Your mother is here, and she wanted to know what room you were in. Your mother was here to visit you.'" (24 RT 6211.) Martin told the police she wanted to press charges. However, a week later, Warren talked her into dropping the charges because he said it would drag his family down. (24 RT 6212-6213.)

Michael's, Ann borrowed some money and took him to Europe as a graduation present. She said she loved Famalaro "with [her] whole heart." (24 RT 6027.)

Ann had hoped Famalaro would meet a nice Catholic girl. When Famalaro met a nice Catholic girl named Ruth, he became obsessed with her and wanted to marry her. (24 RT 6041.) For two or three years, Ruth would break up with Famalaro, then they would get back together. (24 RT 6042.) Ann only learned Ruth was pregnant when Famalaro asked his parents and his grandmother to help him get custody of the baby. They went to court with him and Ann said she would never forget seeing Famalaro "sobbing on the stand and begging for the baby. Begging." (24 RT 6046-6047.) The court ruled against Famalaro and Ann believed, "this is the story that changed his life." They never saw the child, who was apparently put up for adoption. (24 RT 6048.)

Ann and her husband and mother eventually moved to a house in the Prescott Country Club in Arizona. Ann said she was tired of trying to save the world and wanted to get away from the embarrassment Warren had caused the family. (24 RT 6054.) After Ann's mother died in Arizona, Marion and her family attended her funeral on Easter Sunday in 1988. That was when Marion and her husband decided to move their family to Arizona as well. (24 RT 6058-6059.) They moved into the house Ann and her husband had been living in, and Ann and her husband moved into another house they owned next door. When Marion and her husband later split up, Marion's husband remained in the house. Famalaro later moved into the house with Marion's ex-husband, and her ex-husband eventually moved out. (24 RT 6064-6065.)

Ann estimated Famalaro had lived in the house for about two years before he was arrested. (24 RT 6067.) During that time, Famalaro was working too hard and Ann said he looked "like the picture of death." Nevertheless, whenever his father was ill, Famalaro found the time to visit him

in the hospital every day. (24 RT 6068-6069.) At some point, a Ryder rental truck appeared.[19] Ann did not think much of the truck at first, but after it had been there for some time, she and her husband became concerned that the rental fees were going to cost Famalaro a lot of money. Her husband, who Ann described as being more subtle than she, suggested that Famalaro ought to try to start the motor, but the hint seemed lost on Famalaro. Ann even told Famalaro she had seen some people looking at the truck, but still nothing was done. (24 RT 6070.) One day, after visiting her husband during one of his hospitalizations, she was with Famalaro when suddenly "every sheriff's car in the county" appeared and Famalaro was taken away from her. (24 RT 6068.)

Marion Thobe, Famalaro's sister, explained that she was three years older than Famalaro, and their brother, Warren Famalaro, was 18 months older than Marion. (24 RT 6110-6111.) Sometime shortly after Famalaro was born in New York, the family moved to Santa Ana, California. Their mother was mostly bed-ridden for about a year after Famalaro was born and their grandmother, who was living with them at the time, helped out with the family. (24 RT 6111-6112.) Marion felt there was not much of a bond between Famalaro and their mother when he was young, but he did receive a lot of nurturing from Marion and their grandmother. (24 RT 6112-6113.) Famalaro was also weak and sickly as a boy, and Marion tended to protect him at home and at school. (24 RT 6113-6114.) Marion recalled that as they were growing up, their mother always gave Warren a lot of attention because of his outgoing personality and numerous school activities. (24 RT 6114-6115.) While their

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19. The Ryder rental truck found at Famalaro's Arizona residence had been rented for one day in Orange County in January of 1994, but was never returned. (26 RT 6529.)

father, who was still alive at the time of trial,[20] was a good man, their mother had been "the dominate force" in the family. (24 RT 6117.) The children often heard their mother verbally abuse their father, and he seemed to tolerate things to keep peace in the family. Marion quickly learned to follow his lead. Marion recalled one occasion when she and Warren asked their father why he put up with their mother's behavior. He told them that was the way it was done in Catholic, Italian families. (24 RT 6117-6118.)

Their mother also saved all sort of things, including newspapers and magazines. Their garage was filled with boxes they had moved from New York 20 years earlier, but had never unpacked. (24 RT 6119-6120.) Their mother also went through the trash to see what was being thrown away. The children never invited friends over to play because they were embarrassed by all of the piles of laundry and other things in the house. (24 RT 6120-6121.)

Marion described her mother's temperament while they were growing up as "peaks and valleys." When their mother was "up," they would have a wonderful day at Disneyland, for example, and everyone was happy. (24 RT 6123.) On days their mother was in a "valley," she had a very short fuse. If she was angry with any of the children, there would either be an outburst or she would give them the "cold shoulder" for days on end. (24 RT 6124.) Their mother sometimes spanked the boys with a belt. (24 RT 6125.) Overall, Marion described their mother as being controlling in every aspect of their lives, but particularly when it came to dating. Although the children attended Catholic schools, and the family went to church every Sunday, Marion believed their mother was not really a religious person and that she only used religion to

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20. At the time of trial, Famalaro's father, Angelo Famalaro, was 80-years-old and suffered from Parkinson's Disease. He was living in a nursing home in Arizona. (24 RT 6191.)

justify her behavior. Their mother always told the children they would go to Hell if they did anything wrong. (24 RT 6129-6130.)

Their mother also had extremely conservative political views. She was active in political campaigns and once ran for a place on the city council. At one point, their mother was concerned that the Russians were coming and said they were going to sell their house and move into the hills. Marion said their mother hoarded food and silver to use to survive in case this country was ever bombed. (24 RT 6130-6131.)

According to Marion, Warren had occasionally picked on Famalaro as they were growing up. When Marion was about 10 or twelve years old, Warren tried to sexually fondle her several times. Because Marion was bigger than Warren at the time, she was able to make him stop. (24 RT 6147-6148.) Their mother never talked to the children about sex. She recalled their mother waiting outside Famalaro and Warren's rooms after they went to bed, then suddenly bursting in on them. Marion did not understand it at the time, but she later concluded their mother was trying to catch them masturbating. When Warren started dating girls, their mother became obsessed about it and started following him and listening in on his telephone conversations. (24 RT 6132-6233.)

Marion recalled that when Famalaro was in grammar school, he could not sit still and got into a lot of trouble. He always seemed either hyperactive or down and depressed. When he was hyper, he would do things that got him into trouble and their mother would punish him by sending him to his room. (24 RT 6138-6139.) When he was down, their mother did not do anything about it. (24 RT 6140.) Famalaro never got any kind of professional help for his behavior, which Marion later concluded was probably the result of Attention Deficit Disorder. Like their mother, Famalaro had a facial twitch that would get worse when he was under stress. (24 RT 6141.) He had a compulsion about

things being even, i.e., if someone touched one hand, he wanted them to touch the other hand as well, and he tended to accumulate a lot of papers and magazines in his room. (24 RT 6142.)

When Marion was 17-years-old, she moved to Iowa to attend college. While she was there, she got married and started a family. (24 RT 6149.) Marion and her new family moved to California in 1980. From 1980 through 1988, Famalaro frequently went to their house for dinner and always spent holidays with them. (24 RT 6151.) He was very close to Marion's two daughters and spent lots of time with them. Famalaro was generous with his nieces and paid for expensive things like horseback riding and trips to Sea World. Famalaro was also generous with his parents. He bought his father a Cadillac because his father had always wanted one, and one year he took the whole family to the Ritz-Carlton for Christmas. (24 RT 6153-6154.)

In 1988, Marion and her family left California and moved next door to her parents in Prescott, Arizona. (24 RT 6155.) Marion kept in touch with Famalaro by telephone and they spoke to each other at least once every week. (24 RT 6156.) Marion recalled one telephone conversation around June of 1991 that particularly disturbed her. Famalaro was crying and said he was upset about something that had happened many years earlier. (24 6156-6157.)

In June of 1990, Marion and her husband separated and she moved out of the house. When Famalaro moved to Arizona, he moved into the house with Marion's ex-husband, Duane. (24 RT 6158.) After Duane moved out, Falamaro was in the process of buying the house, but that sale was apparently never completed because the house was ultimately sold to someone else. (24 RT 6174.)

On cross-examination, Marion acknowledged Famalaro had been active in Little League for many years and had attended karate classes. (24 RT 6169.) As he grew older, Famalaro became increasingly more social with others,

started getting better grades in school, and had several girlfriends over the years. (24 RT 6167-6168.)

Warren Famalaro testified he had attended St. Joseph's Catholic School and Washington School in Santa Ana, then Santa Ana College and the Palmer College of Chiropractic in Iowa. He worked as a chiropractor until 1980 when he was arrested for sexually molesting a 10-year-old girl and a 10-year-old boy, and having unlawful sexual intercourse with a 17-year-old girl. After he was convicted, he was committed to Patton State Hospital as a mentally disorder sex offender. (25 RT 6243-6244.)

Warren said his relationship with his father was very close and his father was a kind and loving man. While his father stood by the children as best he could, there had been a lot of pressure on his father to do whatever his mother wanted him to do. (25 RT 6244-6245.) As for his mother, Warren said he mostly felt sorry for her. After years of counseling (which his wife encouraged him to do after his 1980 convictions (25 RT 6316)), Warren understood more about the dynamics of his family. He believed his mother's intentions had been good and that she tried to do the best she could, but she "just did not have the skills or capacity to pull it off." (25 RT 6245.) Warren said he had no contact with either of his parents after they moved away without leaving him their new address or telephone number. (25 RT 6245.) Between 1990 and 1994, he had no idea where Famalaro was and the only relatives Warren had any contact with at all were Marion and her daughters. (25 RT 6286.)

Warren's description of his family and household as he was growing up was somewhat similar to Marion's portrayal. Their mother was very conservative and overly controlling. (25 RT 6247.) The children never invited friends over because they were embarrassed about the stacks of things all over the house. (25 RT 6248-6249.) According to Warren, he and Marion were always trying to protect Famalaro because he was frail and other kids used to

pick on him. (25 RT 6266.) While he might have occasionally teased Famalaro while they were growing up, he never hit him. Warren said he had tried to pave the way for both Famalaro and Marion by being the one to stand up to their demanding mother, but he believed neither of them ever realized what he had tried to do. (25 RT 6265.)

Some aspects of Warren's testimony were contrary to the portrait painted by Marion. Warren had thought their mother was the best mother in the world until he reached puberty. Their mother made arrangements for swimming, dance, and piano lessons, Little League, little theater, and different coaching and tutoring. (25 RT 6293.) She always drove them to school and picked them up, so they never had to walk. Warren said his parents never physically beat the children. His mother once wanted Warren to be beaten, but it was not done. (25 RT 6294.)

Warren acknowledged trying to fondle Marion several times when he was in the seventh grade. (25 RT 6299-6300.) He never tried to fondle or molest Famalaro. (25 RT 6301.) When they were children, they were all very shy about sex and it was never discussed. In the mid-to-late 1980s, Warren started to see a change in Famalaro in that he started telling dirty jokes and bought sexual books and sexual gag gifts. Famalaro became "very open about sexual comfort." (25 RT 6282.)

Marie Ebiner testified she met Famalaro at an Orange County Catholic singles dance in 1986. (25 RT 6341.) They began going out together, but the relationship never became romantic. (25 RT 6343.) Ebiner accompanied Famalaro to Palm Springs to visit his sister and her family, and Famalaro attended the wedding of Ebiner's brother. (25 RT 6345.) Ebiner had told her family Famalaro was a little different, but that he was a nice person. (25 RT 6350.) When they first started going out, Famalaro sent her an Easter card with a prayer on it and he signed the card "J.M.J.," which stood for Jesus, Mary, and

Joseph. (25 RT 6354.) In that card and others, Famalaro praised Ebiner for her high moral values and for being "pure and wholesome." (25 RT 6354-6355.)

Ebiner visited Famalaro's apartment in Irvine several times and was surprised to see books about sex on Famalaro's bookcase because she thought his faith was important to him and that he was leading a chaste life. (25 RT 6357.) Ebiner stopped seeing Famalaro after three or four months because she did not want to lead him on by continuing to go out with him. He respected her wishes. (25 RT 6352, 6359.) Ebiner had been working as an adoption social worker at the Children's Home Society at the time. (25 RT 6341.) Famalaro never mentioned anyone named Ruth or told her that he had lost a baby through adoption. (25 RT 6357-6358.)

James Nesmith met Famalaro around 1990. (25 RT 6363.) He was an electrical contractor and he and Famalaro referred clients to each other and sometimes did work for each other on a barter basis. Nesmith did not get to know Famalaro very well and he thought Famalaro was always nervous and uncomfortable with other people. (25 RT 6364-6365.) Nesmith installed outside security floodlights on Famalaro's house on Perth Street before Famalaro moved into the warehouse on Verdugo. (25 RT 6365.) Famalaro told Nesmith and his workers that there was no reason for them to go into certain rooms and he seemed to be concerned about keeping people away from his things. (25 RT 6367-6368.) The interior of the house was cluttered and had boxes stacked on top of each other, but the inside and outside of the house were otherwise kept clean. (25 RT 6369.) Nesmith thought Famalaro's business was going downhill in 1991, and it seemed to get worse after he moved into the warehouse. (25 RT 6373-6374.)

Nanci Rommel was recalled to the stand and she identified a birthday card she gave to Famalaro in June of 1991. In that card, Rommel had written she was sorry she had "brought so much pain" to Famalaro and that she wished

him well. (25 RT 6376.) Rommel recalled Famalaro occasionally having periods of depression that would last a week or two, while other times he had lots of energy and worked day and night without stopping. (25 RT 6377.) Rommel also recalled that Famalaro never wanted to spend any time with his brother. (25 RT 6378.) Rommel ultimately broke up with Famalaro because she was tired of the relationship and because he was such a good manipulator. (25 RT 6378-6379.)

Patricia Pina, executive director of the volunteer Hotline Help Center in Orange County, explained how the hotline was intended to help callers with various kinds of problems including, but not limited to, depression and thoughts of suicide. (25 RT 6380.) Volunteers would listen to the callers who sometimes had a specific problem, needed a referral, or just wanted someone to talk to. (25 RT 6382.) A Pacific Bell invoice for Famalaro's telephone number at the time reflected 42-minute call placed to the hotline's telephone number on May 27, 1991, at 7:13 p.m. (25 RT 6383; 26 RT 6529-6530.) The hotline was also well known as being a prayer line. (25 RT 6384-6385.)

Ingrid Glenn testified she met Famalaro when they worked together in a restaurant near Disneyland in Anaheim in the late 1970s. Famalaro worked as a busboy and was attending Santa Ana College at that time. Glen described him as a hard worker who was always willing to help others. Glen said Famalaro had a good sense of humor and laughed a lot, so he was well liked by the other employees. (24 RT 6222-6223.) Famalaro stayed with Glen and her family for a short time before me moved to Glendale to attend a school for chiropractics. (24 RT 6224-6225.) Once, when Glen accompanied Famalaro to his family's home to pick up his grandmother, Glen thought the house was strange. (24 RT 6227.) The dining room had no furniture, and a pile of something on the floor of that room was covered with sheets. One closet was "stacked up to the top" with paper towels, and there were some Bible scriptures

on the refrigerator and the walls of the kitchen. (24 RT 6227-6228.) During the three years Glen knew Famalaro, they often talked about religion and Famalaro seemed to have a lot of knowledge about Christianity. Glen thought he was a deep believer in his faith. (24 RT 6230-6231.)

Laura Becker met Famalaro in 1984 when she responded to an add offering his services as a housekeeper. (25 RT 6387.) Over the four years Famalaro worked for Becker as a housekeeper, they developed a sort of mother-son relationship. (25 RT 6388, 6390.) Famalaro often spoke about religion and mentioned Ruthie and his baby. His failed relationship with Ruthie seemed to have been a tragedy for him. (25 RT 6389.) Famalaro stopped all of his cleaning jobs when he decided to get into commercial painting full time, but he continued to call Becker occasionally. Once he called her on the night before Mother's Day. (25 RT 6391-6392.) The last time Becker had spoken to Famalaro was just before Christmas of 1989 or 1990. Famalaro's parents were going to be visiting him from Arizona for the holidays and he seemed happy about an anticipated reconciliation with them. (25 RT 6393.) Becker considered Famalaro "very intelligent." (25 RT 6395.)

Marc Murphy attended the Cleveland Chiropractic College in Los Angeles with Famalaro in 1980 and 1981. (26 RT 6471.) One morning in August of 1981, Murphy and Famalaro were in a donut shop when an intoxicated man entered the shop carrying a knife. The man started "carrying on," and Murphy became frightened and jumped behind the counter. Famalaro, however, confronted the man and told him to stop. When that did not work, Famalaro sprayed the man with some mace he was carrying. (26 RT 6472-6473.) The mace did not have much of an effect, so the owner came from the back of the shop with a broomstick. Famalaro took the broomstick from the owner and used it to push the intoxicated man out of the shop. That seemed to be the end of it, so Murphy and Famalaro got their food and left. (26 RT 6474.)

Once they were outside, however, they saw the same man across the street, still "acting crazy." Famalaro insisted upon following the man. They saw the man approach a woman at a bus stop from behind, put his arm around her neck, and threaten her with the knife. (26 RT 6475-6476.) Famalaro dropped everything he was carrying and ran towards the man. When the man moved the knife from the woman's face towards her abdomen, Famalaro singlehandedly grabbed the man from behind, pinned him to the ground, and wrestled the knife away from him. Murphy helped Famalaro keep the man on the ground until police arrived.[21] (26 RT 6476-6477.) Murphy knew Famalaro sometimes carried mace or a handgun. (26 RT 6481-6482.) He also knew Famalaro was studying martial arts. (26 RT 6484.)

In December of 1981, Famalaro gave Murphy a religious book as a Christmas present. Famalaro wrote a short inscription in which he expressed his hope that the book would be "a source of great spiritual enrichment and strength" for Murphy. (26 RT 6478-6479.) In early 1982, Murphy and Famalaro were waiting to take their state exam to allow them to start seeing chiropractic patients. When a clinician called his name, Famalaro asked to be excused to use the restroom, but Murphy never saw Famalaro again after that. (26 RT 6479-6480.)

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21. The woman at the bus stop, Deborah Lynn Worthington-Hall, also testified about the incident that had occurred on August 13, 1981. (26 RT 6465.) She was by herself at a bus stop when a man approached her from behind and put an arm around her neck in a choke hold. The man, who smelled like liquor, put a knife to her side and demanded money. (26 RT 6466-6467.) Then man was slurring his words and repeatedly said he was going to kill her. Just when it seemed the man was about to stab her, some people grabbed the man from behind and tackled him to the ground. (26 RT 6468.) Worthington-Hall did not know who tackled the man, but she knew three people had been involved and she saw two people sitting on top of the man before police arrived. (26 RT 6469.) Worthington-Hall did not recognize Famalaro. (26 RT 6466.)

Father Vincent Young met Famalaro in the early 1980s when Ruth recommended him to Famalaro after she and Famalaro had separated. In his capacity as a Catholic priest, he counseled Famalaro for almost two years. (26 RT 6486-6487.) The break up with Ruth had been very emotional for Famalaro, in part because Ruth had an abortion during their relationship. (26 RT 6488.) Famalaro visited Father Young several times a week and seemed to be doing better in school and with his relationships with other people. After about six months, Ruth and Famalaro got back together for several months. Father Young continued to counsel them, both together and separately. (26 RT 6489-6490.) Ruth again became pregnant and Famalaro never wavered in his desire to marry her and have the baby. (26 RT 6491-6492.) However, Ruth broke up with Famalaro again and left while she was still pregnant. (26 RT 6493.) Even though Famalaro was distraught and seemed obsessed with finding Ruth and the baby [22], he only continued to see Father Young for another month or so. (26 RT 6494-6495.)

Father Young described Famalaro as considerate and polite, and possessing a tremendous amount of intellectual and physical energy. He was also an intense person who could be very melancholic, but Father Young never felt Famalaro needed psychiatric help. (26 RT 6495-6496.) He believed Famalaro cared about his family and wanted to provide his family with a sense of stability after his brother's imprisonment. (26 RT 6497.) Famalaro was very guarded in discussing his family. He did not seem to have an overly emotional connection with his family - it was more "intellectual." (26 RT 6498.) Father

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22. Introduced into evidence by the defense was a sonogram of a fetus reflecting the name of Ruth Walsh with the handwritten words, "I love you," and a certificate from Community Hospital reflecting Famalaro had completed a class called "Preparation for Parenthood." (26 RT 6531-6532.)

Young believed Famalaro's religious commitment at that time was sincere.[23] (26 RT 6499.)

Gregorio Martinez was the Hispanic Coordinator for the Catholic Detention Ministry that provided religious services for people incarcerated in Orange County. Martinez was a lay worker, not a priest, and he went into the jails to talk to inmates about religions matters. (26 RT 6506.) About three months after Famalaro's incarceration, Famalaro's mother called Martinez and asked him to visit Famalaro. Martinez initially visited Famalaro once a week. He continued to visit Famalaro until the time of trial, but a little less frequently. (26 RT 6507.) They discussed religion and Famalaro was particularly interested in materials dealing with repentance and the reconciliation of one's sins. (26 RT 6508-6509.) Martinez believed Famalaro was 100% sincere in his religious beliefs. (26 RT 6510.)

Marion Thobe's 20-year-old daughter, Angela Thobe, described how she had always been very close to Famalaro. (26 RT 6514.) When her family lived in California from 1980 to 1988, she spent several days a week with Famalaro, as well as every birthday and holiday. (26 RT 6515.) Angela and her younger sister, Theresa, often watched television, played games, and went horseback riding with him. (26 RT 6516-6517.) Famalaro always gave them books to read, and he gave them books on Arizona when her family moved to Arizona in 1988. When Angela's parents were splitting up in approximately 1991, Famalaro frequently visited them in Arizona and helped her and her sister cope with the divorce. (26 RT 6518.) After Famalaro moved to Arizona, Angela only saw him about once a week because he was busy getting settled and moving all of his things from California. (26 RT 6522.) When Angela was 17-

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23. A photo of Famalaro with a Catholic Cardinal (that had been taken during his trip to Europe with his mother) was admitted into evidence. (26 RT 6533.)

years-old, she had her confirmation in the Catholic church. She chose Famalaro as her sponsor because he was the "logical choice." Angela loved him very much. (26 RT 6526-6528.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED FAMALARO'S MOTION FOR A CHANGE OF VENUE FROM ORANGE COUNTY

In his first argument, Famalaro claims he was denied his constitutional rights to due process and to a fair trial as a result of the trial court's denial of his motion to transfer venue from Orange County. (AOB 78-208.) Famalaro also claims he did not receive a fair trial in Orange County due to all of the inflammatory pretrial publicity and the notoriety of the case. (AOB 191-208.) Famalaro's claims are untenable. The trial court did not abuse its discretion by denying Famalaro's change of venue motion, nor did the publicity surrounding his crimes deny him a fair trial.

Penal Code section 1033, provides in pertinent part:

> In a criminal action pending in the superior court, the court shall order a change of venue:
>
> (a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county. . . .

In ruling on a motion requesting a change of venue, the trial court considers the following factors: the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of the publicity. (*People v. Vieira* (2005) 35 Cal.4th 264, 278; *People v.Sanders* (1995) 11 Cal.4th 475, 505; *People v. Bonin* (1988) 46 Cal.3d 659, 672.) The trial court must decide whether, on the unique facts of the particular case, there is a reasonable likelihood that jurors chosen for the trial have formed such fixed opinions because of pretrial publicity that they cannot make impartial determinations.

