SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Court of Appeal No.
	) SO85348
v.	)
	) Superior Court No.
GABRIEL CASTANEDA,	) FWV-15543
	)
Defendant and Appellant.	)
	)
	)
	)

SUPREME COURT
FILED
APR 28 2006
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DEPUTY

Appeal from the Superior Court of the State of California

In and For the County of San Bernardino

Honorable Mary E. Fuller, Judge

APPELLANT'S OPENING BRIEF
(Volume I–Pages 1-285)

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Court of Appeal No.
	)	SO85348
v.	)	
	)	Superior Court No.
GABRIEL CASTANEDA,	)	FWV-15543
	)	
Defendant and Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court of the State of California

In and For the County of San Bernardino

Honorable Mary E. Fuller, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALIBILITY

This is an automatic appeal from a final judgment of death which disposes of all the issues between the parties and is authorized under California Rules of Court, rule 34.

STATEMENT OF THE CASE

On April 15, 1998, a felony complaint was filed in the San Bernardino Municipal Court which alleged that appellant committed first-degree murder of Colleen Kennedy in

violation of Penal Code section 187, subdivision (a). The complaint alleged five special circumstances under count one. The complaint also alleged that appellant committed second degree commercial burglary in violation of Penal Code section 459 (count two), kidnaping in violation of Penal Code section 207, subdivision (a) (count three), forcible rape in violation of Penal Code section 261, subdivision (a)(2) (count four), sodomy by use of force in violation of Penal Code section 286, subdivision (c) (count five), and second-degree robbery in violation of Penal Code section 211. (Count six.) Count three alleged that appellant kidnaped the victim in a manner that exposed her to death or serious bodily harm, within the meaning of Penal Code section 209, subdivision (a). Counts four and five alleged that appellant used a deadly weapon on the commission of the offenses within the meaning of Penal Code section 12022.3, subdivision (a), and committed specified acts within the meaning of Penal Code section 667.61, subdivisions (a), (b), and (c). The complaint also alleged that appellant: (1) had suffered two prior violent or serious felony convictions within the meaning of Penal Code section 667, subdivisions (b) through (i); (2) had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b); (3) used a dangerous or deadly weapon in the commission of counts 1 through 6, within the meaning of Penal Code section 12022, subdivision (b)(1), and; (4) had suffered a serious felony conviction within the meaning of Penal Code section 667, subdivision (a)(1). (Vol. 1, C.T. pp. 1-5.)

The preliminary hearing was held September 1, 1998. (Vol. 1, C.T. pp. 67-134.)

Appellant was ordered to stand trial in the Superior Court on the allegations in felony complaint number FWV-15543. (Vol. 1, C.T. p. 133.)

An information filed on September 10, 1998 alleged that appellant committed the following six violations of the Penal Code (Vol. 1, C.T. pp. 23-29):

1. Count one–the murder of Colleen Kennedy in violation of Penal Code section 187, subdivision (a). Count one further alleged that appellant committed burglary, kidnaping, rape and attempted rape, sodomy and attempted sodomy, and robbery and attempted robbery, within the meaning of Penal Code section 190, subdivision (a)(17), while engaged in the commission of the murder.

2. Count two--second degree commercial burglary in violation of Penal Code section 459.

3. Count three--kidnaping in violation of Penal Code section 207, subdivision (a). Count three further alleged that appellant confined the victim in a manner which exposed her to a substantial likelihood of death within the meaning of Penal Code section 209, subdivision (a).

4. Count four--forcible rape in violation of Penal Code section 261, subdivision (a)(2).

5. Count five--sodomy by use of force in violation of Penal Code section 286, subdivision (c).

6. Count six–second degree robbery in violation of Penal Code section 211.

The information alleged under counts four and five that appellant used a deadly or dangerous weapon in the commission of the offenses within the meaning of Penal Code section 12022.3, subdivision (a), and committed kidnaping, burglary, infliction of great bodily injury, use of a deadly or dangerous weapon, and tied and bound the victim, within the meaning of Penal Code section 667.61, subdivisions (a), (b), and (e). It further alleged that appellant had been convicted of two violent or serious felonies within the meaning of Penal Code section 667, subdivisions (b) through (i) and 1170.12, subdivision (a), two serious felonies within the meaning of Penal Code section 667, subdivision (a)(1), and a prior prison enhancement within the meaning of Penal Code section 667.5, subdivision (b). Finally, the information alleged that appellant used a dangerous or deadly weapon in the commission of the offense within the meaning of Penal Code section 12022, subdivision (b)(1). (Vol. 1, C.T. pp. 23-29.)

Jury selection commenced on August 30, 1999. (Vol. 1, R.T. p. 198.) The jury was empaneled on September 21, 1999. (Vol. 4, R.T. p. 800.) Opening statements were conducted on October 4, 1999. (Vol. 4, R.T. pp. 811, 834.) Trial testimony commenced that same day. (Vol. 4, R.T. p. 859.) On October 20, 1999, the trial court denied appellant's Marsden motion. (Vol. 9A, R.T. pp. 2160-2169.) The presentation of evidence for the guilt phase of the trial concluded on November 1, 1999. (Vol. 11, R.T. pp. 2640, 2660.)

The jury reached verdicts on November 4, 1999. (Vol. 12, R.T. pp. 2867-2879.) The jury found appellant guilty of first degree murder (count one), second degree commercial

burglary (count two), kidnaping (count three), sodomy by use of force (count five), and second degree robbery (count six). The jury found appellant not guilty of rape, (count four), and not true the enhancements and special circumstances alleged under that count.

The jury found true the following enhancement allegations and special circumstances:

1. Use of a dangerous and deadly weapon in the commission of counts one through three, and five and six.

2. Burglary during the commission of counts one and five.

3. Kidnaping during the commission of counts one, three, and five.

4. Sodomy during the commission of counts one.

5. Robbery during the commission of count one.

6. Confinement of the victim in a manner which exposed her to a substantial likelihood of death during the commission of count three.

7. Tying and binding the victim during the commission of count five.

8. Infliction of great bodily injury on the victim during the commission of count five. (Vol. 12, R.T. pp. 2871-2877.) The jurors were polled and affirmed their verdicts. (Vol. 12, R.T. pp. 2877-2879.)

On November 15, 1999, the trial court denied appellant's Marsden motion. (Vol. 12A, R.T. pp. 2899-2904.) Appellant also made a Faretta motion. (Vol. 12A, R.T. p. 2903.) That same day, the trial court deemed appellant's Faretta motion withdrawn. (Vol. 12, R.T. p. 2912.) Evidence for the penalty phase commenced on November 15, 1999. (Vol. 12, R.T.

pp. 2932, 2941.)

On November 23, 1999, the trial court made true findings regarding the prior conviction allegations. (Vol. 16, R.T. pp. 3845-3846.) On November 30, 1999, the prosecutor and the defense counsel made their closing arguments for the penalty phase. (Vol. 16, R.T. p. 3789, 3796, 3821.) On December 1, 1999, the jury asked the trial court what would happen if it could not reach a verdict. (Vol. 16, R.T. p. 3861.) The trial court instructed the jury that it could not answer that question. (Vol. 16, R.T. p. 3864.) On December 2, 1999, the jury returned a verdict and fixed the penalty at death. (Vol. 16, R.T. p. 3868.)

The sentencing hearing occurred on January 7, 2000. (Vol. 16, R.T. pp. 3876-3897.) The trial court denied a motion for a reduction of the penalty. (Vol. 16, R.T. p. 3884.) It imposed sentence as follows:

1. Count one–death to be imposed within the walls of San Quentin State Prison in a manner prescribed by law and to determined by the warrant of execution.

2. Count two–25 years to life in state prison plus a consecutive one year term for the dangerous and deadly weapon enhancement that was found true. The sentence for this count was stayed pursuant to Penal Code section 654.

3. Count three with the enhancement found true under Penal Code section 209, subdivision (a) that appellant confined the victim in a manner which exposed her to a substantial likelihood of death during the commission of the kidnaping–life without the

possibility of parole.

4. Count five–25 years to life which was tripled to 75 years to life because of the true findings to the strike allegations pursuant to Penal Code sections 667, subdivisions (b) through (i), and the enhancement allegation under 667.61, subdivision (a). The trial court imposed a consecutive 10 year term for the enhancement found true under section 12022.3, subdivision (a). Appellant was therefore sentenced to 85 years to life in prison for count five.

5. Count six–25 years to life in prison plus a consecutive one-year term for the dangerous and deadly weapon enhancement found true.

6. Count six–25 years to life in prison plus a consecutive one year term for the dangerous and deadly weapon enhancement found true.

7. The trial court imposed a consecutive one year term for the prior prison enhancement that was found true under section 667.5, subdivision (b), and two consecutive five year terms for the serious felony enhancements found true under section 667, subdivision (a)(1). The court stayed the sentence for counts two through six pending appeal of the sentence, and execution of the sentence for count one. (Vol. 16, R.T. pp. 3897-3901.)

STATEMENT OF FACTS-GUILT PHASE

A. THE PROSECUTION EVIDENCE

1. EVENTS LEADING UP TO THE DEATH OF COLLEEN KENNEDY

On February 20, 1998, appellant and his brother George Castaneda, and Gina Ybarbo, appellant's sister-in-law, were involved in a motor vehicle accident. (Vol. 7, R.T. pp. 1702, 1712.) They were driving a red Nissan Sentra owned by Virginia Castaneda. (Vol. 7, R.T. pp. 1759-1760.) A mirror was damaged in the accident. (Vol. 7, R.T. p. 1760.) Gina went to see an attorney because of the accident. (Vol. 7, R.T. p. 1712.) The attorney referred them to the medical office of Basil Vassantachart, M.D., for treatment. (Vol. 5, R.T. pp. 1102-1103; Vol.7, R.T. pp. 1712-1713.) Dr. Vassantachart's office was located at 9345 Central Avenue in Montclair. (Vol. 5, R.T. p. 1248.) Dr. Vassantachart also had clinics in Alhambra and Covina. (Vol. 4, R.T. p. 940.) The main entrance to the clinic was in the rear of the building off an alley that ran behind the building and parallel to Central Avenue. (Vol. 5, R.T. pp. 1078; exhibit 2.) Central Avenue ran north-south and was a major street. (Vol. 6, R.T. p. 1288.)

Colleen Kennedy, the victim, worked as a medical assistant at the Montclair and Covina clinics. (Vol. 5, R.T. p. 1006.) She worked at the Monclair clinic on Monday and Wednesday. (Vol. 4, R.T. pp. 881-882; Vol. 5, R.T. p. 1006.)[1] On Mondays, Ms. Kennedy

[1] Shirley Vassantachart testified that Ms. Kennedy worked at the Covina Clinic on Wednesday. (Vol. 5, R.T. p. 1006.) Mr. Kennedy testified that Ms. Kennedy worked at the Montclair clinic on Wednesday. (Vol. 4, R.T. pp. 881-882.)

typically arrived at the Montclair clinic between 8:00 and 9:00 a.m. to prepare the office for patients. She worked alone until patients arrived. (Vol. 5, R.T. pp. 881-882; Vol. 6, R.T. pp.1006-1007.) Ms. Kennedy's habit was to wear a watch and ring during the workday. (Vol. 8, R.T. p. 1896.) Ms. Kennedy often read a book or newspaper once she had prepared the office and prior to the arrival of any patients. (Vol. 5, R.T. pp. 1008-1009.) She kept the doors to the clinic locked until the first patient arrived, but would open the door if she saw a patient drive up to the clinic and let them enter. (Vol. 5, R.T. pp. 1023, 1128-1129.)

On February 26, 1998, George, Gina, and appellant went to their first appointment together. (Vol. 5, R.T. pp. 1104, 1128, 1130, 1140-1141; exhibits 20 [sign-in sheet] and 21 [appointment book].) Dr. Vassantachart examined appellant in the examination room located on the south side of the building. (Vol. 5, R.T. p. 1109.) Appellant came in for two more appointments on March 5 and 9, 1998. Appellant received an X-ray and physical therapy on March 5. He received physical therapy on March 9. Appellant canceled appointments that were scheduled for March 12 and 16, 1998. (Vol. 5, R.T. pp. 1131, 1135, 1144-1145.) Ms. Kennedy treated appellant during the March 9 appointment. (Vol. 5, R.T. p. 1143.) Gina came in for treatment about a week prior to March 30. Ms. Kennedy informed Gina that the individual who struck the Nissan Sentra did not have insurance. She told Gina that medical treatment could continue as long as they were responsible for payment. (Vol. 5, R.T. p. 1107.)

Appellant starting living with Virginia Castaneda in February 1998. (Vol. 7, R.T.

pp. 1732-1733.) Virginia was the wife of appellant's brother. (Vol. 6, R.T. p. 1498.) Towards the end of February, Virginia and appellant moved to Ontario and rented an apartment in the same apartment complex where George and Gina lived. (Vol. 7, R.T. pp. 1702, 1732-1734.) Virginia drove a red burgundy 1995 Nissan Sentra. (Vol. 7, R.T. p. 1737.) Virginia had three children, ages nine, eight, and five. Her three children lived with appellant and her. (Vol. 7, R.T. p. 1734.) Her youngest son went by the name of Joey. (Vol. 7, R.T. p. 1735.) Virginia was pregnant during the month of March and suffering from morning sickness. (Vol. 7, R.T. p. 1762.) After one of appellant's visits to Dr. Vassantachart's clinic, he mentioned to Virginia that a Mexican nurse had flirted with him and "stuck her butt" in his face. Virginia was upset at appellant's comment and told him that it was inappropriate. (Vol. 7, R.T. p. 1745.)

2. EVENTS ON THE DAY OF COLLEEN KENNEDY'S DEATH ON MARCH 30, 1998

Approximately three weeks prior to March 30, 1998,[2] appellant obtained employment through an employment agency called Staff Mart. (Vol. 4, R.T. pp. 967; Vol. 7, R.T. p. 1636.) The company was also known as WGI Solutions. (Vol. 7, R.T. p. 1636.) Appellant was placed with Toyo Tires. (Vol. 4, R.T. pp. 976-977.)

Appellant reported for work on March 30 at 6:00 a.m. (Vol. 4, R.T. pp. 976-977; Vol. 8, R.T. p. 1954.) He drove Virginia's Nissan Sentra. (Vol. 7, R.T. pp. 1736-1737.) Francisco Tello was working at Toyo Tires that Monday morning. (Vol. 8, R.T. p. 1946.)

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[2] March 30, 1998, was a Monday.

During the 9:00 a.m. break, appellant asked Mr. Tello where he could find something to eat. Appellant then left Toyo Tires. (Vol. 8, R.T. pp. 1948-1949.) Mr. Tello did not recall appellant saying anything about injuring his hand. (Vol. 8, R.T. p. 1949.) Robert Love worked as a supervisor at Toyo Tires. (Vol. 8, R.T. pp. 1952-1953.) Following the 9:00 a.m. break, somebody told Mr. Love that appellant had left. Appellant did not report an injury to his thumb. (Vol. 8, R.T. p. 1955.) Mr. Love asked Jackie, the office secretary, if appellant had told her that he was going to leave. She said no. Mr. Love called the employment agency to obtain a replacement worker. (Vol. 8, R.T. p. 1956.)

Shirley Vassantachart, the wife of Dr. Basil Vassantachart, was working at the Alhambra clinic the morning of March 30. Ms. Vassantachart spoke with Ms. Kennedy at 9:28 a.m. and sent her documents via facsimile. (Vol. 5, R.T. pp. 1014-1015.) The conversation lasted about one minute. (Vol. 5, R.T. p. 1019.) Ms. Vassantachart called the Montclair office again around 10:15 to 10:30 a.m., and did not receive an answer. The answering company also did not respond to the telephone call. (Vol. 5, R.T. pp. 1020-1021.)

A Long John Silver restaurant was located a short distance down the street from Dr. Vassantachart's Montclair clinic. (Vol. 8, R.T. p. 1960.) When Linda Salley, an employee at the restaurant, arrived for work at 9:15 a.m., there were no vehicles in the parking lot. (Vol. 8, R.T. pp. 1976-1977.) Martha Carter arrived for work at the restaurant at approximately 9:45 a.m. When she arrived, a Nissan Sentra was parked in the parking lot. The parking lot was on the south side of the restaurant. (Vol. 8, R.T. pp. 1964-1965; exhibit

16, photos G and H.) Ms. Carter went inside the restaurant and mentioned the vehicle to Ms. Salley. (Vol. 8, R.T. pp. 1962, 1979.) Around 10:05 a.m., Ms. Salley went outside and looked at the vehicle. (Vol. 8, R.T. p. 1980; exhibit 16, photo F.) Neither Ms. Carter nor Ms. Salley remembered seeing damage to the vehicle. (Vol. 8, R.T. pp. 1972, 1984.) Ms. Carter also went outside to the parking lot between 10:00 and 10:30 a.m. and saw the vehicle. (Vol. 8, R.T. p. 1969.)

Commodore Perry Childs, a patient of Dr. Vassantachart, arrived at the Montclair clinic, around 10:30 a.m. for an 11:00 a.m. appointment. (Vol. 4, R.T. p. 894.) He waited in his van for Ms. Kennedy to open the door. (Vol. 4, R.T. p. 899.) After approximately 10 minutes, Ida Oles arrived at the clinic. She joined Mr. Childs in his van. (Vol. 4, R.T. pp. 898, 912, 916.) Dorothy Cruz and her husband also arrived at the Montclair clinic around 10:30 a.m. (Vol. 4, R.T. pp. 929-930, 937.) Ms. Cruz and her husband tried to open the front door of the clinic but it was locked. They became suspicious and walked around the building. (Vol. 4, R.T. p. 936.) Ms. Cruz and her husband returned to their vehicle. Ms. Cruz called the Montclair clinic, but there was no answer. (Vol. 4, R.T. p. 937.) Ms. Cruz then called Dr. Vassantachart's Alhambra clinic and spoke with Shirley Vassantachart. (Vol. 4, R.T. pp. 937-939.) Ms. Cruz told her that the doors to the clinic were locked, and Ms. Kennedy had not answered when she called the clinic. (Vol. 4, R.T. pp. 940-941; Vol. 5, R.T. p. 1025.) Ms. Vassantachart called her husband and informed him of the situation. (Vol. 4, R.T. p. 941.)

Dr. Vassantachart arrived 15 to 20 minutes later at the Montclair Clinic. (Vol. 4, R.T. p. 941; Vol. 5, R.T. p. 1068.) He opened the front door with his key and entered. (Vol. 5, R.T. p. 1069.) He went to Ms. Kennedy's office, which was next to the front door and to the right. (Vol. 5, R.T. pp. 1069-1070; exhibit 12, photograph A and E.) He saw a book Ms. Kennedy had been reading on the floor of her office. (Vol. 4, R.T. p. 873; Vol. 5, R.T. pp. 1071-1072; exhibit 12, photograph C.) Dr. Vassantachart walked down the hallway and into the procedure room. (Vol. 5, R.T. pp. 1073-1074, 1081.) He saw Ms. Kennedy's body laying over the table in the procedure room. (Vol. 5, R.T. pp. 1081-1082.) Dr. Vassantachart went back into the procedure room and determined that it was Ms. Kennedy's body on the table and that she was dead. (Vol. 5, R.T. p. 1082.) He called 911. The police arrived in about 10 minutes. (Vol. 5, R.T. p. 1084.)

Gloria Salazar, appellant's cousin, lived in El Monte during the March/April 1998 time period. Sometime in late March/early April 1998, appellant came to Ms. Salazar's residence. He arrived between 10:30 a.m. and 12:00 a.m. Ms. Salazar was sleeping when appellant arrived and her niece woke her. (Vol. 7, R.T. p. 1547.) Appellant was dressed in black slacks and a dress-type shirt. (Vol. 7, R.T. pp. 1547-1548.) Appellant said that he had come from a job interview. (Vol. 7, R.T. p. 1548.) Appellant was quiet and did not exhibit an unusual mood. (Vol. 7, R.T. p. 1549.) He did not complain about an injury to his thumb. (Vol. 7, R.T. pp. 1571-1572.) Appellant gave Ms. Salazar a watch and a woman's ring. He said that he was going to throw it off the freeway because the bitch got him mad. Ms.

Salazar assumed that appellant was referring to his girlfriend. (Vol. 7, R.T. pp. 1550-1151.) Ms. Salazar later gave the watch to a friend by the last name of Dominguez. She commonly referred to Mr. Dominguez as her grandfather, but they were not related by blood. Ms. Salazar sold the ring to the Valley Pawnshop in El Monte. (Vol. 7, R.T. pp. 1552-1553, 1565.)

On March 30, 1998, appellant picked Virginia Castaneda up from work in Rancho Cucamonga at 5:30 p.m. He was driving her vehicle. (Vol. 7, R.T. p. 1737.) There was nothing unusual about appellant's behavior, and he did not complain about a sore thumb. (Vol. 7, R.T. p. 1738.) Either the next day or a few days later, appellant told Virginia that he quit working at Toyo Tires because he had an argument with someone. (Vol. 7, R.T. pp. 1738-1740.) Virginia was not aware of a Phillips head screwdrivers in her apartment or vehicle. (Vol. 7, R.T. pp. 1742-1744.)

3. THE INVESTIGATION THE DAY OF THE INCIDENT

Detectives, and forensic and evidence technicians from the San Bernardino County Sheriff's Department, and detectives from the Montclair Police Department went to the Montclair clinic. (Vol. 5, R.T. pp. 1241-1242, 1257; Vol. 6, R.T. pp. 1307-1308, 1394-1395; Vol. 9, R.T. pp. 2224-2225.) Detective Roger Price of the Montclair Police Department responded to the crime scene a few minutes after the 911 call was made. He became the lead detective on the case. (Vol. 5, R.T. pp. 1241-1242, 1249, 1252.) Detective Price inspected the building and did not see any sign of forced entry or sign of a recent

attempt to break into the building. (Vol. 6, R.T. pp. 1283-1284, 1304.)

Deborah Harris and Richard Dysart, forensic specialists with the San Bernardino County Sheriff's Department, responded to the crime scene shortly after the report of the murder. (Vol. 6, R.T. pp. 1307-1308, 1316; Vol. 8, R.T. pp. 1823-1824; exhibit 18.)[3] Ms. Harris walked through the crime scene, took photographs, and marked the location of evidence with yellow placards. (Vol. 6, R.T. pp. 1320, 1324.) Ms. Harris found a short white cotton crew sock on the floor of the procedure room near Ms. Kennedy's leg. It matched the sock that was on Ms. Kennedy's other leg. The sock had fecal matter on it. (Vol. 6, R.T. p. 1327; exhibit 18, photograph A.) The sock was identified as item A-20 for purpose of identification and the chain of custody. (Vol. 6, R.T. p. 1362.) Examination paper was under Ms. Kennedy's body. (Vol. 6, R.T. p. 1325; Vol. 8, R.T. p. 1787; exhibit 18, photograph B.) Ms. Harris sprayed the examination paper for fingerprints. She was able to develop one usable palm print from the examination paper which she provided to Richard Howie, a forensic print specialist. (Vol. 8, R.T. pp. 1790, 1795.) Personnel at Dr. Vassantachart's office changed the paper used to cover the examining table after each patient was treated. (Vol. 4, R.T. p. 957; Vol. 5, R.T. pp. 1039, 1089; Vol. 8, R.T. pp. 2004-2005.)

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[3] Exhibit 18 is a series of photographs of the room where the body of Ms. Kennedy was found. (Vol. 6, R.T. p. 1326.) Dr. Vassantachart referred to the room where Ms. Kennedy's body was found as the procedure room. Other witnesses referred to it as the examination room.

A white tube sock had been used as a gag. The tube sock was in her mouth and tied around the back of her neck. That sock was secured with a tightly tied shoestring. A second sock was against Ms. Kennedy's neck and the sock that had been used as a gag. (Vol. 6, R.T. pp. 1365-1366.) Ms. Kennedy's hands were tied behind her with shoelaces. (Vol. 6, R.T. p. 1369.) Ms. Harris conducted the sex kit procedure at the crime scene. Cotton swabs were taken from Ms. Kennedy's vagina, anus, and mouth. (Vol. 6, R.T. pp. 1373-1376.) Ms. Kennedy did not have a ring or a watch on her. (Vol. 6, RT. pp. 1284-1285.)

Sometime around midnight, Dr. Vassanchart went back into the medical clinic with Detective Price. (Vol. 5, R.T. pp. 1097-1098, 1259.) They went into the procedure room where Ms. Kennedy's body was found. (Vol. 5, R.T. pp. 1259-1260.) There was a window ledge that was high up on the exterior wall of the procedure room. Boxes and a magazine had been placed on the window ledge. (Vol. 5, R.T. pp. 1098-1099, 1259-1260; Vol. 6, R.T. pp. 1386-1387; exhibit 22.) The box had previously been on top of a white metal cabinet. (Vol. 5, R.T. pp. 1100-1101.) Dr. Vassantachart believed that the magazine had previously been in the office. (Vol. 6, R.T. p. 1388.) Dr. Vassantachart did not know when the boxes had been placed on the window ledge. (Vol. 5, R.T. p. 1117.) The procedure room had an exterior door that was kept locked with a dead bolt lock and a knob lock. (Vol. 5, R.T. p. 1099; exhibit 8; exhibit 18, photograph C.) The procedure room was on the west side of the building and next to Central Avenue. Because of the high volume of vehicular traffic, it would be difficult for anybody to hear anything that was occurring in the procedure

room. (Vol. 6, R.T. p. 1288.) Dr. Vassantachart could not find any evidence that drugs had been taken from the clinic. (Vol. 5, R.T. p. 1125.)

4. THE POST-INCIDENT INVESTIGATION

Elizabeth Ibarra had known appellant for 13 to 14 years. (Vol. 7, R.T. p. 1573.) Appellant came to Ms. Ibarra's residence in early March. He drove Virginia Castaneda's red Nissan Sentra. (Vol. 7, R.T. p. 1576.) Appellant had Virginia's two-year old son Joey with him. (Vol. 7, R.T. pp. 1576-1577.)[4] The visit lasted for an hour, and occurred between 8:30 and 9:30 a.m. Ms. Ibarra did not visit with appellant any other time during the month of March. (Vol. 7, R.T. p. 1577.) On March 30, Ms. Ibarra left home at 7:45 a.m. and went to a doctor's appointment. (Vol. 7, R.T. pp. 1583-1584.) She arrived home at 2:45 p.m. after she visited relatives. (Vol. 7, R.T. p. 1584.)

Ms. Ibarra saw appellant again on April 3, 1998. (Vol. 7, R.T. p. 1578.) He arrived at her residence around 8:30 a.m. Appellant was alone. (Vol. 7, R.T. pp. 1578-1579.) They drove to El Monte and stopped at Gloria Salazar's apartment. (Vol. 7, R.T. p. 1579.) Ms. Ibarra stood at the street corner while appellant went into Ms. Salazar's residence. He returned after about 10 to 15 minutes. (Vol. 7, R.T. p. 1580.) They then went to a lake off the Interstate 605 freeway and talked. (Vol. 7, R.T. pp. 1580-1581.) Appellant visited Ms. Ibarra again about four days later. (Vol. 7, R.T. p. 1581.) Appellant asked her to call the

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[4] There is a conflict in the testimony about the age of Virginia's youngest child. Ms. Ibarra testified that she saw Virginia's youngest son, whom she estimated to be two years old. (Vol. 7, R.T. pp. 1576-1577.) Virginia testified that her youngest son was five years old. (Vol. 7, R.T. p. 1734.)

temporary work agency. She did so and spoke with Olga. Ms. Ibarra told Olga that appellant left the job at Toyo Tires because he did not want to work there. Appellant wanted to know if he could get another job. Olga said that appellant could not have another job for 90 days. (Vol. 7, R.T. p. 1582.) Appellant told Ms. Ibarra that he had walked off the job at Toyo Tires the day before. (Vol. 7, R.T. p. 1582.)

During several of their meetings, Ms. Ibarra and appellant discussed anal sex. Appellant said that he liked to have anal sex with Virginia. Virginia did not like engaging in anal sex. Ms. Ibarra told appellant to be easy when he engaged in anal sex and she gave him four to five packets of K-Y jelly. (Vol. 7, R.T. pp. 1628-1629.) Virginia Castaneda denied that she engaged, or attempted to engage, in anal intercourse with appellant. (Vol. 7, R.T. pp. 1745, 1756.) She also denied that appellant ever had any creams or lubricants. The last time they had sexual relations was early in the morning the day appellant was arrested by his parole officer, which was April 20, 1998. (Vol. 7, R.T. p. 1757.)

On April 20, 1998, Aram Madenilan, appellant's parole officer, searched Virginia Castaneda's red Nissan Sentra. He found a Phillips head screwdriver in the wheel well of the trunk. (Vol. 8, R.T. p. 2017.)[5] Mr. Madenilan took custody of the screwdriver.

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[5] Mr. Madenilan conducted a parole search on April 20, 1998 at appellant's apartment. Appellant was arrested as a result of that search for a parole violation. The parties agreed that Mr. Madenilan would be examined in a manner designed to avoid the jury learning that he was a parole officer. (Vol. 9, R.T. p. 2021.) Virginia Castaneda nevertheless mentioned during direct examination by the prosecutor that appellant was arrested by his parole officer. (Vol. 7, R.T. p. 1757.) During the defense case-in-chief, evidence was admitted that appellant was on parole and that a parole search was conducted on April 20, 1998. (Vol. 9, R.T. pp. 2239; Vol. 11, R.T. pp. 2594-2605.)

Detectives from the Montclair Police Department picked up the screwdriver. (Vol. 8, R.T. p. 2018.)

Dr. Vassantachart provided Detective Price with a list of patients' names. (Vol. 6, R.T. p. 1296.) Detectives Robert Acevedo and Dan Glozer interviewed appellant on May 6, 1998, at 11:47 a.m. (Vol. 6, R.T. pp. 1480, 1487-1488.) They asked appellant about the murder of Ms. Kennedy. Appellant said that he heard about the murder and that it was a tragedy because she was a nice woman. (Vol. 6, R.T. pp. 1462-1463, 1487.) Appellant provided fingerprints, a palm print, and blood and saliva samples. (Vol. 6, R.T. pp. 1462, 1464-1467.) He was very cooperative. (Vol. 6, R.T. p. 1462.) The evidence was submitted for forensic examination. The latent print examiner, Richard Howie, called Detective Glozer and requested that he obtain a second palm print from appellant. (Vol. 6, R.T. p. 1473.)

Detectives Acevedo and Price interviewed appellant on May 8, 1998, at 3:45 p.m. at the Montclair Police Department. (Vol. 6, R.T. p. 1488; Vol. 7, R.T. p. 1685.) The interview was videotaped and audiotaped. (Vol. 6, R.T. p. 1489.) Appellant described the automobile accident and the medical treatment he received from Dr. Vassantachart's office. (Vol. 6, R.T. pp. 1489-1492.) Appellant said that he first heard about Ms. Kennedy's death when Detectives Acevedo and Glozer went to the jail to obtain hair samples and palm prints from him. (Vol. 6, R.T. p. 1495.) Appellant said that he had been working at Toyo Tires in Ontario the day that Ms. Kennedy was murdered. (Vol. 6, R.T. p. 1495.) He said that he drove Virginia's red Nissan to Toyo Tires. (Vol. 6, R.T. p. 1496.)

Appellant said that he hurt his thumb unloading tires, walked off the job around 8:30 a.m., and went to his cousin Gloria's residence in El Monte. (Vol. 6, R.T. pp. 1496-1497.)[6] Appellant said that he traveled to Gloria's residence on Interstate-10. He then changed his mind and said that he traveled to her residence on the Pomona freeway, which is Interstate-60. Appellant said that he arrived at Gloria's residence around 9:00 or 10:00 a.m. (Vol. 6, R.T. p. 1497.) Gloria was sleeping when appellant arrived and he awakened her. Appellant then went to the store, purchased beer and food, and returned to Gloria's residence. (Vol. 6, R.T. p. 1498.) He spent the rest of the day talking with Gloria at her residence. (Vol. 6, R.T. p.1498.) Appellant left around 3:30 p.m. and picked Virginia up at her place of employment. (Vol. 6, R.T. pp. 1498-1499.) Detective Acevedo obtained another palm print from appellant at the conclusion of the interview. (Vol. 6, R.T. pp. 1477, 1499-1500.) Richard Dysart obtained hair and blood samples from appellant. (Vol. 6, R.T. p. 1500.)

Detectives Acevedo and Kleczko of the San Bernardino County Sheriff's Department interviewed appellant again on May 8, at 7:45 p.m. (Vol. 6, R.T. p. 1500.) The interview was audio recorded and videotaped. Appellant mentioned a good looking Hispanic female who worked at Dr. Vassantachart's office. (Vol. 6, R.T. p. 1501.) Appellant said that he was not upset when Ms. Kennedy informed Gina that the medical office could no longer provide treatment without arrangements for payment. (Vol. 6, R.T. p. 1502.) Detective Acevedo told appellant that Gloria had informed law enforcement officers that appellant arrived at her

[6] The full name of appellant's cousin is Gloria Salazar. (Vol. 7, R.T. p. 1686.)

residence at 12:00 p.m. that day. (Vol. 6, R.T. p. 1504.)[7]

Appellant explained that while traveling to Gloria's residence, he saw his half-brother, Louie Arroyo, standing on Gilman Street. They "scored" dope from Louie's dope connection in El Monte. (Vol. 6, R.T. pp. 1503-1505.) Appellant said that he traveled on the Pomona Freeway and got off on a street named Durfee or Duffey. (Vol. 6, R.T. p. 1504.) Appellant went to Gloria's residence after helping Mr. Arroyo purchase heroin. (Vol. 6, R.T. pp. 1505-1506.) Appellant denied any involvement in Ms. Kennedy's death, or being in the Montclair office the day she was murdered. (Vol. 6, R.T. pp. 1506-1507.)

Detective Acevedo falsely told appellant that a tube sock found at the crime scene matched a sock found during a search of his residence. (Vol. 6, R.T. pp. 1507-1508.) Appellant said the socks found at his residence belonged to his brother. (Vol. 6, R.T. p. 1508.) Detective Acevedo told appellant that DNA testing had confirmed that the sperm found on the sock at the crime scene belonged to appellant. (Vol. 6, R.T. pp. 1507-1508.)[8] Appellant said "come on man," in a manner that denied committing the crime. (Vol. 6, R.T. p. 1509.) Appellant had the same response when Detective Acevedo told him that his vehicle had been seen at the crime scene. (Vol. 6, R.T. pp. 1509-1510.)

On May 15, 1998, appellant called his sister, Dianna Castaneda, from jail. (Vol. 7,

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[7] Detective Acevedo could not recall whether another officer had actually told him this information or if he was simply making it up to test appellant. (Vol. 6, R.T. pp. 1504-1505.)

[8] At the time of the interview, Detective Acevedo had not received any results from the laboratory concerning the DNA analysis. (Vol. 6, R.T. p. 1508.)

R.T. pp. 1562-1564, 1769-1770.) Appellant told her to contact Detective Kleczko and inform him that appellant wanted to speak with him. (Vol. 7, R.T. pp. 1564, 1770.) Appellant told Dianne that he wanted to inform Detective Kleczko of his activities on the day of the murder. (Vol. 7, R.T. pp. 1564, 1770.) Appellant said that he went to Elizabeth Ibarra's residence after he left work. (Vol. 7, R.T. p. 1771.) Detective Kleczko went to interview appellant. The interview was audio recorded and tape recorded. (Vol. 7, R.T. pp. 1655-1656.)

Appellant said that he had read in the newspaper that a press conference was going to be held in which the District Attorney's Office was going to announce the filing of charges against a suspect in the murder of Ms. Kennedy. Appellant was confused about why law enforcement officers were talking to him about the murder when the newspaper indicated that there was a suspect. (Vol. 7, R.T. pp. 1655-1656.) Appellant admitted that he had not been truthful regarding his whereabouts when he spoke with Detective Kleczko on May 8. (Vol. 7, R.T. p. 1656.) Appellant said that he had gone to visit an old girlfriend named Elizabeth. Appellant did not tell the detectives about seeing her because he was afraid of getting in trouble with his girlfriend. Appellant did not say anything about seeing Louie Arroyo on the day of the murder. (Vol. 7, R.T. p. 1657.) Appellant said that he left Toyo Tires about 9:00 a.m., and drove Virginia's red Nissan Sentra. (Vol. 7, R.T. pp. 1657-1658.) He arrived at Elizabeth's residence in Pomona about 9:30 a.m. Sometime around 9:30 to 9:45 a.m., appellant had Elizabeth call the temporary employment agency to have his name put back on

the working list. Appellant said that Elizabeth spoke with someone named Olga. (Vol. 7, R.T. pp. 1659-1660.) They then went to meet a "connection." (Vol. 7, R.T. pp. 1658-1659.) Appellant stayed at Elizabeth's residence until approximately 11:00 a.m., and then went to Gloria's residence. (Vol. 7, R.T. pp. 1659, 1661.) Appellant stayed at Gloria's residence until 4:30 p.m.,when he left and picked up Virginia. (Vol. 7, R.T. p. 1661.) He said that he did not see Louis Arroyo that day. (Vol. 7, R.T. p. 1662.) Appellant again denied being at the Montclair Clinic the day of the murder, or at the Long John Silver down the street from the clinic. (Vol. 7, R.T. pp. 1662-1663.) Detective Kleczko checked appellant's telephone records and determined that he had called Elizabeth Ibarra 11 times between May 8 and May 15. (Vol. 7, R.T. p. 1664.)

Detective Price interviewed Gloria after appellant's interview of May 8. (Vol. 6, R.T. pp. 1499-1500; Vol. 7, R.T. p. 1685.) He later served Gloria with a subpoena to appear in court. She told him that appellant gave her a watch and a ring when he visited her in late March/early April, 1998. (Vol. 7, R.T. p. 1686.) She said that she had pawned the ring at a pawnshop. (Vol. 7, R.T. p. 1686.) Detective Price attempted to retrieve the ring from the pawnshop, but it had been sold. (Vol. 7, R.T. pp. 1686-1687.) Ms. Salazar said that the ring had a green stone, but she could not remember the details of the design. (Vol. 7, R.T. p. 1687.) Detective Price retrieved the watch, which was marked exhibit 19, from the person to whom Ms. Salazar had given it. (Vol. 7, R.T. pp. 1565, 1688-1689.) Steven Kennedy, Ms. Kennedy's husband, testified that exhibit 19 appeared similar to a watch worn by her.

Exhibit 19, however, was more worn than Ms. Kennedy's watch. (Vol. 4, R.T. pp. 864, 875, 890.) Mr. Kennedy could not confirm that exhibit 19 was the watch owned by his wife. (Vol. 4, R.T. pp. 890-891.) Mr. Kennedy inventoried his wife's jewelry following her death. A ring that had either a green or red diamond was missing. (Vol. 4, R.T. pp. 865, 869.)

After appellant called Dianna Castaneda from jail, she spoke with Elizabeth Ibarra twice over the telephone. (Vol. 7, R.T. pp. 1773-1774.) In the first conversation, Ms. Ibarra said that there was no doubt that appellant was at her residence the day of the murder. (Vol. 7, R.T. p. 1774.) Dianna spoke with Ms. Ibarra again about five days later. (Vol. 7, R.T. pp. 1774-1775.) Ms. Ibarra said that she could not tell the truth because she was being threatened by people from the police department. (Vol. 7, R.T. p. 1775.) The officers told her that they were going to call her parole officer, inform him that she was with a parolee, and her children would be taken from her. Ms. Ibarra also did not want her husband to find out that she had been with appellant. (Vol. 7, R.T. pp. 1775-1776.)

The distance between Toyo Tires and the Montclair clinic is between nine and 11 miles depending on the route traveled. (Vol. 9, R.T. pp. 2224, 2259-2260.)

5. THE FORENSIC ANALYSIS

David Blackburn, a forensic laboratory technician for the San Bernardino County Sheriff's Department, tested evidence seized from the crime scene for biological fluids. (Vol. 6, R.T. pp. 1395-1396, 1401-1402.) He found seminal fluid on the sock seized from the crime scene and which had been marked item A-20. (Vol. 6, R.T. p. 1412.) Mr. Blackburn

examined the vaginal and rectal smears collected as part of the sex kit. He did not find any sperm on either smear. (Vol. 6, R.T. pp. 1414-1415.)

Daniel Gregonis, a criminalist with the Scientific Investigation Division of the San Bernardino County Sheriff's Office, was qualified as an expert witness in DNA analysis. (Vol. 8, R.T. pp. 1901-1907.) DNA stands for deoxyribonucleic acid. DNA is found in every cell in the body. (Vol. 8, R.T. p. 1913.) DNA is analyzed by two different tests. The first test is referred to as RFLP, which means restricted fragment length polymorphism. The second test is referred to as PCR, which means polymerase chain reaction. (Vol. 8, R.T. p. 1937.) Mr. Gregonis had experience in both RFLP and PCR testing. (Vol. 8, R.T. pp. 1937-1938, 1940.) Both tests are equally accurate. (Vol. 8, R.T. p. 1940.) The DNA of one individual cannot be changed to look like the DNA of another individual. (Vol. 9, R.T. pp. 2023-2024.) Mr. Gregonis did RFLP testing on sperm that had been extracted from a semen stain on the sock and which had been marked item A-20. (Vol. 9, R.T. pp. 2053-2054.) Mr. Gregonis compared the DNA that had been extracted from appellant's oral swab and blood sample with the DNA that had been extracted from the sock found at the crime scene and which had been marked item A-20. (Vol. 9, R.T. p. 2068.) He concluded that appellant was the sperm donor on item A-20. (Vol. 9, R.T. p. 2089.)

Caroline Kim, a criminalist with the Scientific Investigation Division of the San Bernardino County Sheriff's Department, worked with Daniel Gregonis. (Vol. 9, R.T. pp. 2139-2140.) She was also qualified as an expert witness in DNA analysis. (Vol. 9, R.T. pp.

2143-2151.) She extracted sperm from the sock which was marked item A-20. (Vol. 9, R.T. pp. 2171-2172.) She started the extraction process on April 6, 1998, and completed the DNA profile of the sperm on April 16, 1998. (Vol. 9, R.T. p. 2174.) Ms. Kim also extracted DNA from the oral swab collected from appellant by Detective Glozer on May 3, 1998. (Vol. 9, R.T. pp. 2184-2185.) The DNA profile from appellant's oral swab matched the profile of the sperm found on item A-20. (Vol. 9, R.T. p. 2185.)

Richard Howie was a forensic print specialist with the San Bernardino County Sheriff's Department. (Vol. 8, R.T. pp. 1863-1866.) Exhibit 23 was a chart which contains a series of documents and photographs. One of the photographs showed a palm print taken from the paper under Ms. Kennedy's body at the crime scene. (Vol. 8, R.T. pp. 1870-1871, 1877.) Another document contained appellant's palm prints. The palm prints were rolled by Detective Glozer. (Vol. 8, R.T. p. 1873.) Exhibit 23 also contained a second set of known palm prints from appellant which were rolled by Richard Dysart. (Vol. 8, R.T. pp. 1844-1846, 1874-1875.) Mr. Howie determined that appellant's palm print appeared on the piece of paper found under Ms. Kennedy's body. (Vol. 8, R.T. p. 1877.)

6. THE AUTOPSY

Dr. Frank Sheridan, a forensic pathologist for the San Bernardino County Coroner's Office, examined Ms. Kennedy's body. (Vol. 5, R.T. pp. 1147-1149, 1151; exhibit 7 [the autopsy report].) A deputy coroner visually examined Ms. Kennedy's body at the crime scene at 3:05 p.m. Her hands were tied tightly behind her back with shoelaces. A bloody sock was

wrapped around her neck and placed in her mouth as a gag. The neck area had multiple stab and puncture wounds. There was an abrasion on the skin below the chin. (Vol. 5, R.T. p. 1159.)

The deputy coroner physically examined the body at 5:35 p.m. Rigor mortis was fully developed. Rigor mortis refers to the stiffening up of the body after death due to contraction of the muscles. Rigor mortis commences immediately after death, but does not become obvious for about two hours. (Vol. 5, R.T. pp. 1161-1162.) Liver mortis was also present when the deputy coroner examined the body. Liver mortis refers to the discoloration of the body due to movements of fluids within the body caused by gravity. (Vol. 5, R.T. p. 1164.) There was no apparent trauma to the anal region. (Vol. 5, R.T. p. 1181.) Dr. Sheridan made an incision in the abdomen and internally examined the rectum and anal area. He saw no definite sign of trauma. (Vol. 5, R.T. p. 1182.) There were some small abrasions on the left arm that occurred before death. The front of the chin and one of the thighs had some minor abrasions. Both wrists had deep ligature marks from the shoelaces. (Vol. 5, R.T. p. 1183.)

The neck area had 29 wounds that ranged from superficial injuries to deep injuries. The wounds had been caused by a Phillips head screwdriver. Fifteen of the 29 wounds had a definite cross pattern which resembled an X. (Vol. 5, R.T. p. 1189.) The other 14 wounds were consistent with having been caused by a Phillips head screwdriver, but did not have a clear pattern. (Vol. 5, R.T. pp. 1189-1190.) The injuries went from one side of the neck to the other side across the back. None of the injuries were to the front of the neck. The gag

had been present when most of the wounds were inflicted to the neck. The gag had holes in it which had been caused by the screwdriver. The injuries caused hemorrhaging to the neck. There was a lot of blood inside the tissues of the neck. (Vol. 5, R.T. p. 1190.)

The carotid artery and the jugular vein are the two main blood vessels in the neck. (Vol. 5, R.T. pp. 1190-1191.) The two significant injuries were caused by two stab wounds closest to the angle of the jaw on the left side of the neck. Those stab wounds opened up the carotid artery and the jugular vein. (Vol. 5, R.T. p. 1190.) These two wounds were sufficient by themselves to cause death. (Vol. 5, R.T. p. 1198.) The tearing of the carotid artery and the jugular vein interferes with the supply of blood to the brain. (Vol. 5, R.T. p. 1191.) The nature of the injuries suggested that the assailant jabbed Ms. Kennedy with a screwdriver. The two lethal wounds to the neck involved someone taking a screwdriver and plunging it into the victim with great force. Fifteen of the 29 stab wounds were superficial injuries. The other 14 stab wounds varied in depth. (Vol. 5, R.T. p. 1192.) It appeared that the assailant was attempting to intimidate Ms. Kennedy into doing what he wanted. (Vol. 5, R.T. p. 1193.)

The main cause of death was the puncture wounds to the carotid artery and the jugular vein and the gag. (Vol. 5, R.T. pp. 1200, 1212.) The gag, however, probably would not be sufficient to cause death by itself because the nose would be clear. (Vol. 5, R.T. p. 1201.) Death occurred within a matter of minutes after the wounds to the carotid artery and the jugular vein. (Vol. 5, R.T. p. 1219.) Dr. Sheridan did not find any evidence that sodomy or a sexual assault occurred. (Vol. 5, R.T. pp. 1227-1228.) The sex test kit would not show

evidence of a sexual assault if the perpetrator withdrew from the victim before ejaculating. (Vol. 5, R.T. p. 1235.)

B. THE DEFENSE EVIDENCE

Detective Acevedo interviewed Francisco Tello of Toyo Tires on May 9, 1998. Mr. Tello said that the break on March 30 occurred at 9:30 a.m. (Vol. 10, R.T. pp. 2319-2320.) Detective Glozer interviewed Robert Love on May 8, 1998. Mr. Love said that the first break occurred at 9:30 a.m. (Vol. 10, R.T. p. 2322.)

Virginia Castaneda testified as a defense witness. (Vol. 10, R.T. p. 2325.) Appellant was released from prison in December, 1997. (Vol. 10, R.T. p. 2396.) During the middle of February 1998, she started living with appellant in an apartment in Riverside. (Vol. 10, R.T. pp. 2340-2341.) During the last week of February, they moved to Ontario and stayed in an apartment with George Castaneda and his wife. Virginia and appellant lived with them for a week and then moved into their own apartment in the same complex. (Vol. 10, R.T. pp. 2341-2342.)

The morning of March 30, appellant said goodbye to Virginia about 7:00 a.m. and left for work. (Vol. 10, R.T. p. 2329.) Gina Ybarbo took Virginia to work that day at approximately 8:00 a.m. (Vol. 10, R.T. pp. 2330, 2418-2420.) The preceding weekend, Gabriel Castaneda, Jr. stayed at their apartment. (Vol. 10, R.T. pp. 2329-2330.) Gabriel Jr. was in tenth or eleventh grade. (Vol. 10, R.T. p. 2350.) Gabriel Jr. watched Virginia's children while she was at work. (Vol. 10, R.T. pp. 2330-2331.) When Virginia left for work

the next day, she still thought that appellant was working at Toyo Tires. When Virginia came home from work that evening, Gabriel Jr. was no longer at the apartment. (Vol. 10, R.T. p. 2331.) Virginia stopped working on April 4, because she was having difficulty with her pregnancy. (Vol. 10, R.T. p. 2338.)

During the morning of April 20, 1998, Virginia was having sex with appellant. (Vol. 10, R.T. pp. 2325-2326.) Appellant ejaculated while they were having sex. Virginia and appellant heard someone banging on the door. (Vol. 10, R.T. 2328.) Appellant cleaned himself with either a sock or boxer shorts. (Vol. 10, R.T. pp. 2328, 2337.) Appellant then answered the door. (Vol. 10, R.T. pp. 2326, 2328.)

Appellant's parole officer entered and arrested appellant for a parole violation. Appellant's parole officer was accompanied by police officers. (Vol. 10, R.T. pp. 2328, 2342-2343.) The officers searched the apartment and garage. (Vol. 10, R.T. p. 2326.) The parole officer seized boxers, socks, T-shirts, tools, and a homemade tattoo machine. (Vol. 10, R.T. p. 2326.) Virginia had been having problems with the washing machine, and dirty clothing had been in the apartment between one to two weeks. (Vol. 10, R.T. p. 2327.) The search lasted between 90 minutes to two hours. (Vol. 10, R.T. p. 2328.) The officers found a gun on a chair in the bedroom. (Vol. 10, R.T. pp. 2328-2329.)

On May 8, 1998, police officers executed a search warrant at Virginia's apartment. They seized clothing at the apartment, including soiled socks. (Vol. 10, R.T. pp. 2332, 2335-2336.) Virginia never saw a Phillips head screwdriver in her apartment or vehicle. (Vol. 10,

R.T. pp. 2384-2385.)

On March 30, 1998, Gina Ybarbo was working the graveyard shift at Taco Bell. After leaving work, she arrived at her apartment around 6:10 a.m. The back door to appellant's apartment was open. Virginia and appellant were in the kitchen. Appellant was getting ready to leave for work. (Vol. 10, R.T. pp. 2419-2420.) Appellant left for work. At 8:00 a.m., Ms. Ybarbo drove Virginia to work. (Vol. 10, R.T. p. 2420.) Ms. Ybarbo returned home and cleaned her apartment until about 9:30 a.m., when she went to bed. (Vol. 10, R.T. pp. 2422-2423.) Sometime around 10:00 a.m., Elizabeth Ibarra and appellant arrived at the apartment complex. Ms. Ybarbo saw them through a window. (Vol. 10, R.T. p. 2424.) When they left, Ms. Ybarbo went to the back door of Virginia and appellant's apartment and asked Gabriel Jr. why appellant was at the apartment. (Vol. 10, R.T. p. 2425.) He said that he did not know. (Vol. 10, R.T. p. 2425.) Ms. Ybarbo's apartment was also searched on May 8, 1998. (Vol. 10, R.T. pp. 2425-2426.)

Louie Arroyo, appellant's half-brother, was in custody when he testified. (Vol. 10, R.T. p. 2498.) From December 1997 through April 1998, Mr. Arroyo was living with his sister Dianna Castaneda in Temple City and Ontario. (Vol. 10, R.T. pp. 2499, 2507.) During that time period, Mr. Arroyo also occasionally lived with his brother Michael in Ontario. (Vol. 10, R.T. p. 2508.)

Sometime in February or March 1998, Mr. Arroyo met Elizabeth Ibarra and appellant at a 7-Eleven. Mr. Arroyo drove to the 7-Eleven with appellant. Appellant left the 7-Eleven

with Ms. Ibarra. Mr. Arroyo left the 7-Eleven with his girlfriend. (Vol. 10, R.T. pp. 2499-2500.) Mr. Arroyo picked Ms. Ibarra and appellant up that evening at a residence in Rosemead. They appeared to be intimate with each other and Mr. Arroyo saw "hickeys" on them. (Vol. 10, R.T. pp. 2502-2503.) Mr. Arroyo drove Ms. Ibarra and appellant to her home in Pomona. Ms. Ibarra's daughter was with them. (Vol. 10, R.T. p. 2503.) Appellant stayed with Mr. Arroyo after Ms. Ibarra and her daughter were dropped off at her residence. (Vol. 10, R.T. p. 2503.)

Mr. Arroyo next saw Ms. Ibarra and appellant together sometime in the last week of March or the first week of April. (Vol. 10, R.T. p. 2504.) Mr. Arroyo went to a house in El Monte to purchase drugs. After purchasing drugs, Mr. Arroyo assisted someone start a vehicle that had a dead battery. Ms. Ibarra and appellant drove up in Virginia's red Nissan Sentra to the house Mr. Arroyo had just left. (Vol. 10, R.T. p. 2504.)

From January through March 1998, Mr. Arroyo received numerous messages on his pager from Elizabeth Ibarra. Mr. Arroyo contacted appellant to let him know that Ms. Ibarra was trying to reach him. (Vol. 10, R.T. pp. 2500-2501.) Mr. Arroyo also saw appellant with Ms. Ibarra during the January/February time frame on two or three occasions. (Vol. 10, R.T. p. 2502.)

Gabriel Castaneda, Jr. is appellant's son. Starting in March 1998, he visited appellant at his apartment in Ontario. (Vol. 10, R.T. pp. 2524, 2529.) Virginia and appellant picked Gabriel Jr. up on a Fridays and he would stay until Monday or Tuesday. (Vol. 10, R.T. p.

2525.) Gabriel Jr. went to appellant's apartment for the weekend on three to four occasions. (Vol. 10, R.T. p. 2529.) Gabriel Jr. watched Virginia's children when he stayed at appellant's apartment. (Vol. 10, R.T. p. 2526.). Appellant came into the apartment on a Monday morning and stayed for about 10 to 15 minutes. (Vol. 10, R.T. p. 2526.) He arrived around 10:50 a.m. A woman with black hair waited in the vehicle for appellant. (Vol. 10, R.T. p. 2527.) After appellant left, Gina Ybarbo came into the apartment and spoke with Gabriel Jr. (Vol. 10, R.T. pp. 2526, 2528.)

C. THE PROSECUTION REBUTTAL EVIDENCE

Lucia Gonzalez is the mother of Gabriel Castaneda, Jr. (Vol. 10, R.T. p. 2558.) She was living in Pomona during the early 1998 time period. (Vol. 10, R.T. pp. 2558-2559.) Gabriel Jr. visited appellant approximately four times. (Vol. 10, R.T. p. 2559.) The visits started sometime in March and stopped when appellant was arrested for a parole violation. (Vol. 10, R.T. pp. 2560, 2566.) On a Tuesday approximately one to two weeks prior to appellant's arrest for the parole violation, a woman with dark hair was in the vehicle with appellant when he returned Gabriel Jr. to his home after a visit. (Vol. 10, R.T. pp. 2560-2561, 2565.) Appellant called Ms. Gonzalez following his arrest for the parole violation and informed her that he was in custody. (Vol. 10, R.T. p. 2565.)

Aram Madenilan, appellant's parole officer, decided to arrest appellant for moving out of the county without informing him of his new address. Mr. Madenilan determined appellant's address through independent investigation. He went to appellant's apartment on

April 20, 1998, in order to arrest him and search his apartment. (Vol. 11, R.T. pp. 2592-2594.) Mr. Madenilan was accompanied by parole officer Michael Penilla and two officers from the Montclair Police Department when he conducted the search. (Vol. 11, R.T. p. 2594.)

Mr. Madenilan knocked on the door to appellant's apartment. Appellant opened the door. (Vol. 11, R.T. p. 2597.) Appellant was wearing a T-shirt and pants. (Vol. 11, R.T. p. 2599.) The officers searched the apartment. When the officers arrived, Virginia was hooked to an IV-line. She looked ill. (R.T. 11, pp. 2599, 2615-2616, 2626.) Virginia said that she was hooked to an IV-line because she was having problems with her pregnancy. Mr. Madenilan asked Virginia if there were any weapons in the apartment and she said no. A child between the age of three and five was sleeping on the floor next to appellant. (Vol. 11, R.T. p. 2600.)

Virginia did not say anything to Mr. Madenilan about having sexual relations with appellant immediately prior to his arrival. (Vol. 11, R.T. p. 2601.) Mr. Madenilan did not see any evidence that Virginia and appellant had just engaged in sexual relations. (Vol. 11, R.T. p. 2601.) Mr. Penilla found a loaded .22 revolver on a chair in the bedroom. (Vol. 11, R.T. p. 2616.) The officers seized a cap and a shirt during the search of the apartment. Officer Penilla did not recall seizing any socks. (Vol. 11, R.T. pp. 2617-2618.) He also did not recall seizing a screwdriver. (Vol. 11, R.T. pp. 2618-2619.) Officer Erik Tellen participated in the parole search. He did not recall either of the parole officers seizing socks. (Vol. 11, R.T. p.

2627.)

Elizabeth Ibarra testified as a prosecution rebuttal witness. She thought appellant might have been at her residence on March 30. She concluded that appellant had not been at her residence that day after reviewing her phone bills. (Vol. 11, R.T. pp. 2630-2631.) Ms. Ibarra never went to appellant's apartment in Ontario. (Vol. 11, R.T. p. 2638.) During the January through May 1998 time period, Ms. Ibarra's hair was blond. (Vol. 11, R.T. p. 2641.) Ms. Ibarra knew Louie Arroyo. One day, Ms. Ibarra and appellant went to a house in El Monte to purchase drugs. They were pulling out of the driveway when they saw Mr. Arroyo. (Vol. 11, R.T. p. 2642.) Ms. Ibarra purchased heroin for appellant three to four times. Appellant purchased heroin for her once. All the purchases occurred in Pomona. (Vol. 11, R.T. pp. 2644-2645.) Ms. Ibarra was not the dark haired woman referred to by Gabriel Jr. in his testimony. She had reddish-blond hair during this time period. (Vol. 11, R.T. p. 2652.)

Detective Price also testified as a prosecution rebuttal witness. Neither Detective Price nor police officers from the Montclair Police Department were involved in the parole search that occurred on April 20, 1998. Appellant was arrested for Ms. Kennedy's murder on May 15, 1998. Detective Price learned about the parole search after appellant had been identified as a suspect in the murder of Ms. Kennedy. (Vol. 11, R.T. p. 2656.) Detective Price interviewed Louis Arroyo. Mr. Arroyo said that he had not seen appellant for several weeks prior to March 30. He said that he had been living with his brother Michael in Ontario. (Vol. 11, R.T. p. 2658.)

STATEMENT OF FACTS-PENALTY PHASE

A. THE DEFENSE EVIDENCE

Richard Hall, a forensic psychologist, testified about the conditions in prison and appellant's functioning while incarcerated. (Vol. 12, R.T. pp. 2942-2944.) He has a doctorate degree in neuroscience. (Vol. 12, R.T. pp. 2942-2943.) He started working as a prison psychologist at the California Rehabilitation Center in 1995. (Vol. 12, R.T. p. 2947.) He performed psychological evaluations of inmates when they entered the institution. (Vol. 12, R.T. p. 2947.) The California penal system has four levels of incarceration. Custody levels three and four are maximum security. (Vol. 12, R.T. p. 2949.) Generally, violent criminals enter levels three or four custody. (Vol. 12, R.T. p. 2954.) The lives of inmates in level three or four custody is very regulated. (Vol. 12, R.T. p. 2953.) The inmate will be put in solitary confinement, or some other form of discipline, if he does not follow the rules. (Vol. 12, R.T. p. 2955.) Inmates in levels three and four custody become institutionalized after a period of time. They adopt to the prison rules and become good workers. (Vol. 12, R.T. pp. 2958-2959.) Inmates who become institutionalized do not feel comfortable when the controls of prison are removed and often commit new crimes that result in continued incarceration. (Vol. 12, R.T. pp. 2960-2961.) An individual can become institutionalized in the California Youth Authority. (Vol. 12, R.T. pp. 2965-2966.)

Dr. Hall reviewed appellant's prison records to prepare a psychological evaluation and interviewed appellant for eight hours. (Vol. 12, R.T. pp. 2950-2951, 2981.) Appellant

had spent most of his life in custody. (Vol. 12, R.T. p. 2966.) He had a number of 115 violation reports in his record. The reports were for engaging in mutual combat or not following prison rules. (Vol. 12, R.T. pp. 2951-2952.) An inmate could be placed in a special housing unit if he engaged in mutual combat. The special housing unit isolates the inmate from other inmates. Appellant was placed in a special housing unit. (Vol. 12, R.T. pp. 2951-2952.)

Dr. Hall reviewed appellant's history and also administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). (Vol. 12, R.T. p. 2967.) The MMPI-2 consists of 562 true-false questions that form a personality profile. (Vol. 12, R.T. pp. 2967-2968.) Dr. Hall determined appellant's intelligence quotient using the Wechsler Adult Intelligence Scale Revised. (Vol. 12, R.T. p. 2968.) Exhibit 42 was the test results for the Wechsler Adult Intelligence Scale Revised. Appellant scored 84, which put him in the low average range of intellectual functioning. (Vol. 12, R.T. pp. 2969-2970.) Appellant's intelligence level would not prevent him from functioning effectively in a prison setting. (Vol. 12, R.T. p. 2974.)

Exhibit 43 was the test results for the MMPI-2. (Vol. 12, R.T. p. 2975.) Scales L, F, and K are validity scales. Scales one through zero are emotional modalities. The emotional modalities are hypochondriasis, depression, histrionic traits, psychopathic deviation, male/femaleness, paranoia, anxiety, schizophrenia, mania, and introversion. The validity scales indicate that the test administered to appellant was valid for interpretation. (Vol. 12, R.T. p. 2975.) The raw scores are adjusted with a K factor and then converted to a T score.

(Vol. 12, R.T. pp. 2975-2976.) Appellant's T score on scale two was below normal and his T score on scale six was one point below the abnormal range. Appellant's T score on scale six indicated that he suffered from depression. (Vol. 12, R.T. p. 2976.) Appellant's depression could have been the result of being incarcerated. (Vol. 12, R.T. p. 2980.) His T score on scale two indicates a very male oriented person. (Vol. 12, R.T. p. 2976.) Appellant's results for male/femaleness was typical of Mexican-American culture. (Vol. 12, R.T. pp. 2977, 3018.) The test did not indicate that appellant suffered from psychosis, schizophrenia, or any of the other severe mental illnesses routinely seen in prisons. (Vol. 12, R.T. pp. 2977-2978, 3015.) Appellant had an opiate dependency. (Vol. 12, R.T. p. 3022.) The CAT scan administered to appellant showed no evidence of brain damage. (Vol. 12, R.T. p. 3023.)

Appellant's inability to cope in society was a function of his personality traits, which was a product of his environment. (Vol. 12, R.T. p. 2981.) Appellant had a personality disorder. (Vol. 12, R.T. p. 2982.) In Dr. Hall's opinion, appellant could function successfully in prison the rest of his life. (Vol. 12, R.T. p. 2983.)

Dr. Frank Gawin, a psychiatrist who specialized in the effects of medication and drugs on the brain, interviewed appellant in the county jail for about an hour. The interview focused on appellant's substance abuse. (Vol. 12, R.T. pp. 3032, 3035.) Dr. Gawin also reviewed various investigative and medical reports concerning appellant. (Vol. 12, R.T. p. 3036.) Appellant started inhaling paint when he was between 12 and 14 years old. Around the age of 14, appellant also started using marijuana and alcohol. Between the ages of 20

and 24, appellant had mild use of marijuana and alcohol. At age 24, appellant started using heroin. Appellant's heroin use has lasted the rest of his life. (Vol. 12, R.T. p. 3044.) Drug dependence results in the person spending an increasing amount of time attempting to obtain the substance. (Vol. 12, R.T. p. 3045.) Tolerance refers to the effect of a person needing greater quantities of the drug to obtain the desired effect. Withdrawal refers to negative symptoms when the person stops using the drugs. (Vol. 12, R.T. p. 3046.)

Appellant fulfilled the criteria for a drug abuser with the possible exception of alcohol use. It was not clear that appellant was alcohol dependent. (Vol. 12, R.T. p. 3046.) Appellant's use of drugs at the age of 12 indicated the presence of a substantially drug permissive environment. Appellant's use of drugs limited his maturation in two ways. (Vol. 12, R.T. pp. 3047-3048.) If an individual is constantly intoxicated, his or her capacity to perceive the world is impaired. The abuser will not pick up the social and moral signals in society. The abuser's capacity to remember adverse consequences as a result of conduct is impaired. Appellant's role models while he was developing were drug abusers and gangs. (Vol. 12, R.T. p. 3048.)

At age 20, appellant's drug use moderated and he started to lead a constructive life. He held two jobs and was involved in a stable relationship. The ages 20 to 24 were the most productive years of appellant's life. (Vol. 12, R.T. p. 3049.) Appellant's success led to his belief that he could control his drug use. At age 24, appellant rapidly became a heroin addict. (Vol. 12, R.T. pp. 3049-3050.) Appellant's heroin habit involved using between $20 to $40

worth of heroin per day, which is a moderate amount. (Vol. 12, R.T. p. 3050.)

Exhibit 45 explained the symptoms of opioid dependence. (Vol. 12, R.T. p. 3051.) Heroin use produces a feeling of calmness. The user feels nervous and experiences withdrawal symptoms when the heroin use stops. Opioid withdrawal involves flu-like symptoms, such as increased body temperature, vomiting and diarrhea, muscle ache, tearing, and a runny nose. Many heroin addicts cannot function normally unless they use heroin at the start of the day. (Vol. 12, R.T. p. 3052.) Appellant used heroin to stave off withdrawal symptoms and to function during the day. Heroin users that are more heavily addicted than appellant use heroin to regenerate euphoria upon euphoria. (*Ibid.*)

Appellant's level of depression was substantial. Drug abusers like appellant are said to have depressive disorders due to substance abuse. (Vol. 12, R.T. p. 3053.) It was difficult to determine if the depressive disorder was due to substance abuse, or self-medication for depression through the substance abuse. (Vol. 12, R.T. p. 3053.) The chronic use of heroin had an increasing effect on appellant's brain functioning and increased his depression. (Vol. 12, R.T. pp. 3054, 3056.) Appellant started using cocaine, and occasionally used heroin and cocaine together. (Vol. 12, R.T. pp. 3054-3055.) After three to four years of using cocaine, appellant had a panic attack at age 34, which completely stopped his cocaine use. (Vol. 12, R.T. p. 3055.) Appellant has been incarcerated most of his 17 years as an adult, but drugs are available in custodial facilities. (Vol. 12, R.T. p. 3057.) Appellant's condition could be classified as both a psychiatric illness and a mental illness. Dr. Gawin diagnosed appellant

with heroin dependence, cocaine, marijuana and alcohol dependence for a period of time, and a major depressive disorder and anxiety disorder. (Vol. 12, R.T. p. 3058.) Drug use can cause extreme irritability and reactions. (Vol. 12, R.T. p. 3075.)

Dr. Armando Morales, a professor of psychiatry and behavioral sciences at the University of California Los Angeles School of Medicine, has a doctorate in clinical social work from the University of Southern California. (Vol. 13, R.T. p. 3089.) His specialized in Hispanic gangs. (Vol. 13, R.T. p. 3090.) He authored 90 articles and chapters, and 10 books, dealing with gangs and criminal offenders. (Vol. 13, R.T. p. 3091.) Dr. Morales evaluated appellant's gang involvement and family background. (Vol. 13, R.T. p. 3092.) Dr. Morales interviewed appellant for two and one-half to three hours and received a partial list of family members from appellant and his family members, and an investigator. (Vol. 13, R.T. p. 3094.) Gangs are a substitute for a family. The gang provides the psychological, social and emotional needs that the gang member does not receive from his family. (Vol. 13, R.T. pp. 3095-3096.) There are four types of gangs: (1) turf-oriented gangs, which is usually the category to which Hispanic gangs belong; (2) criminal gangs, which are devoted to making a profit; (3) retreatist gangs, which involve gang members getting together to use drugs or alcohol, and; (4) cult gangs such as neo-nazi type organizations. (Vol. 13, R.T. p. 3096.)

A significant factor in whether a neighborhood social group becomes delinquent is the amount of criminal activity in the neighborhood. The more criminal activity in the

neighborhood, the more youth groups will gravitate towards delinquent behavior. (Vol. 13, R.T. p. 3098.) In Dr. Morales' 34 years of working with juvenile and adult offenders, he found that gang association for most individuals is a temporary phase. Ninety-three percent of juveniles in the California Youth Authority eventually stop their criminal behavior. The other seven to eight-percent go to state prison. (Vol. 13, R.T. p. 3099.)

Hispanic families often have a strong hierarchal organization and strong belief in the extended family. (Vol. 13, R.T. p. 3105.) Positive Hispanic machismo is reflected in the father who is the head of the traditional family. (Vol. 13, R.T. p. 3106.) Negative Hispanic machismo is reflected in the male who is a womanizer, drunk, and irresponsible husband and father. With Hispanic culture, there is racism, sexism, and class discrimination. The middle class look down upon the poor. (Vol. 13, R.T. p. 3107.)