(*People v. Bonin, supra*, 46 Cal.3d at p. 676.) The defendant, as the moving party, has the burden of proof. (*Id.*, at p. 673.)

On appeal from the denial of a change of venue motion, an appellant seeking relief from the denial of the motion must make two showings: (1) that it was reasonably likely a fair trial could not be had at the time the motion was made; and (2) that it was reasonably likely a fair trial was not, in fact, had. (*People v. Massie* (1998) 19 Cal.4th 550, 578; *People v. Pride* (1992) 3 Cal.4th 195, 224.) In this context, "reasonably likely" means something less than "more probable than not" and something more than merely "possible." (*People v. Dennis* (1998) 17 Cal.4th 468, 523, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 523.)

The reviewing court conducts a de novo evaluation of the trial court's determination as to whether there was a reasonable likelihood of an unfair trial. The trial court's resolution of factual issues is reviewed under a deferential substantial-evidence standard. (*People v. Sanders, supra*, 11 Cal.4th at pp. 505-506.) On appeal, it is incumbent upon Famalaro to show

> """"both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not *in fact* had.""""

(*People v. Jenkins* (2000) 22 Cal.4th 900, 943, quoting *People v. Proctor, supra*, 4 Cal.4th at p, 523, original italics.)

A. <u>Famalaro Fails To Show That He Demonstrated To The Trial Court That There Was A Reasonable Likelihood He Would Receive An Unfair Trial</u>

Famalaro filed his first motion for a change of venue from Orange County on November 12, 1996. (5 CT 1459-1483.) Famalaro contended that because of the high profile of this case, a change of venue was necessary to ensure a fair trial under the federal and state constitutions. (5 CT 1461-1463.)

His pleadings included detailed summaries of all of the media coverage of Denise Huber's disappearance, the discovery of her body, and her memorial service and funeral in South Dakota. (5 CT 1465-1491.) Famalaro also argued that Denise Huber had been portrayed in the media in a very favorable light, while he had been portrayed in negative terms, e.g., an "obsessive loner." (5 CT 1464-1465.)

The trial court conducted an evidentiary hearing on Famalaro's venue motion on February 14, 21, and 28, 1997. (7 RT-2000-2174; 8 RT 2178-2377; 9 RT 2385-2502.) Famalaro presented testimony from Edward Bronson, a political science professor at California State University at Chico. (7 RT 2000-2013.) Dr. Bronson prepared questions for a survey, and his colleague Dr. Robert Ross conducted the survey. (7 RT 2014-2017.) According to Dr. Bronson, 83% of the people surveyed in Orange County remembered Famalaro's case, and the rate of "prejudgment" was approximately 70%. (7 RT 2063-2065.) Dr. Bronson was of the opinion that a survey was a better indication of what people had heard and what they were thinking than jury voir dire because people were more honest when responding to anonymous surveys. (7 RT 2073-2074.)

According to Dr. Bronson, despite its population, Orange County was like a small community in many ways. He described Orange County as a series of small communities. In his opinion, the media coverage of this case and the community support it generated was more like that typically seen in small towns. (7 RT 2052-2057.) Dr. Bronson also saw Orange County as more homogenous (in terms of being White suburban, middle-class, and Republican conservative), than the counties of Alameda and San Francisco.[24/] (7 RT 2109-

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24. Having lived in Orange County since the early 1960's, and relying on his knowledge of people residing in Orange County, and all of the juror voir dire he had conducted over the years, the trial court expressly rejected Dr.

2110.) Also, while people generally support the death penalty for the most egregious cases, the 70% rate of penalty prejudgment found in this case had been the second highest rate Dr. Bronson had encountered out of approximately 15 surveys he had conducted in capital cases. He testified that the rate of penalty prejudgment in other cases was usually in the 50% range. (7 RT 2129-2132.) In Dr. Bronson's opinion, Famalaro could not get a fair trial in Orange County. (7 RT 2081.)

Ebbe Ebbesen, a psychology professor at the University of California at San Diego, testified for the prosecution. Dr. Ebbesen is familiar with scientific methods of data collection analysis and methodology in general. Dr. Ebbesen reviewed Dr. Bronson's work on Famalaro's case and faulted the survey. Dr. Ebbesen noted the survey did not include any "false-positive" questions. False positive questions, which are designed to obtain affirmative answers falsely, are one way of measuring how many of the people answering the questions are answering truthfully. This is important in determining the true rate of recognition. (8 RT 2231-2236.) Dr. Ebbesen opined that this omission alone could have increased the results in Dr. Bronson's survey by 10.5%. (8 RT 2238.) Another flaw Dr. Ebbesen identified was the lack of any means of measuring the degree of recognition. People who had a slight familiarity with the case were counted the same as people who knew a lot about the case. (8 RT 2236-2237.) The survey lacked any open-ended recall questions like, "Tell me everything you know about the case." (8 RT 2239.)

The framing of some of the questions, or the way the questions were phrased, was also problematic. For example, *following a description of the facts of the case*, one of the questions read:

Bronson's assertion that Orange County's population was homogenous. (9 RT 2500-2501.)

> A man named John Famalaro has been charged with the murder of Denise Huber. Based upon what you have read, seen or heard about this case, do you believe that Famalaro is definitely guilty, probably guilty, definitely not guilty or probably not guilty?

(8 RT 2242.)

Dr. Ebbesen explained this question not only conveyed the information that Famalaro had been charged with the murder, but it also failed to include a "don't know" answer alternative. (8 RT 2243-2244.) Additionally, the fact that only one person had answered "definitely not guilty" to this question was a strong indication that the question inherently suggested one of the "guilty" answers. (8 RT 2248-2249.) The wording in questions changes the rates of the answers, so the only way to get reliable answers is to ask questions in many different ways. (8 RT 2253.) Also, in these types of surveys, people rarely say "not guilty." The percentage of such a response is usually less than 5%. Dr. Ebbesen explained that "[it] is really a matter of don't know versus guilty." (8 RT 2254.) Dr. Ebbesen noted that 40% of the individuals who initially failed to recognize any of the specific facts of this case nevertheless responded Famalaro was guilty when that question was put to them in Dr. Bronson's survey. This was consistent with findings that there are individuals in all surveys who, after being told someone has been charged with murder, will think the person is guilty. (8 RT 2259-2260.)

Dr. Ebbesen calculated the various questions and answers in Dr. Bronson's survey and concluded that 191 of the 401 people surveyed, or 47.6%, would be acceptable jurors to the extent they had either not heard about the case or had not formed an opinion as to Famalaro's guilt. (8 RT 2260-2266.) Dr. Ebbesen also prepared tables or columns of the various questions and answers to Dr. Bronson's survey. On the recognition questions, approximately 50% indicated they recognized one or less of the facts of this

case, while approximately 68% indicated they recognized two or less of the facts. (8 RT 2266-2270.)

Ronald Dillahey, a psychology professor at the University of Nevada at Reno, testified in rebuttal. Dr. Dillahey had read the media publicity surrounding this case, the reports by Dr. Bronson and Dr. Ebbesen, and a second survey on this case that had been conducted earlier that week by Dr. Bronson and his colleague, Dr. Ross.[25] (9 RT 2390-2392.) Dr. Dillahey had found that 15% to 22% of people believe a person is guilty if they are brought to trial. With respect to the death penalty, approximately 77% of the people in California support the death penalty, but that number drops to 63% when they are given the option of life without the possibility of parole. Based on his calculations, Dr. Dillahey found that 72% of the people who recognized this case favored the death penalty over life imprisonment for Famalaro. Dr. Dillahey attributed this to the high level of public awareness of Famalaro's case. (9 RT 2424-2427.)

Dr. Dillahey believed voir dire was not an effective way of screening out potential jurors who may have been influenced by pre-trial publicity because it was difficult for people to set aside opinions that have already been formed, particularly when the opinion or belief was "held with some intensity." (9 RT 2440-2441.) This includes a commonly-held opinion that a criminal defendant should be required to prove his or her innocence. Dr. Dillahey opined that 50% to 60% of jurors cling to that opinion, even though the court instructs them that the defendant is presumed innocent and that guilt must be proved beyond a reasonable doubt. (9 RT 2441-2442.) Data indicated people who had a high

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25. On that date, February 28, 1997, which was the last day of the evidentiary hearing on the motion for a change of venue, Famalaro's counsel offered the court the results of the second survey prepared by Dr. Bronson. The results of that survey were similar to the results of his first survey. (9 RT 2456-2457, 2460-2461.)

level of exposure to a case were more likely to prejudge guilt, and assurances by such people that they could be fair jurors would not necessarily be reliable. (9 RT 2443-2454.)

The trial court found the testimony of all three of the experts helpful, while noting that each exhibited bias towards their side of the issue. The trial court specifically found the question in Dr. Bronson's survey about Famalaro's guilt was misleading. (9 RT 2497.) As to the prejudgment questions, the trial court found the survey itself "gives the more damning or the most damning of the information that was published by the press." (9 RT 2498.) The trial court denied Famalaro's motion to change venue on February 28, 1997. (9 RT 2500-2501.)

On March 17, 1997, in Case No. G021303, Famalaro filed a Petition for Writ of Mandate with Division Three of the Fourth District Court of Appeal in which he challenged the trial court's denial of his motion for a change of venue. (2 Supp. CT 211-323.) The Court of Appeal denied the Petition for Writ of Mandate on March 18, 1997. (5 CT 1769-1770; 4 Supp. CT 1106.) On March 28, 1997, Famalaro filed a Petition for Review with this Court in Case No. S060074, challenging the Court of Appeal's denial of his Petition for Writ of Mandate concerning his venue motion. (10 Supp. CT 2746-2789.) This Court denied the Petition for Review on April 18, 1997. (11 Supp. CT 2908.)

Preserving the instant claim for appeal, Famalaro renewed his motion for a change of venue after jury voir dire concluded on May 8, 1997. (17 RT 4493-4496; See, *People v. Hart* (1999) 20 Cal.4th 546, 597-598.) Famalaro also raised his venue claim in a motion for a new trial filed on August 28, 1997. (6 CT 2120-2135.)

Famalaro failed to meet his burden below of showing, at the time of the trial court's ruling, that it was reasonably likely he could not receive a fair trial

in Orange County. Moreover, the trial court's analysis of the factors governing change of venue motions was correct.

In this case, the nature of the offense did not warrant a change of venue motion. As the trial court noted, the offenses were the most serious of charges, i.e. murder committed with special circumstances. (9 RT 2498.) However, as the trial court noted in denying Famalaro's new trial motion:

> The particular facts in this case involved a young woman alone in the middle of the night, abducted, moved, bound, gagged, sodomized, brutally beaten. Very, very, very serious. That is without argument.
>
> But as serious as that is, it does not get as much weight for a change of venue as some of the multiple murder cases we have seen in Orange County or perhaps even some child abduction sex crime murders that we have seen in the county.

(27 RT 6787-6788.)

As this Court has held, the "sensationalism inherent in all capital murder cases will not in and of itself necessitate a change of venue." (*People v. Adcox* (1988) 47 Cal.3d 207, 231.) Accordingly, the nature of the charges against Famalaro is not a dispositive factor. (*People v. Massie, supra*, 19 Cal.4th at p. 578; *People v. Dennis, supra*, 17 Cal.4th at p. 523.)

The next factor considered by the trial court was the extent and nature of the publicity. There had been a great deal of publicity about this case when Denise Huber disappeared in 1991, and a large number of people had seen a banner posted near the freeway where her car had been found seeking information regarding her whereabouts. The trial court noted all of that "publicity was regenerated on the anniversaries of her disappearance," and then again after Famalaro's arrest in Arizona. (9 RT 2498.)

According to Famalaro's trial court pleadings filed on November 12, 1996, more than 240 newspaper articles had been published about this case.[26] (5 CT 1467-1470.) In their responsive pleadings, the prosecution pointed out that the overwhelming majority of articles listed in Famalaro's summary of coverage, i.e. approximately 185 of 251, or 74%, appeared within three months of the discovery of the victim's body in mid-July of 1994. (5 CT 1541-1542.) The prosecution also noted that less than 10% of the coverage had occurred since October of 1994. Eight articles had appeared in 1995, and only four articles had been published in 1996. Moreover, four of the articles cited by Famalaro were on other subjects and contained only brief references to Famalaro's case. For example, the prosecution pointed out that on page 373 of the lodged exhibits[27], there was a one-sentence reference to Famalaro's case in the course of identifying defense counsel Leonard Gumlia, who was quoted about the possible effects the verdicts in the O. J. Simpson case could have on local prosecutions. (5 CT 1542, fn. 2.)

While Famalaro places great significance on the volume and nature of news coverage to argue that his trial should not have been conducted in Orange County (AOB 158-166), most of the news coverage occurred when Denise went missing and when her body was found in a freezer at Famalaro's Arizona residence three years later. This news coverage, in 1991 and 1994, respectively, had little bearing on the fairness of the trial conducted in Orange County in 1997. (See *People v. Jenkins, supra,* 22 Cal.4th at p. 944 [While

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26. As noted by the prosecution, Famalaro's moving papers assigned a separate reference number to each page of an article, so the actual number of articles was less than represented. (5 CT 1544, fn. 3.)

27. The lodged exhibits are not included in the appellate record. However copies of the newspaper articles about Famalaro's case are included in support of a media motion to unseal court records filed by The Times Mirror Company on December 23, 1994. (2 CT 363-628.)

coverage was extensive, it dated from the time crime was committed, i.e. two years before motion for change of venue, and all articles were at least 10 months prior to motion being heard]; *People v. Gallego* (1990) 52 Cal.3d 115, 167.) Famalaro cannot rely on a "'presumption of a deprivation of due process of law aris[ing] from prior exposure to publicity concerning the case.'" (*People v. Jenkins, supra*, 22 Cal.4th at p. 945.)

The passage of time weighs heavily against a change of venue. (*People v. Dennis, supra*, 17 Cal.4th at p. 524.) The passage of several months can dispel the prejudicial effect of pretrial publicity in a large community. (*People v. Proctor, supra*, 4 Cal.4th at p. 525.) Even in a small county, extensive publicity at the time of the crime does not compel a change of venue if the publicity has subsided by the time of trial. In *People v. Price* (1991) 1 Cal.4th 324, for example, a change of venue from Humboldt County (population 108,000) was held to have been properly denied where news coverage abated after the preliminary examination. (*Id.*, at p. 390.) In a Tulare County case, publicity surrounding the murder of a pregnant woman and her unborn child, likewise, did not compel a change of venue where the length and frequency of the articles diminished in advance of the two-month period before jury selection began. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1157-1160.)

Even "troublesome" news reports in Fresno County did not necessitate a change of venue in *People v. Jennings* (1991) 53 Cal.3d 334, 361-362. Similarly, in *People v. Sully* (1991) 53 Cal.3d 1195, extensive coverage of multiple murders (including sensational details such as the fact that three of the six bodies were left in barrels in Golden Gate Park) did not require a change of venue where voir dire showed publicity had waned. (*Id.*, at p. 1237; see also *People v. Edwards* (1991) 54 Cal.3d 787, 807- 808 [murder victim a 12-year-old girl en route from campground to picnic site]; and *People v. Coleman* (1989) 48 Cal.3d 112, 134-135 [change of venue properly denied

although details of the crime became embedded in the community consciousness of Sonoma County residents].)

Clearly, pretrial publicity in the instant matter did not favor a change of venue. The trial court aptly concluded the "nature of the publicity in this case is relatively unspectacular compared to the nature of the publicity in cases where we have had many problems, venue problems." The court noted there had been no confession or admissions, and, for a long time, there had not even been a suspect in the case. The court found that while there had been a lot of publicity concerning the victim's parents, their statements to the press had not been prejudicial or inflammatory. (9 RT 2499-2500.) The trial court also found that while the majority of prospective jurors, including the jurors and alternates selected to serve, said they had heard something about Famalaro's case, most had not known any more of the facts of the case than they were told in the jury selection process. (27 RT 6790-6791.) Accordingly, the nature and extent of the pretrial publicity did not support granting Famalaro's change of venue motion.

The size of the community of Orange County also weighed heavily against a change of venue in this matter. Those cases in which venue changes have been granted or ordered on review have usually involved counties with small populations. The larger the local population, the more unlikely it is that preconceptions about the case have become embedded in the public consciousness. (*People v. Hamilton, supra,* 48 Cal.3d at p. 1158; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1001- 1002.) The "'adversities of publicity are considerably offset if a trial is conducted in a populous metropolitan area.'" (*People v. Sanders, supra*, 11 Cal.4th at p. 506, quoting *People v. Harris* (1981) 28 Cal.3d 935, 949.) This Court has repeatedly held that a metropolitan and heavily populated region does not weigh in favor of a change of venue. (*People v. Edwards, supra*, 54 Cal.3d at p. 807, citing *People v. Cooper* (1991)

53 Cal.3d 771, 806, fn. 4, *People v. Bonin, supra*, 46 Cal.3d at p. 677, and *People v. Harris* (1981) 28 Cal.3d 935, 949.)

As the parties stipulated, in 1995 (two years before Famalaro's trial), Orange County had a population that exceeded two and one half million people, was the fifth largest county in the United States, the third largest county in the State of California, and the population of Orange County was larger than the populations of 18 states in this country. (7 RT 2003-2004.) Accordingly, the trial court correctly concluded that the "size and nature of Orange County definitely do not support a venue change, and that factor gets a lot of weight." (27 RT 6788-6789.)

"Venue changes are seldom granted from counties" of the size of Orange County. (*People v. Coffman & Marlowe* (2004) 34 Cal.4th 1, 46.) Orange County is substantially larger than other venues that have proved adequate to the task of ensuring the selection of a fair and impartial jury in even exceptionally high profile cases. (See, e.g., *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1180 [upholding transfer of Oklahoma City bombing case to Denver, Colorado (population 554,636 (2000 census))].)

The trial court correctly concluded that factors relating to the status of Famalaro and his victim did not support a change of venue. Both Denise Huber and Famalaro were residents of Orange County. Thus, "this case does not present the situation of an outsider defendant against a victim with 'long and extensive ties to the community.'" (*People v. Vieira*, 35 Cal.4th at p. 282.) As the trial court acknowledged, while Denise Huber had not been a well-known person in the community prior to her disappearance, she had gained some post-disappearance status that had probably generated some sympathy for her and her family. (9 RT 2498-2499.) In other words, Denise Huber "became known only because she was a murder victim, not because of any preexisting status." (*People v. Panah* (2005) 35 Cal.4th 395, 449.) Thus,

> [a]ny uniquely heightened features of the case that gave the victim[] and defendant any prominence in the wake of the crimes, which a change in venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.

(*People v. Dennis, supra*, 17 Cal.4th at p. 523, citing *People v. Webb* (1993) 6 Cal. 4th 494, 514-515.)

Put simply, prospective jurors would naturally sympathize with what had happened to Denise Huber, no matter where the trial was held. (*People v. Edwards, supra*, 54 Cal.3d at p. 808.)

Famalaro's status also failed to support a change of venue. Famalaro had been a resident of the county at the time of Denise's disappearance, but he was not known at all and he certainly did not have a bad reputation. The trial court called him "an average Orange County person." (9 RT 2499.) Famalaro had ostensibly lead a quite life while he lived in Orange County. Other than being charged in this case, there was nothing about his status in the community that would affect his ability to obtain a fair trial in Orange County. (*People v. Edwards, supra*, 54 Cal.3d at pp. 806-807.)

Accordingly, based upon the foregoing, Famalaro failed to demonstrate to the trial court a reasonable likelihood of an unfair trial.

B. The Pre-Trial Publicity Does Not Support A Presumption Of Prejudice

Famalaro also claims he did not receive a fair trial in Orange County due to all of the inflammatory pretrial publicity and the notoriety of the case. (AOB 191-208.) Famalaro was not denied a fair trial based on inflammatory pretrial publicity or the notoriety of his case.

Famalaro was entitled to be tried by "a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751.) A trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. (*Rideau*

v. Louisiana (1963) 373 U.S. 726 [83 S.Ct. 1417, 10 L.Ed.2d 663].) Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial, and inflammatory media publicity about the crime. (*Id.* at pp. 726-727; *Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361.) Under such circumstances, it is not necessary to demonstrate actual bias. (*Ibid.*) The presumption of prejudice is "'rarely invoked and only in extreme situations.'" (*United States v. McVeigh, supra*, 153 F.3d at p. 1181; *Nebraska Press Assn v. Stuart* (1976) 427 U.S. 539, 554 [96 S.Ct. 2791, 49 L.Ed.2d 683].)

For the reasons detailed above, the publicity in Famalaro's case was not such as to support a presumption of prejudice. Indeed, the publicity had subsided long before trial began and was unremarkable in comparison to other capital cases.

C. Famalaro Fails To Meet His Burden Of Showing Prejudice From Being Tried In Orange County

In addition to lacking a basis to presume prejudice, Famalaro's case also fails to present a basis for finding actual prejudice. Actual prejudice is demonstrated where a sufficient number of the jury panel has such fixed opinions about the guilt of the defendant that they could not impartially judge the case, and a trial before that panel would be inherently prejudicial. (*Harris v. Pulley, supra*, 885 F.2d at p. 1364.) In deciding whether there was actual prejudice against a defendant, the reviewing court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside. (*Id.*, at p. 1363.)

A juror need to be "totally ignorant of the facts and issues involved." (*Murphy v. Florida* (1975) 421 U.S. 794, 799-800 [95 S.Ct. 2031, 44 L.Ed. 2d 589].) "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court.'" (*Id.*, at p. 800,

quoting *Irvin v. Dowd, supra,* 366 U.S. at p. 723; *People v. Fauber* (1992) 2 Cal.4th 792, 819.) "[A] key factor in gauging the reliability of juror assurances of impartiality is the percentage of venireman who `will admit to a disqualifying prejudice.'" (*Harris v. Pulley, supra,* 885 F.2d at p. 1364, quoting *Murphy v. Florida, supra,* 421 U.S. at p. 803.)

As this Court has observed:

> [I]t should be emphasized that the controlling cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." (*Murphy v. Florida, supra*, 421 U.S. at p. 799 [44 L.Ed.2d at p. 594].) "It is not required ... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*"

(*People v. Harris, supra*, 28 Cal.3d at pp. 949-950, italics added, quoting *Irvin v. Dowd, supra*, 366 U.S. at pp. 722-723; accord, *People v. Cooper*, *supra*, 53 Cal.3d at p. 883; *People v. Weaver* (2001) 26 Cal.4th 876, 908.)

Famalaro complains that the majority of prospective jurors remembered hearing media reports about Denise Huber's disappearance, the discovery of her body, or both. (AOB 98-143). As the trial court correctly noted, Denise Huber had disappeared on June 3, 1991, which was over five years before the trial in this matter. Two years and eight months had elapsed between the discovery of Denise's body on July 13, 1994, and the beginning of jury selection in April of 1977. Moreover, the trial court found the publicity was "relatively benign," and that the jurors learned more about the facts of the case from the juror

questionnaires, the voir dire, and the opening statement than they ever could have learned from the pretrial publicity. (27 RT 6790-6791.)

Further, the trial court's own notes indicated that less than one-third of the prospective jurors had opinions on the case based on pre-trial publicity which made them questionable as jurors, and even though they did not necessarily have fixed opinions, those prospective jurors had been excused for cause.[28] (27 RT 6791-6792.) Both sides had been given five additional peremptory challenges and the trial court expressly found that after voir dire, "not one of the sitting jurors or alternate jurors had any knowledge about this case which would interfere with their ability to render a fair, impartial verdict." (27 RT 6793.)

"The defendant bears the burden of proof that the jurors chosen have *such fixed opinions* that they cannot be impartial." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1250, italics added, citing *People v. Sanders, supra*, 11 Cal.4th at p. 505.) The questioning of jurors during voir dire demonstrates the lack of taint of jurors by pretrial publicity. None of the jurors held a fixed opinion regarding Famalaro's guilt, let alone one they would not set aside so as to decide the case on the evidence presented at trial."

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28. Near the end of the jury voir dire, defense counsel Gumlia had revisited the change of venue issue by arguing to the trial court that they were in the "danger zone," as they had approached the 62% limit under Federal Law of potential jurors who were biased against Famalaro. (17 RT 4493-4496.) The trial court observed that relying on the number of persons being excused for potentially having a fixed opinion as being indicative of prejudice would be inaccurate because the court had been overly inclusive in excusing potential jurors. (17 RT 4501-4503.) Accordingly, Famalaro's reliance on the number of jurors excused is not a valid basis for asserting his jury could not have been impartial due to pretrial publicity.

1. Voir Dire Demonstrated The Lack Of Taint Of Jurors By Pretrial Publicity

No Juror who heard Famalaro's case had any opinion of Famalaro's guilt, let alone a fixed opinion on the subject. The written and oral voir dire demonstrate the lack of taint from pretrial publicity.

Juror No. 1 (Venireperson 422) remembered hearing about this case on television when the arrest was made, but he had not remembered the names of either the victim or the suspect. He indicated he could set aside any knowledge or opinions he had about the case and make impartial determinations as to guilt and penalty. (CJQ 2526-2531.)

In filling out the questionnaire, Juror No. 2 (Venireperson 222) indicated he or she had read an article "many months ago" and had seen a television news broadcast about this case. Juror No. 2 knew the body of a murder victim with "local ties" had been found in Arizona, and that there had been a "brutal aspect to the crime," but did not know how the body or the suspect had been found. Juror No. 2 had not formed any opinion as to Famalaro's guilt or what the penalty should be in the event he was found guilty. (CJQ 2532-2537.) Juror No. 2 also said he or she had learned more about the facts of the case while at the courthouse than had been previously known. (16 RT 4290.)[29]

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29. The last page of the juror questionnaires had the following question:

> This case involves the disappearance and homicide of Denise Huber, who was last seen alive on the night of June 2, 1991. Her car was found with a flat tire on the 73 (Corona del Mar) Freeway in Costa Mesa. Ms. Huber's body was found three years later inside a freezer in a parked, stolen Ryder rental truck outside Prescott, Arizona. She had been bludgeoned to death. The man charged with her abduction, sexual assault, and murder is John Famalaro. Based on the above summary, have you heard of this case from any source?

(See, e.g., CJQ 2531.)

In her questionnaire, Juror No. 3 (Venireperson 218) indicated she had heard a little about the case in the news, but had not paid that much attention as she worked full time and was attending school to obtain a masters degree in business. Juror No. 3 had not formed any opinions about the case because she did not know any of the details. (CJQ 2538-2543.) During voir dire, Juror No. 3 said she was pretty open minded about everything in this case and that most of what she knew about the case she had learned there in court. (15 RT 3924-3937.)

Juror No. 4 (Venireperson 384 and Foreperson of the jury) had heard about the case in the media and believed there must be "evidence already at hand to tie Mr. Famalaro to this crime." She did not, however, have a preconceived notion that he was guilty - she would have to hear the evidence before she could make that decision. Juror No. 4 had read two or three news articles about the case when the victim disappeared, but she had not read anything about the case after the body was found. (14 RT 3875-3895.)

Juror No. 5 (Venireperson 134) had not heard about this case until she appeared at the courthouse for jury duty. (CJQ 2550-2555.) She believed she could be fair to both sides. (12 RT 3383-3398.)

In filling out his questionnaire, Juror No. 6 (Venireperson 353) indicated he had heard about the case in the newspaper and on television news, but the description of the crime in the questionnaire was as much as he knew about the case. He had regularly driven by the banner about the missing woman near Bristol Street and Highway 73. (CJQ 2556-2561.)

Juror No. 6 remembered when the woman went missing and recalled wishing he had the power to find her. Juror No. 6 did not think he would be affected by any publicity surrounding this case, or any pressure to return a death verdict, because he felt "the responsibility level here is too strong and that one's character has to be at the level of saying" that it is easy for others to make

comments. Some people at work had made comments to him about this case, everything from that he would be a good juror to how to get out of jury duty by just saying something like "fry him." Juror No. 6 said he believed they understood the justice system and that they would not have such an attitude if they were on trial. Also, some of the comments were just "off-the-cuff being funny." In light of some of the comments that he "would be good on the case because of an understanding and knowing how to balance things," Juror No. 6 believed his co-workers would respect whatever verdict was returned and that he could keep an open mind. (13 RT 3560-3574.)

Juror No. 7 (Venireperson 225) had seen the missing person banner and had read one newspaper article about the discovery of the body in a freezer in a truck. She realized the discovery of the body "ended the efforts of Denise's family to locate her." (CJQ 2562-2567.) During voir dire questioning, Juror No. 7 said that although she had seen the banner and had read part of one article, she believed she could be impartial. She had first seen the banner when she moved to Orange County around December of 1991, and she "thought it was a good way to get a lot of people to notice, you know, that someone was missing." Juror No. 7 subscribed to the L.A. Times, Orange County version, and had not read anything else about either Denise Huber or Famalaro. The case had not been significant to her until she was called for jury duty. She knew it was an important decision and said she would be careful. She had never been on a jury before, but she believed she could follow the court's instructions. (14 RT 3687-3708.)

Juror Number 8 (Venireperson 411) had not read about the case in the newspapers, but had seen something about the case on television news. Juror No. 8 and her husband lived close to the banner that had been put up near Highway 55, and she remembered talking to her husband about "how scary it [would be] to not have a cell phone if something were to happen." She

eventually got a cellular telephone. When defense counsel asked her if she got the phone because of the banner or anything she had read about this case, Juror No. 8 responded, "No, because it was years after that he let me get a cell phone. I talk a little too much." (12 RT 3223.)

When defense counsel asked the venirepersons in the jury box if anyone had heard any opinions as to what should happen to the perpetrator, the following exchange occurred:

> [Juror No. 8]: I got a reaction from my husband and the girlfriend who was at the house, and both offered -- well, my husband offered an opinion on what should happen. And –
>
> MR. GUMLIA: What was the opinion?
>
> [Juror No. 8]: Well, do I have to say it?
>
> (LAUGHTER.)
>
> MR. GUMLIA: There may be worse. You might find this is
>
> [Juror No. 8]: He said fry him.
>
> MR. GUMLIA: And your husband was familiar with the case prior?
>
> [Juror No. 8]: Not any more than I was.
>
> MR. GUMLIA: Do you remember how you responded to that?
>
> [Juror No. 8]: I laughed because it was a joke.

(12 RT 3227.)

Juror No. 8 and her husband had not discussed the case since that time, but a girlfriend had talked to her about whether the girlfriend could impose the death penalty if she was a juror on such a case. They had not discussed or reached any conclusions about what Juror No. 8 should do in this case. (12 RT 3227-3228.)

When defense counsel again asked Juror No. 8 about the comment made by her husband, Juror No. 8 said the comment had just been for laughs and that she had never "formulated specific opinions about the death penalty or life in

prison. I have never had to. And I think the more you ask questions, the more it is giving me opinions to be honest with you." (12 RT 3236-3237.) Juror No. 8 expressed her belief that she could be open minded about sympathy for Famalaro and that she was not leaning one way or the other (death versus life). (12 RT 3281-3282.)[30]

Juror No. 9 (Venireperson 228) had heard about this case from a television report and newspaper, but she did not know any of the details or remember what she had heard or read. (CJQ 2574-2579.) Juror No. 9 believed she could be impartial. (13 RT 3578-3585.)

Juror No. 10 (Venireperson 289) had read about this case in the newspaper and possibly in Newsweek, and had heard about it on the radio. While she had heard about the case in the news, she had not known about the banner. That morning, she had heard on the radio that a large number of potential jurors were being called to Santa Ana for this case. Based on what she had read or heard, Juror No. 10 had not formed any opinions as to Famalaro's guilt, but noted "there did seem to be a great deal of evidence against him." (CJQ 2580-2585.)

Juror No. 10 remembered when Denise's car had been found on the freeway and she wondered where it had been because she shopped near that area at South Coast Plaza. Her husband explained the location to her. She also remembered when the body was found in 1994, but she had not remembered Famalaro's name. She did recall that he either lived with his mother, or in a

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30. Famalaro suggests he has demonstrated that he was prejudiced by the voir dire process because all of the potential jurors in the box and audience had laughed out loud when a juror (possibly Juror No. 8) made the comment that Famalaro should "fry." (AOB 205.) The trial court noted some of the prospective jurors were shaking their heads negatively during the laughter and that it was "kind of a shock laughter at a juror saying that." The court pointed out they "went overboard in eliminating people who may possibly have a fixed opinion on the case. We eliminated far more than we have to." (17 RT 4501.)

house she rented to him, but she was not sure. As for Denise Huber, Juror No. 10 knew she had been a student and knew her approximate age, but that was all. Defense counsel asked what Juror No. 10 had meant when she wrote in her questionnaire, "there seemed to be a great deal of evidence against him?" Juror No. 10 responded that she meant she knew about the freezer and the location of it, but that did not mean she thought he was probably guilty. She had discussed the possibility of being a juror on this case with her husband, and her husband had only told her she should do the best she could. He had not offered any opinions as to the case or penalty. Juror No. 10 had not formed any opinion as to the penalty in this case and believed she could be fair to both sides. (16 RT 4338-4347.)

Juror No. 11 (Venireperson 219) had heard about this case in the news, but the summary of the facts in the questionnaire was about all he knew. He indicated he had formed an opinion as to Famalaro's guilt due to the fact that the body had been found on his premises and had obviously been in his possession for some time. While he had not formed any opinion as to the appropriate penalty, Juror No. 11 indicated he "would like to know more about Mr. Famalaro's motivation and psychological reasoning." (CJQ 2586-2591.) During voir dire questioning, the trial court asked Juror No. 11 what opinion he had formed as to Famalaro's guilt. Juror No. 11 said he believed Famalaro was probably guilty of something, perhaps collusion. The victim had disappeared in Orange County and turned up in Arizona, and Juror No. 11 did not think she had done that on her own. He had not formed the opinion that Famalaro was guilty of the charges against him and thought the People would have to prove their case. (15 RT 4123-4124.) Juror 11 believed he could be fair to both sides. (15 RT 4135-4137.)

While she usually listened to the news, Juror 12 (Venireperson 151) did not remember ever hearing about this case. (CJQ 2592-2597.) Juror 12 had

only been in California for three years. The only thing Juror No. 12 knew about this case was what she had heard in the courtroom and she believed she could be impartial. (12 RT 3335-3347.)

2. The Juror Declarations Do Not Support A Finding Of Actual Prejudice

Famalaro submitted declarations from three jurors in support of his new trial motion. (6 CT 2120-2135.) He relies on those declarations to support his claim that he was prejudiced from the denial of his change of venue motion. (AOB 149-152.) However, nothing in those declarations supports a presumption of prejudice or finding of actual prejudice from the denial of Famalaro's motion for change of venue.

One juror's declaration indicates that his daughter told him about seeing flowers left at the site where Denise Huber's car had been found on the sixth anniversary of her disappearance. The juror told his daughter he did not want to hear anything about it.[31] (6 CT 2136.) The second juror relayed that three of her co-workers had made comments or tried to talk to her about the case. She told them she did not want to hear anything they had to say because they were not in the courtroom and had not heard the evidence. (6 CT 2137.) Likewise, the third juror indicated that after the guilty verdict had been returned, a person sitting at a lunch table at her place of work made several unsolicited comments like "Hang 'em." (6 CT 2138.)

As to the comments relayed in the declarations by the three jurors, the trial court found that they "in no way could have affected any of the juror's

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31. The declaration also indicates the juror was unaffected by what his daughter had told him. (6 CT 2136.) The statement indicating how the information had or had not affected him is not properly considered because it constitutes inadmissible evidence regarding the deliberative process. (See, Evid. Code § 1150(a); *In re Stankewitz* (1985) 40 Cal.3d 391, 397 [jurors are deemed competent only to "prove objective facts"].)

decisions." (27 RT 6795.) As the trial court explained, the evidence of Famalaro's guilt was overwhelming, and nothing about publicity served to deny Famalaro a fair trial in Orange County. (9 RT 2500-2501.)

While Famalaro did exercise all of his peremptory challenges, other than generally seeking to exclude everyone who had heard anything about this case by virtue of pretrial publicity, the banner near the freeway, or the voir dire process (17 RT 4493-4503), Famalaro "expressed no dissatisfaction with the jury as selected." (*People v. Fauber, supra*, 2 Cal.4th at pp. 819-820.) This fact "strongly suggests the jurors were fair and that the defense so concluded." (see *People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 46; *People v. Dennis, supra*, 17 Cal.4th at p. 524; *People v. Panah, supra*, 35 Cal.4th at p. 448.)

In summary, the voir dire process confirmed that Famalaro could and did receive a fair trial in Orange County despite the pretrial publicity generated from the disappearance of Denise Huber in 1991, and the discovery of her body in 1994. (*People v. Welch* (1999) 20 Cal.4th 701, 745.) As set forth above, no sitting juror's initial impressions of the case were resolutely held, and all of the jurors provided assurances, deemed credible by the trial court, that any pretrial publicity they had heard would not prevent them from performing their duties fairly and impartially. (*People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 47; *People v. Cooper, supra*, 53 Cal.3d at p. 807.) Accordingly, as Famalaro has failed to show either error or prejudice as a result of having been tried in Orange County, this claim must be denied.

II.

THE TRIAL COURT PROPERLY DENIED FAMALARO'S REQUEST FOR A SEQUESTERED JURY VOIR DIRE

Famalaro contends the trial court's refusal to conduct an individual and sequestered voir dire of all of the potential jurors in this case deprived him of

his rights to a fair trial by an impartial jury and to a reliable penalty determination under the Sixth, Eighth, and Fourteenth Amendments because the potential jurors were exposed to information known about the case by the other potential jurors. (AOB 209-219.) Famalaro further contends that because of the lack of evidence supporting the special circumstances of kidnaping and sodomy, this "error may well have affected the outcome of the guilt phase as well as the penalty determination," so his entire judgment must be reversed. (AOB 218-219.) This claim lacks merit. The trial court carefully supervised all aspects of the jury voir dire, encouraged the parties to use a publicity questionnaire, and allowed the parties to individually question each potential juror at length. The trial court properly concluded it was neither practicable nor warranted to individually and privately voir dire each potential juror.

The state and federal guarantees of trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. (*People v. Weaver, supra*, 26 Cal.4th at p. 910.) Voir dire is critical to ensuring the right to an impartial jury. (*People v. Earp* (1999) 20 Cal. 4th 826, 852.) Without adequate voir dire, the trial court cannot fulfill its "responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence ." (*Ibid.*, quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22].)

However, there is no constitutional right to a particular manner of conducting voir dire. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1086.) Voir dire is conducted under the supervision of the trial court, and its scope is necessarily left primarily to the sound discretion of that court. (*Ristaino v. Ross* (1976) 424 U.S. 589, 594 [96 S.Ct. 1017, 47 L.Ed.2d 258].)

In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80, this Court had held that voir dire in capital cases concerning prospective juror views regarding the death penalty "should be done individually and in sequestration." This requirement was not based on the federal or state Constitutions, or on a statute, but rather on this Court's supervisory power. (*People v. Cudjo* (1993) 6 Cal.4th 585, 628.)

In 1990, Proposition 115 was enacted, which included the adoption of former Code of Civil Procedure section 223[32], providing that in all criminal cases, including those involving the death penalty, the trial court must conduct the voir dire of any prospective jurors, where practicable, in the presence of the other prospective jurors.[33] Thus, the holding in *Hovey* was abrogated by Proposition 115. (*People v. Stitely* (2005) 35 Cal.4th 514, 537-538; *People v.*

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32. At the time of Famalaro's trial in 1997, former Code of Civil Procedure section 223 governed the manner in which voir dire was to be conducted. That code section provided:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. ¶ Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. ¶ The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

33. Code of Civil Procedure section 223 was amended in 2000 to allow counsel the right to examine prospective jurors.

Box (2000) 23 Cal.4th 1153, 1180; *People v. Waidla* (2000) 22 Cal.4th 690, 713; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171.)

The trial court properly exercised its discretion by refusing to conduct individual, sequestered voir dire of all of the potential jurors in this case. The trial court is vested with discretion to determine the practicability of large group voir dire. (See *People v. Waidla, supra*, 22 Cal.4th at pp. 713-714; *Covarrubias v. Superior Court, supra*, 60 Cal.App. 4th at p. 1180.) This Court employs the abuse-of-discretion standard to review a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors. A trial court only abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. Waidla, supra*, 22 Cal.4th at pp. 713-714, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

On March 19, 1997, the parties discussed a draft of a juror questionnaire prepared by Famalaro's defense counsel. (9 RT 2575-2587.) The trial court was concerned about the draft because of its length, what it considered to be improper questions, and the amount of information about the facts of the case it contained. (9 RT 2583.) The trial court explained the publicity question in the defense draft was not going to be given to the jurors because it provided "as much information as they would have got if they read all the news articles and watched all the t.v." (9 RT 2580.) The trial court properly concluded that while asking what, if anything, jurors knew about the case or the disappearance of Denise Huber, and perhaps providing the dates, giving information the defense had already objected to any juror knowing about was not appropriate. (9 RT 2581.) In response to the parameters identified by the trial court, defense counsel withdrew the request for a jury questionnaire at that time. (9 RT 2587.)

On March 20, 1997, one of the matters discussed by the parties was how best to conduct the voir dire about the publicity of the case. The trial court pointed out that the "advantage to the questionnaire on the death penalty is you

have it in writing and you are not exposing some opinions to other jurors." The trial court added that if they used charts in the courtroom listing questions about the publicity of the case, "we would be getting answers in front of everybody because I do not plan on doing a *Hovey* voir dire." The parties agreed to try again to devise an acceptable questionnaire. (9 RT 2597-2598.)

On March 31, 1997, Famalaro filed pleadings entitled "Trial Brief No. 2" in which he requested individual and sequestered jury voir dire. Relying on the statistics provided by their expert witnesses during the hearing on the motion for a change of venue (as discussed in Argument I, *ante*), Famalaro claimed sequestered voir dire was necessary because 80% of the venire had been exposed to news coverage of the case, 58% of the venire already believed Famalaro was guilty, and approximately the same percentage thought Famalaro should die. (5 CT 1773-1775.)

On April 7, 1997, prior to the beginning of the time qualification process of the potential jurors, the trial court indicated everyone had agreed that there would be a one page publicity questionnaire. (9 RT 2599.) At the end of that day, the defense request for a sequestered voir dire was discussed. The trial court stated it intended to deny the request, but instead "use the modified *Hovey*, if we have to, we will; and when we don't, we won't." (9 RT 2650.) Defense counsel Gragg told the court she had looked at some of the publicity questionnaires and that "a fair number of people remember a fair number of details," and it would be hard to question them about the effect of the information without asking them what information they knew. The trial court responded that in those situations, they could do sequestered voir dire. "That is what I meant by a modified *Hovey*." (9 RT 2650-2651.)

Each potential juror was required to fill out a five page questionnaire entitled "Attitudes Regarding The Death Penalty," along with an attached, single-paged publicity questionnaire asking what information, if any, they had

heard about this case. (See, e.g., CJQ 2526-2531.) Each questionnaire included a signature line indicating it was to be signed under penalty of perjury. (See, e.g., CJQ 2530-2531.) After the questionnaires were returned to the trial court, the parties were allowed to stipulate to excusing some of the potential jurors for cause based solely upon the responses in the questionnaires. Other potential jurors continued on with the voir dire process. (See, e.g., 9 RT 2652.) After the trial court asked its voir dire questions, both the defense and the prosecution were allowed to ask their own, often extensive, questions. (See, e.g., 15 RT 3924-3937; 15 RT 4123-4137; 16 RT 4338-4347.)

All of Famalaro's requests for a completely sequestered juror voir dire were denied by the trial court. After the jury had been selected, the trial court stated it had not seen "anything from any of the jurors that would have a negative impact or bias on the other prospective jurors. I don't see any problem with the jurors selected by both sides." (17 RT 4503.)

In the instant case, the record demonstrates the trial court acted within its discretion. It encouraged the parties to prepare a jury questionnaire to obtain information about each potential juror's knowledge of the facts of the case. It repeatedly admonished potential jurors not to expose themselves to media coverage of case. (See, e.g., 9 RT 2647-2648.) Arrangements were made to allow for excusing some potential jurors for cause based solely upon their questionnaire responses. The trial court also made provisions for individual questioning when necessary, and such in camera questioning was done on several occasions. (See, e.g., 5 CT 1829-1830; 6 CT 1834; 15 RT 4138-4146.) Thus, the individual, sequestered voir dire to which Famalaro claims he was entitled was effectively provided to him - primarily through the use of the questionnaires. If Famalaro believed any verbal responses were being influenced by things said by other potential jurors in the courtroom, he had the ability to compare those verbal responses with the responses in that potential

juror's questionnaire to determine consistency. He also had the ability to question each and every potential juror about their responses.

This Court has previously rejected similar claims concerning the denial of sequestered and individual voir dire in capital cases (*People v. Ramos* (2004) 34 Cal.4th 494, 512-513; *People v. Navarette* (2003) 30 Cal.4th 458, 490; *People v. Box, supra*, 23 Cal.4th at p. 1179.) Famalaro offers no valid reason for revisiting these decisions. Accordingly, as the trial court did not abuse its discretion in this matter, this claim should be denied.

III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURORS WITH CALJIC NO. 2.06

Famalaro contends he was denied his federal constitutional rights to due process of law, to a fair jury trial, and to a reliable jury determination on the issues of guilt, special circumstances, and penalty, because the trial court instructed the jury with a modified version of CALJIC No. 2.06 [Consciousness of Guilt May Be Inferred By Defendant's Attempt To Conceal Evidence]. (AOB 220-230.) As Famalaro did not object to this instruction or request any modifications below, his claim is waived. Moreover, because the instruction was a correct statement of the law and was supported by the evidence, no error occurred.

Penal Code section 1259 allows an appellate court to review instructions given to a jury even if there was no objection at trial if "the substantial rights of the defendant were affected thereby." (See also Pen. Code, § 1176.) As this Court has determined, a failure to request an amplification or modification of standard jury instructions bars the issue from being heard on appeal. (*People v. Bonin* (1989) 47 Cal.3d 808, 856; *People v. Anderson* (1966) 64 Cal.2d 633, 639; see also *People v. Beeler* (1995) 9 Cal.4th 953, 982-983; *People v. Daya* (1994) 29 Cal.App.4th 697, 714 [A defendant may not "remain mute at trial and

scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions."].) Famalaro did not object, nor did he request any amplification or modification, to the People's request for instruction with CALJIC No. 2.06. (22 RT 5461.) Thus, Famalaro's claim of error concerning the giving of CALJIC No. 2.06 has been waived for appeal.

In any event, Famalaro's instant claim also fails on the merits. By giving CALJIC No. 2.06, the trial court implicitly determined as a matter of law that the evidence of Famalaro's attempts to suppress evidence, if credited by the jury, could warrant an inference of consciousness of guilt. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1236.) This finding is supported by the record.

The trial court instructed the jury with the following version of CALJIC No. 2.06:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as, by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(22 RT 5725-5726; 8 CT 2631.)