Appellant was raised Mexican-American. (Vol. 13, R.T. p. 3101.) Appellant's family background, including the mental health history of his family members, was important in assessing appellant. (Vol. 13, R.T. pp. 3134-3135.) Appellant's grandmother was born in Jalisco, Mexico in 1902. His grandfather was born in the same area in 1900. The area is rural. (Vol. 13, R.T. p. 3114.) Appellant's grandmother died of a heart attack in 1992 at age 89. She suffered from depression at various times. Appellant's grandfather died in 1977 at age 77. He abused alcohol. (Vol. 13, R.T. p. 3114.) Appellant's grandparents came to the United States in 1920 and became farm workers. (Vol. 13, R.T. p. 3114.) Dr. Morales found a history of heavy alcohol use in appellant's family. (Vol. 13, R.T. p. 3137.) Appellant's

mother, Angie Castaneda, engaged in moderate to heavy drinking from the age of 17 to 22. (Vol. 13, R.T. pp. 3139, 3313.) She started traveling up and down California when she was three to four years old because her parents were farm workers. Angie was raped at the age of 12, but did not report the incident to her parents. (Vol. 13, R.T. p. 3140.) She ran away from home at the age of 14 and had a relationship with a 19 year old man. They had a child that was born in 1956. The father was a heavy drinker and undocumented worker who was deported. Angie commenced another relationship when she was 16 years old with a 15 year old boy. That relationship lasted from 1958 through 1966. He was a heavy drinker and womanizer. They had three children. (Vol. 13, R.T. p. 3141.)

Appellant was born in 1960. A twin sister was born at the same time, but she was not alive at the time of birth. (Vol. 13, R.T. p. 3142.) Appellant had siblings born in 1961, 1962, 1964, and 1966. The five male children in appellant's family all had juvenile and/or adult criminal records and a history of drug problems. Appellant's sister Dianna did not have a criminal record, or a history of substance abuse problems. (Vol. 13, R.T. p. 3143.)

Angie's third relationship lasted from 1968 through 1988. She was 26 years old when it commenced. Her spouse, who had the last name of Arroyo, was 25 years old. They had two male children who were born in 1971 and 1972. Those children also have criminal records and a history of substance abuse. (Vol. 13, R.T. p. 3144.) Angie worked from the age of 16 because she had children and her partners did not maintain steady employment. (Vol. 13, R.T. p. 3166.) She left her children with their grandparents, who were already in

their 60s and did not have control over them. As a result, appellant and his brother associated with gangs. (Vol. 13, R.T. p. 3167.) Angie attempted to commit suicide when she was 42 years old because of problems she was having with her husband. (Vol. 13, R.T. p. 3144.) Appellant and his brother were involved gangs located in the La Puenta area. The gangs were turf oriented gangs. (Vol. 13, R.T. pp. 3145-3146, 3164.)

Appellant spent less time with his gang as he became more involved with drugs. At age 21, appellant was on parole from the California Youth Authority when he met his wife, Elvira. Elvira moved out of her parent's home to live with appellant and his family. (Vol. 13, R.T. p. 3164.) Once appellant and Elvira married, they were permitted to live with Elvira's family. Appellant responded positively to strong parental figures. He obtained employment and stopped associating with negative peer influences, including his brothers. Appellant's peers and his brothers eventually pulled him away from a positive lifestyle and towards drugs. Elvira did not want anything to do with him. (Vol. 13, R.T. p. 3165.)

Exhibit 58 was a chart entitled Hispanic Gang Member Psychiatric Diagnostic Categories. (Vol. 13, R.T. p. 3173.) Dr. Morales diagnosed appellant with three of the conditions; substance abuse, dependent personality disorder, and mood disorder. (Vol. 13, R.T. pp. 3181-3182.) Appellant had difficulty following through with decisions and expressing disagreement with others because of fear of loss of support or approval. He avoided confrontations with family members. (Vol. 13, R.T. p. 3184.) Appellant's repeated incarcerations have reinforced his sense of dependency on others. He had a constant need

to have someone with him at all times and anger towards authority figures. Anger is typical in gang members. (Vol. 13, R.T. pp. 3185, 3209.) While appellant was in custody in the CYA and state prison, he functioned relatively well. He learned brick masonry and studied towards his GED. When appellant is left on his own, he lacks energy. (Vol. 13, R.T. p. 3210.) Dr. Morales did not find any evidence that appellant engaged in systematic spousal abuse. (Vol. 14, R.T. p. 3387.) Dr. Morales believed that appellant engaged in antisocial behavior, but did not have an antisocial personality disorder. (Vol. 14, R.T. p. 3389.)

Jamie Phillips worked with the Calvary Assembly of God in El Monte. Appellant's family members, including his mother and Dianna Castaneda regularly attended the church. (Vol. 13, R.T. pp. 3256-3257, 3259.) Appellant attended service at the church during January and February, 1998. (Vol. 13, R.T. p. 3257.) Appellant was very polite. (Vol. 13, R.T. p. 3258.) He stopped attending the church in late February. (Vol. 13, R.T. p. 3259.)

Leo Moreno, the father of Elvira Castaneda, retired from the El Monte High School District after working there for 24 years as a maintenance man. (Vol. 13, R.T. p. 3274.) Appellant started dating Elvira when she was 16 or 17 years old. Elvira got pregnant and Mr. Moreno then accepted appellant. Appellant dressed like a "gangbanger" when Mr. Moreno first met him. (Vol. 13, R.T. p. 3276.) Mr Moreno told appellant that he would have to wear long pants and cover his tattoos and he did so. (Vol. 13, R.T. p. 3277.) Mr. Moreno told his daughter and appellant that they could live with him if they got married. They got married and started living with the Moreno family. (Vol. 13, R.T. p. 3278.) Mr. Moreno had rules

for the house which appellant followed. (Vol. 13, R.T. p. 3279.) He lived with the family for eight to nine months and maintained employment. (Vol. 13, R.T. p. 3280.) John Gabriel Castaneda was born to Elvira and appellant on October 8, 1983. (Vol. 13, R.T. pp. 3281, 3307.) Appellant moved out of the Moreno residence after an argument with Elvira. Mr. Moreno did not see appellant engage in any physical violence and he was a gentlemen. (Vol. 13, R.T. p. 3282.) Appellant's behavior was fine until he started associating with his brothers and relatives. (Vol. 13, R.T. p. 3283.)

Elvira Castaneda married appellant on June 8, 1982. They never divorced. They had lived together for almost two years prior to getting married. Elvira moved in with appellant and his mother after she got pregnant. (Vol. 13, R.T. pp. 3294-3295.) Elvira and appellant started living with appellant's father in La Puenta when she was seven months pregnant. (Vol. 13, R.T. p. 3296.) After Elvira and appellant got married, they started living with Mr. Moreno. Appellant helped Elvira's father and worked at a business named Rainbow Plastics. They separated when John Gabriel Castaneda was about 11 months old. (Vol. 13, R.T. p. 3297.) They separated because Elvira's discovered a syringe. (Vol. 13, R.T. p. 3298.) Appellant was usually quiet and went with the flow of events. (Vol. 13, R.T. pp. 3298-3299.) Appellant loved John Gabriel and was always good with him. Appellant wrote to her and John Gabriel many times while in state prison. (Vol. 13, R.T. pp. 3301-3302; exhibits 66-72.) On one occasion, Elvira got into an argument with appellant. Elvira scratched appellant's eye and he gave her a black eye. (Vol. 13, R.T. p. 3315.) On another occasion, Elvira jumped

on appellant's back. He pushed her off with his hands and struck her in the eye. He apologized. (Vol. 14, R.T. pp. 3334-3335.)

John Gabriel Castaneda testified. He lost contact with appellant when he was a baby because appellant was sent to prison. Appellant was incarcerated for most of his life. He received telephone calls and letters from appellant from prison. Appellant asked how he was doing in school and encouraged him. (Vol. 14, R.T. pp. 3343-3344.) John Gabriel lived with his grandparents since he was a baby. He did not want his father to be executed. (Vol. 14, R.T. p. 3347.)

Lucia Gonzalez met appellant when she was in ninth grade. (Vol. 14, R.T. p. 3350.) Ms. Gonzalez was 21 years old when appellant got her pregnant. Their son, Gabriel Jr., was born December 3, 1981. (Vol. 14, R.T. pp. 3351, 3358.) Ms. Gonzalez never lived with appellant, but dated him over a period of nine years. (Vol. 14, R.T. p. 3352.) Appellant always treated Ms. Gonzalez well and never struck her. (Vol. 14, R.T. p. 3353.) Appellant never forced Ms. Gonzalez to engage in any unwanted sexual activity. (Vol. 14, R.T. p. 3355.) While appellant was in prison, he maintained contact with Ms. Gonzalez and their son through telephone calls and letters. Appellant called about once every four months and on the birthday of their son. (Vol. 14, R.T. p. 3356.) Appellant wanted Gabriel Jr. to accept responsibility for the gun found in his apartment when the parole search was conducted on April 20. (Vol. 14, R.T. p. 3364.) Gabriel Jr. initially decided to accept responsibility for the firearm, but Ms. Gonzalez convinced him not to do so. (Vol. 14, R.T. p. 3365.)

Gabriel Castaneda, Jr. also testified. He spent time with appellant during March 1998, and they developed a relationship. Appellant talked to Gabriel Jr. about how he was doing and encouraged him to stay out of trouble. (Vol. 14, R.T. p. 3373.) Appellant asked him to accept responsibility for the gun found during the parole search, but Gabriel Jr. refused to do so. (Vol. 14, R.T. p. 3374.)

Henry Arroyo was appellant's half-brother. Appellant's other brothers are Fernando, Johnny, George, Michael, Joey, Louie, and the witness. Mr. Arroyo's father is Luis Arroyo. (Vol. 14, R.T. p. 3395.) Luis Arroyo treated appellant like a son. All of the brothers had spent time in prison and associated with gangs. (Vol. 14, R.T. pp. 3396, 3398.) Appellant treated the woman around him well. Henry never saw appellant strike a woman, including Elizabeth Ibarra. (Vol. 14, R.T. pp. 3401-3402.)

Louie Arroyo also testified. (Vol. 14, R.T. p. 3417.) He was appellant's half brother. (Vol. 14, R.T. p. 3418.) He first went to prison when he was 19 years old. (Vol. 14, R.T. pp. 3425-3429.) At the time of trial, Mr. Arroyo was in custody at Calipatria State Prison. (Vol. 14, R.T. p. 3447.) Mr. Arroyo was in lock-down most of the time. (Vol. 14, R.T. p. 3429.) Inmates go to a job after chow if they have one. Alternatively, the inmate can spend time on the yard. The lights are out at 9:30 or 10:00 p.m. (Vol. 14, R.T. p. 3431.)

Guards are around the prisons at all times and are armed with pepper spray and batons. The guards do not carry guns inside the prison when in the company of inmates. (Vol. 14, R.T. p. 3423.) Mr. Arroyo had never heard of gang rapes occurring in prison. (Vol. 14, R.T.

p. 3439.) When Mr. Arroyo was 17 years old, he participated in a burglary with Elizabeth Arroyo and appellant. (Vol. 14, R.T. pp. 3440-3442.) The purpose of the burglary was to obtain money for drugs. (Vol. 14, R.T. p. 3443.) Mr. Arroyo and appellant broke a store window and grabbed a stereo. (Vol. 14, R.T. p. 3443.) They fled in a vehicle and were pursued by a police officer. They were caught when their vehicle ran out of gas. (Vol. 14, R.T. pp. 3444-3445.)

Veronica Arroyo is appellant's 15 year old sister. (Vol. 14, R.T. p. 3425.) Appellant left home when she was four to five years old. Her next memory of him was when he was released from prison in December 1997. (Vol. 14, R.T. pp. 3452-3453.) She visited appellant while he was in prison. Appellant encouraged her to stay out of trouble and away from gangs. (Vol. 14, R.T. p. 3454.) Appellant sent her birthday cards and drawings. (Vol. 14, R.T. p. 3455.) Virginia Castaneda was married to her brother Juan Castaneda. He went to prison and was released about a week prior to Veronica testifying in the case. The family was very upset when appellant started a relationship with Virginia. (Vol. 14, R.T. pp. 3459-3461.) Veronica did not want appellant to be sentenced to death. (Vol. 14, R.T. p. 3461.)

Yvonne Tovar was a friend of the Castaneda family. She had known appellant for 19 years. (Vol. 14, R.T. p. 3465.) The Castaneda family lived two houses away from Ms. Tovar's family. Ms. Tovar was best friends with Dianna Castaneda. (Vol. 14, R.T. p. 3465.) Ms. Tovar saw appellant with girlfriends. He was a happy, friendly person who was cordial and respectful to everyone. (Vol. 14, R.T. pp. 3465-3466.)

Dianna Castaneda is appellant's sister. She is seven years older than appellant. (Vol. 14, R.T. p. 3470.) Dianna is a dietitian with the County of Los Angeles, Children Services. She is 32 years old. (Vol. 14, R.T. p. 3481.) Dianna has three children. Her oldest is a senior in high school, and her youngest child is a freshman in high school. (Vol. 14, R.T. p. 3481.)

Dianna's mother, Angie Castaneda, was never home. She was raised by her older brothers. The brothers raised themselves. (Vol. 14, R.T. p. 3472.) Dianne cooked for her brothers when her older sister moved from the house. (Vol. 14, R.T. p. 3472.) Dianne moved from her mother's house when she was 14 years old. (Vol. 14, R.T. p. 3481.)

Dianna took appellant to church when he got released from prison. She never saw appellant behave violently with any girlfriend, (Vol. 14, R.T. p. 3474), or strike Elizabeth Ibarra. (Vol. 14, R.T. pp. 3475-3476.) Appellant started living with Dianna after his release from prison in December 1997. One evening, appellant and Louie came home at 2:00 a.m., in violation of her household rules. Appellant subsequently did not come home on weekends. Dianna heard through family members that appellant was staying with their brother in Ontario. She was upset and hurt by appellant's conduct. (Vol. 14, R.T. p. 3476.) When Dianna confronted appellant, he said that he would not disrespect her by coming home later to her residence. Appellant left her residence because he respected her wishes. (Vol. 14, R.T. p. 3477.) Appellant treated his son, John Gabriel, well. (Vol. 14, R.T. p. 3478.)

B. THE PROSECUTION EVIDENCE

George Castaneda is three years younger than appellant. Appellant became mellow

and slept when he was under the influence of heroin. (Vol. 14, R.T. p. 3505.) George stopped using heroin 11 years ago. He maintained steady employment and supported his family. (Vol. 14, R.T. p. 3506.) When the police questioned George, he said that appellant may be engaged in robbery, but he would not commit a murder. (Vol. 15, R.T. p. 3507.) On one occasion, appellant brought a pistol to George's apartment. Appellant said that he had been committing robberies. (Vol. 14, R.T. p. 3509.)

Appellant street moniker was Gato. It means cat in Spanish. (Vol. 14, R.T. p. 3510.) When Mr. Castaneda and appellant were teenagers, he saw appellant hit a rival gang member with a brick during a gang fight. (Vol. 14, R.T. pp. 3516-3517.) The altercation occurred when a rival gang invaded their territory. The other gang was armed with weapons, including baseball bats and bottles. Such altercations were common among gangs. (Vol. 14, R.T. p. 3518.) Appellant's stepfather encouraged George and appellant to obtain dope for him. George also smoked marijuana with his stepfather. Their stepfather also abused alcohol (Vol. 14, R.T. p. 3519.) George was in state prison for three and one-half years following his conviction for burglary. George straightened out his life following his release from prison. (Vol. 14, R.T. p. 3520.) George never saw appellant act violently with a female. (Vol. 14, R.T. p. 3521.) Appellant was a good father to John Gabriel. (Vol. 14, R.T. p. 3522.)

On August 27, 1991, at approximately 1:00 a.m., Daniel Hills drove to a bar on Ramona Street in the city of El Monte. He parked his Toyota pickup truck in the parking lot behind the bar. (Vol. 14, R.T. pp. 3541-3543.) He walked to the back door of the bar, but

the door was locked. Mr. Hills walked back to his truck. When Mr. Hill put the key in the door, he was grabbed from behind and around the neck. (Vol. 14, R.T. p. 3543.) His assailant told him not to turn around or he would shoot him. (Vol. 14, R.T. p. 3544.) The person said that he had a gun. Mr. Hills felt a metallic object in his neck. Two other individuals went through his pockets and took property. (Vol. 14, R.T. p. 3545.) Mr. Hills was thrown to the ground and his hands were tied behind his back with his belt. The robbers took off his shoes and socks and shoved a sock in his mouth. (Vol. 14, R.T. p. 3546.) The robbers went to the truck and Mr. Hills could hear the door open. The robbers returned and asked him where the keys were located. Mr. Hills was able to speak through the sock and said, "the shiny one." (Vol. 14, R.T. p. 3549.) Mr. Hills never saw a gun and could not identify the assailants. (Vol. 14, R.T. pp. 3553-3554.)

On August 28, 1991, at approximately 3:30 a.m., Highway Patrol Officer Barbara Jean Marshall and her partner were traveling on the 605 Freeway when they went to the scene of an accident. Mr. Hills' Toyota pickup truck was in the middle of the freeway. Another vehicle was on the right shoulder with its hazard lights lit. (Vol. 14, R.T. pp. 3534-3536.) Two individuals, including appellant, were slumped over in the Toyota truck. (Vol. 14, R.T. p. 3537.) Officer Marshall learned that the Toyota truck had been reported stolen. Appellant and his companion were arrested. (Vol. 14, R.T. pp. 3537-3538.) Deputy Highway Patrol Officer James Fonseca spoke with appellant about the robbery. Appellant admitted using a gun during the robbery. He committed the crime along with two fellow gang members. (Vol.

14, R.T. pp. 3357-3360.)

Deputy Joe Bratten worked for the San Bernardino County Sheriff's Department. He was assigned to the West Valley Detention Center. (Vol. 14, R.T. p. 3565.) On June 6, 1998, Deputy Bratten received information that appellant had a hypodermic kit in a lotion bottle that was in his cell. (Vol. 14, R.T. p. 3569.) Deputy Bratten searched the cell. (Vol. 14, R.T. p. 3573.) Officer Bratten did not find anything in the lotion bottle. He found a homemade handcuff key in a jar of baby powder. It was on window ledge (Vol. 14, R.T. p. 3574.) He was not able to determine which prisoner had made the key. The key appeared to have been made out of a metal tray. (Vol. 14, R.T. p. 3574.) A shank that was made out of a plastic spoon was in plain view on a desk. It appeared that a razor blade had been taken apart to be used as the sharp edge of the shank. (Vol. 14, R.T. p. 3576.) He also found a syringe in a deodorant container. It was wrapped in toilet paper. The deodorant container was marked with appellant's moniker of Gato. (Vol. 14, R.T. p. 3577.) The needle for the syringe was found in a soap container. (Vol. 14, R.T. p. 3579.) Deputy Christopher Leahy participated in the search of appellant's cell. He found a shank in the mattress of appellant's cellmate. (Vol. 14, R.T. pp. 3593-3594.)

Deputy Bratten questioned appellant. Appellant wanted to know what he was being "rolled up for," which is a term used by prisoners to refer to discipline. Appellant had not been informed that anything had been found in his cell when he made the statement about being rolled up. (Vol. 14, R.T. p. 3580.) Appellant denied responsibility for the items found

in his cell. (Vol. 14, R.T. p. 3581.)

Elizabeth Ibarra met appellant at the Biscalu County jail when she was visiting a friend. She obtained appellant's name and visited him when he was released from jail. They eventually started living together at the residence of Ms. Ibarra's mother. (Vol. 15, R.T. p. 3602.) They started using heroin together in 1989. (Vol. 15, R.T. p. 3625.) Ms. Ibarra's brother belonged to a rival gang from appellant's gang. Ms. Ibarra and appellant therefore started living with appellant's mother. (Vol. 15, R.T. p. 3603.) One evening, Ms. Ibarra, Louie Arroyo and appellant were traveling in a vehicle looking for drugs. Ms. Ibarra was driving. Appellant threw a brick through the window of a store. Louie and appellant grabbed a stereo and got back in the vehicle. (Vol. 15, R.T. p. 3604.) They were pursued by police officers and apprehended when their vehicle ran out of gas. (Vol. 15, R.T. p. 3606.) Ms. Ibarra went to prison for five years because of the incident. (Vol. 15, R.T. p. 3607.) She started living with appellant again when she was released from prison. They alternated between living with appellant's mother and his brother. Ms. Ibarra lived with appellant until he went back to prison. (Vol. 15, R.T. p. 3609.)

Ms. Ibarra's relationship with appellant was initially peaceful. (Vol. 15, R.T. p. 3608.) Appellant became angry and a different person when under the influence of drugs. If appellant became angry, he would grab Ms. Ibarra's arm and put her in a headlock. On five or six occasions, appellant forced Ms. Ibarra to have sexual relations with him. (Vol. 15, R.T. pp. 3609, 3639.) Ms. Ibarra told appellant that she wanted to go home to her mother.

Appellant refused to let her leave. (Vol. 15, R.T. p. 3610.) Appellant followed her to the bathroom and shower. Appellant tied her up on three occasions. (Vol. 15, R.T. p. 3611.) Ms. Ibarra left appellant on a few occasions. She went to her mother's house and appellant followed her there. (Vol. 15, R.T. p. 3612.)

Olga Frontino is the mother of Elizabeth Ibarra. (Vol. 15, R.T. p. 3644.) On one occasion, Ms. Frontino went to the apartment where her daughter and appellant lived. Elizabeth had bruises on her body and neck. She was crying and said that she had gotten into an argument with appellant and he choked her. (Vol. 15, R.T. p. 3648.) Ms. Frontino told Elizabeth not to go back to appellant, but she did so the next day. Appellant continued to assault Elizabeth. (Vol. 15, R.T. p. 3648.) Appellant was always respectful towards Ms. Frontino. (Vol. 15, R.T. p. 3651.) She got along with appellant when he lived at her residence. (Vol. 15, R.T. p. 3651.)

Sandra Baca has a doctorate in psychology. She was a therapist and worked at a clinical program that deals with domestic abuse. (Vol. 15, R.T. p. 3684.) She worked in the area of domestic and sexual abuse on a full time basis. (Vol. 15, R.T. p. 3691.) She reviewed a variety of documents concerning appellant. (Vol. 15, R.T. p. 3686.) She also reviewed the data for the test given to appellant, including the Minnesota Multiphasic Personality Inventory, the Wechsler adult Intelligence Test Revised, the Simple Digit Modalities Test, Cattell's 16 PF-Personality Factor, and a 15 item test. (Vol. 15, R.T. p. 3687.) She was familiar with a condition known as "battered woman syndrome." (Vol. 15, R.T. p. 3695.)

It refers to a pattern of conduct in which one partner controls another partner through physical, psychological, and emotional abuse. (Vol. 15, R.T. pp. 3695-3697.) The victim will often minimize the conduct of the abusive partner by believing that the conduct was his or her fault. (Vol. 15, R.T. p. 3697.) Victim commonly have warm feelings for the abuser despite the abuse and stay with that person. (Vol. 15, R.T. p. 3698.)

Ms. Baca reviewed material pertaining to Elizabeth Ibarra and Elvira Castaneda. (Vol. 15, R.T. pp. 3698, 3702.) Ms. Ibarra and Ms. Castaneda spoke warmly of appellant, and this attitude is common among abuse victims. (Vol. 15, R.T. pp. 3698, 3702-3703.) In Dr. Baca's opinion, appellant is a batterer. (Vol. 15, R.T. p. 3704.) He engaged in abusive and controlling behavior through coercive tactics. Appellant was economically irresponsible. (Vol. 15, R.T. p. 3705.) Dr. Baca had studied the behavior and motives of rapists. (Vol. 15, R.T. pp. 3706-3707.) Forced sodomy is done to satisfy the perpetrator's unmet needs. Spousal abuse is a form of coercion to get the victim to follow the perpetrator's will. (Vol. 15, R.T. pp. 3707-3708.) Recent research suggested that 40 to 50 percent of domestic abusers have antisocial personality disorders and can also be diagnosed as narcissistic. Another category of batterers have a dependent personality. These are men who need a woman because they do not have a good sense of self without a woman. (Vol. 15, R.T. pp. 3709-3710.) A third category of batterer is schizo typical. They need to be part of a family, but cannot participate in family life and are isolated because they do not get along well with people. (Vol. 15, R.T. p. 3710.)

Dr. Baca was familiar with the MMPI-2. (Vol. 15, R.T. p. 3710.) She reviewed the MMPI-2 test Dr. Hall administered to appellant. Dr. Hall miscalculated the K score. Dr. Hall, Dr. Gawin, and Dr. Morales all diagnosed appellant with depression, not otherwise specified. Dr. Hall failed to include a correction factor when he calculated the K score. (Vol. 15, R.T. p. 3711.) Dr. Hall, the defense expert, correctly diagnosed appellant as depressed. (Vol. 15, R.T. p. 3711.) If the correction factor to the K score is included, appellant met the criteria for an antisocial personality disorder with depressive features, and alcohol and substance abuse. (Vol. 15, R.T. p. 3712.) Dr. Hall provided Dr. Baca with the raw data from the MMPI-2 test he administered to appellant and she calculated the correct scores. (Vol. 15, R.T. p. 3712.) Exhibit 43 was a chart of the results from appellant's MMPI-2 test. Dr. Baca put in red on exhibit 43 the location where corrections should be made to the scores. (Vol. 15, R.T. p. 3713.) Appellant's scales for paranoia, revenge, anger, and a desire to inflict pain on others was very high. (Vol. 15, R.T. p. 3716.) Dr. Baca's diagnosis of appellant as suffering from an antisocial personality disorder was not based only on the results of the MMPI-2. A diagnosis of an antisocial personality disorder requires the individual to have had problems with law enforcement before the age 15. Appellant met that criteria because he was first arrested when he was 10 years old. (Vol. 15, R.T. p. 3717.) On the MMPI-2, appellant met five of the seven criteria for diagnosis of an antisocial personality disorder. (Vol. 15, R.T. p. 3717.) Dr. Hall's MMPI-2 diagnosis gave the impression that appellant suffered depression that could have been related to substance abuse, or that appellant used

drugs to medicate depression. (Vol. 15, R.T. p. 3718.) In Dr. Baca's opinion, appellant had a diagnosis of depression on Axis I, which is a transitory diagnosis. An axis II diagnosis is more permanent. (Vol. 15, R.T. p. 3719.)

Dr. Baca agreed with Dr. Hall that appellant did not suffer from psychosis, mental illness, mental defect, or any form of insanity. (Vol. 15, R.T. pp. 3719-3720.) Individuals who have antisocial personality disorders are not out of touch with reality. (Vol. 15, R.T. p. 3720.) Such individuals are significantly impaired in their social relations and do not suffer subjective distress. (Vol. 15, R.T. p. 3726.) All individuals are formed a certain way by the age of five. (Vol. 15, R.T. p. 3733.) Individuals with antisocial personality disorders start to develop that disorder by the age of five. (Vol. 15, R.T. p. 3749.) A person with an antisocial personality disorder cannot be changed and cannot be treated through medication or therapy. (Vol. 15, R.T. p. 3733.) Therapy will only make the abuser a better abuser and more adept at manipulating people. (Vol. 15, R.T. pp. 3733-3734.)

Individuals with an antisocial personality disorder exercise free will. (Vol. 15, R.T. p. 3734.) They are able to override any fears they may have, ignore the consequences of their conduct, and believe that they will not get caught through distorted thinking. (Vol. 15, R.T. p. 3734.) Appellant came to a point in his life when he had a choice about how he was going to behave. He chose not to attend school and be law abiding. In Dr. Baca's opinion, that choice was made by appellant as early as the age of 10, when he was first in trouble with law enforcement. (Vol. 15, R.T. p. 3737.)

GUILT PHASE ISSUES

I

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED APPELLANT'S RIGHT TO BE PRESENT DURING THE TRIAL, WHICH WAS GUARANTEED BY: (1) THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; (2) ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND; (3) PENAL CODE SECTIONS 977, SUBDIVISION (B) AND 1043, SUBDIVISION (A).

1. SUMMARY OF ARGUMENT

After a significant portion of jury selection had occurred, the trial court asked appellant if he wanted to be present during bench conferences. Appellant elected to be present during those conferences. Appellant had been excluded from all the bench conferences which had occurred up to that point in time. A criminal defendant has the right to be present during all critical stages of a criminal trial. This right is guaranteed under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, Article I, sections 7 and 15 of the California Constitution, and Penal Code sections 977, subdivision (b), and 1043, subdivision (a). Jury selection was a critical stage of appellant's trial, and he had the right to be present during the bench conferences. The trial court's failure to include appellant in all the bench conferences was prejudicial error per se. The error, furthermore,

was prejudicial under either the Chapman[9] or the Watson[10] standard of review. Hence, the judgment must be reversed.

2. SUMMARY OF PROCEEDINGS BELOW

On August 30 and 31, and September 1, the trial court took the initial steps to screen prospective jurors. (Vol. 1, R.T. pp. 199-248; Vol. 2, R.T. pp. 249-299, 307-388, 406-472.) After this screening process, jury selection resumed during the afternoon session of September 20. (Vol. 3, R.T. p. 563.) During that session, a discussion occurred in the hallway between the trial court and the attorneys. (Vol. 3, R.T. pp. 570-572.) The court reporter's transcript contains the notation, "off the record." (Vol. 3, R.T. p. 572.) The hearing resumed in the courtroom outside the presence of the prospective jurors. (Vol. 3, R.T. pp. 573-586.) When the defense counsel questioned a prospective juror, the prosecutor objected and a conference was held, outside the presence of the jurors and appellant, to discuss the objection. (Vol. 3, R.T. pp. 598-600.) The court reporter's transcript contains the notation again, "off the record." (Vol. 3, R.T. p. 600.)[11]

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[9] *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.

[10] *People v. Watson* (1956) 46 Cal.2d 818, 836

[11] On September 22, 2004, appellant filed a motion to augment, correct, and settle the record. (1st Supp. Vol. 1, C.T. pp. 89-118.) Appellant sought to settle the record as follows: "On pages 679-680 [Vol. 3, R.T.], the trial court and counsel made reference to discussion of jury selection issues which occurred in the hallway, in chambers, or at the bench without appellant's participation. The record needs to be settled to specify which discussions fall in the aforementioned categories and whether any of those discussions were not reported." (1st Supp. Vol. 1, C.T. p. 98.) Appellant's motion also sought to put on the record an off-the-record conversation which occurred at Vol. 3, page 600 of the

The prosecutor raised the issue of whether hearings should be held outside appellant's presence. (Vol. 3, R.T. p. 600.) The trial court asked the prosecutor to provide some authority on the issue because it was her opinion that appellant did not have to be present for bench conferences. (Vol. 3, R.T. pp. 600-601.) The trial court agreed with the prosecutor that a waiver had not been obtained from appellant of his right to be present at bench conferences. (Vol. 3, R.T. p. 601.) Jury selection resumed. (Vol. 3, R.T. pp. 601-678.)

At the commencement of the afternoon session of September 21, the following exchange occurred:

> THE COURT: All right. Let's go ahead–wait, before you do. Let's go on the record in the matter of the People v. Gabriel Castaneda. Mr. Castaneda is present with both counsel.
>
> Counsel, I have considered and done a little bit of reading and attempted research on the issue of the defendant's presence at the bench conferences. I have not located anything dispositive on that particular issue. It seems to me that it's not something that is required. However, out of abundance of caution, I will make arrangements to have Mr. Castaneda present at our bench conferences unless he wishes to waive his appearance.

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reporter's transcript. (*Ibid.*) The hearing on appellant's motion occurred on October 6, 2004. (Vol. 17, R.T. pp. 3921-3987.) The trial court clarified what occurred on pages 598 through 600 of the reporter's transcript. (Vol. 17, R.T. pp. 3929-3932.) The "off the record" notation was a reference to the prosecutor bringing to the trial court's attention the issue of whether appellant should be personally present for all hearings. (Vol. 17, R.T. pp. 3929-3930.) In response to a question from appellate counsel about whether other hearings occurred off-the-record, the trial court stated that "[i]f there were other hearings that occurred in the hallway, and it would indicate that as it does at page 598, these proceedings were held outside the presence of the jury, then those hearing would have been, or if they were at the bench, outside the presence of Mr. Castaneda." (Vol. 17, R.T. p. 3931.)

Mr. Hardy, what do you wish to do with regard to that?

MR. HARDY: If I can inquire.

Mr. Castaneda, during the course of, in particular, jury selection, on occasions we have had conferences behind the court wall here in the hallway. These are in reference to the jury issues, questions that may come up, objections. For example, yesterday Mr. McDowell objected to one line of questioning. We went in behind the wall. And the Court ruled in his favor and you probably noticed I changed the way I was questioning.

Will you waive your right to be in those conferences during this jury selection and the jury selection only? It's your choice.

THE DEFENDANT: So what are you saying? I can be present there, right?

MR. HARDY: You can be present during any conference we have.

THE DEFENDANT: I would like to be present.

MR. HARDY: Okay.

THE COURT: All right. Then what we will do on any bench conferences, we will hold them in the jury deliberation room and we will have a custody officer escort Mr. Castaneda along with counsel back to the jury deliberation room.

(Vol. 3, R.T. pp. 679-680.) The trial court then stated that it was only dealing with the procedure to be followed during jury selection, and that it would deal with the procedure to be followed during the evidence portion of the case at a later time. (Vol. 3, R.T. p. 680.)

3. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT, STATE CONSTITUTIONAL RIGHT, AND STATUTORY RIGHT TO BE PRESENT DURING ALL STAGES OF THE TRIAL

At least two hearings were held outside appellant's presence. The clerk's minutes for September 20, 1999, states that "Confidential Conference held. SCR reported. Jury not present regarding a comment overheard by a Prospective Juror that they would be video taped." (Vol. 1, C.T. p. 182.) The court reporter's transcript states that the trial court had a conference in the hallway with the attorneys. (Vol. 3, R.T. p. 487.) Based on the trial court's comments during the record correction hearing, appellant was not present in the hallway during this conversation. The hearing, which is transcribed beginning at Volume 3, page 598 of the reporter's transcript, also occurred without appellant's presence.

A criminal defendant "has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (*Snyder v. Commonwealth* (1934) 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed.2d 674.) The Constitutional right to presence is rooted in the Confrontation Clause of the Sixth Amendment and the Due Process Clause. (*United States v. Gagnon* (1985) 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486; *La Grosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, 707-708.) The defendant's presence "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (*United States v. Gagnon, supra*, 470 U.S. at p. 526.) The exclusion of a defendant from trial proceedings must be evaluated in light of the whole

record. (*Snyder v. Commonwealth, supra*, 291 U.S. at p. 115.)

A criminal defendant also has a statutory and constitutional right under California law to be present during felony proceedings, including jury voir-dire. Article I, Section 7 of the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." Article I, section 15 provides in part: "The defendant in a criminal cause has the right . . . to be personally present with counsel. . . ." This provision requires the defendant's presence "whenever a full opportunity to defend against the charges reasonably appears to require his presence." (*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039.)

Statutory provisions also require the defendant's presence during trial. Penal Code section 977, subdivision (b), requires a defendant in a felony case to be present during the arraignment, a plea, the preliminary hearing, when evidence is taken before the trier of fact during a trial, and sentencing. Subdivision (b) further provides that "[t]he accused shall be personally present at all other proceedings unless or he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph 2." Penal Code section 1043, subdivision (a), provides that "[e]xcept as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial."

In *United States v. Gagnon*, the trial judge talked to a juror in chambers about the juror's concern regarding the defendant's sketching of members of the jury. The questioning

occurred in the presence of the attorneys. The defendant did not make any objections to the in-chambers conference or request to be present. The Court concluded that the in camera hearing without the defendant's presence did not violate the Fifth Amendment Due Process Clause. "'The mere occurrence of an ex-parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror . . .'." (*United States v. Gagnon, supra*, 470 U.S. at p. 526, quoting *Rushen v. Spain* (1983) 464 U.S. 114, 125-126, 104 S.Ct. 453, 459, 78 L.Ed.2d 267 [Stevens, J., concurring in judgment].) The Court found no deprivation of the defendant's constitutional rights because "[t]he encounter between the judge, the juror, and Gagnon's lawyer was a short interlude in a complex trial; the conference was not the sort of event which every defendant has a right personally to attend under the Fifth Amendment. Respondents could have done nothing had they been at the conference, nor would they have gained anything by attending." (*United States v. Gagnon, supra*, 470 U.S. at p. 527.)

This Court has concluded in a number of cases that a defendant's failure to personally be present during various stages of the trial did not violate any federal constitutional rights. (E.g. *People v. Benavides* (2005) 35 Cal.4th 69, 86-88 [defendant's lack of presence when his defense counsel and the prosecutor agreed to dismiss eight prospective jurors did not violate any constitutional rights when the defendant was present in court during all stages of jury selection and when the stipulation to dismiss the jurors was put on the record];

People v. Hovey (1988) 44 Cal.3d 543, 585-586 [defendant did not have the right to be present during a readback of testimony].) This case is distinguishable because appellant was physically not in the presence of the judge, the defense counsel, and the prosecutor when key discussions occurred regarding jury selection.

Appellant's inability to be present during the two sessions conducted in the hallway during jury selection violated his Fifth and Fourteenth Amendments right to due process of law, Sixth Amendment right of confrontation, and state constitutional and statutory right to be present during his trial. Appellant's presence during those hearings had "a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge[s]." (*Snyder v. Commonwealth, supra*, 291 U.S. at p. 97.) The discussion that occurred the morning of September 20 concerned the erroneous information that had been spread among the jurors that they were going to be videotaped. (Vol. 3, R.T. pp. 487-488.) Both the prosecutor and the defense counsel stated that they objected to any videotaping. (Vol. 3, R.T. p. 487.) The parties decided to ignore the issue for the present time. (Vol. 3, R.T. p. 488.)

The issue of the jurors believing that they were being photographed or videotaped erupted in front of the entire jury panel. Later during the morning session on September 20, the following exchange occurred:

> THE COURT: All right. Mr. Powell, what is your circumstance.
>
> PROSPECTIVE JUROR POWELL: Due to the fact that this

> courthouse allows people to come with cameras and video tapes, I felt concern for my welfare in this case. If the defendant was found guilty, I feel that there would be gang retaliation against me and my family.
>
> THE COURT: And let me inquire, Mr. Powell. You evidently mentioned that to our jury coordinator.
>
> PROSPECTIVE JUROR POWELL: Yes, I did, yes.
>
> THE COURT: The individual that approached you, how did that occur? I mean we checked and there was —
>
> PROSPECTIVE JUROR POWELL: Nobody approached me. I was walking by the individual and overheard him speaking that when the people came out of the courtroom, take pictures with the camera. And I am very concerned about my welfare.

(Vol. 3, R.T. p. 538.) After some additional discussion, the following occurred:

> MR. MCDOWELL [the prosecutor]: Can I ask, since he has talked to the entire panel that's present here.
>
> Mr. Powell, why did you feel that the camera was associated with this case?
>
> PROSPECTIVE JUROR POWELL: Um, well, the individual that's being –the defendant, I feel, is affiliated with gangs. I see tattoos around his neck. I know I may be stereotyping him, but I –I have known–I have heard things in the past where people have been gang retaliated against, the families have been hurt in one way or another. I just don't feel comfortable being on this case. And I don't feel my judgment in judging him would be fair either. You know, I would have a tendency to say he is not guilty.
>
> MR. HARDY: I am going to object to any further discourse at this point.
>
> . . .

> MR. MCDOWELL: We have now an entire panel here that I think is under a total misperception as to what is involved with filming and so forth and perhaps the Court would like to tell this group of the panel that there is no filming and there is no taping going on.
>
> PROSPECTIVE JUROR POWELL: There's no safety in this courthouse—
>
> THE COURT: Mr. Powell, I will ask you not speak at this time.

(Vol. 3, R.T. p. 539.) Prospective Juror Powell was excused, and the trial court informed the remaining jurors that "we checked into Mr. Powell's allegations and they were incorrect. The only individual that was here filming was here to film a wedding that was taking place this morning." (Vol. 3, R.T. p. 540.) The court then stated "ladies and gentlemen, Mr. Powell has indicated some information that is just not based on facts that are going to be in any way involved in this case and I want you to disregard any of his comments. He seems to be somewhat concerned where he doesn't need to be." (*Id.*)

The first discussion concerning videotaping was the 10:27 a.m. sidebar in which counsel for the parties agree not to take any action. Appellant was not present during that sidebar. Given Juror Powell's his ranting and raving in the courtroom, which may have contaminated other jurors, the first sidebar in which videotaping was discussed had a substantial relationship to appellant's opportunity to defend himself. (*Snyder v. Commonwealth, supra*, 291 U.S. at p. 97.)

As a result of the defense counsel's decision to not pursue the issue of whether the

prospective jurors erroneously believed that they were being videotaped, juror Powell subsequently had the opportunity to poison the entire jury panel with the notion that appellant had confederates who would engage in gang retaliation against jurors. Had appellant been present during the sidebar, he would have had the opportunity to object to the decision of the trial court and his defense counsel to not pursue the videotaping issue at that time. If the trial court and the parties had pursued the issue of videotaping immediately after the sidebar, the jurors could have been called into the courtroom, and Mr. Powell could have been identified as the source of erroneous information regarding the videotaping. Mr. Powell then could have been questioned outside the presence of the other jurors, which would have avoided the contamination that occurred when he started talking about gang retaliation. Because of appellant's exclusion from the sidebar, he did not have the opportunity to defend himself against a procedure during jury voir-dire which resulted in the contamination of the entire jury panel.

In *People v. Davis* (2005) 36 Cal.4th 510, the defendant's presence during a hearing on the admissibility of a jailhouse tape was waived by his defense counsel. This Court found the waiver invalid because it was not personally given by the defendant. (*People v. Davis*, *supra*, 36 Cal.4th at p. 532.) The Court also concluded that the defendant's presence during the hearing had a reasonable and substantial relationship to his ability to defend against the charges. The Court reached this conclusion because the defendant was personally present at the police station lockup when the tapes were made and could have

assisted his attorney in determining the speakers and what was being said. (*People v. Davis, supra*, 36 Cal.4th at p. 531.) Similar reasoning applies to the instant case. Appellant's presence during the discussion about whether videotaping had occurred would have provided him the opportunity to insure the trial court and attorneys that no such conduct was occurring on his behalf and to urge the jurors to be so instructed.

The sidebar which was held during the afternoon session of September 20 was also hearing which had a substantial relationship to appellant's opportunity to defend himself. The defense counsel was questioning the jurors about whether they could accept the fact that he had to assert appellant's lack of guilt during the guilt phase, but then argue the appropriate penalty during the penalty phase. (Vol. 3, R.T. pp. 597-598.) The defense counsel stated:

> In the penalty phase, the whole ball game changes because you will be instructed —and I'm not going to go through all the various criteria but you will be instructed that you can consider the prior record of my client, if any; any type of conduct; the offense he has been convicted of, if he is convicted. But also there is some broad classifications. You can consider what type of upbringing he had. You can consider the area he lived in. You can consider his education.

(Vol. 3, R.T. p. 598.) The prosecutor objected, and the sidebar conference was held outside appellant's presence. (Vol. 3, R.T. p. 598.) The prosecutor argued that the defense counsel had gone beyond what was acceptable voir-dire, and was incorrectly instructing the jury on the law. (Vol. 3, R.T. p. 599.) The trial court sustained the objection. (*Ibid.*) The defense counsel stated that he was attempting to explain the concept of aggravating and mitigating

factors without confusing the jury by actually using those terms. (*Ibid.*) He agreed to rephrase his questions. (Vol. 3, R.T. p. 600.) The parties then discussed whether appellant should be present for the sidebars. (Vol. 3, R.T. pp. 600-601.) When jury voir-dire resumed, the defense counsel attempted to explain to the jury the concept and role of aggravating and mitigating factors. (Vol. 3, R.T. p. 601.)

The above hearing also had a substantial relationship to appellant's opportunity to defend himself because it was critical for the jury to have an adequate understanding of the concepts of aggravation and mitigation. The defense counsel was attempting to explain the concepts to the pool of jurors in a manner that could be understood by the ordinary person. If appellant had been present during the sidebar, he could have assisted his counsel in two ways. The prosecutor stated that his objection was based on the defense counsel improperly instructing the jury on the law when he stated that the neighborhoods in which appellant had lived could be considered in mitigation of the sentence. (Vol. 3, R.T. p. 599.) Appellant could have assisted his defense counsel by providing information about himself that could have been used to explain the concepts of aggravation and mitigation in a way that would have avoided the prosecutor's objection. For instance, appellant could have reminded the defense counsel of his dysfunctional family background, which was clearly a proper fact in mitigation in a death penalty case. Appellant's absence from the sidebar meant that he did not know the basis of the prosecutor's objection to the defense counsel's voir-dire. Had appellant been present during the sidebar, he could have provided the defense counsel

information to use in questioning the jury as voir-dire progressed. Information about how individuals feel and react to a situation is always more accurately obtained by presenting specific and concrete facts rather than abstractions.

When jury voir-dire resumed, the defense counsel stated the court had referred to factors in aggravation and mitigation, and "[n]ow what I need to know from you is there anyone on this panel who would feel that once the guilt phase is over and if you convict Mr. Castaneda, that no matter what, at that point you won't listen to the mitigating factors that might be presented by me in this case?" (Vol. 3, R.T. pp. 601-602.) The defense counsel's attempt to elicit from the jury how they felt about the factors in aggravation and mitigation that were going to be presented in this case would have been far more effective if the prospective jurors been presented the facts from appellant's background that was would be offered in mitigation.

4. PREJUDICE

This Court has required a defendant to demonstrate prejudice from his absence from court proceedings. (*People v. Carter* (2005) 36 Cal.4th 1114, 1203; *People v. Davis, supra*, 36 Cal.4th at pp. 533-534; *People v. Bradford* (1997) 15 Cal.4th 1229, 1358.) However, such an error should be prejudicial per-se.

Under both federal and California law, a proceeding held in the absence of the defendant constitutes error when the defendant's presence has some relationship to the defendant's opportunity to defend himself. (*United States v. Gagnon, supra*, 470 U.S. at p.

526; *People v. Hines, supra,* 15 Cal.4th 997 at pp. 1038-1039.) Given the test under both federal and California law for finding error from court proceedings being held in the defendant's absence, a finding of error constitutes as a practical matter a finding of prejudice.

This Court has applied a rule of per-se prejudice when there was no realistic measure of prejudice, or prejudice was difficult to measure. (E.g. *People v. Bigelow* (1985) 37 Cal.3d 731, 744-745 [finding reversible error per se from the trial court's failure to appoint advisory counsel].) If this Court concludes that prejudice cannot be measured from appellant's absence from the sidebars, then the judgment should be automatically reversed.

Reversal is required, furthermore, even if this Court concludes that prejudice from appellant's absences from the sidebars can be measured. Generally, it is difficult to measure prejudice from the defendant's absence from a proceedings if the defendant was represented by counsel. This was the unusual case in which prejudice can be determined from the defendant's absence from the sidebars even though he was represented by counsel.

Because appellant's absence from the proceedings violated his federal constitutional rights, the judgment must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) Reversal is also required under the Watson[12] standard for the statutory violations of Penal Code sections 977, subdivision (b), and 1043, subdivision (a), and the violation of Article

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[12] *People v. Watson* (1956) 46 Cal.2d 818, 836

I, sections 7 and 15 of the California Constitution. The Watson standard requires reversal when there was a "reasonable chance, more than an abstract possibility," (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715), that the error was prejudicial.

As a result of the first sidebar in which the trial court and the attorneys elected not to take any action regarding the alleged videotaping that allegedly was occurring, prospective juror Powell poisoned the entire jury panel with his ranting and ravings about gang retaliation and lack of safety in the courtroom. As a result of appellant's absence during the second sidebar, the defense counsel was impaired in his ability to explain to the jury the concepts of aggravation and mitigation in a manner that allowed the defense counsel to make informed choices about jury selection.

Appellant faced trial in which the ultimate punishment was imposed. His presence was denied during key proceedings impacting the selection of the jurors who would sit in judgment of whether he would retain his life. One need only look at the companies that have developed to assist counsel and parties in selecting a jury to know that jury selection is a critical state of the trial stage of the trial in which a defendant should be present.

For the reasons above, the trial court's failure to include appellant in the sidebar conferences during jury selection was prejudicial error. The judgment of guilt should therefore be reversed.

II

THE JUDGMENT OF GUILT TO COUNT ONE SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SECOND-DEGREE MURDER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND IN VIOLATION OF THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I SECTION 17 OF THE CALIFORNIA CONSTITUTION

1. SUMMARY OF ARGUMENT

Appellant was found guilty of the first degree murder of Colleen Kennedy. The prosecution proceeded on two theories to prove appellant guilty of first degree murder; the killing of the victim with malice aforethought and felony murder. The trial court refused a defense request for jury instructions on second degree murder. The trial court erred by refusing the defense request for second degree murder instructions because the evidence raised the question of whether appellant intended to kill the victim with express malice and whether the killing occurred during the commission of a felony. The trial court's refusal to give second-degree murder instructions deprived appellant of his state and federal constitutional rights to due process, fair trial, jury determination of every material fact, a proper determination of his death eligibility, and undermined the reliability of the guilt and

penalty determinations. (U.S. Const., 5th, 6th, 8th, 14th Amends; Cal.Const., Art. I, Secs. 1, 7, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 632-635, 100 S.Ct. 2382, 65 L.Ed.2d 392; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175; *People v. Geiger* (1984) 35 Cal.3d 510, 520-521; *People v. Dillon (1983) 34 Cal.3d 441*, 481-482.) Because the trial court's failure to instruct the jury on the lesser included offense of second degree murder was not harmless beyond a reasonable doubt, the judgment of guilt to count one must be reversed.

2. SUMMARY OF PROCEEDINGS BELOW

Count one alleged that "the crime of murder, in violation of Penal Code section 187 (a), a felony, was committed by Gabriel Castaneda, who did unlawfully, willfully, deliberately, and with malice aforethought and premeditation murder Colleen Mary Kennedy, a human being." (Vol. 1, C.T. p. 25.) The prosecution did not present any evidence of the details of Ms. Kennedy's death other than information provided by the testimony of the coroner. Frank Sheridan, a forensic pathologist, testified about the cause of the victim's death. Her hands were tied behind her back with shoelaces. A sock was wrapped around her neck and used as a gag. The body had multiple stab or puncture wounds around the neck. The eyes had marked congestion, which could have indicated strangulation or pressure to the neck. (Vol. 5, Vol. 5, p. 1159.) However, the congestion in the victim's eyes also could have been the result of the head being in a down position. (R.T. pp. 1159-1160.)

Dr. Sheridan counted 29 wounds in the neck area which ranged from superficial to deep injuries. The X pattern of the injuries established that a Phillips screwdriver was the mechanism of injury. (Vol. 5, R.T. p. 1189.) Some of the injuries were superficial enough that the full X pattern did not appear. The significant injuries were two stab wounds on the left side closest to the angle of the jaw. These injuries opened the carotid artery and the jugular vein. (Vol. 5, R.T. p. 1190.) The carotid artery was completely severed. (Vol. 5, R.T. p. 1230.) Damage to the carotid artery and the jugular vein interferes with the flow of blood to the brain. (Vol. 5, R.T. p. 1191.) Two of the wounds involved the assailant plunging the screwdriver into the victim's neck with great force. (Vol. 5, R.T. p. 1192.) These two wounds are circled on Exhibit 14, photograph A. (Vol. 5, R.T. p. 1193.) There was no blood flowing through the carotid artery or the jugular vein. (Vol. 5, R.T. p. 1230.) At least 15 of the wounds appeared as if the assailant was attempting to compel the victim to comply with his will. (Vol. 5, R.T. p. 1193.) The injuries to the carotid artery and the jugular vein were probably sufficient by themselves to cause the victim's death. The gag around her mouth obstructed the flow of oxygen and contributed to her death. (Vol. 5, pp. 1198, 1200, 1212.) Dr. Sheridan listed the cause of death as the stab wounds to the neck. (Vol. 5, R.T. p. 1208.)

The prosecution proceeded on two theories for the murder charge. The instructions stated as follows:

> Defendant is accused in Count 1 of having committed the crime of murder, a violation of Penal Code section 187.

> Every person who unlawfully kills a human being with malice aforethought **or** during the commission or attempted commission of burglary, kidnaping, rape, sodomy by use of force, or robbery, all of which are felonies inherently dangerous to human life, is guilty of the crime of murder in violation of section 187 of the Penal Code .
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A human being was killed.
>
> 2. The killing was unlawful, and
>
> 3. The killing was done with malice aforethought or occurred during the commission or attempted commission of burglary, kidnaping, rape, sodomy by use of force, or robbery, all felonies which are inherently dangerous to human life.

(Vol. 1, C.T. p. 291; Vol. 11, R.T. pp. 2698-2699.) The court instructed the jury that "[m]alice is express when there is manifested an intention to kill a human being." (Vol. 1, C.T. p. 292; Vol. 11, p. 2699.) Malice is implied when "1. The killing resulted from an intentional act, /p/ 2. The natural consequences of the act are dangerous to human life, and /p/ 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (Vol. 1, C.T. p. 292; Vol. 11, R.T. p. 2699.)[13]

The trial court told the jury that first degree murder requires "a clear, deliberate intent

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[13] The trial court erred by giving implied malice instructions because that theory is limited to second degree murder, and the trial court did not give instructions on second degree murder. The erroneous giving of implied malice instructions is raised in Issue II. Because the trial court gave implied malice instructions, the jury was actually presented with three theories in which to find appellant guilty of first-degree murder; deliberate and premeditated murder, felony murder, and implied malice.

on the part of the defendant to kill, which was the result of deliberation and premeditation, so that must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation . . . ." (Vol. 1, C.T. p. 293; Vol. 11, R.T. p. 2700.) It continued: "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 decided to and does kill." (Vol. 1, C.T. p. 294; Vol. 11, R.T. p. 2701.) The felony murder instruction stated as follows:

> The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of one or more of the following crimes or as a direct causal result of one or more of the following crimes:
>
> Burglary, or kidnaping, or rape, or sodomy by use of force or robbery, is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(Vol. 1, C.T. p. 295; R.T. p. 2701.)

The prosecutor filed a memorandum of points and authorities which argued that the trial court should not give jury instructions on second degree murder. (Vol. 1, C.T. pp. 246-247.) The points and authorities cited case law which stood for the proposition that second degree murder instructions should not be given "where the evidence is substantial that the murder occurred during a proscribed felony or where '. . . the jury has ample evidence from which to find premeditation and deliberation." (Vol. 1, C.T. p. 246, citing *People v. Bold* (1990) 222 Cal.App.3d 541, 564-565 and *People v. Fenebock* (1996) 46 Cal.App.4th 1688,

1704-1705.) The prosecution memorandum argued that "the evidence before the jury would only support theories of first degree murder. The tying of the victim, the gag, all in connection with the wounds to the neck, strongly support premeditation and deliberation. This argument is only bolstered by the felony murder evidence of the obvious sexual attack upon the victim, with additional evidence of a burglary, robbery, and kidnaping." (Vol. 1, C.T. p. 247.)

Following the close of the evidence, the defense counsel argued that the trial court should give second degree murder instructions. (Vol. 11, p. 2662.) The trial court refused to give second degree murder instructions because "when I originally discussed this issue with counsel last week, I had not taken into consideration the evidence with regard to the gagging and binding. I had taken into consideration the nature of the cause of death but I had not taken into consideration the nature of the gagging and the binding, which would add to the evidence with regard–the strength of the evidence with regard to the jury returning a premeditation first degree verdict." (Vol. 11, R.T. p. 2662.)

The prosecutor argued the theory of a premeditated murder and a felony murder during his closing argument. (Vol. 11, R.T. pp. 2728-2736, 2738-2742.) The jury found appellant guilty of first degree murder. (Vol. 2, C.T. p. 364; R.T. p. 2871.) The verdict did not specify whether the finding was based on a premeditated murder or the felony murder theory. The jury found true the special circumstances that the murder was committed during the commission or attempted commission of burglary, (Vol. 2, C.T. p. 366; R.T. p.2871), the

commission or attempted commission of kidnaping, (Vol. 2, C.T. p. 367; R.T. p. 2871), the commission or attempted commission of sodomy, (Vol. 2, C.T. p. 369; R.T. p. 2872), and the commission or attempted commission of robbery. (Vol. 2, C.T. p. 370; R.T. p. 2872.)

3. THE TRIAL COURT'S FAILURE TO GIVE JURY INSTRUCTIONS ON SECOND DEGREE MURDER VIOLATED: (1) APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW; (2) APPELLANT'S RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

Federal and state due process of law requires the giving of jury instructions on lesser included offenses in capital prosecutions. In *Beck v. Alabama* (1980) 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, the defendant was found guilty of the capital offense of robbery after a victim was intentionally killed. Under the Alabama death penalty scheme, the required intent to kill necessary to impose the death penalty could not be based on the felony-murder doctrine. Felony-murder was therefore a lesser offense of the capital crime of robbery-intentional killing. Alabama law, however, prohibited the judge from giving jury instructions on lesser included offenses in a capital prosecution. Alabama law provided for the giving of lesser included offenses in non-capital prosecutions "if there is any reasonable theory from the evidence which would support the position." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 630, fn. 5, quoting *Fulghum v. State* (1973) 291 Ala. 71, 75, 277 So.2d 886, 890.)

The State conceded that, under the above standard, the evidence was sufficient to raise the question of the defendant's guilt of the lesser included offense of felony-murder.

The trial court judge did not give jury instructions on the lesser included offense of felony murder because of the prohibition in Alabama law against such instructions in capital prosecutions.

The defendant argued before the Supreme Court that the Alabama prohibition on giving jury instructions on lesser-included offenses in capital proceedings violated his rights under the Sixth, Eighth, and Fourteenth Amendments by "substantially increasing the risk of error in the factfinding process." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 632.) The Supreme Court agreed with the defendant:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

(*Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

The Court noted that it had invalidated sentencing rules which impair the reliability of the sentencing determination in a capital case. (*Ibid.*, at p. 638.) Hence, "the same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Ibid.*) Procedures that undermine the reliability of the fact finding process in a capital prosecution thus violate the Eighth and Fourteenth Amendments. (*Ibid.*) Alabama's prohibition on

giving lesser included offenses also violated the Fifth and Fourteenth Amendments requirement of proof beyond a reasonable doubt: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 642.)

The Supreme Court has rejected the argument that a defendant is entitled to jury instructions on a lesser related offense in a capital prosecution. (*Hopkins v. Reeves* (1998) 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 [the court concluded that *Beck v. Alabama* did not require the state to provide instruction on lesser nonincluded offenses in capital cases when it did not allow such instructions in noncapital cases].)

The Sixth and Fourteenth Amendments grant a defendant the right to a jury trial. The trial court's failure to give second-degree murder instructions violated appellant's right to a jury trial. In *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182, the Court concluded that an unconstitutional reasonable doubt instruction violated a defendant's right to a jury trial because "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated . . . [and] the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Similarly, if the evidence raised a question of appellant's guilt of second-degree murder, the Sixth Amendment guarantee of a jury trial required the jury to

determine appellant's guilt of that offense.

The California Constitution also requires the giving of lesser included offenses. Article I, sections 7 and 15 of the California Constitution guarantees due process of law to individuals. Penal Code section 1042 provides that "[i]ssues of fact shall be tried in the manner provided by Article I, Section 16 of the Constitution of this State." Article I, Section 16 of the California Constitution provides in part that, "[t]rial by jury is an inviolate right . . ." In *People v. Breverman* (1998) 19 Cal.4th 142, this Court affirmed that jury instructions on lesser included offenses was required by the California Constitution:

> Cases have suggested that the requirement of sua sponte instructions arises, among other things, from the defendant's right under the California Constitution "to have the jury determine every material issue presented by the evidence." (E.g., *People v. Geiger* (1984) 35 Cal.3d 510, 519, overruled on other grounds, *Birks*, *supra*, 19 Cal.4th 108; see also *Wickersham*, *supra*, 32 Cal.3d 307, 335; *Sedeno*, *supra*, 10 Cal.3d 703, 720; *Modesto*, *supra*, 59 Cal.2d 722, 730.) However, we have consistently stressed the broader interests served by the sua sponte instructional rule. As we have said, insofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the "strategy, ignorance, or mistakes" of *either* party from presenting the jury with an "unwarranted all-or-nothing choice," encourages "a verdict ... no harsher *or more lenient* than the evidence merits" (*Wickersham*, *supra*, 32 Cal.3d at p. 324, italics added), and thus protects the jury's "truth-ascertainment function" (*Barton*, *supra*, 12 Cal.4th 186, 196). "These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice." (*Wickersham*, *supra*, 32 Cal.3d at p. 324.)

(*People v. Breverman, supra*, 19 Cal.4th at p. 155.)

Article I, section 17, of the California Constitution prohibits the imposition of cruel and unusual punishment It requires reliability during the guilt phase of a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 263.) The reliability of the guilt phase of this case was undermined when the jury was deprived of the opportunity to determine appellant guilt of second degree murder because a conviction of that crime would have excluded him from eligibility for the death penalty.

4. THE EVIDENCE IN THIS CASE RAISED A QUESTION OF APPELLANT'S GUILT OF SECOND DEGREE MURDER

The prosecution proceeded on a theory of premeditated murder and felony murder, and the trial court gave jury instructions encompassing those theories.

The trial court has a duty to instruct the jury on a lesser included offense "when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1989) 19 Cal.4th 142, 154-155.) The trial court should instruct the jury on "lesser included offenses that find substantial support in the evidence." (*Id.*, at p. 162.) Substantial evidence is evidence from which a jury composed of a reasonable person could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*)

This Court has stated in numerous decisions that "[n]ormally, an intentional killing is at least second-degree murder." (*People v. Wickersham* (1982) 32 Cal.3d 307, 325.) The requirement to give second-degree murder instructions in homicide cases in which the prosecution alleges that the defendant had the specific intent to kill accompanied by

premeditation and deliberation. (See e.g. *People v. Sedeno* (1974) 10 Cal.3d 703, 716-717; *People v. Saille* (1991) 54 Cal.3d 1103, 1115-1117; *People v. Barton* (1995) 12 Cal.4th 186, 196-198.) Justice Chin in his dissenting opinion in *People v. Valdez* (2004) 32 Cal.4th 73, cogently explained the difference between the sufficiency of the evidence to support the defendant's conviction of the greater offense, and the quantum of evidence necessary to warrant jury instructions on lesser included offenses:

> But the issue here--regarding the duty to instruct on a lesser included offense--is very different than the mere question whether substantial evidence supports conviction of the greater offense. Unlike an appellate court, a jury is *not* required to view the evidence in the light most favorable to the prosecution. It is free to accept all, none, or some of the evidence in support of the prosecution's case; the same is true for evidence in support of the defense case. (Citation omitted.) It is within the province of the jury to assess and weigh all of the evidence independently. Thus, the issue here is whether the *jury*--in assessing and weighing the evidence independently--*could have reasonably concluded* that defendant committed second degree murder, but not first degree robbery murder. The issue is *not*, as the majority seems to suggest, whether substantial evidence exists to support the robbery-murder conviction or whether the jury reasonably found first degree robbery murder on this record.

(*People v. Valdez, supra*, 32 Cal.4th at pp. 142-143 [J. Chin dissenting].)

Murder is defined as an unlawful killing committed with malice aforethought. (*People v. Robertson* (2004) 34 Cal.4th 156, 164, citing Penal Code section 187, subd. (a).) "An unlawful killing with malice aforethought, perpetrated by certain specified means or that is willful, deliberate, and premeditated, constitutes murder in the first degree. (*People*

v. Robertson, *supra*, 34 Cal.4th at p. 164.) A killing in the course of certain enumerated felonies also constitutes first degree murder. (*Ibid*, citing Penal Code §189.) Second degree murder is a lesser included offense of premeditated murder. (*People v. Robertson*, *supra*, 34 Cal.4th at p. 164; *People v. Wickersham* (1982) 32 Cal.3d 307, 330.)

Second degree murder, as a lesser included offense of premeditated murder, can occur two ways: (1) the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation, (CALJIC 8.30), and; (2) the unlawful killing of a human being when the killing resulted from an intentional act, the natural consequences of the act are dangerous to human life, and the act was deliberately performed with knowledge of the danger to, and with conscious disregard for human life. (CALJIC 8.31.)

Hence, the issue is whether a reasonable trier of fact could have found that the victim's murder was either not deliberate and premeditated, or the result of an intentional act which was dangerous to human life and performed with conscious disregard for her life. The evidence in this case was sufficient to warrant second degree murder instructions under either theory.

In assessing whether a defendant has the specific intent to kill, courts should consider: (1) prior planning activity; (2) motive; and, (3) the manner of killing. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462; *People v. Anderson* (1968) 70 Cal.2d 15.) The prosecution did not present any evidence that appellant made statements that he intended to

kill Ms. Kennedy, that he did so pursuant to a plan, or that he had a motive to kill her. Following Ms. Kennedy's murder, appellant made the statement that the "bitch had made him mad." (Vol. 6, R.T. pp. 1550-1551.) This statement did not prove an intent to kill Ms. Kennedy, but proved at most an intent to commit an assault. It is also not clear to whom appellant was referring when he made this statement. Hence, the only evidence that appellant deliberately, and with premeditation, killed Ms. Kennedy was the manner of her death.

Dr. Sheridan testified that the cause of Ms. Kennedy's death was the injury to the carotid artery and jugular vein, which severed the flow of blood to the brain. (Vol. 5, R.T. pp. 1190-1191, 1198, 1208.) According to Dr. Sheridan, the infliction of these two lethal injuries required quite an amount of force. (Vol. 5, R.T. p. 1204.) He also believed that the gag around Ms. Kennedy's mouth impaired her supply of oxygen and contributed to her death. (Vol. 5, R.T. p. 1198.)

The above evidence raised a question of fact about whether the assailant must have intended to kill the victim with deliberation and premeditation, and hence whether second degree murder instructions should have been given. The assailant inflicted 29 blows that caused abrasions, other non-lethal injuries, and the two lethal injuries. (Vol. 5, R.T. pp. 1159, 1192-1193; Augmented Vol. 1, C.T. p. 139; prosecution exhibit 6 .) In Dr. Sheridan's opinion, the assailant was attempting to compel Ms. Kennedy to obey his will. (Vol. 5, R.T. p. 1193.) The lethal blows could have been an attempt by appellant to continue to compel the victim to obey his will, but too much force was inadvertently used. There was no

evidence that appellant had the sophistication to know where to stab the victim so that the carotid artery and jugular vein would be severed. There was no evidence that appellant even knew that damaging the carotid artery and jugular vein would contribute to a person's death. There was no evidence that appellant knew the degree of force that would have to be applied to make the blows lethal. Furthermore, this was not a situation where so many stab wounds were inflicted of such severity that the assailant must have intended to kill the victim. Only two lethal blows were inflicted. Many of the stabs resulted in only superficial wounds or abrasions. (Vol. 5, R.T. pp. 1189-1192.) Many victims of vicious assault are left alive by their assailants. The blows that turned out to be lethal could have been a continuation of the assailant's desire to compel Ms. Kennedy to obey his will, rather than an effort to end her life. The presence of the gag around Ms. Kennedy's mouth did not establish an intent to kill. The most likely use of the gag was to prevent her from screaming and alerting any third parties. The assailant obviously took steps to avoid being detected because boxes were placed on a window ledge. (Vol. 5, R.T. pp, 1098-1099, 1259-1260.) The perpetrator did not make any effort to prevent Ms. Kennedy from breathing through her nose. The use of a gag around the mouth was not sufficient to conclude that appellant must have intended to kill Ms. Kennedy, given the lack of any obstruction of the airway through her nose.

Second degree murder occurs when the defendant intentionally kills a person without premeditation and deliberation, or commits an intentional act which is dangerous to human life and with conscious disregard for human life. (CALJIC 8.30 and 8.31; see discussion at

p. 71.) There is no way to know what transpired prior to this incident turning into a deadly assault. The incident could have been a burglary, or a sexual assault that spiraled beyond the intended goal. If appellant did intentionally kill the victim, it could have been the spur of a moment decision made without deliberation and premeditation. The two blows that were lethal were obviously inflicted in a matter of seconds. The jury could have found that appellant's stabbing the victim with the screwdriver was an intentional act that was dangerous to human life and committed with conscious disregard for human life, but not committed with the intention to cause death.

People v. Haley (2004) 34 Cal.4th 283, demonstrates why the trial court committed error by not giving second degree murder instructions. The victim in *People v. Haley* found the defendant burglarizing her apartment. The defendant raped and sodomized the victim. She died as a result of the assault. The defendant was convicted of first degree murder based on a felony murder theory. In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153-154, the Court held that intent to kill was an element of felony murder. In *People v. Anderson* (1987) 43 Cal.3d 1104, 1142-1143, the Court overruled *People v. Carlos* and held that felony murder does not require an intent to kill. The intent to kill requirement, however, still applied to all cases tried before *People v. Anderson* was decided. Hence, the prosecution in *People v. Haley* was required to prove that the defendant committed the felony murder with an intent to kill.