On appeal, Famalaro asserts CALJIC No. 2.06 improperly allowed the jury to make the impermissible inference that because he concealed Denise's body and possessions, he must be guilty of first degree murder. Famalaro builds this argument by pointing out that during the prosecutor's closing argument to the jury, the prosecutor accurately anticipated that the defense would probably concede the killing, so the only decisions likely to be left for the jury to decide would be the degree of the murder and the truth of the special circumstance allegations. (AOB 222-223, citing 22 RT 5496-5497.) Famalaro then reasons that since there were only two possible theories that would support a first degree murder conviction, e.g., that Famalaro intentionally and with premeditation murdered Denise, or that he killed her during the commission of

the kidnaping, sodomy, or attempted sodomy, and since Famalaro's retention of Denise's body did not tend to prove or support any of those theories, instructing the jury with CALJIC No. 2.06 did nothing except allow the jurors to draw the impermissible inference that Famalaro was guilty of first degree murder in violation of his federal constitutional rights. (AOB 224-230.)

Famalaro's argument misses the point. The propriety of CALJIC No. 2.06 was for the trial court to decide based upon the evidence presented at trial, and the trial court ruled upon the prosecution's request to give CALJIC No. 2.06 before the closing arguments to the jury were heard. The question before this Court is whether the trial court abused its discretion in finding sufficient evidence existed to permit an inference of consciousness of guilt if the jury found Famalaro had attempted to conceal evidence. After the prosecution submitted its request for CALJIC No. 2.06, the trial court indicated it had not initially included that instruction in the packet. The trial court said it had added the instruction to the packet and asked defense counsel to look at the instruction to see if there was any objection. Defense counsel Gragg responded, "We will submit it." The trial court ruled, "It is being given as requested." (22 RT 5461.)

Contrary to Famalaro's insistence that his retention of Denise's body was the *only evidence* capable of being interpreted as an attempt to conceal evidence, such was not the case. While the trial court did not specify what evidence it had found sufficient to permit an inference of consciousness of guilt, the evidence presented at trial speaks for itself. As the prosecutor argued below, one of the reasons why Famalaro kept Denise's body in a freezer for more than three years was that he knew his spermatozoa were in her body, so he could not allow her body to be discovered. (22 RT 5514.) Freezing the

body was a "pretty good way" to prevent it from smelling before he "figured out how to destroy it."[34] (22 RT 5515.)

In addition to preventing the discovery of his spermatozoa in Denise's dead body, Famalaro's attempts to conceal evidence were also demonstrated by his transportation of Denise from the Corona del Mar Freeway in Costa Mesa to the isolation of his rented warehouse space in the Laguna Hills where he was less likely to be seen or disturbed. (22 RT 5535, 5682-5683.) The physical evidence strongly suggested Denise had been gagged by having rags stuffed into her mouth and having her mouth covered with duct tape. This demonstrated an intent to muffle any screams or cries for help, again exhibiting an effort to conceal his crimes and avoid detection. (22 RT 5687-5688, 5597.) There were also the three white plastic bags that had been placed over Denise's head before the fatal blows were struck. This evidence clearly exhibited an attempt to conceal and contain the blood and body tissue that would necessarily result from hitting Denise's head with a hammer and nail puller. There was simply no other plausible purpose for the three white bags. Denise was already blindfolded with duct tape, and the bits of the white plastic bags embedded in indentations in her skull unmistakably established that the bags were in place when she was bludgeoned to death. The fact that Famalaro defeated his intended purpose of the bags by tearing multiple holes in them as he struck Denise with the hammer and nail puller (which allowed Denise's blood to flow onto the floor and the wooden framing where it was later found by investigators) did nothing to mitigate the strength of this evidence.

Thus, the evidence of Famalaro's attempts to conceal evidence was sufficient to permit an inference of consciousness of guilt, so Famalaro is

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34. The prosecutor argued another reason Famalaro kept Denise's body was that her body, like her possessions and the media reports of her disappearance, were his trophies "to remind him of the good times he had that night." (22 RT 5515.)

unable to demonstrate any abuse of the trial court's discretion in this instance. (See *People v. Cooper, supra*, 53 Cal.3d at p. 833 [defendant disposed of shoes]; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1296 [defendant attempted to get rid of gun].)

Moreover, contrary to Famalaro's argument that the only issues for the jury to decide were the degree of the murder and the truth of the special circumstance allegations (AOB 224), Famalaro's plea of not guilty put in issue the existence of every element of every offense charged. (*People v. Coddington* (2000) 23 Cal.4th 529, 597.) The prosecution had the right, and the obligation if they were to avoid a directed verdict of acquittal (Pen. Code, § 1118.1), to offer evidence in their case-in-chief to establish all of the elements of the charged offenses and allegations before the jury. The fact that Famalaro placed the three white plastic trash bags over Denise's head before he killed her was not only sufficient to support an inference of his consciousness of guilt, it was also proof that he intentionally murdered Denise with planning and premeditation - which was argued by the prosecutor (22 RT 5701-5703) and was a question for the jury to decide.

CALJIC No. 2.06 made it clear to the jury that certain types of behavior on a defendant's part could indicate a consciousness of guilt, but it also made it clear that such activity was not, in and of itself, sufficient to prove his guilt. It was up to the jury to determine the weight and significance assigned to the behavior. Additionally, "[t]he cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; see also *People v. Johnson, supra*, 3 Cal.4th at p. 1235 [CALJIC No. 2.06 is of benefit to defense and not improper].)

In any event, even if providing the jury with CALJIC No. 2.06 was erroneous, the correct standard of review is whether it is reasonably probable

that a verdict more favorable to the defendant might have resulted if the instruction had not been given. (*People v. Hannon* (1977) 19 Cal.3d 588, 603, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

It is not reasonably probable that the jury would have accepted Famalaro's argument that Denise willingly accompanied him to his warehouse after becoming stranded on the freeway if only CALJIC No. 2.06 had not been given. (AOB 224, 227.) Denise's car became disabled as she was on her way home late at night. As the prosecutor pointed out to the jury with the use of a map of the area (17 RT 4574), it would have made little sense for Denise to willingly travel in a direction away from her destination to seek help, especially since Famalaro's warehouse was several miles farther away from the location of Denise's car than her home. (22 RT 5521-5522.) The evidence supporting premeditated murder and kidnaping was overwhelming. Moreover, nothing in CALJIC 2.06 would alter the evidence that Famalaro sodomized Denise in light of the fact that spermatozoa were recovered from anal swabs taken from her body. (19 RT 4869-4870; 19 RT 4945-4946.)

Accordingly, given the totality of the evidence presented at trial, it is not reasonably probable that a verdict or penalty more favorable to Famalaro would have resulted in the absence of the now-alleged error. Therefore, if this Court finds this claim has not been waived by Famalaro's failure to preserve it for appeal, this claim should nevertheless be denied on its merits.

IV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE PROSECUTION'S BURDEN OF PROVING EVERY ELEMENT OF THE CHARGED OFFENSES AND SPECIAL ALLEGATIONS BEYOND A REASONABLE DOUBT DURING THE GUILT PHASE OF THE TRIAL

Famalaro contends he was denied his federal constitutional right to due process of law as a result of several standard CALJIC instructions given to the jury during the guilt phase of his trial. Although the trial court properly instructed the jury on reasonable doubt (CALJIC No. 2.90 [Presumption Of Innocence -- Reasonable Doubt -- Burden Of Proof]), Famalaro asserts the prosecution's burden of proving every element of the charged offenses and special circumstance allegations was diluted when the trial court instructed the jury with the following: CALJIC No. 2.01 [Sufficiency Of Circumstantial Evidence -- Generally]; CALJIC No. 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State]; CALJIC No. 2.21.2 [Witness Willfully False]; CALJIC No 2.22 [Weighing Conflicting Testimony]; CALJIC No. 2.27 [Sufficiency Of Testimony Of One Witness]; CALJIC No. 2.51 [Motive]; and CALJIC No. 8.20 [Deliberate And Premeditated Murder]. (AOB 231-244.)

As Famalaro did not object to any of the now-challenged CALJIC instructions before the trial court, and because none of his substantial rights were adversely affected, all of his contentions of error as to these instructions have been waived. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."]; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *cf.*, *People v. Noble* (2002) 100 Cal.App.4th 184, 189 ["Because the claimed error affects defendant's substantial rights, it was not waived by the failure to object

to the instruction"]; Pen. Code, § 1259 [preserving for appellate review any instructional error affecting substantial rights].) Even if Famalaro's claim regarding instructional error had not been waived, it would otherwise fail as this Court has rejected identical claims presented in other cases and Famalaro provides no reason for this Court to reach a contrary result in his case.

A. CALJIC Nos. 2.01 And 2.02 Are Valid Instructions

During the guilt phase, the trial court instructed the jury on the sufficiency of circumstantial evidence and on specific intent with modified versions of CALJIC Nos. 2.01 and 2.02 that incorporated the language of CALJIC Nos. 8.83 and 8.83.1 concerning the special circumstance allegations.

Famalaro contends the last paragraphs of the circumstantial evidence and specific intent/mental state instructions given below undermine the requirement of proof beyond a reasonable doubt by misleading the jurors into believing they could find Famalaro guilty, and find the special circumstances true, if "one interpretation of the evidence 'appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.'" (AOB 233, quoting 22 RT 5724-5725.)

The trial court instructed the jury with a combined version of CALJIC Nos. 2.01 and 8.83 as follows:

> You are not permitted to find the defendant guilty of murder, and you are not permitted to find a special circumstance alleged in this case to be true based upon circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime and consistent with the theory that a special circumstance is true, but, two, cannot be reconciled with any other rational conclusion.
>
> You can probably tell that I have combined two instructions on circumstantial evidence. One which deals with the charge; the other with the special circumstances. If there is any confusions in your mind as to what these instructions mean, those that are combined, you let me know and we will talk about it, okay?

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt and the truth of a special circumstance must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt and to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, *if the circumstantial evidence is susceptible of two reasonable interpretations*, one of which points to the defendant's guilt and to the truth of a special circumstance and the other to his innocence and to the untruth of a special circumstance, you must adopt that interpretation which points to the defendant's innocence and to the untruth of a special circumstance and reject that interpretation which points to his guilt and to the truth of a special circumstance.

If, on the one hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(22 RT 5723-5724; 8 CT 2629, emphasis added.)

The trial court likewise instructed the jury with a combined version of CALJIC Nos. 2.02 and 8.83.1 as to the sufficiency of circumstantial evidence to prove specific intent or mental state as to the charged murder and alleged special circumstances as follows:

The specific intent and/or mental state with which an act is done may be shown by the circumstances surrounding its commission, but you may not find the defendant guilty of the crime charged, murder, and you may not find any special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only, one, consistent with the theory that the defendant had the required specific intent and/or mental state, but, two, cannot be reconciled with any other rational conclusion.

Also, *if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations*, one of which points to the existence of the specific intent or mental state and another to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.

If, on the one hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(22 RT 5724-5725; 8 CT 2630, emphasis added.)

According to Famalaro, the "appears to you to be reasonable" language in these instructions is inconsistent with the "proof beyond a reasonable doubt" required by the Due Process Clause of the United States Constitution. (AOB 233, citing *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40 [111 S.Ct. 328, 112 L.Ed.2d 339].) Famalaro also claims the "appears to you to be reasonable" language, in conjunction with the language in the two instructions about "two reasonable interpretations," impermissibly suggests a defendant is required to present "a theory of innocence in order to be entitled to an acquittal, or to explain the incriminating evidence." (AOB 234.) As to CALJIC No. 2.01, Famalaro additionally claims the choice between "guilt" and "innocence" undercuts the prosecution's burden of proof because "the issue is not one of guilt or innocence, but rather whether there is a reasonable doubt as to the prosecution's evidence." (AOB 234-235.) These claims are without merit.

The jury was instructed with the standard reasonable doubt instruction of CALJIC No. 2.90 (22 RT 5732; 8 CT 2641), and the United States Supreme Court has determined that instruction satisfies the requirements of due process. (*Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) Because CALJIC No. 2.90, in and of itself, correctly defines reasonable doubt, this Court has rejected claims similar to those now raised by Famalaro challenging the sufficiency of the circumstantial evidence instructions. (See, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 428-429.) This Court has repeatedly held that when the circumstantial evidence instructions are read in conjunction with other standard instructions, including CALJIC No. 2.90, the prosecution's burden of proof beyond a reasonable doubt is not diluted or

reduced. (*People v. Maury, supra*, 30 Cal.4th at pp. 428-429; *People v. Hughes* (2002) 27 Cal.4th 287, 346-347; *People v. Osband* (1996) 13 Cal.4th 622, 678-679; *People v. Ray* (1996) 13 Cal.4th 313, 347-348; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943; *People v. Jennings, supra*, 53 Cal.3d at p. 386.)

When read in context, it is clear that the jury was required only to reject unreasonable interpretations of the evidence and to accept a reasonable interpretation that was consistent with the evidence. (*People v. Hughes, supra*, 27 Cal.4th at pp. 346-347.) Famalaro offers no justifiable reason for this Court to overrule the long line of cases upholding the propriety of these standard jury instructions. Accordingly, even if Famalaro's assignments of error concerning CALJIC No.s 2.01 and 2.02 had not been waived, they should otherwise be rejected by this Court as meritless.

B. Standard Jury Instructions Did Not Result In The Jury Being Erroneously Instructed As To The Prosecution's Burden To Prove The Charges And Allegations Beyond A Reasonable Doubt

Famalaro also contends the following standard jury instructions, individually and collectively, diluted the reasonable doubt standard: CALJIC No. 2.21.2 [Witness Willfully False]; CALJIC No. 2.22 [Weighing Conflicting Testimony]; CALJIC No. 2.27 [Sufficiency of Evidence of One Witness]; 2.51 [Motive]; and CALJIC No. 8.20 [Deliberate and Premeditated Murder]. (AOB 235-240.) Famalaro submits each of these instructions, "urged the jury to decide material issues by determining which side had presented relatively stronger evidence." (AOB 235.) According to Famalaro, these instructions effectively replaced the reasonable doubt standard with a "'preponderance of the evidence'" standard. (AOB 236.) However, Famalaro failed to object to any of these standard jury instructions below. Accordingly, just as with the circumstantial evidence instructions discussed above, even if Famalaro's

contentions concerning the effect of these various CALJIC instructions had not been waived, they should be rejected as they lack merit.

Famalaro claims CALJIC No. 2.21.2 [Witness Willfully False] lessens the prosecution's burden of proof by permitting the jury to assess the testimony of prosecution witnesses under a "probability of truth" standard. (AOB 236.) The trial court instructed the jury with CALJIC No. 2.21.2 as follows:

> The witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars.

(22 RT 5728; 8 CT 2635.)

This Court has rejected similar claims that the instruction decreased the prosecution's burden of proof from a reasonable doubt to a "probability of truth." (*People v. Maury, supra*, 30 Cal.4th at pp. 428-429; *People v. Beardslee* (1991) 53 Cal.3d 68, 94.) In *Beardslee*, this Court explained the challenged language does not affect the burden of proof, but that it

> is merely a statement of the obvious -- that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it. [¶] "Thus CALJIC No. 2.21[.2] does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute."

(*People v. Beardslee, supra*, 53 Cal.3d. at p. 95 [citation omitted].)

When CALJIC No. 2.21.2 is considered in conjunction with CALJIC No. 1.01 [Instructions to be Considered as a Whole] and CALJIC No. 2.90 [Burden of Proof], "the jury was adequately told to apply CALJIC No. 2.21.2 'only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt.'[Citation.]" (*People v. Maury, supra*, 30 Cal.4th at p. 429, quoting *People v. Foster* (1995) 34 Cal.App.4th 766, 775.)

Famalaro claims the "convincing force of the evidence" language of CALJIC No. 2.22 [Weighing Conflicting Testimony] lessens the prosecution's burden of proof of beyond a reasonable doubt to something akin to a "'preponderance of the evidence' standard." (AOB 237.) The trial court instructed the jurors with CALJIC No. 2.22 as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. ¶ You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on opposing side[s]. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(22 RT 5728-5729; 8 CT 2635.)

This Court rejected the identical claim when it was raised in *People v. Maury, supra*, 30 Cal.4th at p. 429. This Court found that when considered in conjunction with CALJIC No. 1.01 [Instructions to be Considered as a Whole] and CALJIC No. 2.90 [Reasonable Doubt], CALJIC No. 2.22 instructed the jury to "'weigh the relative convincing force of the evidence . . . only as part of the process of determining whether the prosecution had met its fundamental burden'" of proof beyond a reasonable doubt. (*People v. Maury, supra*, 30 Cal.4th at p. 429 [citation omitted].) As CALJIC No. 2.22 did not lessen the prosecution's burden of proof, Famalaro's instant claim, even if not waived, fails.

Famalaro asserts CALJIC No. 2.27 [Sufficiency of Evidence of One Witness] improperly suggests the defense has the burden of proving facts. (AOB 237-238.) The trial court instructed the jury with CALJIC No. 2.27 as follows:

> You should give the testimony of a single witness whatever weight you think it deserves. ¶ Testimony by one witness which you believe

> concerning any fact is sufficient for the proof of the fact. You should carefully review all the evidence upon which the proof of that fact depends.

(2 RT 5726; 8 CT 2632.)

As with the previously discussed instructions, CALJIC No. 2.27 simply explains that the jury may consider the testimony of one witness concerning a fact to be sufficient for the proof of that fact. CALJIC No. 2.27 properly directs a jury to make findings using reasonable factual interpretations over those that require unreasonable interpretations. (*People v. Noguera* (1992) 4 Cal.4th 599, 633-634.) When considered with all of the other instructions provided to the jury, CALJIC No. 2.27 does not dilute the prosecution's burden of proof. Instead, CALJIC No. 2.27 simply advises the jury on how to evaluate a fact proved solely by the testimony of one witness. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) While CALJIC No. 2.27 does not refer to the prosecution's burden of proving each element beyond a reasonable doubt, the instruction, when read in conjunction with the other instructions, in no way lessens the prosecution's burden of proof. (*People v. Montiel* (1993) 5 Cal.4th 877, 941.) Accordingly, this claim, even if not waived, should be denied.

Famalaro also claims CALJIC No. 2.51 [Motive Not An Element], when considered in conjunction with CALJIC No. 8.21 [Felony Murder (during commission of kidnaping, sodomy or attempted sodomy)], reduced the prosecution's burden of proof by "improperly suggesting to the jurors that they need not find that [Famalaro] intended to commit kidnaping or sodomy in order to convict him of first degree murder." (AOB 239.) The jury was instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. ¶ Presence of motive may tend to establish

> the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(22 RT 5729; 8 CT 2636.)

Famalaro's attempt to confuse the concepts of "motive" and "intent" is misguided. As this Court explained in *People v. Hillhouse, supra*, 27 Cal.4th at p. 504: "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." Specifically, "'[m]otive, intent, and malice—contrary to appellant's assumption—are separate and disparate mental states. The words are not synonyms. Their separate definitions were accurate and appropriate.'" (*Ibid.*, quoting *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098.) This Court has determined that CALJIC No. 2.51 neither lessens the prosecution's burden of proof (*People v. Frye* (1998) 18 Cal.4th 894, 958), nor shifts the burden of proof to the accused (*People v. Noguera, supra*, 4 Cal.4th at pp. 633-634). Accordingly, this claim of error concerning CALJIC No. 2.51, even if it had been preserved for appellate review, must fail.

Famalaro asserts the word "precluding," as used in the last sentence of the second paragraph of CALJIC No. 8.20 [Deliberate and Premeditated Murder], could be interpreted as requiring the defense to absolutely preclude the possibility of deliberation, as opposed to merely raising a reasonable doubt on that issue. (AOB 239-240.) The trial court instructed the jury with CALJIC No. 8.20 as follows:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. The word 'willful' as used in this instruction means intentional. The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.
>
> The word 'premeditated' means considered beforehand. If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of

> deliberation and premeditation so it must have been formed upon pre-existing reflection and not upon a sudden heat of passion or other conditions precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. ¶ A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse even though it includes an intent to kill is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing, and the reasons for and against such a choice, and having in mind the consequences, he decides to and does kill.

(22 RT 5734-5735; 8 CT 2645.)

This Court rejected the identical claim in *People v. Nakahara* (2003) 30 Cal.4th 705, 715. When considered in conjunction with the usual reasonable doubt instructions, particularly the presumption of innocence and the People's burden of proof specified in CALJIC No. 2.90, CALJIC No. 8.20 makes it clear that a criminal defendant is not required to absolutely preclude the element of deliberation. (*People v. Nakahara, supra*, 30 Cal.4th at p. 715; *People v. Crew* (2003) 31 Cal.4th 822, 848.) Accordingly, Famalaro's instant claim concerning CALJIC No. 8.20, even if not waived, should be rejected.

Famalaro also encourages this Court to revisit prior holdings which, according to Famalaro, uphold "defective instructions." (AOB 240.) This Court recently explained that it has previously "rejected claims that the challenged instructions, alone or in combination, somehow dilute or undermine the reasonable doubt standard and thus deprive defendants of due process." (*People v. Rogers* (2006) 39 Cal.4th 826, 888-889.) The jury was instructed on

the concepts of the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt in CALJIC No. 2.90, and the "United States Supreme Court has held that this instruction satisfies due process requirements." (*Id.*, at p. 889, citing *Victor v. Nebraska, supra*, 511 U.S. at pp. 7-17.) Accordingly, even if these claims had not been waived, they should be rejected as there was no instructional error.

V.

THE JURY WAS PROPERLY INSTRUCTED ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER

Famalaro claims the trial court erred in instructing the jury on first degree premeditated murder, and on first degree felony-murder, because the Grand Jury's Indictment "did not charge [Famalaro] with first degree murder and did not allege facts necessary to establish first degree murder." (AOB 245-252.) This claim is without merit. The Indictment charged Famalaro with the crime of "murder" in the language used in Penal Code section 187. Subdivision (a) of that section provides that "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought." In the instant matter, the trial court properly instructed the jurors on all theories of murder supported by the evidence, including first degree premeditated and deliberated murder and first degree felony-murder. There was no error.

Famalaro argues that since the Indictment only charged him with a violation of Penal Code section 187 (murder with malice aforethought), and since all forms of first degree murder are set forth in Penal Code section 189 (including first degree premeditated and deliberated murder, and first degree felony murder), the trial court had no jurisdiction to try him for either first degree premeditated and deliberated murder, or first degree felony-murder. (AOB 246-247.) Famalaro is mistaken. As this Court has explained,

> An accusatory pleading charging murder in the short form prescribed by Penal Code sections 951 and 952, without specifying the degree of murder, adequately apprises an accused of a first degree murder charge [citations], and it has long been settled that under such a charge the accused may be convicted of first degree murder on the theory that the murder was committed in the perpetration of one of the felonies specified in Penal Code section 189 [citations].

(*In re Walker* (1974) 10 Cal.3d 764, 781.)

Famalaro nevertheless asserts that due to the language used in the Indictment, he could not be legally convicted of murder of the first degree, even though the Indictment used the language of the statute defining murder, which is: "Murder is the unlawful killing of a human being with malice aforethought." (Pen. Code, § 187.) However, under that definition, murder includes murder in the first degree and murder in the second degree. (*People v. De La Cour Soto* (1883) 63 Cal. 165, 166; overruled on other grounds in *People v. Gorshen* (1959) 51 Cal.2d 716, 731-732.)

Penal Code section 952 states, in pertinent part:

> In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

After three days of testimony before the Orange County Grand Jury (1 CT 4-337), the Grand Jury filed an Indictment with the Orange County Superior Court in case number 94ZF0196 that charged Famalaro as follows:

> **THE GRAND JURY OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA, BY THIS INDICTMENT**, hereby accuses the aforementioned defendant[] of violating the law at and within the County of Orange as follows:
>
> COUNT 1: That on or about June, 1991, JOHN JOSEPH FAMALARO, in violation of Section 187 (a) of the Penal Code

(MURDER), a FELONY, did willfully and unlawfully and with malice aforethought murder Denise Huber, a human being.