The trial court in *People v. Haley* erroneously applied *People v. Anderson*

retroactively and instructed the jury that intent to kill was not required to convict the defendant of felony murder. The defendant claimed in a post-arrest statement to the police that he did not intend to kill the victim, but had only tried to keep her from screaming. He admitted to having sexual relations with the victim and then choking her with his hands while she was laying on her back.

The deputy coroner testified that the cause of death was asphyxia due to manual strangulation. The victim had extensive bruises in the neck muscles, a fracture to the hyoid bone, which is a small U-shaped bone at the base of the tongue, fracture to the thyroid cartilage, and petechial hemorrhages along the mucosal surfaces of the larynx. The deputy coroner could not determine which fracture impeded the victim's breathing, and she acknowledged that it was very likely that manual pressure was removed from the neck. The obstruction caused insufficient oxygen to reach the brain. The issue before the court was whether the trial court's failure to instruct the jury that the defendant did not have to intend to kill the victim in order to be guilty of felony murder was harmless error. The Court concluded that the error was not harmless:

> But the evidence that defendant intended to kill Clement was not overwhelming. Rather, the jury might have believed defendant's claim that he did not intend to kill the victim and that she was alive when he fled the scene of the crime.
>
> Defendant admitted strangling Clement, but asserted that she had interrupted him while he was committing a burglary and he strangled her only to prevent her from screaming . . .
>
> . . .

> The autopsy report is also consistent with defendant's version of events. The report listed the cause of death as asphyxia due to manual strangulation, to wit, a lack of oxygen due to pressure applied to the neck. The report supported its conclusion as to the cause of death by pointing to fractures to the victim's hyoid bone and thyroid cartilage. But the victim's thyroid cartilage was fractured in a manner that left it intact, and the medical examiner was unable to determine which of the two fractures impeded the victim's breathing. Rather, the medical examiner testified that there was "probably a partial obstruction" to the victim's breathing passageway, and acknowledged that it was "very likely" that manual pressure was removed from the neck, and the obstruction caused insufficient oxygen to reach the brain.

(*People v. Haley*, *supra*, 34 Cal.4th at pp. 310-311.)

In *Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, then circuit judge Anthony M. Kennedy wrote for an unanimous court in reversing a district court's denial of the defendant's petition for a writ of habeas corpus. The Arizona Supreme Court found "abundant, clear, persuasive evidence of premeditation" and a confession to a "premeditated" killing by strangulation. Justice Kennedy concluded that even with the above evidence, a second-degree murder instruction was required even though evidence of lack of premeditation was not compelling. Justice Kennedy observed that the method of killing was not conclusive of whether the crime was first or second degree murder:

> A garrotte made before the killing points to premeditation but not necessarily so. A jury given the choice between first and second degree murder might well return a verdict of either first or second degree murder. Under the Supreme Court's decisions in Beck and Hopper, due process required that the jury be given that choice.

(*Vickers v. Ricketts*, 798 F.2d at p. 373.) This Court observed in *People v. Frank* (1985) 38 Cal.3d 711, 733-734, "such a manner of killing [strangulation] shows at least a deliberate intent to kill (*People v. Rowland* (1982) 134 Cal.App.3d 1, 9), although not necessarily premeditation and deliberation."

Appellant did not testify in this case. He denied playing any role in the death of the victim in the statements he made to the police during the investigation. In *People v. Haley*, the defendant denied in his post-arrest statement to the police that he intended to kill the victim, but admitted to assaulting her. The lack of a statement from appellant that he did not intend to kill the victim does not mean that second degree murder instructions should not have been given. Because only two fatal blows were inflicted on the victim, and the remaining injuries were non-lethal and appeared to be efforts by appellant to compel the victim to follow his will, the evidence of intent to kill was not compelling or even strong. The evidence that appellant intended to kill the victim, or killed her with premeditation and deliberation, was less compelling than in *People v. Haley* or *Vickers v. Ricketts*. Dr. Sheridan testified that the victim would have died within minutes of the lethal blows being inflicted. (Vol. 5, R.T. p. 1219.) It is a reasonable inference that appellant departed the medical building while she was still alive. The victim's body did not have lethal injuries other than in the neck area. If appellant had intended to kill the victim, it seems likely that he would have inflicted damage to vital organs. Hence, the evidence that appellant intended to kill the victim, or that he did so with deliberation and premeditation, was not

overwhelming. The trial court should therefore have given second degree murder instructions.

In *People v. Carter* (2005) 36 Cal.4th 1114, this Court found no error from the trial court's refusal to give second-degree murder instructions. The defendant in that case fatally strangled three victims within days of each other at their residences. The defendant's entire course of conduct was consistent with a plan to commit willful, premeditated, and deliberate murder. (*People v. Carter, supra*, 36 Cal.4th at p. 1184-1185.) Appellant's case is distinguishable. It involved a single victim and was the result of opportunism and the spur of a moment incident that transpired out of control. The facts of this case lack the indicia of planning and premeditation present in *People v. Carter*.

The jury was also given felony murder instructions, (Vol. 1, C.T. p. 295; Vol. 11, R.T. pp. 2701), and found that appellant committed the murder during the course of several felonies. (Vol. 2, C.T. pp. 366-370; Vol. 12, R.T. pp. 2871-2872.) In *People v. Valdez* (2004) 32 Cal.4th 73, the defendant was found guilty of first degree felony murder. The defendant argued that the trial court should have instructed the jury on first degree premeditated murder and second degree murder as lesser included offenses of first degree felony murder. The Court observed that premeditated murder and felony murder are different theories of the single offense of murder, and hence premeditated murder was not a lesser included offense of first degree felony murder. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 115, fn. 17.) The Court also stated that "[b]ecause of our disposition of this issue, we

do not address here whether second degree murder is a lesser included offense of felony murder." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 115, fn. 17.) This Court has held in the context of a prosecution for murder by poisoning, that a defendant may be found guilty of second degree murder based on a felony murder theory if the jury was not satisfied that the defendant acted with either express or implied malice. (*People v. Blair* (2005) 36 Cal.4th 686, 745; *People v. Mattison* (1971) 4 Cal.3d 177, 182-184.) That rule should apply outside the context of a prosecution for murder by poison and apply generally to all felony murders.

This Court does not need to determine whether second degree murder is a lesser included offense of first degree felony murder in order to find that the trial court erred by failing to give second degree murder instructions. The trial court instructed the jury on premeditated murder, and second degree murder is a lesser included offense of that crime under either of the theories set forth in CALJIC 8.30 and 8.31.[14] Hence, the trial court erred by not giving second degree murder instructions, regardless of whether second degree murder is a lesser included offense of felony murder. The issue of appellant's guilt of second degree murder was raised independent of the felony murder theory. The giving of felony murder instructions is relevant only to the question of whether the trial court's failure to give second degree murder instructions was harmless error, and not to the issue of whether second degree murder instructions should have been given.

This Court should conclude that second degree murder is a lesser included offense

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[14] CALJIC 8.30 is the crime of unpremeditated murder of the second degree. CALJIC 8.31 is second degree murder based on the commission of a dangerous act.

of felony murder if it addresses that issue on the merits. There is a single statutory offense of murder. (*People v. Valdez, supra*, 42 Cal.4th at p. 115, fn. 17; *People v. Silva* (2001) 25 Cal.4th 345, 367.) "Felony murder and premeditated murder are not distinct crimes." (*People v. Davis* (1995) 10 Cal.4th 463, 514.) "[T]they constitute 'two kinds of first degree murder' requiring different elements of proof." (*People v. Davis*, *supra*, 10 Cal.4th at p. 514, quoting *People v. Bernard* (1994) 27 Cal. App. 4th 458, 470.) Hence, when first degree felony murder instructions are given, the issue is not whether second degree murder is a lesser included offense of first degree felony murder. Clearly it is. The issue is whether the evidence raises the issue of the defendant's guilt of second degree murder.

For the reasons above, the trial court committed error by failing to instruct the jury on second degree murder.

5. STANDARD OF REVIEW

The issue of whether the trial court correctly instructed the jury is reviewed de-novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.) The appellate court applies the independent, or de-novo, standard of review to the question of whether the trial court erred by failing to give instructions on lesser included offenses. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*Ibid.*)

6. PREJUDICE

Because the trial court's failure to instruct the jury on second degree murder violated appellant's right to federal due process of law, Sixth Amendment right to a jury trial, and the prohibition against the imposition of cruel and unusual punishment, (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638), the judgment of guilt to count one must be reversed unless the trial court's failure to give second degree murder instructions was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.)

As explained above, the trial court's failure to give second degree murder instructions also violated appellant's right under Article I, Sections 7, 15, 16 and 17 of the California Constitution. Appellant had a federal due process right to require the State to follow it own rules and procedures, including its constitutional provisions, during the trial. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Hence, the Chapman standard of harmless beyond a reasonable doubt also applies to the errors of state law.

Because the jury was instructed on first degree deliberate and premeditated murder, and first degree felony murder, the issue of prejudice from the trial court's failure to give second degree murder instructions must be analyzed under both theories given to the jury.

A. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON SECOND-DEGREE MURDER WAS PREJUDICIAL ERROR WITH REGARD TO THE FIRST-DEGREE MURDER CONVICTION BASED ON THE THEORY OF PREMEDITATED MURDER.

Appellant will first address the issue of prejudice under the first degree deliberate and premeditated murder theory. Appellant has argued at length above why a reasonable trier of

fact could conclude that appellant did not intend to kill the victim, or did not kill the victim with premeditation and deliberation. The reasons why the trial court erred by not giving second degree murder instructions also applies to the reasons why the failure to give those instructions was not harmless beyond a reasonable doubt. The evidence that appellant intended to kill the victim was not overwhelming. The victim had 29 injuries from the screwdriver. The vast majority of the injuries inflicted on the victim were non-lethal. The two lethal blows were inflicted in a matter of seconds. This was not a situation in which the assailant inflicted so many injuries to the victim that death could have been the only desired result. This Court cannot conclude beyond a reasonable doubt that the jury would have found appellant guilty of first-degree premeditated murder had it been given the option of finding appellant guilty of second-degree murder.

B. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON SECOND-DEGREE MURDER WAS PREJUDICIAL ERROR WITH REGARD TO THE FIRST-DEGREE MURDER CONVICTION BASED ON THE THEORY OF A FELONY-MURDER

The first degree felony-murder rule is a creation of statute. (*People v. Robertson* (2004) 34 Cal.4th 156, 166, citing Penal Code § 189.) "The felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder. (*People v. Robertson*, *supra*, 34 Cal.4th at p. 165.) "When the prosecution establishes that a defendant killed while committing one of the felonies section 189 lists, 'by operation of the statute the killing is deemed to be first degree

as a matter of law'." (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.) "Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the only guilty verdict a jury may return is first degree murder." (*Ibid*, citing *People v. Jeter* (1964) 60 Cal.2d 671, 675; *People v. Lessard* (1962) 58 Cal.2d 447, 453, and *People v. Perkins* (1937) 8 Cal.2d 502, 516.)

The trial court's failure to instruct the jury on second degree murder was not harmless beyond a reasonable doubt. The prosecution evidence did not indisputably establish that appellant killed the victim while committing a felony. The jury found that appellant killed the victim while committing the felonies of burglary, kidnaping, sodomy, and robbery. Appellant has argued below the insufficiency of the evidence to support appellant's convictions of those felonies. Appellant will briefly summarize those arguments.

The burglary conviction required the prosecution to prove that appellant entered the medical building, or a room within the medical building, with the intent to commit a felony. (Penal Code §159.) There was no evidence how this murder transpired. There was no evidence that appellant entered the building through force. It appears that Ms. Kennedy allowed appellant to enter the building. There was no evidence that appellant formed an intent to murder Ms. Kennedy prior to entering the procedure room. If appellant decided to murder her after he entered the procedure room, then he was not guilty of burglary. The prosecution had the burden of proving beyond a reasonable doubt that appellant formed the intent to murder Ms. Kennedy prior to entering the procedure room. Because the

prosecution failed to present such evidence, the felony-murder conviction cannot be affirmed based on the commission of a burglary. Similarly, the burglary special-circumstance finding must also be set aside.

The felony-murder conviction cannot be affirmed based on the commission of a kidnaping because the prosecution presented no evidence that appellant moved the victim against her will within the medical building, or moved her a sufficient distance to establish asportation. (See Penal Code §207, subd. (a); *People v. Martinez* (1999) 20 Cal.4th 225, 236-237 [asportation is an element of simple kidnaping].) The kidnaping special circumstance must be set aside for the same reason.

The victim's body was found in the procedure room. There was no evidence of forcible asportation. A book was found on the floor of the victim's office. (Vol. 4, R.T. p. 873; Vol. 5, R.T. pp.1071-1072.) This evidence was to ambiguous to conclude that appellant forcibly moved the victim from her office to the procedure room. She may have voluntarily dropped the book or placed it in that location. The victim may have accompanied appellant to the procedure room for medical treatment, and the situation then spiraled out of control. Speculation cannot substitute for proof. Hence, the felony-murder conviction cannot be affirmed based on the commission of a kidnaping.

The felony-murder conviction also cannot be affirmed based on the commission of sodomy. Sodomy requires the penis to penetrate the anus of the victim while he or she is alive. (Penal Code section 286, subd. (c)(2); *People v. Farnham* (2002) 28 Cal.4th 107,

143.) There was no trauma to the victim's anal region. (Vol. 5, R.T. pp. 1181-1182.) The lack of such trauma suggests that sodomy did not occur. (Vol. 5, R.T. pp. 1227-1228.) There was no spermatoza found in the rectal smear taken from the victim's body. (Vol. 6, pp. 1414-1415.) Dr. Sheridan testified that Ms. Kennedy died shortly after the lethal blows were inflicted to the carotid artery and jugular vein. (Vol. 5, R.T. pp. 1198-1999.) The prosecution timetable had appellant leave Toyo Tires sometime around 9:00 a.m., arrive at the medical building within approximately 30 minutes, and depart from the Long John Silver parking lot sometime around 10:30 a.m. (Vol. 8, R.T. pp. 1948-1949, 1969; Vol. 9, R.T. pp. 2224, 2259-2260.) Given the above timetable, the victim could have been deceased if appellant committed sodomy. The prosecution had the burden of proving that the victim was alive when any act of sodomy occurred. Given the lack of evidence that appellant's penis penetrated the victim's anus, or that she was alive when sodomy may have occurred, the felony-murder conviction cannot be affirmed based on the commission of sodomy. Hence, the sodomy special circumstance finding must also be reversed.

The felony-murder conviction cannot be affirmed based on the commission of robbery because the prosecution failed to prove that : (1) appellant took the victim's property; and (2) the victim was alive when appellant took her property. Robbery requires the taking of personal property against the will of the victim by means of force or fear. (Penal Code §211.) A defendant must form the intent to take the victim's property prior to killing the victim in order for the crime of robbery to have occurred. (*People v. Frye* (1998)

18 Cal.4th 894, 956.) The prosecution offered Exhibit 19, a watch, as the property allegedly taken by appellant. (Vol. 4, R.T. p. 864.) However, the victim's husband could not confirm that Exhibit 19 belonged to his wife (Vol. 4, R.T. pp. 874-875, 877.) Dr. Sheridan testified that the victim died shortly after the fatal blows were inflicted to the carotid artery and jugular vein. (Vol. 5, R.T. pp. 1198-1199.) Appellant allegedly made the comment after the incident that "the bitch made me mad." (Vol. 7, R.T. p. 1550.) This suggests that the murder escalated from a misunderstanding or perceived insult to appellant rather than a plan to commit robbery. The prosecution failed to prove that appellant formed the intent to take the victim's property prior to her death. Hence, the felony-murder conviction cannot be affirmed based on the commission of a robbery. Similarly, the robbery special circumstance finding must be set aside.

The evidence was insufficient to establish any of the felonies upon which the felony-murder conviction was based. Hence, the first-degree murder conviction cannot be affirmed based on the commission of a felony-murder. However, even if the evidence was sufficient to uphold a conviction of one of the felonies, the trial court still erred by failing to instruct the jury on second-degree murder. The evidence establishing the commission of the felonies was weak. The trial court's failure to give second-degree murder instructions did not give the jury any other option on the murder charge other than finding appellant guilty of first-degree murder or acquitting him of murder. The need for instructions on lesser included offenses in such situations is well recognized: "One of the primary reasons for requiring

instructions on lesser included offenses is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between [guilt] and innocence -- that is, to eliminate the risk that the jury will convict ... simply to avoid setting the defendant free." (*People v. Majors* (1998) 18 Cal.4th 385, 410, quoting *Schad v. Arizona* (1991) 501 U.S. 624, 646-647, 111 S.Ct. 2491, 2505, 115 L.Ed.2d 555.)

The trial court's failure to instruct the jury on second-degree murder did not put the jury in the position of setting appellant free if it found him not guilty of first-degree murder. The jury had the option of convicting appellant of crimes other than first-degree murder. However, the trial court's failure to instruct the jury on second-degree murder had the same effect as if the jury had been given an all or nothing choice. The jury was not going to let appellant escape responsibility for the victim's death if it concluded that he caused her death. By failing to instruct the jury on second-degree murder, the jury was forced to either find appellant guilty of first-degree murder, or exonerate him from any responsibility for the victim's death. This distorted the jury's fact finding process by forcing the jury to find appellant guilty of first-degree murder when it may have chosen the lesser option of second-degree murder. The trial court's failure to instruct the jury on second-degree murder was not harmless beyond a reasonable doubt with regard to the first-degree murder conviction based on the commission of a felony-murder. The judgment of guilt to first-degree murder must be reversed. Reversal of the first-degree murder conviction renders appellant ineligible for the death penalty. The judgment of death must therefore be reversed.

III

THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND IN VIOLATION OF THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I SECTION 17 OF THE CALIFORNIA CONSTITUTION

1. SUMMARY OF ARGUMENT

Appellant was found guilty in count one of first degree murder based on a theory of a premeditated and deliberate killing, and the felony murder rule. The trial court did not instruct the jury on the lesser included offense of voluntary manslaughter based on heat of passion. According to the prosecution evidence, appellant told a friend shortly after the murder that, "the bitch made me mad." The prosecution presented no evidence about what transpired leading up to the victim's death. The evidence raised a question regarding appellant's guilty of voluntary manslaughter based on a heat of passion. The trial court had a sua sponte duty under the federal and state constitutions to instruct the jury on all lesser included offenses raised by the evidence. Because the trial court's failure to instruct the jury on voluntary manslaughter was prejudicial, the judgment of guilty to count one, and the

judgment of death, must be reversed.

2. SUMMARY OF PROCEEDINGS BELOW

The Summary of Proceedings Below from Issue II is hereby incorporated in this argument and will not be repeated for purpose of brevity. Shortly after the victim's murder, appellant told Gloria Salazar that the "bitch made me mad." (Vol. 7, R.T. pp. 1550-1551.) The victim's book was found on the floor of her office. (Vol. 4, R.T. pp. 873; Vol. 5, R.T. pp. 1071-1072; exhibit 12, photograph C.) There was no other evidence regarding what transpired leading up to the victim's death. The trial court instructed the jury on first degree murder based on a theory of an intentional killing and felony-murder. (Vol. 1, C.T. p. 291; Vol. 11, R.T. pp. 2698-2699.) The trial court refused a defense request for jury instructions on second-degree murder. (Vol. 11, R.T. p. 2662.) The trial court did not instruct the jury on voluntary manslaughter based on reasonable provocation.

3. THE TRIAL COURT HAD A FEDERAL AND STATE CONSTITUTIONAL DUTY TO INSTRUCT THE JURY ON ALL LESSER INCLUDED OFFENSES RAISED BY THE EVIDENCE

The federal and State constitutional basis for the duty of the trial court to instruct the jury on all lesser included offenses raised by the evidence in a capital prosecution was set forth in Issue II. That discussion is incorporated in this argument and will be briefly summarized in the interest of brevity. Under *Beck v. Alabama, supra*, 447 U.S. at p. 637, the federal due process clause required the trial court to instruct the jury on all lesser included offenses raised by the evidence. The California Constitution also required the trial court to

instruct the jury on all lesser included offenses raised by the evidence. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 155; Cal. Const., Art. I, Sections 7 and 15 [guaranteeing a defendant the right to due process of law]; Cal. Const., Art. I, Section 16 [providing that the right to trial by jury is inviolate].) The prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments, (*Beck v. Alabama, supra*, 447 U.S. at p. 637 [procedures that undermine the reliability of the fact finding process in capital prosecutions violate the Eighth and Fourteenth Amendments]), and Article I, section 17 of the California Constitution, also required the trial court to instruct the jury on all lesser included offenses raised by the evidence. Finally, appellant's right to jury trial under the Sixth and Fourteenth Amendments, (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 278), and Article I, Section 16 of the California Constitution, required the trial court to give jury instructions on the lesser included offense of voluntary manslaughter.

The defense counsel did not request the trial court to instruct the jury on the lesser included offense of voluntary manslaughter. However, California law requires the trial court to sua sponte instruct the jury on all lesser included offenses raised by the evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Memro* (1995) 11 Cal.4th 786, 871.) The duty of the trial court to sua sponte instruct the jury on all lesser included offenses raised by the evidence was the functional equivalent of the defense counsel requesting such an instruction. Because state law granted appellant the right to jury instructions on voluntary manslaughter if the evidence raised a question of his guilt to that offense, appellant's right

to such instructions acquired federal constitutional protection. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [a defendant has a due process right to requires the state to adhere to its own procedures and rules].) Whether voluntary manslaughter instructions were requested by appellant or should have been given sua sponte by the trial court, the reliability of the fact finding process required the trier of fact to have the full range of options with regard to count one.

4. ELEMENT OF VOLUNTARY MANSLAUGHTER

Penal Code section 192, subdivision (a), provides that voluntary manslaughter is the unlawful killing of a human being "upon a sudden quarrel or heat of passion." Provocation and heat of passion must be affirmatively demonstrated. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Sedeno* (1974) 10 Cal.3d 703, 719.)

The heat of passion required for voluntary manslaughter has a subjective and an objective component. (*People v. Steele, supra*, 27 Cal.4th at p. 1252; *People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) The defendant must actually kill under a heat of passion or as the result of a sudden quarrel. (See *People v. Wickersham, supra*, 32 Cal.3d at p. 327.) However, the sudden quarrel or heat of passion "must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . ." (*People v. Steel, supra*, 27 Cal.4th at p. 1252.) The reason is that "no defendant may set up his own standard of conduct and justify or excuse himself because his passions were aroused, unless further the jury believe the facts and circumstances were

sufficient to arouse the passions of the ordinarily reasonable man." (*Ibid.*, quoting *People v. Logan* (1917) 175 Cal.45, 49.) "The passion necessary to constitute heat of passion need not be rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection." (*People v. Berry* (1976) 18 Cal.3d 509, 515.) The provocation can occur in a single occasion or over a period of time. (*Id.*, at pp. 515-516.) No specific provocation is required, and the provocation may be verbal. (*People v. Berry, supra*, 18 Cal.3d at p. 515; *People v. Valentine* (1946) 28 Cal.2d 121, 141-144.) In *People v. Lasko* (2000) 23 Cal.4th 101, the Court concluded that an intent to kill is not required for the crime of voluntary manslaughter. "[A] killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing with malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill." (*People v. Lasko, supra*, 23 Cal.4th at p. 109.)

5. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE OF FIRST-DEGREE MURDER

The trial court had a duty to instruct the jury on voluntary manslaughter if there was evidence from which a jury composed of reasonable persons could conclude that the crime had been committed. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.)

Following the victim's murder, appellant allegedly said that, "the bitch made me mad." (Vol. 7, R.T. pp. 1550-1551.) The trier of fact could have concluded from this comment that appellant assaulted the victim because she said or did something to provoke appellant's anger. Evidence was presented that appellant hurt his finger while working at Toyo Tires. (Vol. 6, R.T. pp. 1496-1497.) Appellant could have gone to the medical center for the legitimate purpose of seeking medical treatment for his injury. Once appellant arrived at the medical clinic, events transpired out of control because appellant became angry over some conduct or comment by the victim. The sudden quarrel or heat of passion necessary to raise a question of fact concerning appellant's guilt of voluntary manslaughter may be "any violent, intense, overwrought or enthusiastic emotion which cause[d] [him] . . . to act rashly and without deliberation and reflection." (*People v. Berry, supra*, 18 Cal.3d at p. 515.) The only evidence presented in this case about how the assault occurred suggested that appellant acted because of provocation from the victim. Appellant's statement that, "the bitch made me mad," was sufficient for a reasonable juror to conclude that appellant killed the victim because of a sudden quarrel or heat of passion. This was sufficient to trigger the trial court's duty to instruct the jury on the lesser included offense of voluntary manslaughter. Appellant's comment supplied the only evidence of possible motive for the crime, i.e., appellant's anger at the victim.

Case law establishes that the evidence was sufficient to raise the issue of appellant's guilt of voluntary manslaughter. In *People v. Berry*, the defendant killed his wife after she

taunted him over a period of two weeks about her sexual involvement and love for another man, and then engaged in sexual relations with the defendant in order to taunt and excite him. The defendant eventually strangled his wife in a fit of rage. The Court concluded that voluntary manslaughter instructions based on sudden quarrel and heat of passion should have been given because, "[d]efendant's testimony chronicles a two-week period of provocatory conduct by his wife Rachel that could arouse a passion of jealousy, pain, and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion." (*People v. Berry, supra*, 18 Cal.3d at p. 515.)

In the instant case, the provocation occurred over a short period of time. However, the provocation necessary to establish sudden quarrel or heat of passion can occur over a short or long period of time. (*People v. Berry, supra*, 18 Cal.3d at pp. 515-516.) Similar to the manner in which the victim provoked the defendant in *People v. Berry*, the victim in this case provoked appellant into a violent rage.

6. STANDARD OF REVIEW

The discussion of the standard of review from Issue II is hereby incorporated in this argument. The issue of whether the trial court should have sua sponte instructed the jury on the lesser included offense of voluntary manslaughter is reviewed de-novo. (*People v. Waidla, supra*, 22 Cal.4th at p. 733.)

7. PREJUDICE

The trial court's failure to instruct the jury on voluntary manslaughter as a lesser

included offense of first-degree murder violated appellant's right to state and federal due process of law, the state and federal prohibition against imposition of cruel and unusual punishment, and the state and federal guarantee of the right to a jury trial. The judgment of guilt to count one must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The trial court's failure to give voluntary manslaughter instructions was not harmless beyond a reasonable doubt. The prejudice discussion in Issue II is incorporated in this argument. The prosecution theory of the case was that appellant committed an intentional killing, and a killing during the course of several felonies. Appellant argued in Issue II why the evidence suggests that appellant may not have committed an intentional killing. (See *Argument II, supra*, pp. 75-103.) There was no evidence appellant planned the incident and the physical evidence was not conclusive with regard to an intent to kill. Only two of the 29 blows sustained by the victim were lethal, and the remaining injuries ranged from abrasions to other non-lethal injuries. (Vol. 5, R.T. pp. 1159, 1192-1193.) Voluntary manslaughter is committed when a defendant kills as a result of sudden quarrel or heat of passion, regardless of whether the killing was intentional or unintended. (*People v. Lasko, supra*, 23 Cal.4 at p. 109.) Under the scenario of either an intentional killing or an accidental killing, appellant was guilty only of voluntary manslaughter if he killed the victim as the result of a sudden quarrel or heat of passion. The trial court's failure to give voluntary manslaughter instructions was therefore prejudicial with regard to the first degree

murder conviction based on an intentional killing with premeditation and malice.

The jury also found appellant guilty of first degree murder based on the felony-murder rule. The trial court's failure to give voluntary manslaughter instructions was prejudicial with regard to the felony-murder theory. As explained below, the evidence that appellant committed any of the felonies found true in connection with the felony-murder allegation was weak. There was no evidence that appellant intended to commit a crime when he entered the medical building or when he entered a room within the medical building. The prosecution did not sufficiently connect appellant to any property taken from the victim to prove that he committed robbery. The prosecution also failed to present evidence that appellant took property from the victim while she was alive. The sodomy allegation also lacked convincing evidence. The physical evidence suggested that the victim's anal area had not been sodomized. Dr. Sheridan concluded that "from my autopsy examination in this case, I have no grounds for saying that there was sodomy or indeed sexual assault at all." (Vol. 5, R.T. pp. 1227-1228.) The kidnaping allegation was not proven because there was no evidence that appellant forcibly moved the victim, or moved her a sufficient distance to establish asportation. Because the evidence that appellant committed the felonies was weak, the trial court's failure to give voluntary manslaughter instructions was not harmless beyond a reasonable doubt.

The trial court did not give jury instructions on second-degree murder. Hence, it is not possible to conclude that the failure to give voluntary manslaughter instructions was

harmless because the jury had the option of finding appellant guilty of a lesser offense than first degree murder and declined to do so. (See *People v. Lasko, supra*, 23 Cal.4th at p. 113 [finding the trial court's failure to give voluntary manslaughter instructions harmless in part because the jury found the defendant guilty of second degree murder].) The trial court's failure to instruct the jury on a lesser included offense is harmless error when the factual issue presented by the lesser included offense was resolved under another jury instruction given to the jury. (*People v. Sedeno, supra*, 10 Cal.3d at pp. 720-721.) The factual issue of whether appellant killed the victim because of sudden quarrel or heat of passion was not resolved under any other jury instructions. The jurors needed to resolve whether appellant's comment that the "bitch made me mad," established that he killed the victim because of sudden quarrel or heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 141.)

The giving of a voluntary manslaughter instruction would have prevented the jury from being put in the all or nothing situation of either finding appellant guilty of first degree murder or finding him not guilty of any crime related to the victim's death. (*People v. Majors, supra*, 18 Cal.4th at p. 410.) Because the jury was instructed only on first degree murder, it was inevitable that appellant would be found guilty of that crime if the jury concluded that he caused the victim's death.

For the reasons above, the trial court's failure to give voluntary manslaughter instructions was prejudicial error. Hence, the judgment of guilty to count one must be reversed.

IV

THE JUDGMENT OF GUILT TO COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY GAVE AN IMPLIED MALICE INSTRUCTION IN VIOLATION OF APPELLANT'S: (1) RIGHT TO DUE PROCESS OF LAW UNDER FEDERAL AND STATE LAW; (2) RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION, AND (3) RIGHT TO BE FREE FROM THE IMPOSITION CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION

1. SUMMARY OF ARGUMENT

The trial court instructed the jury only on first-degree murder based on the theories of a deliberate and premeditated murder and felony-murder. The trial court instructed the jury on the definition of implied malice. Implied malice is when a defendant commits an intentional act, the natural consequences of that act are dangerous to human life, and the act was deliberately performed with knowledge of the danger to, and with conscious disregard for human life. Implied malice is a basis to find a defendant guilty of second degree murder, and does not apply to first degree intentional and premeditated murder, or felony murder. Because the trial court did not instruct the jury on second degree murder, it should not have given an implied malice instruction. The giving of an implied malice instruction was prejudicial because it allowed the jury to find appellant guilty of first degree murder based on a legal theory that did not support a conviction for that crime.

2. THE GIVING OF AN IMPLIED MALICE INSTRUCTION IN CONNECTION WITH A CHARGE OF FIRST DEGREE MURDER WAS ERRONEOUS

CALJIC 8.11 defines malice. Malice can be express or implied. Malice is "express when there is manifested an intention unlawfully to kill a human being." Malice is implied when:

> 1. The killing resulted from an intentional act.
>
> 2. The natural consequences of the act are dangerous to human life; and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

(CALJIC 8.11.)

When the trial court gives felony-murder instructions, express or implied malice is not relevant, and the jury should not be given the definition of malice. (*People v. Combs* (2004) 34 Cal.4th 821, 857; *People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Dillon* (1983) 34 Cal.3d 441, 475.) Implied malice is present "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102-103.) "Second degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements–i.e., willfulness, premeditation, and deliberation–that would support a

conviction of first degree murder." (*Id.*, at p. 102.) "Implied malice murder normally constitutes only murder in the second degree." (*People v. Catlin* (2001) 26 Cal.4th 81, 149; *see People v. Nieto Benitez, supra*, 4 Cal.4th at pp. 102-103.)

3. THE TRIAL COURT ERRED BY GIVING AN IMPLIED MALICE INSTRUCTION

The trial court's jury instructions are set forth in Issue I and will be briefly discussed herein for purpose of brevity. The trial court refused to give second degree murder instructions. (Vol. 11, R.T. p. 2662.) The trial court's definition of malice included both express and implied malice for the jury. (Vol. 1, C.T. p. 292; R.T. p. 2699.) Under *People v. Catlin* and *People v. Nieto Benitez*, an implied malice instruction should not have been given.

4. THE DEFENSE COUNSEL'S FAILURE TO OBJECT TO IMPLIED MALICE INSTRUCTIONS DID NOT WAIVE THAT ERROR ON APPEAL

The defense counsel did not object to the trial court giving implied malice instructions. However, California law does not require an objection in the trial court in order for this Court to review whether jury instructions were correct. Penal Code section 1259 provides as follows:

> The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

This court has applied Penal Code section 1259 to review the correctness of jury instructions, despite the defendant's failure to make an objection in the trial court. (*E.g.*,

People v. Cleveland (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Hence, this Court may review whether the giving of implied malice instructions was prejudicial despite the lack of an objection.

5. THE TRIAL COURT'S GIVING OF AN IMPLIED MALICE INSTRUCTION VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENTS RIGHT TO FEDERAL DUE PROCESS OF LAW, RIGHT TO DUE PROCESS OF LAW UNDER THE CALIFORNIA CONSTITUTION, SIXTH AND FOURTEENTH AMENDMENTS RIGHT TO A JURY TRIAL, THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT, AND THE STATE PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT

Jury instructions which impair the jury's ability to determine all the elements of an offense violate federal due process of law. Hence, the giving of jury instructions which allows the jury to base a guilty verdict on an erroneous legal theory violates a defendant's right to federal due process of law. Article I, sections 7 and 15 of the California Constitution guarantee a defendant due process of law. Hence, a jury instruction which impairs a jury's ability to find all the elements of an offense also violates the California Constitution.