It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7 (c) (1).

It is further alleged that the murder of Denise Huber was committed by defendant[] JOHN JOSEPH FAMALARO, with the intent to kill, while the defendant[] was engaged in the attempted commission and commission of the crime of kidnaping in violation of Penal Code Section(s) 207 and 209, within the meaning of Penal Code Section 190.2 (a) (17) (11).

It is further alleged that the murder of Denise Huber was committed by defendant[] JOHN JOSEPH FAMALARO, with the intent to kill, while the defendant[] was engaged in the attempted commission and commission of the crime of sodomy in violation of Penal Code Section 286 within the meaning of Penal Code Section 190.2 (a) (17) (iv).

Contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

(1 CT 340-341, emphasis in the original.)

The Indictment was dated September 29, 1994, and, under the words "A TRUE BILL," was signed by Marion Lazo, Jr., Foreman of the Grand Jury of Orange County for the year 1994 through 1995. (1 CT 341.)

The language used in the Indictment that charged Famalaro with murder in general terms satisfied the requirements of Penal Code section 952. With regard specifically to felony murder, this Court has held for almost 100 years that a criminal defendant can legitimately be convicted of felony murder if charged simply with murder under Penal Code section 187. (*People v. Witt* (1915) 170 Cal. 104, 107-108.) Famalaro acknowledges such holdings by this Court, but contends the rationale of *Witt* was "completely undermined" by this Court's holding in *People v. Dillon* (1983) 34 Cal.3d 441. (AOB 248-251.)

In *Dillon*, this Court pointed out that felony murder does not require malice (*Id.*, at p. 474), and also pointed out that Penal Code section 189 is "a statutory enactment of the first degree felony murder rule in California." (*Id.*,

at p. 472.) However, *Dillon* did not overrule *Witt*. This Court has rejected the notion that felony murder and murder with malice are separate offenses. As this Court has explained,

> . . . subsequent to *Dillon* [citation], we have reaffirmed the rule of *People v. Witt* [citation], that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely.

(*People v. Hughes, supra*, 27 Cal.4th at p. 369.)

Other decisions have also determined that *Dillon* did not preclude felony murder convictions where murder with malice was generally charged. (*People v. Scott* (1991) 229 Cal.App.3d 707, 715; *People v. Watkins* (1987) 195 Cal.App.3d 258, 265.)

> As *Watkins* holds, "[w]hether murder is committed with malice, or in the context of felony murder, the crime committed is still murder. And while identification of the statute violated is advisable, it is not required. [Citation.] Therefore, an information charging murder is sufficient to charge either a violation of section 187 or section 189."

(*People v. Scott , supra*, 229 Cal.App.3d at p. 714, quoting *People v. Watkins, supra*, 195 Cal.App.3d at p. 267.)

While the elements of felony murder and murder with express or implied malice differ, this only means that the elements of the two kinds of murder differ. There is only one statutory offense of murder. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) "Felony murder and premeditated murder are not distinct crimes." (*People v. Davis* (1995) 10 Cal.4th 463, 514.)

Famalaro also argues that permitting him to be convicted of premeditated murder and/or felony murder after he was only generally charged with murder under Penal Code section 187 violated the United States Supreme Court's holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], because it allowed him to be convicted and punished for a crime that was not specified in the charging document as mandated by the

notice and jury trial guarantees of the Sixth Amendment, and the due process guarantee of the Fourteenth Amendment. (AOB 251-252.)

In *Apprendi*, the United States Supreme Court held that other than a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 489.) However, Famalaro's *Apprendi* argument is misplaced because there is only one crime of murder which is divisible by degrees (based on the evidence), and which can be established by various theories (also based on the evidence). (*People v. Carpenter, supra*, 15 Cal.4th at pp. 394-395.) Penal Code section 187 is the statute that sets forth the crime of murder. As set forth above, Penal Code section 187 was charged in this case. The maximum penalty for murder with the special circumstance alleged in this case was not exceeded, and all the facts necessary to support the verdicts were determined by the jury.

In the instant case, the jury was fully instructed on premeditated and deliberated first degree murder, as well as on first degree felony-murder. (8 CT 2642-2646; 22 RT 5733-5736.) Thus, it cannot be said that the necessary "facts" for these theories were not considered and/or found to be true by the jury in convicting Famalaro of first degree murder. Moreover, the fact that the Indictment alleged the special circumstances that the murder was committed while Famalaro "was engaged in the attempted commission and commission of the crime of kidnaping in violation of Penal Code Section(s) 207 and 209, within the meaning of Penal Code Section 190.2 (a) (17) (11)," and that the murder was committed while Famalaro "was engaged in the attempted commission and commission of the crime of sodomy in violation of Penal Code Section 286 within the meaning of Penal Code Section 190.2 (a) (17) (iv)," further called for all the necessary factual findings required for establishing

felony murder, and for placing Famalaro on notice that the prosecution would be attempting to prove such facts.

Famalaro was properly convicted of first degree murder in this matter. Instructions on first degree murder by premeditation and deliberation, as well as instructions on first degree felony murder, were properly given in the case because the pleading of murder in the language of Penal Code section 187 encompassed all forms of murder, and the evidence presented in this case justified instructions on premeditated and deliberated murder, as well as felony murder. Accordingly, this claim should be denied.

VI.

THERE WAS NO INSTRUCTIONAL ERROR BASED ON FAILING TO REQUIRE JURY UNANIMITY AS TO WHETHER FAMALARO WAS GUILTY OF PREMEDITATED MURDER AND/OR FELONY MURDER

Famalaro contends the trial court's failure to instruct the jury that they had to unanimously agree on whether he committed first degree premeditated murder, or felony murder, denied him of his right to have all elements of the crimes of which was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 253-261.) Preliminarily, this claim of instructional error is not cognizable on appeal as Famalaro failed to present this claim to the trial court. (*People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1189-1192.) Even if this claim was properly before this Court, it would still fail as this Court has consistently held that a unanimous jury verdict as to the underlying theory of first degree murder is not required.

Famalaro acknowledges this Court has rejected identical claims in the past (AOB 253-254), but he contends that pursuant to the United States Supreme Court's holdings in cases such as *Apprendi v. New Jersey, supra*, 530 U.S. at p. 466, and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2532, 159 L. Ed.2d 403], and this Court's holding in *People v. Dillon, supra*, 34 Cal.3d at pp. 475-477, all findings by a jury as to the elements of a crime are required to be made unanimously and beyond a reasonable doubt. Since premeditated murder has different elements than felony murder, and vice versa, Famalaro claims the trial court erred by failing to instruct the jury that it must unanimously agree as to which kind of first degree murder he committed. (AOB 254-261.)

This Court has consistently held that "although the two forms of murder have different elements, only a single statutory offense of murder exists. Felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded." (*People v. Nakahara, supra*, 30 Cal.4th at p. 712, citing *People v. Hughes, supra*, 27 Cal.4th at p. 369; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Silva* (2001) 25 Cal.4th 345, 367; and *People v. Carpenter, supra*, 15 Cal.4th at pp. 394-395.) Likewise, addressing claims that a unanimity instruction should be given in this context, this Court has "repeatedly rejected this contention, holding that the jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation." (*People v. Nakahara, supra*, 30 Cal.4th at p. 712, citing *People v. Kipp, supra*, 26 Cal.4th at p. 1132; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Box, supra*, 23 Cal.4th at p. 1212; and *People v. Riel* (2000) 22 Cal.4th 1153, 1200.) Addressing a claim of confusion between these cases and this Court's holding in D*illon*, this Court explained that in *People v. Dillon, supra*, 34 Cal.3d at p. 476 fn. 23,

> . . . we said that "in this state the two kinds of murder are not the 'same' crimes and malice is not an element of felony murder." Premised on a mistaken interpretation of this language, defendant argues that felony murder and willful, premeditated, and deliberate murder are two separate and distinct crimes, requiring unanimous agreement as to each. He is incorrect. "Felony murder and premeditated murder are not distinct crimes." (*People v. Davis* (1995) 10 Cal.4th 463, 514.) As we have repeatedly explained, the statement referred to in *Dillon* "means only that the two forms of murder have different elements even though there is but a single statutory offense of murder." (*Kipp, supra*, 26 Cal.4th at p. 1131, 113; *Carpenter, supra*, 15 Cal.4th at pp. 394-395.) When, as here, the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed, the jury need not unanimously agree on the theory under which the defendant is guilty.

(*People v. Benavides* (2005) 35 Cal. 4th 69, 101, also citing *People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Addressing any alleged confusion between *Apprendi* and this Court's prior holdings that although the two forms of murder have different elements, only a single statutory offense of murder exists, this Court explained that in *Apprendi*,

> . . . the United States Supreme Court found a constitutional requirement that any *fact* that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.] We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular *theory* justifying a finding of first degree murder. (See also *Ring v. Arizona* (2002) 536 U.S. 584, 610 [122 S.Ct. 2428, 2443-2444, 153 L.Ed.2d 556] [requiring jury finding beyond reasonable doubt as to *facts* essential to punishment].)

(*People v. Nakahara, supra*, 30 Cal.4th at p. 712-713, emphasis in the original.)

Contrary to Famalaro's representation that the United State Supreme Court has left this particular "question open" (AOB 258, citing *Schad v. Arizona* (1991) 501 U.S. 630 [111 S.Ct. 2491, 115 L.Ed.2d 555]), the United States Supreme Court actually rejected a claim that jury unanimity as to the

theory on which a jury reaches its verdict was constitutionally required. (*Schad v. Arizona, supra*, 501 U.S. at pp. 630-645.)

In *Schad*, the United States Supreme Court held that federal due process did not require the jury to agree on one of two alternative statutory theories of first degree murder (i.e., premeditated murder or felony murder). Although the majority agreed that due process imposes some limits on the degree to which different states of mind may be considered merely alternative means of committing a single offense, the court did not agree on the application or extent of such limits. (*Schad v. Arizona, supra*, 501 U.S. at pp. 632, 651, 656.) In writing for the plurality, Justice Souter explained that there exists no single test for determining when two means are so disparate as to exemplify two inherently separate offenses. (*Schad v. Arizona, supra*, 501 U.S. at pp. 633-637, 643.) Along with history and widespread practice, the relevant mental states must be considered to determine whether they demonstrate comparable levels of culpability. In addressing the culpability level of premeditated murder and felony murder, Justice Souter concluded:

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.

(*Schad v. Arizona, supra*, 501 U.S. at pp. 642-644.)

The plurality specifically held that a unanimous agreement as to the underlying theory of first degree murder was unwarranted (*Schad v. Arizona, supra*, 501 U.S. at p.645.) Thus, the holding in *Schad* is completely consistent with this Court's repeated holdings on this point of law. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1185, citing *Schad*.)

Famalaro's suggestion that *Apprendi* overruled *Schad* on this point (AOB 259-260) also lacks merit. (*State v. Tucker* (Ariz. 2003) 68 P.3d 110,

120; see also *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1236 n.20; *Mansfield v. State* (Fla. 2005) 911 So.2d 1160, 1179.) Whatever else it might be thought that *Apprendi* accomplished, it "'did not alter, restructure, or redefine'" the elements of any state-law crime, or require that the states do so themselves. (*State v. Lovelace* (Idaho 2004) 90 P.3d 298, 303.)

Famalaro fails to offer a sufficient reason as to why this Court should either reconsider, or revise, its prior holdings on this point. As the jury found, unanimously and beyond a reasonable doubt, each fact essential to support Famalaro's first degree murder conviction, this claim, even if it was properly before this Court, should be denied.

VII.

THE VICTIM IMPACT EVIDENCE PRESENTED IN THE TESTIMONY OF DENISE HUBER'S PARENTS WAS PROPERLY ADMITTED BY THE COURT AND DID NOT VIOLATE EX POST FACTO PRINCIPLES

Famalaro contends his federal and state constitutional rights against the ex post facto application of law and his due process rights were violated when the trial court allowed the People to introduce victim impact evidence during the penalty phase of his trial. (AOB 262-280.) Famalaro reasons that because he committed his crimes on June 3, 1991, which was just a little over three weeks before the United States Supreme Court determined victim impact evidence was per se admissible in *Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 115 L.Ed.2d 720], the evidence should have been excluded from his trial because "victim impact evidence was totally barred" when his "crimes occurred." (AOB 264.) Famalaro's claim lacks merit. Not only does the prohibition against the ex post facto application of law not apply to such procedural rules of evidence, but both the United States Supreme Court and this Court have approved the admission of victim impact evidence in capital cases because of its relevance to a jury's penalty determination.

On February 13, 1997, Famalaro submitted a pre-trial brief in which he asked the trial court to exclude victim impact evidence from the penalty phase of the trial on the basis that the evidence was barred by ex post facto principles of the federal and state constitutions since the crimes were committed during a window of time when the admission of such evidence was prohibited. (5 CT 1690-1703.) The matter was heard on February 28, 1997. (9 RT 2491-2496.) Relying on *Dobbert v. Florida* (1977) 432 U.S. 282, 293 [97 S.Ct. 2290, 53 L.Ed.2d 344], the trial court properly rejected Famalaro's argument that the change in the law concerning victim impact evidence "'makes the punishment more burdensome.'" (9 RT 2493-2495.) On May 28, 1997, Famalaro renewed his objection to the admissibility of the victim impact evidence and the trial court reaffirmed its ruling. (23 RT 5775-5776.)

The only victim impact evidence presented to the jury was the testimony of Denise's parents, Ione and Dennis Huber. (23 RT 5928-5936.) Their testimony was properly admitted.

In California, victim impact evidence is admissible under Penal Code section 190.3, factor (a). (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245; *People v. Raley* (1992) 2 Cal.4th 870, 916; *People v. Edwards, supra*, 54 Cal.3d at p. 835.) In *Payne v. Tennessee*, the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed. 2d 440] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S. Ct. 2207, 104 L.Ed.2d 876]. In overruling those two holdings, the high Court specifically held that the Eighth Amendment did not bar the admission of victim impact testimony in the sentencing phase of a capital trial because that evidence is designed to show the victim's uniqueness as an individual human being and "whatever the jury might think the loss to the community resulting from his death might be." (*Payne v. Tennessee, supra*, 501 U.S. at p. 823.)

In *People v. Edwards, supra*, 54 Cal.3d at p. 787, this Court addressed the impact of *Payne v. Tennessee* on California law. This Court noted that prior to *Booth* and *Gathers*, it had approved of argument addressing the issue of victim impact in the case of *People v. Haskett* (1982) 30 Cal.3d 841, 863-864. (*People v. Edwards, supra*, 54 Cal.3d at p. 834.) After *Haskett*, this Court continued to approve of victim impact evidence - although primarily in the context of the suffering of the murder victim. (See *People v. Heishman* (1988) 45 Cal.3d 147, 195 [proper for prosecutor to comment on effect defendant's crimes had on victims]; *People v. Allen* (1986) 42 Cal.3d 1222, 1278 [prosecutor's argument about victim suffering caused by crimes proper].)

This Court subsequently found victim impact evidence inadmissible based on *Booth* and *Gathers*. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267 [improper to comment on impact crimes had on victim's family].) However, this Court later found case law excluding victim impact evidence that had been based on *Booth* and *Gathers* was no longer binding in light of the United States Supreme Court's holding in *Payne v. Tennessee*. (*People v. Edwards, supra*, 54 Cal.3d at p. 835; accord, *People v. Raley* (1992) 2 Cal.4th 870, 915.) Thus, on November 25, 1991 (the date this Court's opinion in *Edwards* was filed) the law in California returned to the holding of *Haskett*, and victim impact evidence was admissible.

This Court has since held that *Payne* and *Edwards* are fully retroactive. (*People v. Catlin* (2001) 26 Cal.4th 81, 175; *People v. Clair* (1992) 2 Cal.4th 629, 672; see also *People v. Thomas* (1992) 2 Cal.4th 489, 535 [*Payne* decided while appeal was pending]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 [*Payne* decided while appeal was pending].) Accordingly, *Payne v. Tennessee* and *People v. Edwards* are applicable to the instant matter.

A. Admission Of Victim Impact Evidence Did Not Violate The Prohibition On Ex Post Facto Laws

Famalaro claims "the sudden and radical change in the constitutional status of victim-impact evidence"did more than just remove "an obstacle to 'a type of evidence that could have proved a material fact.'" (AOB 266) However, the change in the law concerning such evidence was neither sudden nor radical. (*Rogers v. Tennessee* (2001) 532 U.S. 451, 457 [121 S.Ct. 1693, 149 L.Ed.2d 697]; *People v. Davis* (1994) 7 Cal.4th 797, 811.) This Court's 1982 decision in *Haskett* had clearly signaled that this Court would allow victim impact evidence, not exclude it. Following *Haskett*, the decisions in *Booth* and *Gathers* were the unexpected departure, not *Payne v. Tennessee.* Moreover, the United States Supreme Court found both *Booth* and *Gathers* had been "wrongly decided" (*Payne v. Tennessee, supra*, 501 U.S. at p. 830), suggesting those two decisions were not indicated by the legal landscape. Accordingly, any decisional change in allowing victim impact evidence did not implicate ex post facto principles because the change was not "unexpected and indefensible." In other words, *Payne v. Tennessee* did not represent a departure from prior law in California; *Booth* and *Gathers* did.

Famalaro's reliance on *Carmel v. Texas* (2000) 529 U.S. 513, 522 [120 S.Ct. 1620, 146 L.Ed.2d 577], to demonstrate a violation of ex post facto principles in the instant matter is misplaced. (AOB 265-268.) As the United State Supreme Court reiterated in *Carmel*, there are four categories of laws that may violate ex post facto principles:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

(*Carmel v. Texas, supra*, 529 U.S. at p. 522, quoting *Calder v. Bull* (1798) 3 U.S. 386, 390 [1 L.Ed. 648], emphasis in the original; see also *Dobbert v. Florida, supra*, 432 U.S. at pp. 292-293.)

In *Carmel*, the statute at issue allowed conviction of a sexual assault based solely on the victim's testimony, whereas the prior law had required the victim's testimony plus some corroboration. (*Carmel v. Texas, supra*, 529 U.S. at pp. 530-531.) The high court found that statute violated the ex post facto clause because it "authoriz[ed] a conviction on less evidence than previously required . . . ." (*Id.*, at p. 531.) However, the Court took care to note that "[o]rdinary rules of evidence . . . do not violate the Clause." (*Id.*, at p. 533, fn. 23.) The high Court also noted that changes to rules of evidence are usually evenhanded and may benefit the prosecution or the defense. Additionally, and "[m]ore crucially, such rules, by permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption." (*Ibid.*)

Contrary to the statute at issue in *Carmel v. Texas*, a change in the admissibility of victim impact evidence does not alter the rules of evidence "in order to convict" someone. That is, the fourth category re-affirmed in *Carmel* does not apply to a sentencing proceeding *after* the accused has been convicted. Victim impact evidence is only admissible at the penalty phase. Since Famalaro had already been found guilty of first degree murder when the penalty phase of his trial began, the fourth category of *Carmel* is not applicable.

Moreover, a change in the admissibility of victim impact evidence is a change in the ordinary rules of evidence that does not implicate the concerns identified in *Carmel v. Texas*. The United States Supreme Court has made a distinction between changes in the rules of evidence that affect the amount of evidence necessary to convict, therefore affecting the presumption of the

defendant's innocence, and rules that merely allow the admission of a new kind of evidence that had previously been inadmissible:

> If persons excluded upon grounds of public policy at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed.

(*Thompson v. Missouri* (1898) 171 U.S. 380, 387 [18 S.Ct. 922; 43 L.Ed. 204].)

The Tenth Circuit Court of Appeals, relying on *Thompson v. Missouri*, found that a new state statute allowing victim impact evidence at the penalty phase did not alter the rules of evidence in a way that conflicted with *Carmel* because the statute did not change the evidence necessary to obtain a death sentence, even though the change only benefitted the prosecution. (*Neill v. Gibson* (10th Cir. 2001) 278 F.3d 1044, 1051-1053.) Such rules "by simply permitting evidence to be admitted at trial, do not subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption." (*Ibid.*) Similarly, in the instant matter, the admission of victim impact evidence did not change the requirements for the evidence necessary for the prosecution to obtain a death sentence.

Famalaro alternatively contends this Court should hold the retroactive application of victim impact evidence violates the state constitutional provision against ex post facto laws. (AOB 262.) This Court has consistently held that the state constitutional provision (Cal. Const. art. I, § 9) provides the same degree of protection as the federal constitution. (*People v. Frazer* (1999) 21 Cal.4th 737, 754, fn. 15, overruled on other grounds in *Stogner v. California* (2003) 539 U.S. 607 [123 S.Ct. 2446, 156 L.Ed.2d 544]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295-296.) Famalaro offers no persuasive reason for deviating from these past decisions.

B. None Of Famalaro's Due Process Rights Were Violated By The Admission Of The Victim Impact Evidence

Famalaro claims the victim impact testimony presented in this matter violated his due process rights because the testimony of Denise Huber's parents "dovetailed with what so much of the venire and the actual jurors" had otherwise heard about the case. Famalaro claims that since many of the jurors were aware of the efforts Denise's parents had taken to find her after she went missing (e.g., missing person banner near location on Highway 73 where Denise's car had been found), those jurors "would quite naturally be especially receptive to and influenced by the emotionally-charge testimony of the parents with whom they were already so empathetic." (AOB 277.) Building on that foundation, Famalaro reasons the jurors "latent or overt feelings of outrage and frustration, if not outright hatred and desire for vengeance, would likely have inhibited their ability to dispassionately arrive at their penalty determination." (AOB 277-278.) Famalaro's claim is untenable.

This Court has found that "evidence of the specific harm caused by the defendant" is generally a circumstance of the crime admissible under factor (a) of Penal Code section 190.3. (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) This Court explained that the word "circumstance," as it is used under factor (a), means the immediate temporal and spatial circumstances of the crime, as well as that "which surrounds materially, morally, or logically" the crime. (*Ibid.*) Factor (a), therefore, allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.*, at p. 835; see also *People v. Johnson, supra*, 3 Cal.4th at p. 1245.) This holding "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra*, 54 Cal.3d at p. 835.)

While declining to explore the "outer reaches" of the kind of evidence admissible as a circumstance of the crime, this Court held "emotional" evidence

was allowable, with the limitation that "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836, quoting *People v. Haskett, supra*, 30 Cal.3d at p. 864.)

Simply put, the jury's proper role is to decide between a sentence of death and life without the possibility of parole. (*People v. Rodrigues, supra*, 8 Cal.4th 1060, 1193.) A penalty phase jury "performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if life or death is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192, internal quotations omitted.) Therefore, the jury makes a "moral assessment," not a mechanical finding of facts. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268, quoting *People v. Brown* (1985) 40 Cal.3d 512, 540.) In deciding which defendants receive a death sentence, states must allow "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235], emphasis in original.) That determination should not be based on abstract emotions, but should instead be rooted in the aggravating and mitigating evidence. (See *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934][discussing limitations on verdict on based on "mere sympathy"].)

A trial court must "strike a careful balance between the probative and the prejudicial." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) However, in the penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than it has in the guilt phase because the prosecution is entitled to show the full moral scope of the defendant's crime. (*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.) As part of the jury's

normative role, the jury must be allowed to consider any mitigating evidence relating to the defendant's character or background. (*Lockett v. Ohio* (1978) 438 U.S. 587, 604.) There is nothing unconstitutional about balancing that evidence with the most powerful victim evidence the prosecution can muster, because that evidence is most certainly one of the circumstances of the crime. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *People v. Edwards, supra*, 54 Cal.3d at pp. 833-836.)