"What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277, 113 S.Ct. 2078.) "The prosecution bears the burden of proving all elements of the offense charged." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 277.) Jury instructions which relieve the prosecution of the burden of proving each element of an offense beyond a reasonable doubt violate federal due process of law. (*Carella v. California* (1989) 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218; *Francis v. Franklin* (1985) 471 U.S. 307, 312, 105 S.Ct. 1965,

85 L.Ed.2d 344.)

Jury instructions which impair the factfinder's decision making process regarding the elements of an offense have arisen most often in the context of jury instructions which create unlawful presumptions. For instance, in *Francis v. Franklin*, the defendant was found guilty of murder when he fired a shot through a door and killed a homeowner. The defendant was in the process of attempting to escape from custody. The defendant claimed that he fired the weapon accidently when the homeowner closed the door. The trial court instructed the jury that the act of a person of sound mind is presumed to be the product of that person's will, and that a person is presumed to intend the natural and probable consequences of his conduct. The Court found these instructions deficient because it "directs the jury to presume an essential element of the offense–intent to kill–upon proof of other elements of the offense–the act of slaying another. In this way, the instructions 'undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt'." (*Francis v. Franklin, supra*, 471 U.S. at p. 316, quoting *Ulster County v. Allen* (1979) 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777; *see also United States v. Gaudin* (1995) 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 [trial court violated due process of law by failing to submit the issue of materiality to the jury in a prosecution for perjury]; *Carella v. California, supra*, 491 U.S. at pp. 265-266 [an instruction to presume embezzlement of a vehicle if it was not returned to a car rental company within five days after the return date violates due process of law].)

The reasoning of *Francis v. Franklin* applies to the erroneous instructions given in this case. Just as a jury instruction which contains an erroneous presumption regarding an element of an offense undermines the factfinder's ability to find the elements of an offense beyond a reasonable doubt, an erroneous theory of guilt allows the jury to render a guilty verdict based on facts which are not elements of the offense. As a matter of law, appellant's conviction of first degree murder cannot be based on the commission of an intentional act which resulted in the victim's death when the natural consequences of that act were dangerous to human life and performed with knowledge of the danger to, and with conscious disregard, for human life. The inclusion of implied malice instructions allowed the jury to find appellant guilty of first degree murder based on such an act, rather than on a finding that appellant intentionally and with premeditation killed the victim, or killed her during the commission of a felony. The implied malice instruction interfered with the jury's finding of the elements of first degree murder.

The implied malice instruction also violated appellant's Sixth Amendment right to a jury trial, and his state constitutional right to a jury trial under Article I, Section 16 of the California Constitution. In *Sullivan v. Louisiana* (1993) 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182, the trial court gave an unconstitutional reasonable doubt instruction. The Court concluded that the instruction violated the defendant's right to a jury trial:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury

> determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our *per curiam* opinion in *Cage*, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict. Petitioner's Sixth Amendment right to jury trial was therefore denied.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.) Hence, the Sixth Amendment required the jury to find appellant guilty of first degree murder based on a theory of deliberate and premeditated murder, or felony murder, and not on a theory of implied malice.

The prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments forbids any procedure which "substantially increas[es] the risk of error in the fact finding process." (*Beck v. Alabama, supra*, 447 U.S. at p. 632.) Article I, section 17 of the California Constitution also forbids the imposition of cruel and unusual punishment. The giving of an implied malice instruction substantially increased the risk that appellant would be found guilty of first-degree murder based on a legal theory that would not support that conviction. Appellant would not have been eligible for the death penalty if he had not been convicted of first-degree murder. Hence, the giving of an implied malice instruction violated appellant's right under the federal and California Constitutions to be free from the imposition of cruel and unusual punishment.

6. PREJUDICE

Because the giving of implied malice instructions violated appellant's rights under

the Fifth, Sixth, Eighth, and Fourteenth Amendments, the judgment must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) Because the giving of an implied malice instruction violated several provisions of the California Constitution, those errors must also result in reversal of the judgment unless the errors were harmless beyond a reasonable doubt. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [a defendant has a due process right to requires the state to adhere to its own procedures and rules].)

In *Yates v. Evatt* (1991) 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432, the trial court analyzed the Chapman harmless error standard in the context of a a jury instruction which erroneously shifted the burden of proof in violation of the holding of *Sandstrom v. Montana* (1979) 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450. The test under Chapman is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403, quoting *Chapman v. California*, 386 U.S. at p. 24.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403.)

The giving of implied malice instructions was not harmless beyond a reasonable doubt. The first degree murder conviction rested on theories of an intentional and premeditated murder, and felony murder. (Vol. 1, C.T. p.291; Vol. 11, R.T. pp. 2698-2699.)

The implied malice theory confused the jury about whether a first degree murder conviction required a deliberate and intentional killing. The instructions told the jury that the crime of murder requires the killing of a human being with "malice aforethought." (Vol. 11, R.T. p. 2698.) Because the trial court told the jury that malice aforethought could be express or implied, (Vol. 11, R.T. p. 2699), the jury had no way of knowing that a conviction for first degree murder could not be based on an intentional act that was dangerous to human life, and committed with disregard for human life.

The trial court instructed the jury that "all murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree." (Vol. 11, R.T. p. 2700.) This instruction was insufficient to mitigate the confusion from the giving of implied malice instructions for several reasons. The instruction did not expressly preclude the jury from basing a first degree murder conviction on implied malice. The jury was never told that a first degree murder conviction could not be based on implied malice. Furthermore, the instruction appeared to be an attempt to rephrase the definition of express malice. The instruction did not limit the conduct the jury could use to find appellant guilty of first degree murder.

The trial court also instructed the jury that "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 that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the

idea of deliberation, it is murder of the first degree." (Vol. 11, R.T. p. 2700.) This language again only set forth one theory upon which the jury could find appellant guilty of first degree murder, rather than limiting the basis upon which the jury could find the killing to be first degree murder. The language did not preclude the jury from finding appellant guilty of first degree murder based on implied malice. The verdict form for count one merely stated that "We, the jury in the above entitled case, find the defendant, GABRIEL CASTANEDA, GUILTY of the crime of MURDER IN THE FIRST DEGREE, as to count 1." (Vol. 2, C.T. p. 364.) The verdict form did not therefore establish that the jury found that appellant committed a deliberate and premeditated murder. The special circumstance findings for the murder count addressed the commission of the crimes of burglary, kidnaping, rape, sodomy, and burglary, and not whether the killing was intentional and premeditated.

Furthermore, the jury was told that "if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true." (Vol. 11, R.T. p. 2702.) Hence, the true finding to the special circumstances allegations under count one clearly did not establish a finding by the jury that appellant intentionally and with premeditation killed the victim.

The felony murder instructions did not require the jury to find that appellant intentionally and with premeditation killed the victim. The felony murder instruction told the jury that appellant could be found guilty of first degree murder whether the killing was

"intentional, unintentional, or accidental. . ." (Vol. 1, C.T. p. 295; Vol. 11, R.T. p. 2701.) Furthermore, as explained below, the evidence did not conclusively establish the commission of a felony during the murder. Given the failure of the evidence to conclusively establish the commission of a felony during the murder, it cannot be concluded beyond a reasonable doubt that the jury did not base the first degree murder conviction on an implied malice theory. Hence, the giving of felony murder instructions did not render harmless the giving of implied malice instructions.

The jury is presumed to follow the trial court's instructions. (*People v. Poslof* (2005) 126 Cal.App.4th 92, 99.) Because the trial court gave implied malice instructions, it must be presumed that the jury considered that theory during its deliberations. As explained above, there was nothing in the other jury instructions that precluded the jury from basing the first degree murder conviction on a theory of implied malice. The prosecutor argued that appellant committed a premeditated and deliberate killing, and also committed felony murder. (Vol. 11, R.T. pp. 2726-2727.) However, the prosecutor argued a theory that appeared to be based on implied malice:

> And then the defendant got a hold of the victim, took the victim from the front office to the back office, either by force or by threat. Judging from her injuries, it was by force. He got her in the back office. And then he took off her shoes and her socks. He actually took the shoe laces out of her shoes. He then tied and bound her and then he proceeded to place her up onto the examination table and he pulled down her lower clothing. And then after he sexually assaulting he stabbed her numerous times.

> It is obvious that the defendant intended these particular acts. Intended these particular acts and had a great deal of time to go through and say now should I stop here? Have I gotten in over my head? Is this something that I really want to do? I'm obviously putting this person at great risk. Yet the defendant went ahead, Mr. Castaneda went ahead and killed his victim after he had done this. This is a willful, deliberate, premeditated act with an intent to kill.

(Vol. 11, R.T. pp. 2729-2730.)

The prosecutor's comment that "I'm obviously putting this person at great risk" is an argument that conduct which has a strong likelihood of killing someone constitutes willful, deliberate, and premeditated murder, rather than first degree murder requiring a subjective desire by appellant to kill the victim. The prosecutor's comment that "this is a willful, deliberate, premeditated act with an intent to kill" did not clarify that appellant had to subjectively intend the death of the victim because the prosecutor described appellant's conduct of assaulting the victim and then stabbing her as a willful, deliberate, and premeditated act. (Vol. 11, R.T. pp. 2730-2731.)

Because of the circumstances and manner of the victim's death, it is highly likely that the jury found appellant guilty of first degree murder based on an implied malice theory. The issue of whether appellant intended to kill the victim was not resolved under other instructions given to the jury. There was no evidence about what happened prior to the assault or why it occurred. Appellant did not make any statements or admissions that he intended to cause the victim's death. Appellant denied any role whatsoever in the victim's death. Appellant's intent to kill could only be determined from the manner of the victim's

death.

Appellant explained in Issue II why the manner of the victim's death suggested that appellant did not intend to kill her. Many of the neck wounds were superficial, and were consistent with appellant attempting to compel the victim to obey his commands. (Vol. 5, R.T. p. 1193.) Appellant's assault on the victim was obviously an intentional act which was dangerous to human life and performed with conscious disregard for human life. Because: (1) the jury instructions allowed the jury to find appellant guilty of first degree murder based on an implied malice theory; (2) there was no direct evidence that appellant intended to kill the victim; and, (3) the manner of the victim's death did not conclusively establish that appellant subjectively intended to kill the victim, the giving of implied malice instructions was prejudicial.

Several cases which are distinguishable from the instant case have found the giving of implied malice instructions to be harmless error. In *People v. Combs*, *supra*, 34 Cal.4th 821, the defendant beat and strangled the victim with an accomplice and stole her vehicle. The jury found true the special circumstances of lying in wait and robbery. The defendant was sentenced to death. The jury was instructed on the theories of deliberate, premeditated murder and felony murder, and second degree murder based on theories of express and implied malice. The defendant argued that the instructions erroneously allowed the jury to find him guilty of first degree murder based on implied malice. The court noted that the jury had been given CALJIC 8.31. The Court concluded that "[b]ecause the definition of second

degree murder, as given in CALJIC No. 8.31, included the element of implied malice, as defined in CALJIC No. 8.11, the jury was informed that the implied malice instruction applied to the offense of second degree murder." (*People v. Combs*, *supra*, 34 Cal.4th at p. 857.)

The trial court in the instant case did not give CALJIC 8.31. Hence, the jury was not told that implied malice applies only to the crime of second degree murder. Furthermore, the jury was not given second degree murder instructions in the instant case. The only crime to which the jury could have applied the implied malice instructions was first degree murder.

People v. Combs also concluded that the true finding to the special circumstance of lying in wait meant that the jury had found that the defendant intentionally killed the victim. None of the special circumstances found true in this case required the jury to find that appellant intentionally killed the victim. *People v. Combs* also noted that the robbery-felony-murder special circumstances finding meant that the jury found the defendant killed the victim while engaged in a robbery. As explained below, the evidence that appellant committed a felony while murdering the victim was conflicting. The giving of implied malice instructions could only have confused the jury about what was required to find appellant guilty of first degree murder.

In *People v. Cain*, the defendant was found guilty of first degree murder based on a felony-murder theory. The trial court incorrectly gave an implied malice instruction. At the time the case was tried, intent to kill was an element of felony murder under this Court's

decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, overruled by *People v. Anderson* (1987) 43 Cal.3d 1104. The defendant argued that the giving of implied malice instructions injected confusion into the intent instructions that were properly given, and prevented the jury from understanding that intent to kill was a necessary element of the special circumstances charge. The Court noted that the trial court had properly instructed the jury with CALJIC 3.31 and 8.21, which told the jury that the intent necessary for felony murder was a specific intent to commit one of the underlying felonies. The Court stated that "[i]n light of these instructions, which clearly applied to the evidence presented and the arguments made during the trial, we do not find a reasonable likelihood the unnecessary definition of implied malice included in the instructions misled the jury about the intent necessary to convict defendant of murder under the felony-murder theory. When the instructions are viewed as a whole, it is clear the implied malice instruction related only to the general definition of murder given to the jury." (*People v. Cain*, *supra*, 10 Cal.4th at p. 36.)

As explained in Issue II, the evidence was conflicting, and possibly insufficient as a matter of law, to prove that a felony was actually committed during the course of the victim's death. Hence, if the first degree murder conviction cannot be sustained on the felony murder theory, it is clear that the giving of implied malice instructions impaired the jury's finding of a deliberate and premeditated murder.

It was not clear from the instructions that implied malice did not apply to felony-murder. The trial court instructed the jury that murder is committed when a killing is done

"with malice aforethought or occurred during the commission or attempted commission of burglary, kidnaping, rape, sodomy by use of force, or robbery . . ." (Vol. 11, R.T. p. 2699.) The trial court then defined express and implied malice. (*Ibid.*) Implied malice was defined as an intentional act dangerous to human life, and performed with knowledge of the danger to, and conscious disregard, for human life. (*Ibid.*) This definition did not require an intentional killing. The felony murder instruction told the jury that "the unlawful killing of a human being . . . which occurs during the commission or attempted commission of one or more of the following crimes or as a direct causal result of one or more of the following crimes . . . is murder of the first degree when the perpetrator had the specific intent to commit that crime." The implied malice instruction impaired the jury's findings regarding felony murder because: (1) it is presumed that the jury followed the trial court's instructions and considered the implied malice instruction during its deliberations; (2) the jury was not given second degree murder instructions and could not therefore assess the implied malice instruction in connection with that crime; (3) implied malice included an unintentional killing; (4) felony murder included an unintentional killing; (5) the evidence was weak and conflicting that a felony was actually committed in connection with the killing; and, (6) the above facts create a reasonable likelihood that the jury used implied malice as the standard for finding the commission of a felony in connection with the murder.

The giving of implied malice instructions was prejudicial. Hence, the judgment of guilt to count one must be reversed.

V

THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCE FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON KIDNAPING, SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT KIDNAPED THE VICTIM

1. SUMMARY OF ARGUMENT

Appellant was found guilty in count 3 of kidnaping in violation of Penal Code section 207, subdivision (a). (Vol. 2, C.T. p. 373; Vol. 12, R.T. p 2873.) A required element of kidnaping is that the victim be moved for a substantial distance against his or her will. The evidence failed to show any forcible movement of the victim. The crime of kidnaping requires movement of the victim for a substantial distance. Even if the victim had been moved against her will, all the movement occurred in a building and involved a short distance. This evidence is insufficient to prove that the victim was moved the requisite distance. The judgment of guilt to count 3, and the special circumstances finding that appellant committed kidnaping, should be reversed. Furthermore, the finding of a kidnaping committed during the course of a murder under count one should be vacated.

2. STANDARD OF REVIEW

The due process clause of the Fifth and Fourteenth Amendments requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068.) The critical inquiry

upon a challenge to the sufficiency of the evidence to support a criminal conviction is whether the record, when read in a light most favorable to the judgment, contains substantial evidence from which a reasonable trier of fact could reasonably have found defendant guilty of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1970) 443 U.S. 307, 314-315, 99 S.Ct. 2781, 61 L.Ed.2d 560.) "Substantial evidence" is evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1020; *People v. Conner* (1983) 34 Cal.3d 141, 149.) Substantial evidence must be more than evidence which merely raises a strong suspicion of guilt as mere suspicion will not support an inference of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695.) Evidence of each of the essential elements of the crime must be substantial. (*People v. Hernandez* (1988) 47 Cal.3d 315, 345-346)

Mere conflicts in the evidence or testimony which is subject to justifiable suspicion do not warrant reversal of a judgment. (*People v. Wells* (1988) 199 Cal.App.3d 535, 539, citing *People v. Huston* (1943) 21 Cal.2d 690, 693.) Because an appellate court can give credit only to "substantial" evidence, however, the substantial evidence rule necessarily mandates consideration of the weight of the evidence by the trier of fact in determining whether it is sufficient. (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

3. LEGAL ELEMENTS OF THE CRIME OF KIDNAPING

Penal Code section 207, subdivision (a), provides as follows:

> (a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnaping.

The crime codified in section 207, subdivision (a), is commonly known as simple kidnaping. (*People v. Martinez* (1999) 20 Cal.4th 225, 229.) The crime codified in Penal Code section 209 is kidnaping for the purpose of committing specific crimes such as rape and robbery. A violation of section 209 is commonly referred to as aggravated kidnaping. (*Id.*, at p. 232.)

In *People v. Daniels* (1969) 71 Cal.2d 1119, this Court adopted a two-part test for the asportation requirement for aggravated kidnaping. *Daniels* held that aggravated kidnaping requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that present in the commission of the underlying crime. (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1139.) In *People v. Stanworth* (1974) 11 Cal.3d 588, the Court distinguished the asportation requirement for simple kidnaping from the asportation requirement for aggravated kidnaping. The Court stated that "where only simple kidnaping is involved, it is clear that the victim's movement cannot be evaluated in the light of a standard which makes reference to the commission of another crime." (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 600.) The Court stated that distance was the critical factor and "the victim's movement must be more than slight [citation] or trivial [citation], they must be substantial in character to constitute kidnaping under section 207." (*Id.*, at p. 601.)

People v. Caudillo (1978) 21 Cal.3d 562, further defined the asportation requirement for simple kidnaping. The defendant moved the rape victim for an unspecified distance from the elevator to the storage room, and from the storage room to her apartment. (*Id.*, at p. 572.) *People v. Caudillo* focused solely on the distance the victim was moved in finding the asportation insufficient to prove simple kidnaping. (*Id.*, at pp. 573-574.) It also expressly rejected consideration of any factor other than distance in determining whether asportation had occurred:

> The People seek to introduce considerations -- other than actual distance -- as determinative of what constitutes "sufficient movement" of the victim to constitute the offense of kidnaping pursuant to Penal Code section 207. The People claim that intimations in *Stender* suggest that, in the case before us, we should consider Maria's movement substantial because defendant moved Maria to the storage room to avoid detection, thereby increasing her danger, and then waited 20 minutes before he moved her to her apartment. In our view, this position is lacking in substance. Neither the incidental nature of the movement, the defendant's motivation to escape detection, nor the possible enhancement of danger to the victim resulting from the movement is a factor to be considered in the determination of substantiality of movement for the offense of kidnaping. Such factors would be relevant in a *Daniels* situation of aggravated kidnaping -- a kidnaping for the purpose of robbery (Pen. Code, §§ 209) -- but we held in *Stanworth* that the *Daniels* test was not applicable to simple kidnaping under Penal Code section 207.

(*People v. Caudillo*, *supra*, 21 Cal.3d at p. 574.)

People v. Martinez, *supra*, 20 Cal.4th 225, overruled *People v. Caudillo*, and expanded the range of factors that establish asportation for simple kidnaping. *People v.*

Martinez addressed whether the asportation requirement of Penal Code section 208, subdivision (a), was satisfied. *People v. Martinez*, however, stated that section 208, subdivision (a), and section 207, subdivision (a), had the same asportation requirement. (*People v. Martinez*, *supra*, 20 Cal.4th at pp. 236-237.) The trier of fact, in determining whether asportation has been established for simple kidnaping, could consider "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez*, *supra*, 20 Cal.4th at p. 237.) However, federal due process of law prevented the retroactive application of its decision because it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." (*People v. Martinez*, *supra*, 20 Cal.4th at p. 238.) Hence, the movement of the victim in *People v. Martinez* was insufficient as a matter of law to prove asportation. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 239, citing *People v. Brown* (1974) 11 Cal.3d 784, 789 and *People v. Green* (1980) 27 Cal.3d 1, 67.)

4. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE ASPORTATION

As mentioned above, the crime of kidnaping requires the forcible movement of the victim. (Pen. Code §207, subd. (a); *People v. Martinez*, *supra*, 20 Cal.4th at p. 237.) The prosecution failed to present any evidence that the victim was forcible moved. There were no signs of a struggle in any room other than the procedure room where the victim's body

was found. The presence of a book on the floor in the victim's office does not support the conclusion beyond a reasonable doubt that appellant forcibly moved her from that location in the building. The victim could have placed the book on the floor voluntarily while she answered the door or performed some other function. There was no evidence that the victim's office was in disarray. Ms. Kennedy could have taken appellant to the procedure room to administer medical treatment. Because of the complete lack of evidence that the victim was forcible moved, the kidnaping conviction must be reversed.

Furthermore, even if there was some basis to infer that the victim was forcibly moved within the medical building, the distance she was moved was insufficient to prove that asportation occurred.

Two office buildings occupied the lot where the murder occurred. Dr. Vassantachart's office was in the south building. (Vol. 5, R.T. pp. 1045-1048, 1060.) Exhibit Three is a diagram of the medical building where the murder occurred. (Vol. 5, R.T. p. 1050.) The distance from the victim's office to the procedure room where her body was found was approximately 40 to 50 feet. (Vol. 6, R.T. p. 1286.) A book the victim was reading was found on the floor of her office. (Vol. 4, R.T. p. 873; Vol. 5, R.T. p.1069; exhibit 13, photograph C.) The building did not have any sign of forced entry. (Vol. 6, R.T. p. 1284.) A hallway led from the victim's office to the procedure room. (Exhibit 3.)

The entrance to Dr. Vassantachart's medical office was in the rear of the building where the parking lot was located. (Vol. 5, R.T. pp. 1044-1045; Exhibit 11.) The entrance

to the medical office leads to a waiting area for patients. The victim's office was immediately to the right of the front door. The area marked "victim's office" on Exhibit Three was Ms. Kennedy's office, and where the book was found. (Vol. 4, R.T. p. 873; Vol. 5, R.T. p. 1050.) The victim's office was nine feet by nine feet and eight inches. (Exhibit Three.)

The area where the victim's body was found was outlined in red on Exhibit Three and marked, "Exam Room, Location of Homicide." (Vol. 5, R.T. pp. 1053-1055; Exhibit Three.) The reception are was immediately to the left as one exits the door to the victim's office. It was eight feet, six inches by six feet, ten inches. The break room was immediately to the right It was nine feet, seven inches, by six feet and four inches. The X-ray room was the next room after the break room traveling west down the hall through the reception area and towards the procedure room. The X-ray room was eleven feet, six inches, by seven feet and 11 inches. The door to the exam room was immediately to the left traveling down the hall past the south wall of the X-ray room. (Exhibit Three.) Based on a review of Exhibit Three, the distance between the victim's office and the procedure room was between 30 feet and 50 feet, assuming a straight path of travel from the office to the procedure room.[15]

People v. Martinez cited *People v. Brown* and *People v. Green* as cases in which the evidence was insufficient to prove asportation under the standard in *People v. Caudillo*. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 239.) The homicide in this case occurred on

[15] During his testimony, Detective Price estimated the distance between the victim's office and the procedure room was between 40 and 50 feet. (Vol. 6, R.T. p. 1286.)

March 30, 1998. *People v. Martinez* was decided April 8, 1999. *People v. Martinez* held that its holding could not be applied retroactively because of the due process clause. (*People v. Martinez, supra*, 20 Cal.4th at pp. 239-240.) Therefore, the issue of whether appellant asported the victim must be analyzed under the standard in *People v. Caudillo*.

In *People v. Brown*, the defendant confronted the victim in the kitchen of a residence. He forced her to look through the house for her husband. They returned to the kitchen and then went to the living room. The defendant then dragged the victim out of the residence for a distance estimated to be no more than 75 feet. He released the victim when confronted by a neighbor. The Court concluded that "the evidence is insufficient to show that the movements were substantial. The asporation of the victim within her house and for a brief distance outside the house must be regarded as trivial." (*People v. Brown, supra*, 11 Cal.3d at p. 789.) In *People v. Green*, the defendant moved his victim a distance of 90 feet from a vehicle to the location where he shot her. The Court cited *People v. Brown,* and concluded that the distance traveled by the victim was insufficient to prove that she had been kidnaped.

The victim in this case was moved a shorter distance than the victims in *People v. Brown* and *People v. Green*. *People v. Brown* and *People v. Green* found movements of 75 and 90 feet insufficient as a matter of law to prove asportation. Assuming that the victim was forcibly moved, that movement was a distance of between 30 to 50 feet. This movement was insufficient as a matter of law to prove asportation.

Because the prosecution failed to prove that the victim was asported, the judgment

of guilt to count 3 must be reversed. The kidnaping was alleged as a special circumstance under Count 1, and it was found true by the jury. (Vol. 1, C.T. pp. 287, 296; Vol. 12, R.T. p. 2871.) This special circumstance finding must be stricken. Finally, kidnaping was one of the felonies relied upon by the jury to find that appellant committed felony murder. (Vol. 1, C.T. pp. 291, 295; Vol. 12, R.T. p. 2871.) The portion of the felony-murder finding which rested upon the kidnaping allegation must therefore be stricken.

The prejudice argument from Argument XIV concerning the reversal of the special circumstance findings is hereby incorporated in this argument and will not be repeated for purpose of brevity. The reversal of count 3, and the striking of the kidnaping findings under the felony-murder conviction and the special circumstances findings, must result in reversal of the judgment of death.

VI

THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCES FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON A KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION

1. SUMMARY OF ARGUMENT

As discussed in Issue V, appellant was found guilty in count 3 of kidnaping in violation of Penal Code section 207, subdivision (a). The kidnaping was also alleged as a felony in the felony-murder instructions for count 1. The jury found true under count 1 the special circumstance of kidnaping. *People v. Martinez, supra*, 20 Cal.4th 225, expanded the range of factors the trier of fact could consider to prove the element of asportation under section 207, subdivision (a). Prior to the decision in *People v. Martinez*, the only factor in determining whether asportation had occurred under section 207, subdivision (a), was the distance the victim was moved. *People v. Martinez*, however, did not apply its holding to cases in which the crime was committed prior to the decision.

The murder and kidnaping of the victim occurred prior to the decision in *People v. Martinez*. The trial court gave an instruction based on *People v. Martinez*, which allowed the jury to find appellant guilty of kidnaping based on a variety of factors other than distance. The giving of this erroneous instruction violated appellant's right to due process of law under the federal and state constitutions, his Sixth Amendment right to a jury trial,

and his Eight Amendment and Fourteenth Amendments right against the imposition of cruel and unusual punishment. It also violated appellant's corresponding rights under the California Constitution.[16] Hence, the judgment of guilt to count 3 must be reversed. Furthermore, the portion of the felony-murder conviction based on a kidnaping, and the special circumstance finding of a kidnaping, must be reversed. Finally, the judgment of death must be reversed.

2. SUMMARY OF PROCEEDINGS BELOW

The description of the facts concerning the kidnaping is set forth in Argument III and hereby incorporated in this portion of the brief. The trial court gave the following instruction for count 3:

> Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains or arrests another person and carries that person without her consent or compels any person without her consent and because of a reasonable apprehension of harm, to move for a distance that is substantial in character, is guilty of the crime of kidnaping in violation of Penal Code section 207, subdivision (a).
>
> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement or decreased

[16] The corresponding provisions of the California Constitution are Article I, section 7 [due process of law] and Article I, section 17 [prohibition against the imposition of cruel and unusual punishment.]

> the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit the additional crimes. If an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was moved by the use of physical force, or by any other means of instilling fear;
>
> 2. The movement of the other person was without her consent; and
>
> 3. The movement of the other person in distance was substantial in character.

(Vol. 1, C.T. p. 305; Vol. 11, R.T. pp. 2707-2708.) The clerk's transcript states that the instruction is from the 1999 revision of the CALJIC instructions. The instruction is CALJIC 9.50. (Vol. 1, C.T. p. 305.)

People v. Martinez expanded the factors that could be considered to prove asportation for simple kidnaping to include "whether the movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez, supra*, 20 Cal.4th at p. 237.)

The version of CALJIC 9.50 given to appellant's jury included the factors outlined above in *People v. Martinez*. However, the holding of *People v. Martinez* was not applied

retroactively. Because the kidnaping occurred prior to the decision in *People v. Martinez*, the trial court erred by giving the 1999 revision of CALJIC 9.50.

3. THE ERRONEOUS VERSION OF CALJIC 9.50 GIVEN TO THE JURY VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, AND HIS RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS

Jury instructions which relieve the prosecution of the burden of proving each element of an offense beyond a reasonable doubt violate federal due process of law. (*Carella v. California*, *supra*, 491 U.S. 263 at p. 265; *Francis v. Franklin*, *supra*, 471 U.S. at p. 312.) Similarly, such instructions violate a defendant's right to a jury trial under the Sixth and Fourteenth Amendments. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.)

The giving of a jury instruction which defined asportation based on the decision in *People v. Martinez* deprived appellant of fair warning that his conduct was criminal and hence violated the notice requirement of due process. "The basic principle that a criminal statute must give fair warning of the conduct it makes a crime has often been recognized by this Court." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 350-351, 84 S.Ct. 1697, 12 L.Ed.2d 894.) In *Bouie v. City of Columbia*, the South Carolina Supreme Court affirmed the defendant's convictions for trespassing when they refused to leave a drugstore after being asked to do so. The South Carolina Supreme Court construed the statute under which the defendants were convicted in a manner that was not apparent from the text of the statute and which had not been the subject of prior judicial opinion. The Court noted that "[t]here

can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." (*Bouie v. City of Columbia, supra*, 314 U.S. at p. 352.) Hence, "[i]f the state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Id.*, at pp. 353-354.) The Court thus concluded that retroactive effect could not be given to court decisions which construe criminal statutes in a manner that was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. (*Id.*, at p. 354.)

People v. Martinez expanded the definition of asportation for the crime of kidnaping under section 207, subdivision (a), in a manner that was unexpected and indefensible by reference to the law that was in place prior to appellant's commission of the charged offenses. Prior to *People v. Martinez*, the only factor relevant in determining whether a kidnaping had occurred under section 207, subdivision (a), was distance of movement. *People v. Martinez* expanded the test for asportation for kidnaping to include many other factors such as the defendant's opportunity to escape detection and increase in likelihood that the victim would be injured. Indeed, this Court held in *People v. Martinez* that its expansion of the test for asportation could not be applied retroactively. The trial court's giving of a jury instruction which defined asportation based on the decision in *People v. Martinez* thus violated appellant's right to state and federal due process of law.

The trial court's erroneous instruction defining asportation also violated appellant's right to have the jury determine his guilt as required by the Sixth Amendment and Article I, section 16 of the California Constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 [a jury instruction which relieves the jury of finding all the facts necessary to determine the defendant's guilt beyond a reasonable doubt violates the Sixth Amendment right to a jury trial].) The erroneous asportation instruction prevented the jury from determining if the victim had been moved a substantial distance–a required element of kidnaping under the law prior to *People v. Martinez.*

The erroneous instruction also violated the prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17 of the California Constitution. The prohibition against cruel and unusual punishment forbids any procedure which "substantially increas[es] the risk of error in the fact finding process." (*Beck v. Alabama, supra*, 447 U.S. at p. 632.) The erroneous definition of asportation given to the jury substantially increased the risk that appellant would be found guilty of first-degree murder, and the kidnaping special circumstance allegation would be found true, based on a legal theory that verdict or true finding. Appellant would not have been eligible for the death penalty without true findings to the special circumstance allegations.

4. STANDARD OF REVIEW

The issue of whether the trial court correctly instructed the jury is reviewed de-novo.

(*People v. Cole*, *supra*, 33 Cal.4th 1158 at p. 1206.) Hence, this Court should apply the de-novo standard of review in deciding whether the trial court's definition of asportation was erroneous.

5. THE LACK OF A DEFENSE OBJECTION DOES NOT PRECLUDE THIS COURT FROM DETERMINING WHETHER THE JURY WAS GIVEN ERRONEOUS INSTRUCTIONS REGARDING THE ELEMENT OF ASPORTATION

The defense counsel did not object to the version of CALJIC 9.50 that was given to the jury. Under Penal Code section 1259, this Court can review any jury instruction that is erroneous and prejudicial, despite the lack of an objection in the trial court. Hence, this Court can determine whether the version of CALJIC 9.50 given to the jury was erroneous and prejudicial, despite the lack of an objection in the trial court.

6. PREJUDICE

Because the giving of an instruction which erroneously defined asportation for simple kidnaping violated appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, the judgment of guilt to count 3 must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The erroneous definition of asportation also violated appellant's rights under the California Constitution. Because appellant had a due process right to have the State follow its own rules and procedures, (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346), the violations of appellant's state constitutional rights must also result in reversal of count 3 and the kidnaping special circumstance finding unless the errors were

harmless beyond a reasonable doubt.

The test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The erroneous version of CALJIC 9.50 given to the jury was not harmless beyond a reasonable doubt. The instruction relieved the prosecution of the burden of proving the element of movement of the victim a substantial distance. As argued in Issue V, the prosecution did not present any evidence that the victim was moved.

However, assuming this Court believes that there was some evidence from which it could be inferred that the victim was moved, that movement was for a very short distance–approximately 30 to 50 feet. Several cases have held that movement of greater distance than what occurred in this case was not sufficient to prove asportation under section 207, subdivision (a). (*People v. Brown*, *supra*, 11 Cal.3d at p. 789; *People v. Green*, *supra*, 27 Cal.3d at p. 67.)

A correct jury instruction would have told the jury to consider only the distance moved by the victim. (*People v. Martinez*, *supra*, 20 Cal.4th at pp. 234-235; *People v. Caudillo*, *supra*, 21 Cal.3d at p. 572.) Instead, the jury considered a whole variety of factors other than distance. Many of the improper factors the jury was instructed to consider applied in the instant case. Ms. Kennedy was moved from her front office, where individuals outside the building could have heard an altercation, to the procedure room, which was a

more remote location in the building. Appellant decreased the likelihood that he would be detected in the procedure room by putting boxes on the window sill and blocking any view into the room from Central Avenue. The jury most likely concluded that the victim's movement increased the risk of harm by making a successful assault more likely, decreased the victim's opportunity to escape because she was further away from an exit that was not locked or blocked, and decreased the likelihood of detection. During closing argument, the prosecutor, furthermore, argued the change in the victim's location to support the kidnaping charge. He argued that:

> so the defendant when he entered there and decided to attack the victim had to take her into a different part of the office, and he took her into one of the back rooms. Now, the actual distance is only about 50 to 60 feet, I believe. Yes. Not a great distance in terms of actual feet. But in terms of what we look for in this type of crime, kidnaping, did not put her at a disadvantage. Did it change her situation? Did it become more likely that she was going to be attacked. Did it become more likely that this crime was not going to be discovered? Absolutely. Absolutely.
>
> As a matter of fact, as you looked at the video, as you will see in the pictures and as you heard from the evidence from Detective Price and from Dr. Vassantachart that this particular room was the most isolated part of that office, and this is where the defendant took his victim so that he could attack her and not be disturbed. So he took her from a place some safety into a place of that she had no hope whatsoever.

(Vol. 11, R.T. pp. 2734-2735.) The prosecutor's use of the improper factors in CALJIC 9.50 during his closing argument only increased the prejudice from the giving of the erroneous instruction.