In the context of the penalty phase of a trial, "emotional evidence" and "inflammatory rhetoric" are different concepts. The limitation against "inflammatory rhetoric" is similar to the federal limitation against evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair." (*People v. Howard* (1992) 1 Cal.4th 1132, 1190- 1191.) However, the United States Supreme Court has held that the admission of victim impact evidence is not unfair in any way. (*Payne v. Tennessee, supra*, 501 U.S. at p. 823.)

Because of the penalty phase jury's particular duties, even highly emotional victim impact evidence will not divert it from its proper role. An improper diversion might occur if, for example, the prosecution were to urge that a death sentence should be imposed on the basis of the race of the victim or defendant. (*Booth v. Maryland, supra*, 482 U.S. at p. 517, dis. opn. of White, J. [victim impact evidence should be held constitutionally permissible, but "the State may not encourage the sentence to rely on a factor such as the victim's race in determining whether the death penalty is appropriate"]; *South Carolina v. Gathers, supra*, 490 U.S. at p. 821, dis. opn. of O'Connor, J. ["It would indeed be improper for a prosecutor to urge that the death penalty be imposed because of the race, religion, or political affiliation of the victim"]; *Furman v. Georgia* (1972) 408 U.S. 238, 242 [92 S.Ct. 2726, 33 L.Ed.2d 346], conc. opn. of Douglas, J. [death penalty " unusual" if imposed on the basis of "race, religion, wealth, social position, or class"].) Here, however, the

prosecutor did not urge a death sentence on an unconstitutional basis, so the jury was not diverted from its proper role.

Famalaro presented 21 penalty phase witnesses, including his mother, sister, and brother, who all testified about Famalaro's childhood and life. The jury heard extensive testimony about how religious Famalaro had been, including that he had a crucifix and a picture of Jesus over his bed as an adult (23 RT 5891), and how he had offered spiritual counsel to others (e.g., 26 RT 6478 [religious book, and inscription therein, given to fellow student Marc Murphy]). Famalaro's niece explained she had selected him as her sponsor when she was confirmed in the Catholic Church because he had been the "logical choice" and that she loved him. (26 RT 6528.) The jurors also heard what a hard worker Famalaro had been, how generous he had been with his family and girlfriends, and how he had risked his life to save a mugging victim he did not even know. Famalaro was allowed to have sympathetic witnesses testify about his controlling mother, about how he had been teased by other children when he was a child, and how much he had loved his grandmother. Similarly, he was allowed to have a Catholic priest tell the jury about how much Famalaro had suffered when Ruth left him and apparently put their child up for adoption. In light of all of Famalaro's sympathetic witnesses, the prosecution's victim impact evidence was appropriate in order to allow the jury to meaningfully assess Famalaro's moral culpability. (See *Payne v. Tennessee, supra,* 501 U.S. at p. 809.)

Contrary to Famalaro's claim that the "'extraordinary' victim impact evidence" presented in this case effectively denied him of his rights to a fair trial and reliable penalty determination (AOB 279), the victim impact evidence of the two witnesses called by the People, Denise Huber's parents, was not extraordinary at all. (23 RT 5928-5936.) Indeed, their testimony, which fills only eight pages of the Reporter's Transcript (23 RT 5928-5936) was limited

to the permissible subject of how Denise's murder had affected their lives. (*People v. Raley, supra*, 2 Cal.4th at p. 915; *People v. Johnson, supra*, 3 Cal.4th at p. 1245.) During her penalty phase testimony, Ione Huber told the jury about the empty and helpless feeling of not knowing if Denise was dead or alive, about how the joy had been taken out of holidays and weddings, and how much she missed the things she and Denise used to do together like going out to lunch and making their special chicken chow mein dinner. (23 RT 5928-5931.) Dennis Huber told the jury how much he had loved Denise from the moment she was born, how they used to do special things like play softball or have their breakfast dates on Friday mornings, how excruciating the years of not knowing what had happened to her had been, and how he would not trade the little note she had left on his computer screen a couple of days before she disappeared for a million dollars. (23 RT 5932-5936.) Both Ione and Dennis Huber also attributed a number of health problems they had experienced to the stress related to Denise's disappearance. (23 RT 5931-5932, 5934.) While the testimony by Ione and Dennis Huber had certainly been powerful, nothing about it was so inflammatory that it diverted the jury from its proper role. (*Payne v. Tennessee, supra*, 501 U.S. at p. 809; see *People v. Edwards, supra*, 54 Cal.3d at p. 836.)

Moreover, the most powerful aggravating evidence against Famalaro had already been heard by the jury during the guilt phase of his trial. The jury heard evidence that demonstrated Famalaro had kidnaped, stripped, handcuffed, blindfolded, gagged and sodomized Denise before he killed her by smashing her skull with a hammer and nail puller. The jury also heard about how three white plastic trash bags had been placed over Denise's head before the at least 31 fatal blows were struck, even though she was already gagged and blindfolded. This evidence not only showed that Famalaro intentionally killed Denise when she was helpless to defend herself by virtue of being blindfolded

and having her hands cuffed behind her back (which would have only been necessary while she was still alive), but that he also had the presence of mind to think about minimizing the amount of blood he was about to spill inside his warehouse/residence by covering her head with the three plastic bags beforehand.

The jury was well aware of the facts that Denise had disappeared during the early morning hours of June 3, 1991, and that her body had not been found until Famalaro's freezer was opened by members of the Maricopa County Sheriff's Department on July 14, 1994. They also heard the evidence, and saw the exhibits, that demonstrated Famalaro had been following the case in the newspapers and on television, not the least of which was the newspaper dated June 4, 1992, found in an upstairs bedroom closet. One of the articles in that newspaper bore the headline,"Painful Anniversary,"and included a photograph of Ione and Dennis Huber standing in the location where Denise's car had been found a year earlier on Highway 73. In the background of the photograph was a banner or billboard with a photo of Denise that said, "Have You Seen? Denise Huber - Call ...." (18 RT 4703-4704.)[35] Thus, the victim impact evidence presented in this case was minimal when compared to the evidence presented during the guilt phase of the trial.

The specific harm Famalaro caused when he murdered Denise, i.e., the impact of her disappearance and death on her parents, was relevant to the jury's meaningful assessment of his "moral culpability and blameworthiness." (See *Payne v. Tennessee, supra*, 501 U.S. at p. 809.) The evidence of the impact of

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35. The prosecutor correctly argued to the jury that the evidence demonstrating Famalaro had kept Denise's body for three years could not be used as a factor in aggravation. Instead, the prosecutor argued that evidence contradicted the defense evidence offered to show Famalaro had been physically and emotionally racked with remorse after he committed his crimes. (27 RT 6617.)

Famalaro's crimes on his victim's family advanced the State's interest in "counteracting the mitigating evidence which the defendant is entitled to put in[.]" (*Id.*, at p. 825.) Fairness demands that evidence of the victim's personal characteristics, and the harm suffered by her family, be considered along with the "parade of witnesses" praising the "background, character, and good deeds" of the defendant . . . without limitation as to relevancy[.]" (*Id.*, at p. 826; see also *People v. Dennis, supra*, 17 Cal.4th at p. 498 [capital defendant in penalty phase presented evidence from friends and associates as to his childhood difficulties, his shyness and loneliness due to his hearing problem, his friendly and easygoing nature, his pride and love for his son (including a tape recording of defendant and his son) and his devastation at his son's death, his honesty, thoughtfulness, and sensitivity, his good record at work, and his compassion for others].)

Famalaro brutally murdered a 23-year-old woman who had done nothing except get a flat tire in what turned out to be the wrong place and time. Though he may not have known the precise dimensions of the tragedy his actions would cause, the profound harm to the survivors was "so foreseeable as to be virtually inevitable." (*Payne v. Tennessee, supra*, 501 U.S. at p. 838, conc. opn. of Souter, J..) There was no due process violation. As the jury was properly allowed to hear evidence concerning the full impact of Famalaro's actions, the trial court did not err by admitting the victim impact evidence in this case. Accordingly, this claim should be denied.

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE USE OF VICTIM IMPACT EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Famalaro contends for the first time on appeal that the trial court erred by not instructing the jury on the proper use of the victim impact evidence. (AOB 281-286.) Famalaro's claim has not been preserved for appeal because he failed to either object to the instructions given on this point, or to request a clarification. In any event, his contention fails because the trial court properly instructed the jury on how to consider the evidence presented during the penalty phase of the trial with standard CALJIC instructions.

As Famalaro failed to present his claim to the trial court, and as none of Famalaro's substantial rights were adversely affected by the standard penalty-phase CALJIC instructions given to the jury, this claim is not properly pending before this Court. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse, supra,* 27 Cal.4th at p. 503.) When a defendant believes a jury instruction needs amplification, clarification, or explanation, it is incumbent upon him or her to make such a request. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1192.) A failure to object or request such clarifications at trial bars appellate review of the issue. (*People v. Johnson* (1993) 6 Cal. 4th 1, 53.); *People v. Sully* (1991) 53 Cal.3d 1195, 1218.) In the instant matter, the jury was instructed, inter alia, pursuant to CALJIC No. 8.84.1 [Duty of Jury - Penalty Proceeding], and CALJIC No. 8.85 [Factors For Consideration In Determining Penalty]. As Famalaro did not object to these jury instructions before the trial court, nor request the additional limiting instruction now advanced (AOB 283), this claim has been waived.

While Famalaro acknowledges he did not request the jury instruction he now contends should have been given, he claims there was a sua sponte duty for the court to give the same limiting instruction to the jury in order for the jury to properly understand the case. (AOB 282-283.) An example of the type of jury instruction Famalaro contends should have been given sua sponte reads as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is [*sic*] a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further, you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed. (AOB 283.)

The trial court was under no sua sponte duty to amplify the standard instructions given to the jury below. The instructions to the jury guided them with respect to victim impact evidence included standard CALJIC Nos. 1.03 [36], 8.84.1, and 8.85.

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36. CALJIC No. 1.03 provided:

> *You must decide all questions of fact in this case from the evidence received in this trial and not from any other source.* You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information.
>
> *You must not discuss this case with any other person except a fellow juror, and then only after the case is submitted to you for your decision and only when all twelve jurors are present in the jury room.*

(27 RT 6758; 8 CT 2671, emphasis added.)

According to Famalaro, the standard CALJIC No. 8.84.1 instruction [Duty of Jury - - Penalty Proceeding], "does not tell the jurors why victim-impact evidence was introduced."[37] (AOB 284.) Assuming such guidance is

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37. CALJIC No. 8.84.1 was provided as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> *You must neither be influenced by bias nor prejudice against the defendant nor swayed by public opinion or public feelings.*
>
> Both the people and the Defendant have the right to expect that you will consider all of the evidence, follow the law, exercise your discretion consciously, and reach a just verdict.
>
> (c) The presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (h) 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 law was impaired as a result of mental disease or defect or the affects of intoxication.
>
> (i) The age of the defendant at the time of the crime.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial. ¶ You must disregard any jury instruction given to you in the guilt or innocent phase of this trial which conflicts with this principle.

(27 RT 6762-6764; 8 CT 2679-2680, emphasis added.)

even necessary, CALJIC No. 8.85 [38] told the jurors that in "determining which penalty is to be imposed . . . [the jurors] shall consider all of the evidence which has been received during any part of the trial" (27 RT 6762), and CALJIC No. 8.88 informed the jury that an "aggravating factor is any fact, condition or event attending to the commission of a crime which increases its guilt or enormity, or add to its injurious consequences which is above and beyond the elements of the crime itself." (27 RT 6768.) Thus, it was perfectly clear that the victim impact evidence was presented to the jury for its consideration as an aggravating factor.

Famalaro also faults CALJIC No. 8.84.1 because it fails to "caution the jury against an irrational decision." (AOB 284.) This claim is without merit. The jurors were not only told to consider all of the jury instructions given, but, in CALJIC No. 8.88, the trial court specifically told the jurors that in "weighing the various circumstances," they were to "determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." The trial court also instructed that each juror "must be persuaded that the

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38. CALJIC No. 8.85 was provided as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) *The circumstances of the crime of which the defendant was convicted in the present proceeding, the impact of the crimes on the family of the victim, and the existence of any special circumstances found to be true.*
>
> (b) The presence or absence of criminal activity by the defendant other than the crime for which the defendant has been tried in the present proceeding which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(27 RT 6756; 8 CT 2670, emphasis added.)

aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (27 RT 6769.) To additionally tell the jurors not to make "an irrational decision" was unnecessary.

Famalaro next complains that CALJIC No. 8.84.1 does not "warn the jurors not to consider what they may perceive to be the opinions of the victim-impact witnesses." (AOB 284-285.) In this case, neither of Denise Huber's parents voiced an opinion as to what they thought the penalty should be. In any event, the jurors were instructed on the aggravating factors they were permitted to consider in CALJIC No. 8.88. (27 RT 6768.) The "possible opinions of the victim-impact witnesses" was not included in that instruction. Where specific items are listed, it is assumed that the omission of items similar in kind is intentional and the omitted items are therefore excluded. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020, (conc. opn. of Brown, J.).)

Finally, Famalaro faults CALJIC No. 8.84.1 because it fails "to admonish [the jurors] not to employ the improper -- but, in this case, likely-employed--factor of vengeance in their penalty determination." (AOB 285.) Again, this was not required because the jury was instructed on the aggravating factors it was permitted to consider in CALJIC No. 8.88 (27 RT 6768), and vengeance and emotion were not among them. (*People v. Castillo, supra,* 16 Cal.4th at p. 1020.)

As Famalaro notes, a similar argument was rejected by this Court in *People v. Ochoa* (2001) 26 Cal.4th 398, 455. (AOB 284-285.) In *Ochoa*, where, unlike here, a special instruction was actually requested by the defense at trial, this Court found the requested instruction was properly refused because the information was covered in CALJIC No. 8.84.1. (*Ibid.*) The same reasoning applies in the instant matter. As set forth above, CALJIC No. 8.84.1 instructed the jury that "it must neither be influenced by bias or prejudice

against the defendant, nor swayed by public opinion or public feelings." (27 RT 6756.) This language countered any notion that the jurors would make an irrational decision by being overcome by emotion. As this Court has made clear, "the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" *People v. Gurule* (2002) 28 Cal.4th 557, 659, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177.)

No reasonable juror would have misunderstood the standard jury instructions given below as permitting an improper use of the victim impact testimony. Since there is no reasonable likelihood that the jury misunderstood the proper use of victim impact evidence, the instructions given cannot be deemed erroneous. (See, *Boyde v. California* (1990) 494 U.S. 370 [110 L.Ed.2d 1190, 108 L.Ed.2d 316]; *People v. Benson* (1990) 52 Cal.3d 754, 801.) Accordingly, Famalaro's claim that the trial court erred in not sua sponte providing a limiting instruction concerning the victim impact evidence should be rejected.

IX.

THE TRIAL COURT PROPERLY EXCLUDED THE PROFFERED HEARSAY EVIDENCE BY FAMALARO'S SISTER

Famalaro claims the trial court committed reversible error, and violated his rights under the Sixth, Eighth, and Fourteenth Amendments, when it sustained the prosecution's hearsay objection to the proffered penalty phase testimony of his sister, Marion Thobe, about a telephone conversation in which Famalaro told her he had been sexually molested as a child by their older brother, Warren. (AOB 287-305.) This claim fails as the trial court properly excluded the evidence as it was hearsay and did not fall within any of the

recognized exceptions to the hearsay rule. Additionally, to the extent Famalaro claims any of his federal constitutional rights were affected by the ruling, his claims have been waived by his failure to present those bases for the trial court's consideration. In any event, as Famalaro's sister did testify about other aspects of the telephone conversation she had with Famalaro in approximately June of 1991, including the fact that he was very upset by something that he said had happened to him a long time ago, the defense was still able to argue to the jury that he was remorseful and upset, and "trying to get in touch with what would cause him to" commit such crimes. Finally, even assuming error in excluding this evidence, Famalaro was not prejudiced.

During her direct testimony in the penalty phase of the trial, Marion Thobe said their older brother, Warren, had tried to sexually fondle her on several occasions when she was ten or twelve years old. Even though Warren was 18 months older than Marion, she was taller and bigger than he was at the time, so she was able to physically and verbally make him stop. (24 RT 6111, 6147-6148.) Defense attorney Gragg's next question to Marion was, "Did John Famalaro ever report to you Warren doing anything like that to him?" The prosecutor immediately objected on the basis that the question called for hearsay. The objection was sustained. (24 RT 6148.)

Marion went on to testify that in 1988, she and her husband and children left California and moved next door to her parents in Prescott, Arizona. From that time on, she and Famalaro kept in touch with each other with at least one telephone call per week. (24 RT 6155-6156.) Defense attorney Gragg asked Marion if she remembered one particular telephone conversation with Famalaro around the month of June in 1991. Marion responded there was one call that disturbed her. Famalaro was crying and was very emotional. The conversation lasted 15 or 20 minutes, and the subject of the conversation had to do with things that had happened years earlier. (24 RT 6156-6157.)

When Warren Famalaro subsequently testified as a defense witness during the penalty phase of the trial, he admitted trying to touch Marion a couple of times when he was approximately in the seventh grade, but said he "didn't get too far." (25 RT 6300.) During his cross-examination, when he was repeatedly asked if he ever sexually molested Famalaro when he was an adolescent, Warren consistently maintained he had not molested Famalaro. (25 RT 6300-6304.) While he admitted that in 1980 (when he would have been 28 years old), he had been convicted of molesting a 10-year-old girl, a 10-year-old boy, and a 17-year-old girl (25 RT 6243-6244), he testified "that kind of thing wasn't even in [his] repertoire of what was possible" when he was an adolescent. (25 RT 6303.)

A. Famalaro Waived His Claim Of Constitutional Error

Famalaro now claims the trial court erroneously excluded the evidence about him telling Marion that Warren had molested him as a child. He asserts the exclusion of this evidence violated his rights to due process, to present a "complete defense," and to a reliable penalty determination under the Sixth, Eighth, and Fourteenth Amendments. (AOB 287-288, 296-300.) However, Famalaro failed to raise any of these constitutional grounds to the trial court.

The only grounds offered in support of the admissibility of the proffered hearsay evidence by Marion was that Famalaro's disclosure about the alleged molestation was made around the time of Denise Huber's murder. The defense wanted to use the evidence to show that Famalaro felt extreme remorse after the murder, and, in a somewhat strained line of reasoning, to rebut the prosecution's argument that Famalaro had kept Denise's body as a trophy and had gone about his life as usual. (24 RT 6161-6162.)

Specifically, the entire argument presented to the trial court, concerning the admission of the hearsay evidence, was as follows:

MS. GRAGG: Your honor, I just wanted to cite to the court a case on the issue of the statement that I had tried to get in that was objected to as hearsay. The statement made by Mr. Famalaro to his sister in a telephone call in 1991.

First of all, the offer of proof would be that the answer to that question would be that Mr. Famalaro in a tearful, emotional state told his sister for the first time that his brother, Warren Famalaro, had molested him when they were children.

The case I would like the court to look at is [*People v. Brown* (1994) 8 Cal. 4th 746]. I will tell the court right now it - - the facts are not like this. It is a fresh complaint case. I would like the court to look at it because it has a good explanation of the nonhearsay reasons for bringing in that statement.

And my nonhearsay reason for bringing in the statement is to let the jury know that he reported it, and when he reported it[,] and the emotional state in which he reported it because I think it is of importance given it was the month of the killing.

THE COURT: But this is in 1991.

MS. GRAGG: Yes. It is not a fresh complaint, and I am not saying that it is. I am saying that our offer of proof is for it to come in for that nonhearsay purpose, not for - - not as an indication - -

THE COURT: What is the nonhearsay purpose?

MS. GRAGG: To indicate that in a period of time very close to or within the same month when he committed this murder he is having an emotional conversation with his sister in which he for the first time he says something to his sister about him being molested as a child.

It is an indication that the killing affected him. It is evidence that he was not - - you know, the picture that has been painted is that this was an enjoyable experience for him. He went and faced the world the way he always had. He had this trophy at home, and that is not what is happening.

THE COURT: The problem with your offer is that the statement Warren molested him doesn't do any more than the rest of the conversation[,] without that statement[,] has already done. He was emotional - -

MS. GRAGG: Well, I think it indicates that he - - I mean, I think what I would argue is that it indicates the fact that he is bringing this

issue up to Marion, that he never talked to her about it before means that he has committed this horrible act, he realizes he has committed this horrible act, and he is trying to get in touch with what would cause him to do that.

I don't think it is coincidence that he makes that statement to her around this same period of time. It would have - - if it were made five years earlier or five years later, I think I would be hard pressed to argue the relevance.

THE COURT: Well, that is one way I suppose of proving that Warren had molested your client, but there are other ways of proving it. The emotional part is already in.

MS. GRAGG: That is true.

THE COURT: I just - - I understand the *Brown* case; I understand that. I understand the difference between hearsay and nonhearsay, and I will let statements in with an admonition to the jury when appropriate. This is not an appropriate request.

MS. GRAGG: All right.

THE COURT: Denied.

I'm sorry, Mr. Evans, did you want to be heard?

MR. EVANS: No, sir. I can't add anything to that. Just leave it there.

(24 RT 6160-6163, italics added.)

Since the constitutional grounds now raised were not presented to the trial court for its consideration, Famalaro's current claims on these grounds have been forfeited. (*People v. Morrison* (2004) 34 Cal.4th 698, 712; *People v. Smithey* (1999) 20 Cal.4th 936, 995 [defendant did not contend the federal constitution compelled admission of hearsay testimony and he may not do so for the first time on appeal]; see also Evid. Code, § 354.)

B. Famalaro's Claim Of Error Of A Constitutional Magnitude Is Meritless

Famalaro asserts the exclusion of his proffered hearsay evidence "resulted in the exclusion of relevant and critical mitigating evidence, and

violated [his] rights to due process and an individualized and reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments." (AOB 288.) Famalaro's claim lacks merit.

In *People v. Frye, supra*, 18 Cal.4th at p. 894, this Court summarized the standards of admissibility concerning mitigation evidence in capital cases as follows:

> The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [Citations.] The constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. [Citations.] The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." [Citation.]
>
> At the same time, however, the United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense. [Citations.] Thus, in a proper exercise of its discretion, the trial court determines the relevancy of mitigation evidence in the first instance. [Citations.]
>
> In *McKoy v. North Carolina* (1990) 494 U.S. 433 [110 S.Ct. 1227, 108 L.Ed.2d 369], the court provided further guidance on the nature of the relevancy inquiry at the penalty phase. The court observed that the concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally. (*Id.* at p. 440 [110 S.Ct. at p. 1232].) "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. . . .' " [Citations.]

(*People v. Frye, supra*, 18 Cal.4th at pp. 1015-1016, italics added.)

Due process concerns may override state evidentiary rules at the penalty phase of a capital trial in circumstances where the evidence in question is "highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable." (*People v. Phillips* (2000) 22 Cal.4th 226,

238; see also *Green v. Georgia* (1979) 442 U.S. 95, 97 (99 S.Ct. 2150, 60 L.Ed.2d 738].) In the penalty phase, a capital defendant is permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the crimes or the defendant's character and record. (Pen. Code, § 190.3; *People v. Ramos, supra*, 34 Cal.4th at p. 528; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8 [106 S.Ct. 1669, 90 L.Ed.2d 1].) In general, however, this Court has held that the hearsay rule still applies at the penalty phase of a capital trial. (*People v. Weaver, supra*, 26 Cal.4th at p. 980; see also *People v. Phillips, supra*, 22 Cal.4th at p. 238, citing *People v. Edwards, supra*, 54 Cal.3d at p. 837 ["neither this court nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code"].)