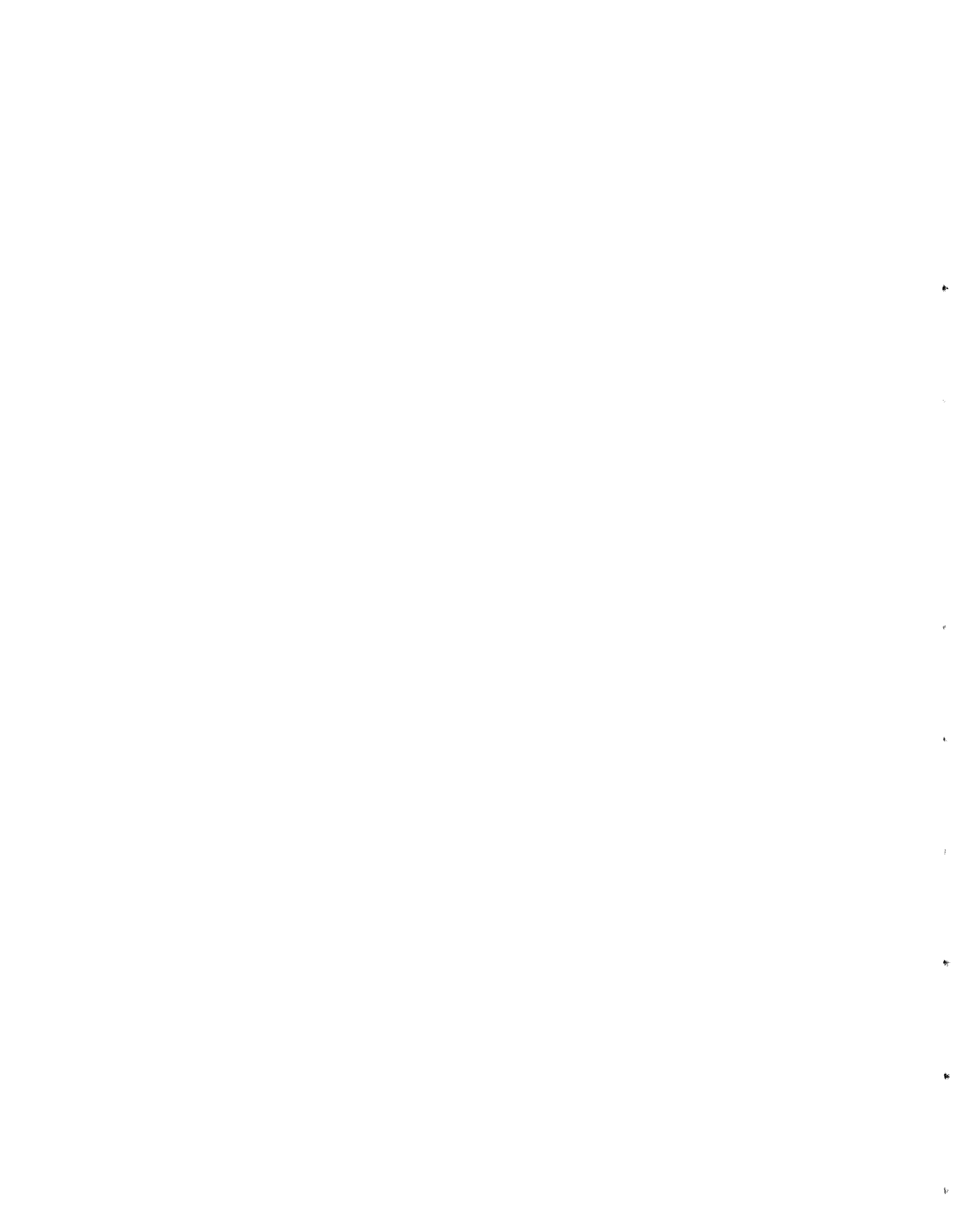
The giving of CALJIC 9.50 was prejudicial. The judgment of guilt to count 3 must be reversed. The jury determined the felony-murder kidnaping allegation and the special circumstance of kidnaping by using the erroneous version of CALJIC 9.50 that was given to the jury. Hence, the portion of the felony-murder finding based on a kidnaping must be stricken, as well as the special circumstance finding of a kidnaping. For the reasons explained in Argument XIV, the judgment of death must also therefore be reversed.

VII

THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCES FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON A KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FALSE IMPRISONMENT, IN VIOLATION OF: (1) APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

1. SUMMARY OF ARGUMENT

Appellant was found guilty in count 3 of kidnaping. False imprisonment is a lesser included offense of kidnaping. The trial court had a duty under the federal and state due process clause to give jury instructions on all lesser included offenses raised by the evidence. The evidence raised a question of appellant's guilt of the lesser included offense of false imprisonment. The prosecution failed to present any evidence that the victim was forcibly moved. Furthermore, even if there was evidence from which it could be inferred that the victim was moved, that movement was for a short distance. Because of the lack of evidence of substantial movement of the victim, the trial court's failure to instruct the jury on the lesser included offense of false imprisonment was prejudicial. Hence, the judgment of guilt to count 3 should be reversed, and the felony-murder finding based on kidnaping and the special circumstance finding of kidnaping should be vacated. The judgment of death must



The requirement that courts give *sua sponte* instructions on lesser included offenses "is based on the defendant's constitutional right to have the jury determine every material issue presented by the evidence." (*People v. Ramkeesoon*, *supra*, 39 Cal. 3d at p. 351.)

The trial court was required to give jury instructions on all lesser included offenses raised by the evidence under the due process clause of the Fifth and Fourteenth Amendments, and the due process clause of the California Constitution. In *Beck v. Alabama, supra*, 447 U.S. 625, the Supreme Court held that the trial court's failure to instruct the jury on a lesser included offense raised by the evidence violated the defendant's right to due process of law and the Eight Amendment prohibition against imposition of cruel and unusual punishment. (*Beck v. Alabama*, *supra,* 447 U.S. at pp. 637-638.) The basis for the Court's decision was that failure to instruct on a lesser included offense enhanced the risk of an unwarranted conviction. (*Ibid.*)

The lesser included offense at issue in *Beck v. Alabama* was felony-murder as a lesser offense of robbery-intentional killing. The lesser included offense at issue in this case is false imprisonment as a lesser included offense of kidnaping. The reason why the due process clause and the Eighth Amendment prohibition against cruel and unusual punishment required instructions on the lesser included offense of felony-murder in *Beck v. Alabama* also applies to the instant case. Kidnaping is a more serious and aggravated offense than false imprisonment. The kidnaping was found true as a special circumstance and one of the felonies supporting the felony-murder conviction. Appellant's commission of a kidnaping

obviously influenced the jury in its decision that death was the appropriate punishment. The trial court's failure to instruct the jury on the lesser offense of false imprisonment increased the likelihood that appellant would be put to death when the jury should have been considering a lesser crime in its sentencing decision.

Appellant's right to a jury trial under the Sixth and Fourteenth Amendments, and Article I, Section 16 of the California Constitution, also required the trial court to instruct the jury on the lesser included offense of false imprisonment. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 [the Sixth Amendment requires the jury to find the facts which determine a defendant's guilt].) The jury was required to determine if appellant's conduct amounted to false imprisonment rather than kidnaping.

The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v. Alabama, supra*, 447 U.S. at p. 632.) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in the guilt phase of a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) By preventing the jury from considering appellant's guilt of an offense that would have removed him from eligibility for the death penalty (at least with regard to the felony-murder conviction based on kidnaping and the kidnaping special circumstance allegation), the trial court's failure to instruct the jury on false imprisonment increased the risk that appellant would erroneously be sentenced to death.

4. STANDARD OF REVIEW

The reviewing court applies the de-novo standard of review to the issue of whether the trial court should have instructed the jury on lesser included offenses. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) Hence, this Court should apply the de-novo standard of review in determining whether the trial court committed error by failing to instruct the jury on false imprisonment as a lesser included offense of kidnaping.

5. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FALSE IMPRISONMENT FOR COUNT 3

Penal Code section 236 defines the crime of false imprisonment as "the unlawful violation of the personal liberty of another." Penal Code section 237 makes false imprisonment a felony if it is "effected by violence, menace, fraud, or deceit . . ."[17] "The essential element of false imprisonment . . . is restraint of the person." (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 717.) False imprisonment by violence is a lesser included offense of kidnaping. (*People v. Gibbs* (1970) 12 Cal.App.3d 526, 547.)

The trial court erred by failing to instruct the jury on the crime of false imprisonment by violence as a lesser included offense of kidnaping. There was no evidence that the victim was forcibly moved. Even if the victim was moved, it was for a short distance in the medical

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[17] CALJIC 9.60 is the pattern jury instruction for false imprisonment. According to CALJIC 9.60, the elements of false imprisonment are: (1) a person intentionally and unlawfully restrained, confined, or detained another person, compelling him or her to stay or go somewhere; (2) the other person did not consent to the restraint, confinement or detention; and (3) the restraint, confinement, or detention was accomplished by violence or menace.

building. That movement was insufficient as a matter of law to prove movement of the victim a substantial distance, which was a required element of kidnaping. Hence, the trial court erred by failing to instruct the jury on the lesser included offense of false imprisonment by violence for count 3.

6. THE TRIAL COURT HAD A DUTY TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES FOR FELONIES ALLEGED AS SPECIAL CIRCUMSTANCES AND UNDER THE FELONY-MURDER ALLEGATION

The crime of kidnaping was found true as a special circumstance and was one of the felonies which formed the basis for finding appellant guilty of felony-murder. This Court has held that a trial court does not have a *sua sponte* duty to instruct the jury on grand theft as a lesser included offense of robbery when robbery is alleged only as the felony in a felony-murder prosecution, or alleged as a special circumstance for the death penalty. (*People v. Valdez* (2004) 32 Cal.4th 73, 110-111; *People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) The issue here is how these decisions impact a trial court's duty to sua sponte instruct on false imprisonment as a lesser included offense of the kidnaping special circumstance allegation and the kidnaping felony-murder allegation.

Kidnaping was a charged offense in the instant case. The rule that instructions for lesser included offenses do not have to be given for felony murder and special circumstance allegations applies only when the greater offense was not a charged crime. (*People v. Silva*, *supra*, 25 Cal.4th at p. 371 [concluding that because robbery was not a charged offense, the

trial court did not have a sua sponte duty to instruct the jury on theft as a lesser included offense of robbery under the felony-murder charge and robbery special circumstance allegation].) Because kidnaping was a charged crime, the trial court had a sua sponte to instruct the jury on false imprisonment as a lesser included offense of kidnaping for the felony-murder charge and the kidnaping special circumstance allegation.

Furthermore, this Court should reconsider and reverse its earlier rulings and hold that the trial court does have a *sua sponte* duty to instruct the jury on lesser included offenses when the greater offense is alleged as a felony in a felony-murder charge or as a special circumstance.

Due process required the trial court to instruct the jury on false imprisonment as a lesser included offense of kidnaping for the felony-murder charge and the kidnaping special circumstances. Felony-murder constitutes first-degree murder, (Pen. Code, § 189), and places the defendant in the class of defendants potentially eligible for the death penalty. (Pen. Code 190.2, subd. (a).) True findings to special circumstances make the defendant eligible for the death penalty. (Pen. Code, § 190.2, subd. (a)(1)-(22).)

The reason why *Beck v. Alabama* required instructions on lesser included offense for a murder charge also apply to the giving of a lesser included offense for a felony-murder charge and a special circumstance allegation. "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense–but leaves some doubt with respect to an element that would justify conviction of a capital offense–the failure to

give the jury the `third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) The trial court's failure to instruct the jury on false imprisonment for the felony-murder charge and the kidnaping special circumstance allegation erroneously increased the risk that appellant would become eligible for, and receive, the death penalty. Hence, due process of law required the trial court to give false imprisonment instructions as a lesser included offense of kidnaping for the felony-murder charge and the special circumstances allegation.

This Court's holding that instructions on lesser included offenses are not necessary for predicate felonies under the felony-murder doctrine, and special circumstance allegations, falls squarely within the procedure condemned by the Supreme Court in *Beck v. Alabama*. *Beck v. Alabama* found the Alabama death penalty statute unconstitutional because it deprived the jury of the option of finding the defendant guilty of a lesser offense which would have removed him from eligibility for the death penalty. (*Beck v. Alabama, supra*, 447 U.S. at pp. 636-638.) Similarly, this Court failure to require jury instructions on lesser included offense for predicate felonies under the felony-murder doctrine, and special circumstance allegations, deprives the jury of the option of finding that the defendant committed a crime less than that charged in those allegations and which would make the defendant ineligible for the death penalty. This outcome cannot be reconciled with *Beck v. Alabama*.

Schad v. Arizona (1991) 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, does not undermine appellant's right to a jury instruction on false imprisonment for the felony-murder charge and the kidnaping special circumstance allegation. In that case, the defendant was found guilty of first-degree murder under theories of premeditated murder and felony-murder based on the commission of a robbery. The defendant argued that he was entitled to a jury instruction on robbery as a lesser included offense of the felony-murder allegation. The trial court in *Schad v. Arizona* instructed the jury on the lesser included offense of second-degree murder. The defendant argued that *Beck v. Alabama* entitled him to a jury instruction on robbery. The Court noted that "[o]ur fundamental concern in Beck was that a jury convinced that the defendant had committed some crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." (*Schad v. Arizona, supra*, 501 U.S. at p. 646.) The Court concluded that the concern in *Beck v. Alabama* was "not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence." (*Schad v. Arizona, supra*, 501 U.S. at p. 647.)

In the instant case, the trial court did not give an instruction on second-degree murder. The jury did not therefore have the option of convicting appellant of a murder charge lesser to that of first-degree murder. Appellant's jury was put in the position of finding him guilty of a crime that made him eligible for the death penalty or finding him not guilty of murder.

Under these circumstances, the jury needed the option of finding that appellant committed a felony lesser than the category of felonies that triggered his eligibility for the death penalty.

The prohibition against cruel and unusual punishment in the Eighth Amendment, as applied to the States through the Fourteenth Amendment, also requires the above result. The function of special circumstance findings is to narrow the class of defendants eligible for the death penalty to the worst offenders. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244, 208 S.Ct. 546, 98 L.Ed.2d 568 [to pass constitutional muster under the Eighth Amendment, a capital sentencing scheme must genuinely narrow the class of person eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to the others found guilty of murder].) The felonies listed in section 189 that make a defendant guilty of first-degree murder do not include false imprisonment. Similarly, the special circumstances listed in section 190.2, subdivision (a), that make a defendant eligible for the death penalty do not include false imprisonment. The statutory scheme erected in California to narrow and determine the class of defendants eligible for the death penalty cannot perform the narrowing function required by the Eight Amendment if the jury is precluded from considering whether the defendant committed a crime less than the crime which triggers the defendant's eligibility for the death penalty.

The reason this Court does not require the giving of lesser included offenses for a felony-murder charge and special circumstance allegation is flawed. *People v. Silva* cited *People v. Miller* (1994) 28 Cal.App.4th 522 and *People v. Memro* (1995) 11 Cal.4th 786,

888-890 (conc. & dis. opn. of Kennard, J.) for the proposition that the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as to predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) In *People v. Memro*, Justice Kennard dissented from language in the majority opinion which could have been interpreted to imply that a defendant had the right to a jury instruction on a lesser included offense when the greater crime only served as a predicate offense for a felony-murder charge. The majority opinion concluded that a lesser included offense was not required because the evidence did not raise the defendant's guilt of that offense. (*People v. Memro, supra*, 11 Cal.4th at pp. 870-873.)

Any language in *People v. Memro* from the majority opinion, or Justice Kennard's concurring and dissenting opinion, concerning instructions on lesser included offenses for predicate felonies under the felony-murder doctrine constitutes dicta. Neither opinion addressed how the trial court's failure to instruct on lesser offenses for predicate felonies in a felony-murder impacts the constitutionality of California's sentencing scheme under the Eighth Amendment.

In *People v. Miller, supra*, 28 Cal.App.4th 522, the defendant was found guilty of felony-murder. The jury found true a robbery special circumstance. The defendant argued that the trial court erred by failing to instruct the jury on grand theft as a lesser included offense of robbery. The Court rejected this argument because "the included offense doctrine applies only to charged offenses." (*People v. Miller, supra*, 28 Cal.App.4th at p. 526.)

People v. Miller was not a capital case and did not consider how due process and Eighth Amendment jurisprudence in the context of capital cases impacted the analysis.

People v. Silva erred by relying on Justice Kennard's concurring and dissenting opinion in *People v. Memro*, and the opinion in *People v. Smith*, for the proposition that in a capital prosecution, the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) Neither case supported this broad conclusion.

In *People v. Cash, supra*, 28 Cal.4th 703, the Court revisited the above issue. The defendant in that case argued that the trial court's failure to instruct the jury on theft as a lesser included offense of the robbery that formed the basis for the felony murder charge and the special circumstance allegation violated his Sixth Amendment right to present a defense and Eighth Amendment right not to be subject to cruel and unusual punishment. This Court rejected the argument because "[d]efendant's claim does not fall within the limited situations in which such claims implicate rights under the federal Constitution. California requires a sua sponte instruction on lesser included charged offenses regardless of whether the case is a capital, or a noncapital, one. Therefore, the unavailability of a lesser included offense instruction to an uncharged crime does not operate to weight the outcome in favor of death for defendants facing capital charges." (*People v. Cash, supra*, 28 Cal.4th at p. 738, citing *Hopkins v. Reeves* (1998) 524 U.S. 88, 96, 118 S.Ct. 1895, 141 L.Ed.2d 76, *Beck v.*

Alabama, supra, 447 U.S. at pp. 637-638 and *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn.5.) This reasoning is flawed because the failure to give jury instructions for a kidnaping that forms the basis for a charge of felony murder and a special circumstances does weigh the outcome in favor of imposition of the death penalty. The failure to give the instruction makes the defendant eligible for the death penalty when he otherwise would not be eligible for that punishment. Furthermore, because special circumstances are factors that make some murders worse than other types of murders, each special circumstance found true by the jury presumably played some role in convincing the jury that death was the appropriate punishment.

This Court's conclusion that lesser included offenses should not be given for felonies alleged under the felony-murder doctrine or as special circumstances because "the included offense doctrine applies only to charged offenses," (*People v. Miller, supra*, 28 Cal.App.4th at p. 526), cannot withstand the decisions in *Jones v. United States* (1999) 526 U.S. 227, 143 L.Ed.2d 311, 119 S.Ct. 1215, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348, *Ring v. Arizona* (2002) 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428, and *Blakely v. Washington* (2004) (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

In *Jones v. United States*, the Court considered the federal carjacking statute, which provided for three maximum sentences depending on the level of harm sustained by the victim; 15 years in jail if there was no serious injury to a victim, 25 years if there was

"serious bodily injury," and life in prison if death resulted. The structure of the statute suggested that bodily harm was a sentencing provision. The Court nevertheless concluded that harm to the victim was an element of the crime. (*Jones v. United States, supra*, 526 U.S. at p. 232.) The Court reached this conclusion in order to avoid reducing the jury's role " to the relative importance of low-level gatekeeping," (*Id.*, at p. 244), and noted that its decision was consistent with a "rule requiring jury determination of facts that raise sentencing ceiling" in state and federal sentencing guideline systems. (*Id.*, at p. 251.)

In *Apprendi v. New Jersey*, the defendant pled guilty to a number of charges. The trial court enhanced the defendant's sentence by 10 years because it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or a group of individuals because of race. The issue, according to the Court, was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." (*Apprendi v. New Jersey*, 120 S.Ct. at p. 2351.) The Court noted that there was no historical distinction between an "element" of an offense and a "sentencing factor." Hence, "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition elements of a separate offense." (*Id.*, at p. 2359, fn. 10.)

In *Blakely v. Washington*, the Supreme Court concluded that a Washington State enhancement statute which depended on findings of fact made by the trial judge was unconstitutional:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring*, *supra*, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); *Harris* v. *United States,* 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop*, *supra*, §§ 87, at 55, and the judge exceeds his proper authority.

(*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2537.)

In *United States v. Booker* (2005) 543 U.S.220, 125 S.Ct. 738, 160 L.Ed.2d 621, the Court further explained its decisions in *Apprendi v. New Jersey* and *Blakely v. Washington.* The Court noted that under those decisions, any fact which impacted the defendant's maximum potential sentence constituted an element of a crime:

> The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.,* at 478, 120 S.Ct. 2348. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for

> the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.,* at 476, 120 S.Ct. 2348.

(*United States v. Booker, supra*, 125 S.Ct. at p. 748.)

In *Ring v. Arizona* (2002) 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428, the Court considered the constitutionality of the capital sentencing scheme in Arizona. In Arizona, the jury determined the defendant's guilt of first-degree murder. The trial judge then determines the presence or absence of aggravating facts and whether a judgment of death should be imposed.[18] In *Walton v. Arizona* (1990) 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, the Supreme Court had upheld that constitutionality of Arizona's sentencing scheme because the additional facts found by the trial judge were sentencing considerations and not "element[s] of the offense of capital murder." (*Walton v. Arizona, supra*, 497 U.S. at p. 649.) *Ring v. Arizona* reconsidered the holding of *Walton v. Arizona* in light of its decision in *Apprendi v. New Jersey.* The Court noted that "Apprendi repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question, 'who decided,' judge or jury." (*Ring v. Arizona, supra*, 536 U.S. at pp. 604-605.) The Court thus concluded that "[b]ecause Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S. at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment

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[18] Under Arizona law, the aggravating facts included the defendant's criminal background as well as facts concerning the commission of the charged murder.

requires that they be found by a jury." (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)

The above cases eliminated the concept of a "sentencing factor" as it pertains to facts that must be found to determine the maximum sentence for which a defendant is eligible. The aggravating factors in *Ring v. Arizona*, which the Supreme Court concluded had to be found by the jury, are the functional equivalent of the felonies which were alleged as aggravating circumstances and under the felony-murder charge. If the above cases require the felonies alleged as aggravating circumstances, and under the felony murder charge, to be treated as elements of an offense, then this Court's conclusion that lesser included offenses should not be given for such allegations because "the included offense doctrine applies only to charged offenses," (*People v. Miller, supra*, 28 Cal.App.4th at p. 526), cannot withstand constitutional scrutiny. The Fifth and Fourteenth Amendments right to due process of law, and the Sixth and Fourteenth Amendments right to a jury trial, as interpreted in the above cases, requires that special circumstance allegations, and felonies alleged in connection with a felony-murder charge, be treated as elements of an offense.

For the reasons above, this Court should reverse its holdings in *People v. Valdez, People v. Cash*, and *People v. Silva* that jury instructions on lesser included offenses are not required for special circumstance allegations and felonies alleged under a felony-murder charge. Hence, the trial court erred by failing to instruct the jury on the lesser included offense of kidnaping for the felony-murder charge and the kidnaping special circumstance allegation.

7. PREJUDICE

The trial court's failure to instruct the jury on the lesser included offense of false imprisonment violated appellant's federal right to due process of law, right to a jury trial, and the Eighth and Fourteenth Amendments prohibition against cruel and unusual punishment. Hence, the judgment of guilt to count 3, the special circumstance finding of kidnaping, and the felony-murder conviction based on kidnaping, must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The trial court's failure to instruct the jury on false imprisonment violated appellant's state constitutional rights because appellant had a due process right to have the state follow its own laws and procedures. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The violations of appellant's state constitutional rights must result in reversal of count 3 unless those errors were harmless beyond a reasonable doubt.

The failure to instruct the jury on false imprisonment was not harmless beyond a reasonable doubt. The evidence of kidnaping was nonexistent to weak. There was no evidence that the victim was forcibly moved within the medical building. If the victim was forcibly moved, it was for a few short feet within the medical building. Such movement constitutes false imprisonment rather than kidnaping. (E.g. *People v. Brown, supra*, 11 Cal.3d at p. 789.) Hence, the judgment should be modified as set forth above. Because of the modification of the judgment as set forth above, the judgment of death should be reversed for the reasons explained in Issue XIV.

VIII

THE JUDGMENT OF GUILT TO COUNT 2, THE PORTION OF THE FELONY-MURDER CONVICTION BASED ON THE COMMISSION OF BURGLARY, AND THE SPECIAL CIRCUMSTANCE FINDING OF BURGLARY DURING THE COMMISSION OF A MURDER, SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT INTENDED TO COMMIT A FELONY AT THE TIME HE ENTERED THE MEDICAL BUILDING OR WHEN HE ENTERED THE ROOM WHERE THE MURDER OCCURRED.

1. SUMMARY OF ARGUMENT

Appellant was found guilty in count 2 of burglary. Burglary was one of the felonies on which the felony-murder conviction was based, and a special circumstance which made appellant eligible for the death penalty. A required element of burglary is that the defendant intended to commit a felony at the time of entry into a structure or a room. There was no evidence of what transpired when appellant entered the building. The only evidence suggesting nefarious intent at the time of entry, other than the commission of the crimes, was appellant's alleged parking of his vehicle at the restaurant a few yards from the medical center. The evidence failed to prove beyond a reasonable doubt that appellant intended to commit a crime at the time he entered the medical building or when he entered the room within the medical building where the victim's body was found. Therefore, the judgment of guilt to count 2, and the special circumstance finding of a burglary, should be reversed. Reversal of the burglary special circumstance finding must result in reversal of the judgment

of death.

2. STANDARD OF REVIEW

For purpose of brevity, appellant incorporates the discussion of the standard of review set forth in Issue V. The due process clause of the Fifth and Fourteenth Amendments requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364.)

3. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT COMMITTED BURGLARY

Penal Code section 459 provides in part that "[e]very person who enters any . . room . . . [or] building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." The crime is complete at the point of entry. "[A] burglary cannot be committed unless the specific intent exists at the time of entry." (*People v. Hill* (1967) 67 Cal.2d 105, 119.) One who enters a structure without the intent to commit a felony therein is not guilty of burglary. (See e.g., *People v. Lowen* (1895) 109 Cal. 381, 382-383; cf., *People v. Young* (1884) 65 Cal. 225, 226.) It is the intent which exists in the mind of the perpetrator at the moment of entry which defines burglary. (*People v. Hill, supra*, 67 Cal.2d at p. 119.) Evidence of intent to commit a burglary at the time of entry can be inferred from the facts and circumstances. (*People v. Earl* (1973) 29 Cal.App.3d 894, 896.)

The evidence was insufficient as a matter of law to prove that appellant intended to commit a felony when he entered the medical building. There were no signs of forced entry. (Vol. 6, R.T. pp. 1282-1283.) The victim's habit and custom was to lock the front door until

the first patients arrived for the morning appointments. (Vol. 5, R.T. pp. 1023, 1128-1129.) Ms. Kennedy must have unlocked the door and allowed appellant entry into the building. A vehicle similar to that driven by appellant was observed in the parking lot of the Long John Silver restaurant. (Vol. 8, R.T. pp. 1964-1965.) This parking lot was a short walk to the medical building. (Vol. 8, R.T. p. 1960.) There was no substantial evidence that appellant's vehicle, was which a common make and model, was the vehicle in the Long John Silver parking lot. There license plate of the vehicle in the parking lot was not offered into evidence. It cannot be concluded that appellant's vehicle was the vehicle in the parking lot.

Assuming for purpose of argument that the vehicle in the Long John Silver parking lot belonged to appellant, this single fact was insufficient to prove that appellant intended to commit a felony when he entered the medical building. Appellant may have parked in that parking lot because he planned to eat in the restaurant either before or after he visited the medical building.

The only fact revealing anything about appellant's state of mind was the comment he made to Gloria Salazar sometime after the murder that the "Bitch made me mad." (Vol. 7, R.T. pp. 1550-1551.) Assuming the comment referred to Ms. Kennedy, it established that appellant did not intend to commit a felony when he entered the medical building. It suggested that the incident escalated from a casual and normal interaction between appellant and Ms. Kennedy into a murder. The only reasonable inference was that appellant became angry only after he entered the medical building.

Given the paucity of evidence about: (1) why appellant went to the medical building; (2) the circumstances of his entry; and, (3) how appellant's interaction with Ms. Kennedy transpired into a murder, the evidence was insufficient to prove that he intended to commit a crime when he entered the medical building.

A book was found on the floor of Ms. Kennedy's office. She was murdered in the procedure room, which was a distance of 30 to 50 feet from her office. Under section 459, entry into a room constitutes burglary. (*People v. Elsey* (2000) 81 Cal.App.4th 948, 955.) Numerous cases have affirmed convictions for entry into a room. (E.g., *People v. Young* (1884) 65 Cal. 225, 226 [burglary by entry into a ticket office in a railroad station separated by an eight or nine-foot high partition from waiting room]; *People v. Davis* (1905) 1 Cal.App.8, 10 [burglary by entry of room of inmate of house of ill-repute]; *People v. Carkeek* (1939) 35 Cal.App.2d 499, 502 [entry into an office was a burglary in that an entry into a room with the necessary intent makes out a case of burglary under section 459].)

The burglary conviction cannot be affirmed based on appellant's entry into the procedure room. There was no evidence that appellant intended to commit a felony at the time he entered the procedure room. The incident could have escalated from a normal encounter into a murder only after appellant and the victim entered the procedure room.

Multiple burglary convictions for entry into multiple rooms of a single structure can be affirmed only when there was a reasonable expectation of privacy in each room . (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575-576 [concluding that the taking of property

from two separate bedrooms in a single apartment does not constitute two burglaries]; *People v. Nible* (1988) 200 Cal.App.3d 838, 844 [a reasonable person would expect a locked door or window to afford protection from unauthorized intrusion].) This principle applies to preclude appellant's burglary conviction based on his alleged entry into the procedure room. Section 459 applies to "[e]very person who enters any . . . room." In *People v. Sparks* (2002) 28 Cal.4th 71, the defendant came to the victim's house selling magazines. The victim allowed the defendant to enter the house. When the victim entered her bedroom to change her shoes, the defendant followed her into the bedroom and raped her. This Court affirmed the defendant's burglary conviction. This Court concluded that the evidence established that the defendant formed the intent to rape prior to entering the bedroom. The Court rejected the argument that the word "room" in section 459 applies only to a room for which there is a reasonable expectation of privacy from intrusion into the house from outside the house, such as a locked room. (*People v. Sparks, supra*, 28 Cal.4th at p. 76.) However, the decision was based on the nature of the privacy interest present in a residence; "treating the entry at issue here as an entry for burglary is consistent with the personal security concerns of the burglary statute, because entry, from inside a home, into a bedroom of the home, raise[s] the level of risk that the burglar will come into contact with the home's occupants with the resultant threat of violence and harm." (*People v. Sparks, supra*, 28 Cal.4th at p. 87, quoting *People v. McCormack* (1991) 234 Cal.App.3d 253, 257.)

People v. Sparks dealt with a home and its holding should be limited to that situation.

A commercial structure simply does not present the elevated risk of an intruder entering the private space of another that is present in a single family home when the intruder moves about from room to room in a single structure. *People v. Sparks* noted that the cases construing the word "room" in section 459 "concern[ed] entry into private rooms within public or commercial building." (*People v. Sparks, supra*, 28 Cal.4th at p. 79.) Here, there was no evidence that the procedure room was a private space in which anybody had an expectation of privacy. The procedure room was one of several rooms in a commercial structure that was easily accessible. Hence, appellant's alleged entry into the procedure room could not support the burglary conviction as a matter of law.

For the reasons above, the evidence was insufficient as a matter of law to prove that appellant intended to commit a felony when either he entered the medical building or when he entered the procedure room. Furthermore, even if appellant intended to commit a felony when he entered the procedure room, that conduct was not sufficient to constitute the crime of burglary. Hence, the judgment of guilt to count two, the felony murder finding based on the commission of a burglary, and the special circumstance finding of a burglary must be reversed. For the reasons explained in Issue XIV, the reversal of the burglary special circumstance finding must result in a reversal of the judgment of death.

IX

THE JUDGMENT OF GUILT TO COUNT 5, THE PORTION OF THE FELONY-MURDER CONVICTION BASED ON THE COMMISSION OF SODOMY, AND THE SPECIAL CIRCUMSTANCE FINDING OF SODOMY DURING THE COMMISSION OF A MURDER, SHOULD BE REVERSED BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT ENGAGED IN SODOMY WITH THE VICTIM; AND (2) EVEN ASSUMING THE EVIDENCE WAS SUFFICIENT TO PROVE THAT APPELLANT COMMITTED SODOMY WITH THE VICTIM, THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT IT OCCURRED WHILE THE VICTIM WAS ALIVE

1. SUMMARY OF ARGUMENT

Appellant was convicted in count 5 of sodomy. Sodomy was one of the felonies on which the felony-murder conviction was based, and a special circumstance which made appellant eligible for the death penalty. A required element of sodomy is that the penis of the perpetrator penetrate the anus of the victim. The evidence in this case was insufficient to prove that appellant penetrated the anus of the victim. The crime of sodomy requires that the victim be alive at the time the penis penetrates the anus of the victim. Even assuming there was sufficient evidence that sodomy occurred, the evidence was insufficient as a matter of law to prove that it occurred while the victim was alive. The judgment of guilt to count 5, and the related felony-murder and special circumstance finding of sodomy, should be vacated. Reversal of the sodomy special circumstance finding requires reversal of the judgment of death.

2. STANDARD OF REVIEW

For purpose of brevity, appellant incorporates the discussion of the standard of review set forth in Issue V. The due process clause of the Fifth and Fourteenth Amendments requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364.)

3. LEGAL STANDARDS GOVERNING THE CRIME OF SODOMY

Penal Code section 286, subdivision (a), defines sodomy as "sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." Section 286, subdivision (c)(2), defines the crime of sodomy "when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim . . ." The offense of sodomy requires that the victim be alive at the time of penetration. (*People v. Farnam* (2002) 28 Cal.4th 107, 143; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176.)

4. THE PROSECUTION EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT'S PENIS PENETRATED THE VICTIM'S ANUS WHILE SHE WAS ALIVE

Dr. Sheridan was the prosecution's medical examiner. He testified about the length of time required for the victim to expire based on her injuries. She sustained 29 stab wounds of varying severity from a Phillips head screwdriver. (Vol. 5, R.T. pp. 1189-1192.) Two lethal blows to the neck area severed the victim's carotid artery and jugular vein. (Vol. 5,

R.T. pp. 1191, 1198.) Those injuries were inflicted very close in time to each other. (Vol. 5, R.T. p. 1202.) The presence of the gag in the victim's mouth obstructed her airway and also contributed to her death. (Vol. 5, R.T. pp. 1198, 1202.) Dr. Sheridan testified as follows regarding the length of time for the heart to stop beating:

> Q. Now, the two injuries to the veins caused by the screwdriver, let's assume –well, let's go to this case. Given those two injuries, and let's assume they were given to the victim very, very close in time, how long would it take the victim to die as a result of those two injuries?
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> A. The reason that's not quite as easy a question to answer as the other one is because we are talking about an injury to the vital structures but only on one side. Whereas obviously there's another pair of vessels on the other side, plus there are some at the back that can partially help to supply the brain. But I would say it would take a matter of several minutes. Probably a bit more than what I described a moment ago with complete occlusion of –strangulation, for example. Because, as I say, one side is punctured but that side would not be adequate on its own because, of course, you are losing a lot of pressure because of the damage to the carotid on this side, on the left side, and you also have the fact of the blood actually accumulating deep in the neck and putting pressure on the rest of the vessels to some extent. But I would say it would take a matter of several minutes. I can't give you an exact figure. More than, say, the three minutes with complete occlusion. Could be, you know, ten minutes, maybe even more until the heart would stop completely.
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> Q. Could it be as much as 15 minutes?
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> A. I would say it's possible. It's very hard to put an exact time on something like this.
>
> Q. All right.