Relevant mitigation evidence must be admitted in the penalty phase of a capital case, even if it constitutes hearsay under state law. (*Green v. Georgia, supra*, 442 U.S. at p. 97.) However, where hearsay evidence in mitigation is not truly significant to a penalty determination, the evidence may be excluded notwithstanding the high court's holding in *Green*. (*People v. Smithey, supra*, 20 Cal.4th at p. 996.) Even if hearsay is relevant to the issue of punishment, exclusion does not violate the defendant's constitutional rights if the hearsay is not reliable. (*People v. Morrison, supra*, 34 Cal.4th at p. 725; *People v. Phillips, supra,* 22 Cal.4th 226, at p. 238.)

The hearsay evidence proffered by Famalaro was neither relevant nor reliable. Even though Famalaro's trial counsel never specifically said the proffered hearsay evidence was necessary to show his state of mind after he committed his crimes, that was essentially what was argued. However, the only authority offered to the trial court to support the position that the hearsay evidence should be admitted was the case of *People v. Brown, supra*, 8 Cal.4th 746. (24 RT 6161.) In *Brown,* this Court held that the fresh-complaint doctrine,

which allowed the admission of evidence that an alleged victim of a sexual offense had disclosed the offense to someone shortly after the event, was still viable in California. While the original premise underlying the fresh-complaint doctrine (i.e., that it was natural for the victim of a sexual assault to promptly disclose such an assault to someone if it had actually occurred) was no longer valid in light of contemporary knowledge, the evidence of such a disclosure could still be admitted for the non-hearsay purpose of establishing the circumstances under which the victim disclosed the offense to someone, so long as the evidence was otherwise relevant. (*Id.*, at pp. 759-763.) The evidence of the circumstances of such a disclosure would be relevant under generally applicable rules of evidence, and therefore admissible, so long as its probative value outweighed its prejudicial effect. (*Ibid.*, citing Evid. Code § 210 and § 352.) This Court determined that the evidence of the victim's disclosure of the sexual assault had been properly admitted in *Brown* because the testimony was limited to the timing of the disclosure and the circumstances under which it was made, and had not included any description of the alleged acts. (*Id.*, at p. 764.) Unlike the situation in *Brown*, where the hearsay evidence of the disclosure was relevant to the limited issue of the alleged victim's credibility at trial, Famalaro's credibility was not at issue because he was not a witness at trial. Accordingly, Famalaro's reliance upon *Brown* was completely misplaced.

Famalaro now argues the evidence was not being sought to prove Warren had molested Famalaro. Indeed, Famalaro asserts "it mattered not at all whether [Famalaro] had in fact been molested by his brother," because the significance of the evidence was that he was distraught by what he had done, and his distress was due to the affect the killing had on him, and "at least in part because his mind had conjured up the memory of having been molested by his own brother as a child." (AOB 293.) As the trial court pointed out, the evidence of his emotional distress, and the timing of same, was already before

the jury. (24 RT 6162.) Thus, whatever reason Famalaro gave Marion for his emotional distress did not add anything to the evidence presented.

It is undisputable that only relevant evidence is admissible. (Evid. Code, § 350.) This is evidence that has any tendency in reason to prove or disprove any disputed material fact. (Evid. Code, §§ 210, 250, 251; *People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Garceau* (1993) 6 Cal.4th 140, 177.) A trial court has broad discretion in determining the relevance of evidence. (*People v. Harris, supra*, at p. 337.) However, even if evidence is relevant, it may still be inadmissible. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1117; Evid. Code, § 355.) Hearsay evidence is inadmissible unless it falls within an exception. Hearsay evidence is evidence of a written or verbal statement made by a declarant on an occasion other than as a witness while testifying at a current trial, that is offered to prove the truth of the matter asserted in the statement. (Evid. Code, §§ 140, 225, 1200.) "'As a general rule, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Phillips, supra*, 22 Cal.4th at p. 238, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) Moreover, "'excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.'" (*People v. Ramos, supra*, 34 Cal.4th at p. 528, quoting *People v. Fudge* (1994) 7 Cal.4th 1975, 1103.)

On appellate review, a trial court's ruling on the admissibility of evidence will not be disturbed unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113, citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Rarely does the exclusion of evidence under a state evidentiary rule amount to a constitutional denial of due process or the right to present a defense. (*People v. Phillips, supra,* 22 Cal.4th at p. 238.)

As this Court has explained,

> In pertinent part, Evidence Code section 1250 creates an exception to the hearsay rule that permits admission of "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) ... when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or any other 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."

(*People v. Jablonski* (2006) 37 Cal.4th 774, 819, quoting Evid. Code, 1250, subd. (a).)

The proponent of any penalty phase evidence has the burden of showing it is reliable or trustworthy. (*People v. Kraft* (2000) 23 Cal. 4th 978, 1074.) "Evidence of a statement of a declarant's state of mind, when offered to prove or explain a declarant's conduct, is admissible, as long as the statement was made under circumstances indicating its trustworthiness." (*People v. Guerra, supra*, 37 Cal.4th at p. 1114; see also *People v. Livaditis* (1992) 2 Cal.4th 759, 779; Evid. Code, § 1252.) This Court has recognized a hearsay statement that falls within a state of mind exception may still be excluded when there is "'ample ground to suspect [a] defendant's motives and sincerity'" in making the statement. (*People v. Edwards, supra*, 54 Cal. 3d at pp. 818-821, quoting *People v. Whitt* (1990) 51 Cal.3d 620, 648; see also *People v. Livaditis, supra*, at p. 779.) In other words, a hearsay statement must still pass the test of trustworthiness. No showing of the reliability of the contents of Famalaro's hearsay statement was ever made to the trial court, and such a showing is also absent from his argument on appeal.

In the instant matter, Famalaro's statements to his sister did not bear sufficient indicia of reliability to warrant admissibility. Warren repeatedly denied that he ever molested Famalaro. In light of Warren's admission that he had molested other children, including a boy, he had no reason to lie about molesting Famalaro while testifying on his behalf in the penalty phase of his

brother's capital trial. (25 RT 6301.) Even now, Famalaro speculates that his mind might have "conjured up the memory of having been molested by his own brother as a child." (AOB 293.) Another equally plausible explanation was that Famalaro intentionally fabricated a story for Marion in order to avoid telling her the real reason for his emotional distress, i.e., that he was upset because Nanci Rommel had just broken their engagement (23 RT 5920; 25 RT 6375-6379), or that he had kidnaped, sexually assaulted, and violently murdered an innocent young woman he happened to encounter late one night after her car developed a flat tire (as the defense wanted the jury to believe). In fact, the admissibility of the evidence about the conversation itself was rather tenuous because there was no proof of exactly when that particular conversation occurred. When defense attorney Gragg asked Marion if she remembered having a particular telephone conversation with Famalaro sometime around the month of June in 1991, Marion responded in the affirmative by saying there had been one particular conversation that disturbed her because Famalaro was very emotional and cried. (24 RT 6156.) While Famalaro's counsel argued the conversation was held in the month following the murder and demonstrated his emotional distress and remorse over what he had done (24 RT 6162), the conversation may just as easily have occurred prior to the crimes. There was no way to know, yet the defense was still able to make use of that uncertain evidence at trial.

Generally, in deciding the admissibility of a statement, a trial court may consider the circumstances surrounding the making of the statement and the witness must be available for cross-examination. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 391, fn. 20.) This crucial requirement was obviously missing in this case. In essence, Famalaro sought to introduce his own statements, but without the risk of subjecting himself to cross-examination.

> "[A] capital defendant has no federal constitutional right to the admission of evidence lacking in trustworthiness, particularly when the

> defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination."

(*People v. Jurado* (2006) 38 Cal.4th 72, 130.)

If Famalaro's reasoning on this issue were to be accepted by this Court, anything a defendant may have ever said about being distressed over past, unverifiable events, would be admissible in the penalty phase of a capital trial without having the defendant take the stand or be subject to cross-examination. Such is not the state of the law.

C. Famalaro Was Not Prejudiced By The Exclusion Of The Proffered Hearsay

Even assuming, arguendo, error of a constitutional magnitude, Famalaro simply cannot show that he suffered any prejudice as a result of the exclusion of the hearsay evidence. The jury heard Marion's testimony that within roughly the same month that Famalaro committed the crimes in this case, he had been very upset about something that had happed a long time ago. (24 RT 6156-6157.) The admission of exactly what it was that he told Marion he was upset about would not have added to the information heard by the jury - particularly when the purported focus of the emotional turmoil evidence had been to convince the jury that in the month following Denise's murder, Famalaro felt remorse for what he had done.

Given the overwhelming aggravating circumstances in comparison to the mitigating circumstances, the admission of Famalaro's hearsay statement to his sister would not have changed the outcome in the penalty phase of this case. There is no reasonable probability that the jury would have reached a different verdict in the absence of the alleged error. (See *People v. Weaver, supra*, 26 Cal. 4th at p. 980, citing *People v. Watson, supra*, 46 Cal.2d at p. 836 [applying the *Watson* standard to exclusion of hearsay evidence at penalty phase in a capital case]; see also *People v. Alcala* (1992) 4 Cal.4th 742, 796 [applying

Watson standard of review to erroneous exclusion of testimony].) Further, even under the standard applicable for error of a constitutional magnitude, enunciated in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed. 2d 705], any error was harmless beyond a reasonable doubt. (See *People v. Frye, supra*, 18 Cal.4th at p. 1017 [applying *Chapman* standard to error in excluding testimony as irrelevant].) Accordingly, even if the trial court had erred in excluding Famalaro's hearsay evidence, under either standard of review, Famalaro's instant claim would still fail due to the absence of any prejudice.

X.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.27

Famalaro contends his death judgment must be reversed because he was denied his constitutional right to due process of law as a result of the trial court instructing the jury with CALJIC No. 2.27 [Sufficiency of Testimony of One Witness] during the penalty phase of his trial. (AOB 306-308.) As Famalaro specifically requested that CALJIC No. 2.27 be given to the jury during the penalty phase of his trial, along with other standard jury instructions such as CALJIC No. 2.11 [neither side required to call all witnesses] and CALJIC No. 2.00 [direct and circumstantial evidence], the alleged error in this instance was invited and was thus waived. Moreover, this Court has repeatedly held that CALJIC No. 2.27 does not lessen the prosecution's burden when given in conjunction with other standard jury instructions on the burden of proof. Accordingly, even if Famalaro's instant claim had been preserved, it is meritless.

Famalaro's counsel expressly requested the modified version of CALJIC No. 2.27 that was given to the jury during the penalty phase of the trial. (25 RT

6458-6459; 6 CT 2006.)[39] Accordingly, the now-alleged error in the giving of

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39. The following discussion occurred on June 9, 1997:

THE COURT: All right. Were there any other - - Let me look at that assault thing again to make sure we are all right on that.

MR. GUMLIA: You gave a couple of others, your Honor, dealing with more mundane things from the guilt phase in Edwards, like the definition of evidence 2.00, 2.11, neither side is required to call all witnesses, I would ask that those be given.

THE COURT: Give me what you want.

MR. GUMLIA: 2.00 - -

MR. EVANS: No objection. Well, wait a minute.

THE COURT: "Evidence is either direct or circumstantial."

MR. GUMLIA: Right. We would like that.

THE COURT: 2.00.

MR. GUMLIA: 2.11.

MR. EVANS: On 2.00, is there any modification?

(Whereupon, Miss Gragg and Mr. Evans confer.)

MR. EVANS: Sorry. I agree. 2.00 is fine. 2.11, I agree with.

MR. GUMLIA: 2.27.

THE COURT: 2.27 I think includes - - let me see. Okay, 2.27. Next.

MR. GUMLIA: As you modified it earlier.

CALJIC No. 2.27 was invited, so Famalaro is estopped from asserting any claim of error related to this instruction before this Court. (*People v. Davis, supra*, 36 Cal.4th at p. 539 [barring appellant from challenging instruction on appeal which he had expressly agreed to at trial under invited error doctrine]; *People v. Dunkle* (2005) 36 Cal.4th 861, 924 [invited error doctrine bars challenge to instruction on appeal if defense counsel "intentionally caused the trial court to err and clearly did so for tactical reasons"]; *cf*, Pen. Code, § 1259 [preserving for appellate review any instructional error affecting substantial rights]; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 [instructional error affects substantial rights only if it "resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result"].)

Famalaro now contends the use of the words "which you believe" in CALJIC No. 2.27 is inconsistent with the "beyond a reasonable doubt" language of other instructions and has the general effect of lessening the prosecution's burden of proof. The trial court instructed the jury with the

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THE COURT: I don't know how I modified it.

MR. GUMLIA: Do you want me to read it?

THE COURT: My [2.27 does not] have uncorroborated in it, and whose testimony about that fact requires corroboration. That is the only - -

MR. GUMLIA: Okay.

THE COURT: - - the only modification.

(25 RT 6458-6459.)

The trial court's written notations on the rough draft of CALJIC No. 2.27 indicates that instruction was being given, as modified by the court, at the request of the defense. (6 CT 2006.)

following modified version of CALJIC No. 2.27 that omitted any reference to the testimony of a single witness either being uncorroborated or requiring corroboration:

> You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of the fact. You should carefully review all the evidence upon which the proof of that fact depends.

(27 RT 6759-6760; 8 CT 2674 .)

Specifically, Famalaro asserts that since Nanci Rommel and Cheryl West were the only two witnesses called by the prosecution who presented Penal Code section 190.3, factor (b) evidence during the penalty phase of his trial, the jurors may have been misled into recommending the death penalty if they only believed the testimony of those two single witnesses was true. (AOB 307.) [40] As discussed in Argument IV, *ante*, CALJIC No. 2.27 simply explains to the jury that it may consider the testimony of one witness concerning a fact to be sufficient for the proof of that fact. It also directs a jury to make findings using reasonable factual interpretations over those that require unreasonable interpretations. (*People v. Noguera, supra*, 4 Cal.4th at pp. 633-634.) When considered with all of the other instructions provided to the jury, CALJIC No. 2.27 does not dilute the prosecution's burden of proof, it only advises the jury on how to evaluate a fact proved solely by the testimony of one witness. (*People v. Gammage, supra,* 2 Cal.4th at p. 700.)

Although CALJIC No. 2.27 does not refer to the prosecution's burden of proving each element beyond a reasonable doubt, the instruction, when read

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40. Famalaro ignores all of the single-witness evidence presented on his behalf during the penalty phase of the trial (e.g., Marion Thobe [Famalaro's emotional distress around June of 1991]; Marc Murphy [Famalaro was the person who saved life of mugging victim in 1981]; Mary Martin [Famalaro's mother was a stalker, threatening and violent]; Patricia Pina [telephone number on Famalaro's phone bill in May of 1991 was to Hotline Help Center].)

in conjunction with the other instructions given to the jury, particularly CALJIC No. 2.90 which specifically states that the People have "the burden of proving such other criminal activity beyond a reasonable doubt" (27 RT 6765; 8 CT 2682), in no way lessens the prosecution's burden of proof. (See, e.g., *People v. Montiel, supra,* 5 Cal.4th at p. 941.) Accordingly, this claim should be denied.

XI.

NONE OF FAMALARO'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ADMISSION OF EVIDENCE OF HIS PRIOR CRIMINAL ACTS IN THE PENALTY PHASE OF HIS TRIAL

Famalaro contends the Penal Code section 190.3, factor (b) evidence of two incidents of "alleged prior criminality" (i.e., the false imprisonment of Cheryl West in New York City in July of 1987, and the false imprisonment and assault of Nanci Rommel in Famalaro's Lake Forest bedroom in March or April of 1989), which were admitted without objection during the penalty phase of his capital trial, violated his constitutional rights to equal protection and due process of law, a fair and speedy trial by an unanimous and impartial jury, a presumption of innocence, effective assistance of counsel, and a reliable, non-arbitrary penalty decision. (AOB 309-319.) Famalaro also contends that because the two incidents involving Cheryl West and Nanci Rommel were beyond the applicable statutes of limitations for the underlying crimes (i.e., false imprisonment and assault), the use of "such stale evidence" violated his rights to due process and to effective cross-examination of witnesses. (AOB 316-319) As none of these claims were presented to the trial court, these claims have been waived. Even if these claims were properly preserved for appeal, this Court has previously considered and rejected identical claims and Famalaro offers no compelling reason for this Court to revisit its prior holdings. Thus, the claims raised in this argument should be rejected.

While Famalaro challenged the admission of the victim impact evidence in the penalty phase of his trial (5 CT 1690-1703), Famalaro never objected to the penalty phase evidence concerning Cheryl West or Nanci Rommel. Since none of the constitutional grounds now raised were ever presented to the trial court for its consideration, Famalaro's current claims on these grounds have been forfeited. Challenges to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-434; see also Evid. Code, § 353.)

Even if this claim had been properly preserved, Famalaro's claims of constitutional error necessarily fails. It is well-settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Boyer* (2006) 38 Cal. 4th 412, 483; *People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Brown* (2004) 33 Cal.4th 383, 402; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Cunningham* (2001) 25 Cal.4th 926, 1042.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa* (1997) 15 Cal.4th 795, 863.) This Court has consistently rejected Famalaro's claim (AOB 311) that factor (b) is impermissibly or unconstitutionally vague. (*People v. Anderson, supra*, 25 Cal.4th at p. 584; *People v. Lewis, supra*, 25 Cal.4th at p. 677; *People v. Osband, supra*, 13 Cal.4th at p. 704; *People v. Medina* (1995) 11 Cal.4th 694, 780; *People v. Balderas* (1985) 41 Cal.3d 144, 201.) The United States Supreme Court also rejected this claim by explaining,

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]

The United State Supreme Court specifically stated, "Here, factor (b) is not vague." (*Tuilaepa v. California, supra*, 512 U.S. at p. 977.)

Famalaro also complains that his penalty jury was not impartial since it was the same jury that had convicted him of capital murder. According to Famalaro, it "would seem self-evident" that such a jury could not "be impartial in considering whether unrelated but similar violent crimes have been proved beyond a reasonable doubt." (AOB 312-314.) However, it is well-established that in a capital case, the statutory preference for a unitary jury set forth in Penal Code section 190.4, subdivision (c), is consistent with constitutional principles. (*People v. Cornwell* (2005) 37 Cal.4th 50, 106; *People v. Osband, supra*, 13 Cal.4th at p. 668; and *People v. Horton* (1995) 11 Cal.4th 1068, 1094.) Famalaro was not entitled to separate guilt and penalty phase juries.

Also contrary to Famalaro's assertion (AOB 315-316), there is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since the aggravating circumstances are not elements of an offense. (*People v. Medina, supra*, 11 Cal.4th at p. 782.) Nor is it necessary to instruct the jury that it must unanimously agree beyond a reasonable doubt that the defendant committed each unadjudicated offense. (*People v. Sims* (1993) 5 Cal.4th 405, 462; *People v. Anderson, supra*, 25 Cal.4th at p. 590.) Contrary to Famalaro's argument (AOB 315-316), neither *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], nor *Apprendi v. New Jersey, supra*, 530 U.S. 446, affect these holdings because *Ring* and *Apprendi* "have no application to the penalty phase procedures of this state." (*People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971-972.)

The recent decision by the United States Supreme Court in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] also fails to support Famalaro's contention that his Fifth, Eighth, and Fourteenth Amendment rights to due process and a reliable death verdict were violated by the failure to require the jury to unanimously find the aggravating circumstances true beyond a reasonable doubt, to unanimously find that aggravation outweighed mitigation beyond a reasonable doubt, or to unanimously find death is the appropriate punishment beyond a reasonable doubt, or the failure to require written findings as to aggravating factors relied on, to require jury unanimity on all aggravating factors relied on, and to provide a procedure allowing for meaningful appellate review of the verdict of death.

In *Cunningham,* the United States Supreme Court held California's determinate sentencing law, by placing sentence-elevating fact-finding within the judge's province, violated a defendant' s right to trial by jury under the Sixth and Fourteenth Amendments. (*Cunningham v. California, supra,* 127 S. Ct. at p. 860.) The United States Supreme Court reasoned that its decisions in *Apprendi v. New Jersey, supra*, 530 U.S. at p. 466, *Ring v. Arizona, supra*, 536 U.S. at p. 584, *Blakely v. Washington, supra*, 542 U.S. at p. 296, and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], instruct that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham v. California*, *supra*, 127 S. Ct. at p 860.) The United States Supreme Court clarified the relevant statutory maximum "'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.'" (*Ibid.*, quoting *Blakely v. Washington*, *supra*, 542 U.S. at pp.

303-304; italics in original.) In its opinion in *Cunningham v. California*, the High Court notably observed:

> Other States have chosen to permit judges genuinely "to exercise broad discretion . . . within a statutory range," [footnote] which, "everyone agrees," encounters no Sixth Amendment shoal. *Booker*, 543 U.S., at 233.

(*Cunningham v. California*, 127 S. Ct. at p. 871.)

In *People v. Morrison, supra*, 34 Cal.4th at p. 698, this Court specified "the jury need not make written findings or achieve unanimity as to specific aggravating circumstances, or find beyond a reasonable doubt that an aggravating circumstance is proved (except for other crimes), that aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate penalty." (*Id.* at p. 730.) This Court further specified the death penalty statute is not constitutionally infirm for failing to provide the jury with instructions regarding the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination. (*Id.* at pp. 730-731.) Additionally, this Court explained the death penalty statute withstood constitutional scrutiny as to appellant's considerations:

> We repeatedly have held that neither *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 nor *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 affects California's death penalty law or otherwise justifies reconsideration of the foregoing decisions. [Citations.] And contrary to defendant's assertion, *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 does not undermine our analysis on the point. That recent decision simply relied on *Apprendi* and *Ring* to conclude that a state noncapital criminal defendant 's Sixth Amendment right to trial by jury was violated where the facts supporting his sentence, which was above the standard range for the crime he committed, were neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt.

(*People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; see also *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Stitely, supra*, 35 Cal.4th at p. 573.)

Because *Cunningham v. California* is essentially an extension of the principles set forth in *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *United States v. Booker*, to California's determinate sentencing law, *Cunningham v. California* does not compel a different result than this Court has previously reached in interpreting these same claims. Accordingly, all of Famalaro's jury-related claims in this argument must be rejected.

Famalaro also contends that the use of unadjudicated factor (b) evidence violates his right to equal protection because the same evidence is not allowed in non-capital trials. (AOB 315.) This Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Morrison, supra*, 34 Cal.4th at p. 371; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette* (2002) 29 Cal.4th 381, 465-467; and *People v. Allen, supra*, 42 Cal.3d at pp. 1286-1288.) Accordingly, Famalaro's equal protection claim is without merit.

Famalaro next contends his constitutional rights were violated by admission of the factor (b) evidence because the underlying conduct in both instances was outside of the applicable statute of limitations. (AOB 316-319.) This Court has consistently rejected the contention that any of the statutory or constitutional rights of a capital defendant are violated by the consideration of evidence of unadjudicated criminal activity for which prosecution would be time-barred. This Court has "long recognized that, as "'[section 190.3, factor] (b) imposes *no* time limitation on the introduction of "violent" crimes; the jury presumably may consider criminal violence which has occurred at any time in the defendant's life.'" (*People v. Williams* (1997)16 Cal.4th 153, 233, citing

People v. Douglas (1990) 50 Cal.3d 468, 529, quoting *People v. Balderas, supra*, 41 Cal.3d at p. 202, original italics.)

Contrary to his argument (AOB 317), Famalaro had no difficulty confronting or cross-examining the two witnesses who provided factor (b) evidence, namely, Cheryl West and Nanci Rommel, due to the time delay. For example, in response to questions put to her by defense counsel, West testified they had stayed on at least the third floor of the hotel while they were in New York, that she had first seen the handcuffs when Famalaro unexpectedly cuffed her to the bar across the window, and that was the only time she ever had handcuffs on her wrists. West testified she never consented to wearing the handcuffs with Famalaro, and further denied that Famalaro had "just left [her] in that position at the window" after they had "engaged in a consentual sex act with handcuffs on." (23 RT 5891-5892.)

Defense counsel Gumlia attempted to impeach those portions of West's testimony with some photographs that had been developed by the defense team from a roll of film found in Famalaro's house in Arizona. (27 RT 6641, 6726-6727.) One of the photos depicted West handcuffed to the bar across the window on an obviously high floor of the hotel (counsel's questions described it as "well up into the sky" and suggested it was around the 20th floor). (23 RT 5893-5894.) Two other photos depicted West with her hands cuffed in front of her and fondling Famalaro's penis. (23 RT 5894.) West acknowledged being the woman in the photographs, but said she did not remember Famalaro taking any pictures of her in the hotel that morning. (23 RT 5893.) Upon being asked if she remembered buying the handcuffs with Famalaro as they shopped in New York, West responded that she only remembered him looking at guns and knives in a shop while they were there and generally attributed any gaps in her memory to having been so traumatized by the whole experience. (23 RT 5895.) Famalaro's counsel subsequently introduced a receipt into evidence

reflecting the purchase of a pair of handcuffs from a vendor in New York on July 3, 1987. (26 RT 6530.)

Likewise, on cross-examination, Nanci Rommel was asked if, after Famalaro suddenly put handcuffs on her in his bedroom, she had screamed or called for help since there were several workers downstairs in the garage. Rommel responded that she had not. (23 RT 5915-5916.) In her direct examination, Rommel had testified that after Famalaro released her, he called her a bitch and said she had brought it on herself. (23 RT 5911-5912.) The defense was able to use a report prepared by the Costa Mesa Police Department on July 27, 1994, that did not include anything about Rommel saying Famalaro had called her a bitch. (23 RT 5917-5918.) Moreover, during cross-examination, Rommel admitted having a sexual relationship with Famalaro both before and after that incident in 1989, and that at no other time had he tried to use handcuffs or put her in a bondage-type of situation. (23 RT 5919.) Also brought out in Rommel's cross-examination were the facts that she and Famalaro had been engaged to marry, but the engagement had been broken in May or June of 1991. (23 RT 5920.) Thus, the passage of time had no effect on Famalaro's ability to confront and cross-examine either Cheryl West or Nanci Rommel.

In this case, the evidence of Famalaro's prior unadjudicated criminal activity was properly admitted under Penal Code section 190.3, factor (b). Even if these claims had not been waived, Famalaro's arguments that the factor (b) evidence violated his constitutional rights are unavailing and have been previously rejected by this Court. Famalaro provides no reason for this Court to revisit its prior decisions rejecting his contentions. Accordingly, the instant claims must be denied.

XII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES DURING THE PENALTY PHASE OF HIS TRIAL

Famalaro contends the jury instructions on the aggravating and mitigating factors related to Penal Code section 190.3, as provided by the trial court in CALJIC No. 8.85 and CALJIC No. 8.88, rendered his death sentence unconstitutional. Specifically, Famalaro claims: (1) the application of Penal Code section 190.3, subdivision (a), resulted in an arbitrary and capricious imposition of the death penalty; (2) the trial court's failure to instruct the jury that the statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable and evenhanded application of the death penalty; (3) the failure of the instruction to require specific written findings by the jury as to the aggravating factors found and considered in returning a death sentence violated Famalaro's rights to meaningful appellate review and equal protection of the law; and (4) even if these procedural safeguards are not necessary for fair and reliable capital sentencing, denying them to capital defendants violates equal protection. (AOB 320-331.) As Famalaro failed to present any of these claims to the trial court, these claims have been waived. Moreover, even if preserved for appeal, Famalaro's arguments fail because the instructions provided to the jury are constitutionally sound.

A. As Famalaro's Claims Were Not Presented To The Trial Court, They Are Waived

Although there were lengthy discussions regarding the jury instructions to be given in the penalty phase of the trial (25 RT 6402-6463; 26 RT 6538-6563), none of the complaints about CALJIC Nos. 8.85 or 8.88 raised in Famalaro's opening brief were ever presented to the trial court. As discussed in Argument III, *ante*, Penal Code section 1259 allows an appellate court to

review instructions given to a jury even if there was no objection at trial so long as "the substantial rights of the defendant were affected thereby." (See also Pen. Code, § 1176.) However, this Court has determined that a failure to request an amplification or modification of standard jury instructions bars the issue from being heard on appeal. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 856; *People v. Daya, supra,* 29 Cal.App.4th at p. 714 [a defendant may not "remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions."].) Thus, Famalaro's claims of error concerning CALJIC Nos. 8.85 and 8.88 have been waived.

During discussions about the jury instructions to be given during the penalty phase of the trial, at the request of Famalaro's defense counsel, the language concerning the following factors of Penal Code section 190.3, was deleted from CALJIC No. 8.85: factor (e) [victim a participant]; factor (f) [acted under moral justification]; factor (g) [acted under duress or domination of another]; and factor (j) [defendant an accomplice to another]. (25 RT 6418-6422.) At the request of Famalaro's defense counsel, the language about the impact of the crimes on the family of the victim was added to factor (a) of this instruction. (25 RT 6422.) Lastly, language about the defendant's childhood, about whether he has displayed any acts of kindness or performed any good deeds on behalf of others, and whether he suffered from any emotional disturbance the jurors find to be less than extreme, were added to factor (k) at the request of Famalaro's defense counsel. (25 RT 6422-6424.)

Thus, the trial court instructed the jurors with the following version of CALJIC No. 8.85 [Penalty Trial -- Factors For Consideration], with the modifications requested by Famalaro's counsel italicized:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding. *The impact of the crimes on the family of the victim*, and the existence of any special circumstance found to be true.

(b) The presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceeding which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(h) 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 law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(k) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.

You must disregard any jury instruction given to you in the guilt or innocent phase of this trial which conflicts with this principle.

In considering factors in mitigation you may consider but are not limited to any of the following which you find to have been established by the evidence.

The defendant's childhood.

Whether the defendant has displayed any acts of kindness or performed any good deeds on behalf of others.

Whether the defendant suffered from any emotional disturbance you find to be less than extreme.

The absence of evidence as to any mitigating factor cannot be used as an aggravating circumstance.

(27 RT 6763-6764; 8 CT 2679-2680.)

The parties also discussed the CALJIC No. 8.88 instruction at length. (25 RT 6451-6458.) After discussing some possible modifications to the instruction, and catching a typo in a draft prepared by the defense, Famalaro's counsel asked that the standard CALJIC No. 8.88 instruction be given with the addition of some mitigating circumstances language in the fourth paragraph of the written instruction. (25 RT 6456-6458.) Thus, the trial court instructed the jury with the following modified version of CALJIC No. 8.88 [Penalty Trial -- Concluding Instruction], with the addition requested by Famalaro's defense counsel in italics:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> 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.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> *You may also consider any other facts relating to the character and background of the defendant as well as any pity, compassion or mercy for the defendant as mitigating circumstances.*
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the varying factors you are permitted to consider.

> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire to deliberate on the penalty. The foreperson previously selected my preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all 12 jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(27 RT 6768-6770; 8 CT 2687.)

B. Giving The Modified Versions Of CALJIC Nos. 8.85 and 8.88 Did Not Violate Famalaro's Constitutional Rights

This Court has consistently held that CALJIC No. 8.85 is not unconstitutionally vague and that it does not allow the penalty process to proceed arbitrarily or capriciously. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Farnam* (2002) 28 Cal.4th107, 191-192; *People v. Lucero* (2000) 23 Cal. 4th 692, 728; *People v. Earp, supra*, 20 Cal.4th 826, 899.) This Court has also found the aggravating factors described in CALJIC No. 8.85 are not impermissibly vague. (*People v. Earp, supra*, 20 Cal. 4th at p. 899; *People v. Arias* (1996) 13 Cal.4th 92, 188-189.) There is no reason for this Court to revisit these decisions.

As to CALJIC No. 8.88, this Court has repeatedly rejected similar claims to the claims now raised, and has repeatedly found the instruction is not unconstitutionally vague. (*People v. Perry, supra*, 38 Cal.4th 302, 320; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Lenart* (2004) 32 Cal.4th 1107, 1134-1135; *People v. Boyette, supra*, 29 Cal.4th at pp. 464-465; *People v.*

Hughes, supra, 27 Cal.4th at p. 405; and *People v. Duncan* (1991) 53 Cal.3d 955, 978.) There is no reason for this Court to revisit these decisions.

This Court has also determined that the jury is not required to render a statement of reasons or to make unanimous written findings on the aggravating factors supporting its verdict. (*People v. Farnam, supra*, 28 Cal.4th at p. 192.) Famalaro offers no valid reason for revisiting these decisions.

To the extent Famalaro asserts an equal protection claim on the basis that this is a capital case (AOB 326-331), the claim should also be rejected. This Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Morrison, supra*, 34 Cal.4th at p. 371; *People v. Brown, supra*, 33 Cal.4th at p. 402; and *People v. Boyette, supra*, 29 Cal.4th at pp. 465-467.)

Accordingly, if this Court finds any of these claims have not been waived by Famalaro's failure to preserve them for appeal, these claims should nevertheless be denied.

XIII.

CALJIC No. 8.88 PROPERLY INSTRUCTS THE JURY ON THE SCOPE OF ITS SENTENCING DISCRETION

Famalaro contends CALJIC No. 8.88 [Penalty Trial - - Concluding Instruction] is constitutionally infirm for a number of reasons. (AOB 332-346.) Specifically, Famalaro claims the instruction uses the impermissibly vague term "so substantial" in telling the jurors how to weigh the aggravating and mitigating circumstances. (AOB 333-337.) Famalaro claims the use of the broader term "warrants," instead of the narrower term "appropriate," fails to clearly tell jurors that their central inquiry is to determine if the death penalty is appropriate. (AOB 337-339.) Famalaro also faults the instruction for failing

to tell the jury that a life sentence is mandatory if the aggravating circumstances do not outweigh the mitigating circumstances (AOB 340-342), or that the jury is required to return a sentence of life without the possibility of parole if it determines the mitigating circumstances outweigh the aggravating circumstances (AOB 342-343). Famalaro claims the instruction fails to tell the jury it could impose a life sentence even if it finds the aggravating circumstances outweighed the mitigating circumstances. (AOB 344-345.) Finally, Famalaro claims the instruction is defective in not advising the jurors that he did not have to persuade them that the death penalty is inappropriate. (AOB 345-346.) All of these claims have been waived as Famalaro never presented them to the trial court. In any event, this Court has rejected identical claims concerning this jury instruction.

There were lengthy discussions concerning the jury instructions to be given in the penalty phase of the trial. (25 RT 6402-6463; 26 RT 6538-6563.) The discussion included CALJIC No. 8.88, and Famalaro's defense counsel drafted some suggested modifications to CALJIC No. 8.88 (which are not part of the record on appeal), but everyone agreed the suggested modifications were either confusing or created problems elsewhere in the instructions. (25 RT 6438-6458.) Famalaro's counsel finally requested that the standard CALJIC No. 8.88 be given with the addition of some mitigating circumstances language in the fourth paragraph of the instruction.[41] (25 RT 6455-6458.) None of the

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41. Thus, the fourth paragraph of CALJIC No. 8.88 was modified with the addition of the italicized words as follows:

> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. *You may also consider any other facts relating to the character and background of the defendant as well as any pity,*

complaints now raised about CALJIC No. 8.88 were ever presented to the trial court. As Famalaro failed to request any of the amplifications or modifications he now claims were necessary to protect his constitutional rights, these claims have been waived. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 856; *People v. Daya, supra,* 29 Cal.App.4th at p. 714.)

All of the claims now raised concerning CALJIC No. 8.88 have been consistently rejected by this Court. This Court has repeatedly rejected the claim that the term "so substantial" is vague or otherwise violates the Eighth Amendment. (AOB 333-337.) (*People v. Prieto* (2003) 30 Cal.4th 226, 273; *People v. Boyette, supra*, 29 Cal.4th at p. 465; People v. Gurule, supra , 28 Cal.4th 557, 662; *People v. Ochoa, supra*, 26 Cal.4th at p. 452.) As this Court has explained,

> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.

(*People v. Taylor* (2001) 26 Cal.4th 1155, 1181.)

Famalaro's claim that the use of the term "warrants" fails to clearly advise jurors that they may only impose the death penalty if they conclude it is

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> *compassion or mercy for the defendant as mitigating circumstances.*
>
> (8 CT 2687.)

The version of CALJIC No. 8.88 ultimately given to the jury is fully set forth in Respondent's Argument XII, *ante*, at pp. 156-157.

the appropriate penalty (AOB 337-339), has also been rejected by this Court. (*People v. Boyette, supra,* 29 Cal.4th at p. 465, citing *People v. Breaux* (1991) 1 Cal.4th 281, 316.)

This Court has rejected the claim that CALJIC 8.88 is defective in failing to tell the jury that a life sentence without possibility of parole is mandatory if the mitigating circumstances outweigh the aggravating circumstances. (AOB 340-342.) As this Court explained,

> Defendant faults the sentencing instructions (CALJIC No. 8.88) for failing to direct the jury to impose a life imprisonment without parole sentence if it concluded the mitigating circumstances outweighed the aggravating ones. We have repeatedly rejected the claim in light of other language in this instruction, allowing a death verdict only if aggravating circumstances outweighed mitigating ones.

(*People v. Taylor, supra*, 26 Cal.4th at p. 1181.)

This Court has previously rejected the claim that CALJIC 8.88 is defective in failing to tell the jury it is required to return a sentence of life without the possibility of parole if it determines the mitigating circumstances outweigh the aggravating circumstances. (AOB 342-343). (*People v. Hughes, supra* , 27 Cal.4th at p. 405, citing, *People v. Duncan, supra*, 53 Cal.3d at p. 978.)

Similarly, this Court has rejected the claim that CALJIC No. 8.88 is constitutionally flawed in failing to tell the jury it could impose a life sentence even if it finds the aggravating circumstances outweigh the mitigating circumstances. (AOB 344-345.) (*People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 123; *People v. Taylor, supra*, 26 Cal.4th at p. 1181 ["We have rejected the argument in past cases"].)

Lastly, Famalaro's claim that CALJIC No. 8.88 is defective in not advising the jurors that he does not have the burden of persuading them that the death penalty is not appropriate (AOB 345-346), has also been rejected by this Court. Unlike the guilt phase of a trial, where the prosecution carries the

burden of proving every element of a charged offense beyond a reasonable doubt, there is no particular burden of proof in the penalty phase. Therefore, no burden instruction is required, either as to the presence or absence of any such burden, because the sentence selection process is normative, not factual. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Dunkle* (2005) 36 Cal.4th 861, 939; *People v. Panah* (2005) 35 Cal.4th 395, 499.)

As stated above, this Court has repeatedly rejected the claims Famalaro raises, and should do so here. (See *People v. Moon* (2005) 37 Cal.4th 1, 42-43; *People v. Boyette, supra*, 29 Cal.4th at p. 464 ["We agree none of the claims has merit and that no reason appears to reconsider our past decisions."]; *People v. Taylor, supra*, 26 Cal.4th at p. 1183 ["Once again, as defendant acknowledges, we have repeatedly rejected similar arguments, and we see no compelling reason to reconsider them here."].) Famalaro fails to offer a compelling reason for this Court to revisit any of its prior holdings. Accordingly, if this Court determines any of these claims have not been waived by Famalaro's failure to present them to the trial court, these claims should be denied on their merits.

XIV.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL

Famalaro presents a multi-faceted argument that California's death penalty sentencing statute (Penal Code, § 190.3), and the standard penalty phase jury instructions, are unconstitutional because they do not set out the appropriate burden of proof. (AOB 347-377.) These contentions are without merit because, with the exception of the prosecution's burden of proving the truth of a prior criminal act beyond a reasonable doubt, neither side bears a burden of proof in the penalty phase of a trial. In this argument, Famalaro also presents the sub-claims that California's death penalty statute and jury

instructions are unconstitutional (under both the state and federal Constitutions) because they fail to require juror unanimity on the aggravating factors (AOB 371-376), and, like the presumption of innocence in a non-capital trial, fail to instruct the jury on the presumption of life (AOB 376-377). These claims lack merit and should be rejected.

"Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; see also *People v. Burgener* (2003) 29 Cal. 4th 833, 884-885; *People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Welch, supra*, 20 Cal.4th at p. 767; *People v. Daniels* (1991) 52 Cal.3d 815, 890; and *People v. Carpenter, supra*, 15 Cal. 4th at pp. 417-418.) This Court has repeatedly rejected any claims that focus on a burden of proof in the penalty phase. (*People v. Welch, supra*, 20 Cal. 4th at pp. 767-768; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box, supra*, 23 Cal.4th at p. 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418; *People v. Dennis, supra*, 17 Cal.4th at p. 552; *People v. Holt* (1997) 15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Famalaro fails to offer any valid reason why this Court should vary from its past decisions.

Famalaro's contention that *Ring v. Arizona, supra*, 536 U.S. 584, and *Apprendi v. New Jersey, supra*, 530 U.S. 466, compel a different conclusion (AOB 349-361), also fails. This Court has determined that *Ring* and *Apprendi* simply have no application to the penalty phase procedures of this state. (*People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison, supra*, 34 Cal. 4th at p. 730; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Prieto, supra*, 30 Cal.4th at pp. 262-264, 271-272, 275.) The United States Supreme Court's subsequent decision in

Blakely v. Washington, supra, 542 U.S. at p. 296, does not alter this conclusion. (*People v. Ward* (2005) 36 Cal.4th 186, 221.)

As this Court explained,

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. ([Pen. Code] § 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.

(*People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn. 14.)

As previously discussed in Argument 11, *ante*, the United States Supreme Court's decision in *Cunningham v. California, supra*, 127 S. Ct. 856, also fails to support Famalaro's claim of a denial of his federal constitutional rights. *Cunningham v. California* is essentially an extension of the principles set forth in *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *United States v. Booker*, to California's determinate sentencing law. *Cunningham v. California* does not compel a different result than this Court has previously reached in interpreting these same claims.

Famalaro's sub-claim that California's death penalty statute and jury instructions are unconstitutional because they fail to require juror unanimity on the aggravating factors (AOB 371-376), is also without merit. This Court has repeatedly determined that penalty phase juries do not need to unanimously agree as to which aggravating circumstances apply. (*People v. Dunkle, supra*, 36 Cal.4th at p. 939; *People v. Davis* (2005) 36 Cal.4th 510, 572; *People v. Carter* (2005) 36 Cal.4th 1215, 1280 [jury not required to agree unanimously as to aggravating circumstances]; *People v. Frye, supra*, 18 Cal.4th at p. 894; *People v. Bolin* (1998) 18 Cal.4th 297, 345-346.)

Likewise, the sub-claim that, as the correlate of the presumption of innocence in non-capital jury trials, penalty phase jurors should be instructed

that there is a "presumption of life" (AOB 376-377), is also meritless. As this Court has explained,

> [N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror.

(*People v. Samayoa, supra*, 15 Cal.4th 795, 853.)

Famalaro offers no valid reason why this Court should revisit these issues. Accordingly, these claims should be denied.

XV.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

Famalaro contends the lack of intercase proportionality review in capital cases in California, which is afforded in non-capital cases in this state, violates his federal constitutional "rights to be protected from the arbitrary and capricious imposition of capital punishment" as guaranteed by the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. (AOB 378-381.) This claim has been rejected by the United States Supreme Court. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed. 2d 29].) This Court has also repeatedly rejected this claim in the past. (See e.g., *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Burgener, supra*, 29 Cal.4th at p. 885; *People v. Anderson, supra*, 25 Cal.4th at p. 602; *People v. Millwee* (1998) 18 Cal.4th 96, 168; and *People v. Stanley* (1995) 10 Cal.4th 764, 842). There is no reason why this Court should rewrite its position on this issue. Accordingly, this claim should be denied.

XVI.

CALIFORNIA'S DEATH PENALTY PROCEDURE DOES NOT VIOLATE INTERNATIONAL LAW, NOR DOES IT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION

Famalaro claims California's death penalty scheme violates international law, as well as his rights under the Eighth and Fourteenth Amendments. (AOB 382-387.) This Court has repeatedly rejected the argument that California's scheme violates the International Covenant of Civil and Political Rights. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646; *People v. Ramos, supra*, 34 Cal.4th at pp. 533-534; *People v. Brown, supra*, 33 Cal.4th at p. 404.) Famalaro's claim that his death sentence violates International law should be rejected.

Famalaro's related claim that the death penalty violates his rights under the Eighth and Fourteenth Amendments (AOB 384-387), also fails. The Eighth Amendment and the due process clause guarantees that death sentences are not arbitrary and capricious. To be arbitrary and capricious a death judgment must be applied in a freakish manner. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 188 [96 S.Ct. 2909, 49 L.Ed.2d 859]; *McCleskey v. Zant* (1987) 481 U.S. 279, 308 [107 S.Ct. 1756, 95 L.Ed.2d 262].) Given the facts and circumstances of Famalaro's crimes, such may not be said of the instant case.

Similar claims have repeatedly been rejected by this Court as this Court has found that California's death penalty law sufficiently narrows the class of death eligible defendants so that it is neither arbitrary nor capricious. *People v. Burgener, supra*, 29 Cal.4th at p. 884; *People v. Lewis, supra*, 25 Cal.4th at p. 676.) Accordingly, this claim must fail.

XVII.

FAMALARO'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED

Famalaro contends the cumulative effect of the trial court's alleged errors undermined the fundamental fairness of his trial and the reliability of his death sentence, therefore the guilt verdicts and death judgment should be reversed. (AOB 388-390.) As explained in the responses to Famalaro's individual claims (*ante*), the trial court did not commit any errors, so there were no errors to accumulate. Accordingly, the cumulative error doctrine does not apply. (See *People v. Beeler, supra*, 9 Cal.4th at p. 994 ["[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict"].)

Moreover, even assuming the trial court had erred in some respect, Famalaro has failed to show that he was in any way denied due process or a fair trial. (See *People v. Mincey* (1992) 2 Cal.4th 408, 454 ["[a] defendant is entitled to a fair trial, not a perfect one"].) Therefore, Famalaro's claim of cumulative error should be rejected.

CONCLUSION

Based on the foregoing, respondent respectfully requests that appellant John Joseph Famalaro's convictions and death sentence be affirmed.

Dated: April 11, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

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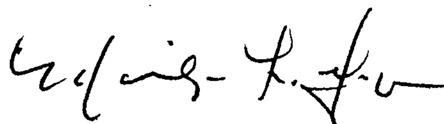

MARILYN L. GEORGE
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Attorneys for Plaintiff and Respondent

MLG:dp
SD1997XS0008
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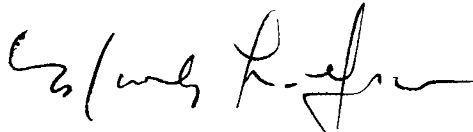
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 54860 words.

Dated: April 11, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



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Attorneys for Plaintiff and Respondent

MLG:dp

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. John Joseph Famalaro** No.: **S064306**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On April 11, 2007, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

Michael J. Hersek (2 Copies)
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San Francisco, CA 94105

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2007, at San Diego, California.

D. Perez
Declarant

Signature

70087563.wpd