> A. And I am talking here, just to make it clear, when you ask me how long it takes to die, I am talking to the point where the heart stops completely.

(Vol. 5, R.T. pp. 1198-1199.)

The prosecution had the burden of proving beyond a reasonable doubt that appellant's penis penetrated the anus of the victim while she was alive. The prosecution failed to carry that burden.

The victim died fairly shortly after the blows were inflicted to the carotid artery and the jugular vein. According to the prosecution evidence, appellant left Toyo Tires sometime shortly after 9:00 a.m. (Vol. 8, R.T. pp. 1948-1949.) The drive from Toyo Tires to the medical clinic probably took less than 30 minutes. (Vol. 9, R.T. pp. 2224, 2259-2260.) [19] Martha Carter, an employee at the Long John Silver Restaurant, went into the restaurant parking lot between 10:00 and 10:30 a.m., and saw a vehicle which resembled the red Nissan Sentra driven by appellant the day of the murder. (Vol. 8, R.T. p. 1969.) Given the probable amount of time for the victim to die after infliction of the blows to the carotid artery and the jugular vein, and the time appellant was in the medical building, any act of sodomy was just as likely to have occurred after the victim had died.

5. THE PROSECUTION EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT'S PENIS PENETRATED THE ANUS OF THE VICTIM

Dr. Sheridan did not find any trauma to the victim's anal region when he performed

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[19] The distance between Toyo Tires and the medical clinic was between nine and 11 miles, depending on the route traveled. (Vol. 9, R.T. pp. 2224, 2259-2260.)

his examination. (Vol. 5, R.T. p. 1181.) When Dr. Sheridan made the incision into the abdomen, he could see the rectum and anal area from inside and did not see any sign of trauma. (Vol. 5, R.T. p. 1182.) He did not find any bruising or tearing in the vaginal area or the anus. (Vol. 5, R.T. pp. 1224-1125.)[20] The presence of tears in the anal region would be a sign that sodomy had occurred, and the lack of such tearing suggested that sodomy had not occurred. (Vol. 5, R.T. pp. 1227-1228.) Dr. Sheridan concluded that "from my autopsy examination in this case, I have no grounds for saying that there was sodomy or indeed sexual assault at all." (Vol. 5, R.T. pp. 1227-1228.)

Additional forensic evidence established that sodomy did not occur. David Blackburn, a forensic laboratory technician for the Scientific Investigations Division Crime Lab section of the San Bernardino Sheriff's Department, examined evidence collected at the crime scene. (Vol. 6, R.T. pp. 1395-1396, 1407-1408.) He had experience in conducting tests to determine the presence of spermatozoa. (Vol. 6, R.T. pp. 1397-1398.) Mr. Blackburn examined the rectal smear obtained from the victim's body and did not find any spermatozoa on the slide. (Vol. 6, R.T. pp. 1414-1415.) A white cotton sock with fecal matter on it was found on the floor of the procedure room near Ms. Kennedy's leg. It matched the sock on Ms. Kennedy's other leg. (Vol. 6, R.T. p. 1327; exhibit 18.) The sock

[20] The autopsy report contains a history which repeated information obtained from the deputy coroner's examination. The deputy coroner reported bruising and tearing in the vaginal area and anus. (Vol. 5, R.T. p. 1224.) As stated above, Dr. Sheridan did not find any such evidence when he performed his examination. (Vol. 5, R.T. pp. 1224-1125.) Hence, there was no conflicting evidence from which the trier of fact could have found that the victim's vaginal area and anus had tearing and bruising.

that had fecal matter on it also contained appellant's seminal fluid.[21] (Vol. 6, R.T. pp. 1362, 1412; Vol. 9, R.T. pp. 2053-2054, 2068, 2089.)

Elizabeth Ibarra had been friends with appellant for several years. (Vol. 6, R.T. p. 1357.) During the March/April 1998 time period, appellant visited Ms. Ibarra several times. Ms. Ibarra testified that during several of the visits, appellant said that he liked engaging in anal sex with Virginia Castaneda. Appellant said that Virginia did not like engaging in anal intercourse because it caused her pain, but appellant was going to continue doing so with her because he liked it. (Vol. 7, R.T. pp. 1628-1629.)[22]

During closing argument, the prosecutor argued that sodomy had occurred because of the manner in which the victim had been tied, the presence of the sock on the floor which had fecal matter, and the testimony that appellant liked to engage in anal intercourse. (Vol. 11, R.T. pp. 2739-2740.) Despite the prosecutor's argument, the evidence was insufficient as a matter of law to prove that appellant's penis penetrated the anus of the victim. The prosecutor's argument that sodomy occurred was based on speculation. All of the objective forensic evidence directly contradicted the prosecutor's assertion that sodomy occurred. Dr. Sheridan did not find any evidence of bruising or tearing in the anus when he performed the

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[21] The sock that had fecal matter on it was identified as item A-20. (Vol. 6, R.T. p. 1327.)

[22] Virginia Castaneda denied that she had engaged in anal intercourse with appellant. (Vol. 7, R.T. pp. 1745, 1756.) However, because the facts are construed to support the judgment below in assessing the sufficiency of the evidence, Ms. Ibarra's testimony is assumed to be true.

autopsy. (Vol. 5, R.T. pp. 1227-1229.) The lack of such bruising or tearing suggested that sodomy did not occur. (*Ibid.*) Mr. Blackburn did not find any spermatozoa on the rectal smear. (Vol. 6, R.T. pp. 1414-1415.) "The finding of sperm in the victim's anus is in itself sufficient evidence of sodomy." (*People v. Farnam, supra*, 28 Cal.4th at p. 144.) That evidence simply does not exists in this case.

Lack of trauma to a victim's rectum does not preclude a finding that the victim was sodomized. (*People v. Farnam, supra*, 28 Cal.4th at p. 144.) However, a finding of guilt cannot be based on circumstantial evidence unless the proved circumstances are: (1) consistent with the theory that the defendant is guilty of the crime; and, (2) cannot be reconciled with any other rational conclusion. (See CALJIC 2.01.) The prosecutor inferred that appellant sodomized the victim based on the position of her body and appellant's apparent interest in sodomy with his girlfriend. Where the trier of fact relies on inferences, those inferences must be reasonable. (*People v. Holt* (1997) 15 Cal.4th 619, 669.) An inference is not reasonable if it is based on speculation. (*Ibid.*)

Given the lack of forensic evidence to establish that sodomy occurred, it was a rational conclusion that the sperm and fecal matter got onto the sock some way other than through sodomy. For instance, appellant may have masturbated, and the victim may have had a bowel movement during the assault. The victim may have been tied up in the manner that she was found in order to facilitate the assault and murder, rather than sodomy. The evidence that appellant engaged in sodomy with his girlfriend, Virginia, did not prove that

he committed that act during the course of a murder.

The evidence proved at most a suspicion that sodomy may have occurred. Circumstantial evidence is like a "chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link it is the duty of the reviewing court to reverse the conviction." (*People v. Redrick* (1961) 55 Cal.2d 282, 290.) The missing link in this case was evidence of actual penile penetration of the victim's anus. There was nothing in the evidence that made it more likely that sodomy occurred or did not occur.

For the reasons above, the prosecution evidence was insufficient to prove that sodomy occurred. The judgment of guilt to count 5, the special circumstance finding of the commission of sodomy during a murder, should therefore be reversed. For the reasons explained in Issue XIV, the reversal of the sodomy special circumstance requires reversal of the judgment of death.

X

THE JUDGMENT OF GUILT TO COUNT 6, ROBBERY, SHOULD BE REVERSED, AND THE SPECIAL CIRCUMSTANCE FINDING OF A ROBBERY DURING THE COMMISSION OF A MURDER, SHOULD BE VACATED, BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT TOOK THE VICTIM'S PROPERTY, OR; (2) THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE VICTIM WAS ALIVE WHEN THE PROPERTY WAS TAKEN

1. SUMMARY OF ARGUMENT

Appellant was found guilty in count 6 of robbery. The prosecution theory was that appellant took some jewelry and other personal items from the victim during the murder. Appellant was never found in possession of any of the victim's property. Appellant gave a ring and watch to Gloria Salazar. The police were able to recover the watch given to Ms. Salazar, but not the ring. The prosecution witnesses could only testify that the watch given to Ms. Salazar appeared similar to the watch owned by Ms. Kennedy. The evidence was insufficient to prove that appellant took the victim's property. The evidence was also insufficient to prove that Ms. Kennedy was alive when any property may have been taken from her. Hence, the judgment of guilt to count 6, and the special circumstance finding of a robbery during the commission of a murder, should be reversed.

2. STANDARD OF REVIEW

For purpose of brevity, appellant incorporates the discussion of the standard of review set forth in Issue V. The due process clause of the Fifth and Fourteenth Amendments

requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364.) Hence, the prosecution was required to prove each element of the robbery count beyond a reasonable doubt.

3. LEGAL STANDARDS GOVERNING ROBBERY

Penal Code section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." A defendant must form the intent to take the victim's property prior to killing the victim in order for the crime of robbery to have occurred. (*People v. Frye* (1998) 18 Cal.4th 894, 956; *People v. Kelly* (1992) 1 Cal.4th 495, 528.) If the defendant's intent to steal property arose only after force was used, the offense was theft and not robbery. (*People v. Kelly, supra*, 1 Cal.4th at p. 529.)

4. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT TOOK THE VICTIM'S PROPERTY

Steve Kennedy, the victim's husband, testified about the jewelry worn by his wife. Ms. Kennedy typically wore a wedding ring, an engagement ring, and a gold circular round lady's watch. Ms. Kennedy owned more than one watch. (Vol. 4, R.T. p. 863.) Exhibit 19 appeared similar to the watch worn by Ms. Kennedy. He believed that she had a dark brown or black leather watchband. (Vol. 4, R.T. p. 864.) Mr. Kennedy conducted an inventory of Ms. Kennedy's jewelry following her death, and a ring was missing. The diamond was either green or red. Mr. Kennedy was color blind. (Vol. 4, R.T. p. 865.) Mr. Kennedy could not confirm, however, that Exhibit 19 was his wife's watch:

Q. Sir, in reference to the watch you described, you described it as a gold watch?

A. Yes.

Q. Do you mean the case itself was a gold color?

A. Yeah, the bezel around the watch was gold.

Q. What about the case itself?

A. Gold. The back was probably silver.

Q. On Exhibit 19, when you looked at the watch in that exhibit it was silver, was it not?

A. Yeah. It looks beat up.

Q. It is similar to your wife's watch?

A. Yes.

Q. But it is different in that it is silver rather than gold, isn't it?

A. Yes.

Q. And also the watch is, as you characterize it, beat up?

A. Worn.

(Vol. 4, R.T. pp. 874-875.) On further cross-examination about exhibit 19, Mr. Kennedy testified as follows:

Q. By Mr. Hardy: What do you mean by the bevel?

A. Bezel. It's the round part that comes up on the crystal.

Q. Okay.

A. This part right here, this round part.

Q. And that was gold?

A. Yes.

Q. And this one is silver?

A. Yes.

Q. So it's not the same watch, is it?

A. I don't –I can't tell if it is or not. It doesn't look like the same watch.

(Vol. 4, R.T. p. 877.) Mr. Kennedy was not observant about the jewelry worn by Ms. Kennedy. (Vol. 4, R.T. p. 889.)

Gloria Salazar, appellant's cousin, lived in El Monte. Appellant came to visit her in the morning during late March or early April. (Vol. 7, R.T. pp. 1544-1547.) Appellant arrived between 10:30 a.m. and 12:00 p.m. (Vol. 7, R.T. p. 1547.) Appellant removed a watch and ring from his pocket. (Vol. 7, R.T. pp. 1550-1551.) Ms. Salazar believed the watch and ring belonged to appellant's girlfriend. (Vol. 7, R.T. p. 1550.) Appellant said the "bitch got me mad," and he was going to throw out the ring and watch. (Vol. 7, R.T. p. 1550.) He gave the ring and watch to Ms. Salazar. (Vol. 7, R.T. pp. 1550-1551.) Ms. Salazar could not describe the watch because of the passage of time, but she believed that the metal was gold and had a stone. (Vol. 7, R.T. p. 1551.)[23] After reading a newspaper

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[23] Detective Price testified that Ms. Salazar told him that the ring had a green stone. (Vol. 7, R.T. p. 1687.)

article about Ms. Kennedy's death, Ms. Salazar gave the watch to her grandfather. (Vol. 7, R.T. p. 1552.) She sold the ring to the Valley Pawn Shop in El Monte. (Vol. 7, R.T. p. 1553.) Ms. Salazar and Detective Price unsuccessfully attempted to retrieve the ring from the pawn shop. (Vol. 7, R.T. pp. 1553, 1686-1687.) Detective Price recovered the watch which Ms. Salazar received from appellant and gave to her grandfather. It was marked Exhibit 19. (Vol. 7, R.T. pp. 1565, 1688-1689.) Mr. Kennedy could not find his wife's purse following her death. (Vol. 4, R.T. p. 868.) He never received reports of illegal transactions with Ms. Kennedy's credit cards. (Vol. 4, R.T. pp. 884-885.)

The above evidence was insufficient to prove that appellant took Ms. Kennedy's property. Three items of property were in issue; Ms. Kennedy's purse, the watch, and the ring. There was no evidence appellant ever possessed Ms. Kennedy's purse. Because there were no illegal credit card transactions which could be traced to appellant, it cannot reasonably be inferred that he took her purse. The ring was never recovered. Neither Mr. Kennedy nor anyone else could testify that Ms. Kennedy was wearing a ring the day of the murder. Mr. Kennedy also did not know the details of any ring she might have worn that day. Ms. Salazar could not provide any details about the ring appellant gave to her. (Vol. 7, R.T. p. 1551.) She also did not know the specific date appellant gave her the ring and watch. (Vol. 7, R.T. pp. 1544-1547.) Given the lack of specific details about the ring appellant gave to Ms. Salazar, the evidence was insufficient to prove that it belonged to Ms. Kennedy.

The evidence was also insufficient to prove that Exhibit 19, the watch, belonged to Ms. Kennedy. Mr. Kennedy could not identify the watch, and testified that "[i]t doesn't look like the same watch." (Vol. 4, R.T. p. 877.) According to Mr. Kennedy, the bezel of Ms. Kennedy's watch was gold. The bezel of Exhibit 19 was silver rather than gold. (Vol. 4, R.T. pp. 874-875, 877.) Furthermore, Exhibit 19 was significantly more worn than Ms. Kennedy's watch. (*Ibid.*) Given the differences in appearance between the watch worn by Ms. Kennedy and Exhibit 19, it cannot reasonably be inferred that Exhibit 19 was Ms. Kennedy's watch. Finally, the lack of a reasonable inference that Exhibit 19 was Ms. Kennedy's watch also suggested that appellant did not take Ms. Kennedy's ring.

5. ASSUMING THERE WAS EVIDENCE THAT APPELLANT TOOK THE VICTIM'S PROPERTY, THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT FORMED THE INTENT TO TAKE THE VICTIM'S PROPERTY PRIOR TO HER DEATH

There was no evidence about what exactly transpired when the victim was murdered. As argued above, the evidence failed to prove that appellant took the victim's property. Assuming this Court does not agree with the argument, the evidence was still insufficient to prove that appellant committed robbery. Appellant must have formed the intent to take the victim's property prior to her death in order to have committed the crime of robbery. (*People v. Frye, supra*, 18 Cal.4th at p. 956.)

There was no evidence that appellant: (1) decided to take the victim's property; and (2) took the property. Appellant showed up at Gloria Salazar's residence with a ring and watch which allegedly belonged to the victim. Appellant made the cryptic comment that

"the bitch made me mad." (Vol. 7, R.T. p. 1550.) This comment by appellant did not provide any basis to infer when he decided to take the victim's ring and watch.

Dr. Sheridan testified about the length of time for the victim to have died based on her injuries. (Vol. 5, R.T. pp. 1189-1202.) His testimony is discussed at length in the argument above regarding the sufficiency of the evidence to sustain the sodomy conviction. His testimony will be briefly summarized in this portion of the brief in the interest of brevity. He could not estimate the precise amount of time for the victim to die after infliction of the blows to the carotid artery and jugular vein. However, he testified that death would have occurred in a "matter of several minutes" after those blows. (Vol. 5, R.T. pp. 1198-1199.)

The prosecution had the burden of proving beyond a reasonable doubt that appellant formed the intent to take the victim's property prior to her death. The prosecution failed to carry that burden. It is clear that the victim died fairly shortly after the blows were inflicted to the carotid artery and the jugular vein. According to the prosecution evidence, appellant left Toyo Tires sometime shortly after 9:00 a.m. (Vol. 8, R.T. pp. 1948-1949.) The drive from Toyo Tires to the medical clinic probably took less than 30 minutes. (Vol. 9, R.T. pp. 2224, 2259-2260.)[24] Martha Carter, an employee at the Long John Silver Restaurant, went into the restaurant parking lot between 10:00 and 10:30 a.m., and saw a vehicle which resembled the red Nissan Sentra driven by appellant the day of the murder. (Vol. 8, R.T. p. 1969.)

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[24] The distance between Toyo Tires and the medical clinic was between nine and 11 miles, depending on the route traveled. (Vol. 9, R.T. pp. 2224, 2259-2260.)

Accepting the prosecution theory about the probable timing of events, appellant could have been in the medical building at the time of the victim's death. If appellant decided to take the property following her death, then he did not commit a robbery. It seems highly unlikely that appellant committed a murder to take a ring and a watch. Furthermore, appellant's comment that "the bitch made me mad," suggested that the incident escalated from a misunderstanding or perceived insult to appellant, and did not occur because appellant intended to rob the victim. Indeed, appellant told Ms. Salazar that he was going to throw away the ring and watch, (Vol. 7, R.T. p. 1550), which is strong evidence that appellant's motive for the murder was not robbery.

As stated above, appellant must have formed the intent to take the victim's property prior to the victim's death to be guilty of robbery. (*People v. Frye, supra*, 18 Cal.4th at p. 956.) This rule should also apply to the situation in which the victim is unconscious. Robbery requires the taking of property from the victim by force or fear. (Pen. Code §211.) An individual who is unconscious experiences neither force nor fear. There are several cases which have affirmed robbery convictions when the robber rendered the victim unconscious for the purpose of perpetrating a robbery. (*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1367-1368; *People v. Dreas* (1984) 153 Cal.App.3d 623, 628-629.) The defendant in those cases obviously formed the intent to commit a robbery prior to the victim becoming unconscious. Conversely, a defendant has not committed robbery when the defendant finds a victim unconscious and takes property. (*People v. Russell* (1953) 118

Cal.App.2d 136, 138-139.)

If appellant had to form the intent to take the victim's property prior to her becoming unconscious, the evidence was clearly insufficient to support the robbery conviction. Dr. Sheridan testified that the victim became unconscious very quickly:

> Q. All right. And yes, going into that further, assuming again that the injuries were received very close in time to each other, what period of time or can you estimate for what period of time the victim would have been conscious?
>
> A. Yes. Assuming there was nothing else causing unconsciousness, okay, I mean in other words, you are asking me to assume that unconsciousness came about because of these injuries and not because of any other factor?
>
> Q. Yes.
>
> A. I would say at most a few minutes. Meaning just a few –in other words, she would remain conscious for only a few minutes, I think, after those injuries were inflicted.
>
> Q. And try to define few minutes, as much as ten minutes?
>
> A. I don't think it would be that long. But it's difficult to be absolutely certain. I would be inclined to go for a shorter period than that?
>
> Q. Eight minutes?
>
> A. Maybe even less than that. Maybe just a matter of four or five.

(Vol. 5, R.T. pp. 1199-1200.)

Given the short period of time in which the victim was conscious following the infliction of the lethal blows to her carotid artery and jugular vein, it was equally likely that

appellant formed the intent to take the watch and ring after she became unconscious.

For the reasons above, the evidence was insufficient as a matter of law to prove appellant guilty of count 6. That conviction should be reversed as well as the special circumstance finding of a robbery committed during the course of a murder. The reversal of the robbery special circumstance finding must result in reversal of the judgment of death. (See Argument XIV.)

XI

THE JUDGMENT OF GUILT TO COUNT 6, ROBBERY, THE SPECIAL CIRCUMSTANCE FINDING OF THE COMMISSION OF ROBBERY DURING A MURDER, THE FIRST-DEGREE MURDER CONVICTION, AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF GRAND THEFT, IN VIOLATION OF: (1) APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

1. SUMMARY OF ARGUMENT

Appellant was found guilty in count 6 of robbery. Robbery was also a special circumstance of the murder, and one of the felonies listed in the felony-murder instruction. The trial court gave the standard CALJIC instructions for the crime of robbery, which are CALJIC Numbers 9.40, 9.40.2, and 9.41. (Vol. 1, C.T. pp. 310, 312, 313.) The trial court also instructed the jury with CALJIC Number 8.21.1, which instructs the jury that a robbery continues while a robber is fleeing. (Vol. 1, C.T. p. 311.) CALJIC Number 8.21.1 is specifically applicable to felony-murder. Grand theft in violation of Penal Code section 487, subdivision (c), is a lesser included offense of robbery. (*People v. Valdez* (2004) 32 Cal.4th 73, 110; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Ramkeesoon* (1985) 39

and Article I, sections 7, 15, 16 and 17 of the California Constitution, to instruct the jury on all lesser included offenses. Appellant incorporates in this portion of the Brief the discussion in Issues II and VI concerning the duty of the trial court to instruct the jury on lesser included offenses in capital prosecutions in order to avoid violating the defendant's rights under the federal and California Constitutions.

The trial court did not instruct the jury on grand theft as a lesser included offense of robbery. The trial court had a *sua sponte* duty to instruct the jury on grand theft if the evidence raised a question of appellant's guilt to that offense. (*People v. Ramkeesoon*, *supra*, 39 Cal. 3d at p. 351 [the requirement that courts give sua sponte instructions on lesser included offenses "is based in the defendant's constitutional right to have the jury determine every material issue presented by the evidence].)

3. THE EVIDENCE RAISED A QUESTION OF FACT REGARDING APPELLANT'S GUILT OF THE LESSER INCLUDED OFFENSE OF GRAND THEFT

The evidence in this case required jury instructions on grand theft from the person as a lesser included offense of robbery. In order to trigger the trial court's *sua sponte* duty to instruct the jury on a lesser included offense, there must be substantial evidence from which a reasonable jury could find the defendant guilty of the lesser offense and not the greater offense. (*People v. Valdez, supra*, 32 Cal.4th at p. 116.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Ibid.*)

There was substantial evidence from which the jury could have found appellant guilty

Cal.3d 346, 351.)[25] The taking of property from the body of a dead person who has just been murdered is grand theft from the person. (*People v. McGrath* (1976) 62 Cal.App.3d 82, 86-88.) The taking of property from an unconscious person is grand theft from the person if the intent to take the property was formed after the person became unconscious. (Cf. *People v. Kelley, supra*, 220 Cal.App.3d at pp. 1367-1368.) The trial court erred by failing to instruct the jury on the lesser included offense of grand theft. Because this error was prejudicial, the judgment of guilt to count 6 should be reversed, the special circumstance finding of a robbery during the commission of a murder should be vacated, and the felony-murder conviction should be vacated.

2. THE DUTY OF THE TRIAL COURT TO SUA SPONTE INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES

Under *Beck v. Alabama* (1980) 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392, the trial court had a duty under the federal due process clause and Eighth and Fourteenth Amendments to instruct the jury on all lesser included offenses. Due process requires an instruction on a lesser included offense when the evidence raises the defendant's guilt of that offense. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.)

The trial court also had a duty under the Sixth and Fourteenth Amendments, (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 [the Sixth Amendment requires the jury to find the facts which determine a defendant's guilt]),

[25] Section 487, subdivision (c), provides that grand theft is committed "[w]hen the property is taken from the person of another."

of grand theft. As explained in Issue IX, appellant was not guilty of robbery if he formed the intent to take the victim's property after she was either unconscious or deceased. (*People v. Frye, supra*, 18 Cal.4th at p. 956 [the defendant must have formed the intent to take the victim's property prior to the victim's death in order to be guilty of robbery]; cf. *People v. Kelley, supra*, 220 Cal.App.3d at pp. 1367-1368 [affirming a robbery conviction of an unconscious person when the defendant rendered the victim unconscious for the purpose of perpetrating the robbery].) In order for appellant to be guilty of robbery if he took property from the victim while she was unconscious, appellant must have rendered her unconscious for the purpose of taking property from her. (*People v. Kelley, supra*, 220 Cal.App.3d at p. 1368.)

The jury was unsure of when various events occurred in relation to the victim's death. The jury was instructed that "[i]n order for the crimes of rape or sodomy by use of force to occur, the victim must be alive at the time of penetration, no matter for how short a time period. If a person intends to commit a rape or sodomy by use of force believing the victim is alive and takes steps to complete that crime and in fact the victim is dead, that person has committed an attempted rape or attempted sodomy by use of force." (Vol. 1, C.T. p. 309.) During jury deliberations, the jury requested a reading of "Frank Sheridan's testimony about length of time the heart was pumping after arteries were punctured (as to legal definition of death, i.e., 10 to 15 minutes.)" (Vol. 2, C.T. p. 363.)

The jury was attempting to determine whether appellant was guilty of sodomy or

attempted sodomy. The jury asked if had to determine appellant's guilt of attempted sodomy if it had already found him guilty of sodomy. (Vol. 2, C.T. p. 362.) Despite the jury ultimately finding appellant guilty of sodomy, the above instruction and questions from the jury suggested that the jury believed that the sodomy occurred close in time to when the victim died. The facts and circumstances suggested that appellant's robbery of the victim was an afterthought to the murder. Appellant commented to Ms. Salazar that "The bitch made me mad," and said that he was going to throw away the watch and ring. (Vol. 7, R.T. pp. 1550-1551.)

It was unlikely that appellant's motive to commit the murder was to obtain the watch and ring if he was willing to throw those objects away. There was no evidence that appellant attempted to financially profit by selling the watch and ring. The victim's credit cards were not used by the perpetrator to makes purchases. (Vol. 4, R.T. p. 879.) According to Dr. Sheridan's testimony, the victim became unconscious within five minutes, and probably died within 10 to 15 minutes, after the infliction of the blows to the carotid artery and the jugular vein. (Vol. 5, R.T. pp. 1198-1200.) There was only a short period of time during which the victim became unconscious and died after the infliction of those blows. The evidence suggested that robbery was an afterthought to the incident and not the reason for the murder. Hence, a reasonable and properly instructed jury could have found that appellant formed the intent to take the victim's property after she either became unconscious or died.

4. THE TRIAL COURT'S SUA SPONTE DUTY TO INSTRUCT THE JURY ON GRAND THEFT EXTENDED TO THE FELONY-MURDER CHARGE AND THE

ROBBERY SPECIAL CIRCUMSTANCE ALLEGATION

The robbery felony-murder finding, and the robbery special circumstance finding, made appellant eligible for the death penalty. This Court has held that a trial court does not have a *sua sponte* duty to instruct the jury on grand theft as a lesser included offense of robbery when robbery is alleged only as the felony in a felony-murder prosecution, or alleged as a special circumstance for the death penalty. (*People v. Valdez, supra*, 32 Cal.4th at pp. 110-111; *People v. Cash, supra*, 28 Cal.4th at p. 737; *People v. Silva, supra*, 25 Cal.4th at p. 371.) Issue VII addressed whether the trial court should have given jury instructions on false imprisonment as a lesser included offense of kidnaping. The argument contained therein regarding the duty of the trial court to instruct the jury on lesser included offenses for felonies alleged as special circumstances, and under a felony-murder charge, is hereby incorporated in this argument. The Fifth, Sixth Amendment, and Fourteenth Amendments, as interpreted in *Jones v. United States*, *Apprendi v. New Jersey*, *Ring v. Arizona*, and *United States v. Booker*, required that aggravating circumstance allegations and felonies alleged under a felony-murder charge be treated as elements of an offense, and instructions on lesser included offenses given if raised by the evidence.

For the reasons above, the trial court erred by failing to instruct the jury on the lesser included offense of grand theft for the felony-murder charge and the robbery special circumstance allegation.

5. PREJUDICE

Because instruction on all lesser included offenses was required by the federal due process clause, the Sixth and Fourteenth Amendments right to a jury trial and the Eighth and Fourteenth Amendments prohibition against imposition of cruel and unusual punishment, the trial court's failure to instruct the jury on the lesser offense of grand theft was reversible error as to count 6, the felony-murder conviction, and the robbery special circumstance finding, unless it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The trial court's failure to instruct the jury on grand theft also violated appellant's rights under the California State Constitution. Because appellant had a due process right to have the State follow its own laws, (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346), the violations of California state law must also result in reversal unless the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Finally, under California state law, errors in capital proceedings must result in reversal of the judgment if there is a "reasonable possibility" the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

The trial court's failure to give an instruction on grand theft was not harmless beyond a reasonable doubt. There was also a reasonable possibility that the error affected judgment of guilt to count 6, the felony-murder conviction, the true finding to the robbery special circumstance, and the jury's decision to impose the death penalty. For purpose of brevity, appellant incorporates in this argument the discussion in Argument IX concerning the timing of the victim's death and the taking of her property. There was no direct evidence that

appellant formed the intent to take the victim's property prior to the victim dying or becoming unconscious. There was no circumstantial evidence regarding this issue. Dr. Sheridan testified that the victim most likely became unconscious within four to five minutes after the blows to the carotid artery and jugular vein were inflicted. (Vol. 5, R.T. pp. 1199-1200.) Dr. Sheridan also believed that the victim died in a "matter of several minutes" after those blows were inflicted. (Vol. 5, R.T. pp. 1198-1199.) The evidence suggested that the taking of the property was incidental to the murder rather than the motive for its commission. Appellant stated that he was going to throw the ring and watch away. He gave those items to Gloria Salazar. (Vol. 7, R.T. p. 1550.) If appellant's motive for the murder was not robbery, it was unlikely that the taking of victim's property was one of the first events that occurred in the sequence of events that led to her death. Speculation about when appellant took the victim's property cannot substitute for proof.

Because the evidence was not clear regarding when the victim's property was taken in relation to when she became unconscious or died, the trial court's failure to instruct the jury on the lesser included offense of grand theft must result in reversal of count 6. Because the sua sponte duty to instruct on lesser included offenses extended to the robbery special circumstance allegation, the true finding to that allegation must be reversed.

The jury did not specifically make a true finding regarding robbery as the predicate crime for the felony-murder conviction. Instead, the jury was simply instructed on the elements of felony-murder, and robbery was one of the predicate crimes. However, a felony-

murder conviction requires the commission, or attempted commission, of arson, rape, carjacking, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under Penal Code sections 206, 286, 288, 288a, or 289, during the murder. (Pen. Code, § 189.)

Here, the predicate felonies alleged in connection with the felony-murder theory were burglary, kidnaping, rape, sodomy by use of force, and robbery. (Vol. 1, C.T. p. 291; Vol. 11, R.T. p. 2699.)[26] For the reasons explained in other portions of this Brief, the burglary, kidnaping, and sodomy by force convictions must be reversed for insufficiency of the evidence and instructional error. Reversal of these convictions means that the corresponding predicate felony allegations cannot serve as predicate felonies to support the felony-murder conviction, and leaves the robbery allegation as the only basis to sustain the felony-murder conviction. However, the robbery allegation cannot serve as the predicate felony to support the felony-murder conviction because of the trial court's failure to instruct the jury on the lesser included offense of grand theft. Hence, the trial court's failure to instruct the jury on grand theft was prejudicial as to the felony-murder conviction. Appellant's conviction of first-degree murder must be reversed to the extent it relies on the felony-murder doctrine. Reversal of the first-degree murder conviction means that appellant was not eligible for the death penalty. Hence, the judgment of death must be reversed.

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[26] Because appellant was found not guilty of rape, that crime has no relevance to whether the murder conviction can be upheld based on a felony-murder theory.

XII

THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCES SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT HAD AN INDEPENDENT FELONIOUS PURPOSE FOR COMMITTING THE FELONIES FOUND TRUE AS SPECIAL CIRCUMSTANCES, AS REQUIRED BY *PEOPLE V. GREEN* (1980) 27 CAL.3D 1, AND THE REQUIREMENTS OF STATE AND FEDERAL DUE PROCESS OF LAW

1. SUMMARY OF ARGUMENT

Appellant was found guilty of first degree murder based on the commission of a premeditated killing and the felony-murder rule. The jury found true the special circumstances that the murder was committed during the course of a burglary, robbery, sodomy, and kidnaping. Under *People v. Green* (1980) 27 Cal.3d 1, the true findings to the special circumstances can be upheld only if appellant had an independent felonious purpose for committing the felonies that were found true as special circumstances. The prosecution evidence failed to prove that appellant had an independent felonious purpose for committing the felonies found true as special circumstances. Under *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Booker v. United States*, the requirement of an independent felonious purpose constituted an element of an offense for purpose of determining appellant's eligibility for the death penalty. Hence, the state and federal due process clause required the prosecution to prove beyond a reasonable doubt that appellant had an independent felonious purpose when he committed the felonies. Because the

prosecution failed to prove this required element, the true findings to the special circumstances, and the judgment of death, must be reversed.

2. LEGAL STANDARDS GOVERNING TRUE FINDINGS TO SPECIAL CIRCUMSTANCES

Penal Code section 190.2, subdivision (a), specifies the special circumstances that make a defendant eligible for the death penalty. Subdivision (a)(17) lists robbery, kidnaping, sodomy, and burglary as special circumstances. Penal Code section 190.4, subdivision (a), requires the trier of fact to find true beyond a reasonable doubt the special circumstances alleged in the information. This Court has ruled that the commission of acts listed in section 190.2, which are incidental to a murder, cannot support true findings to special circumstances.

In *People v. Green* (1980) 27 Cal.3d 1, the defendant murdered his wife. The jury found that the murder was willful, deliberate, and premeditated, and committed by the defendant during the course of a robbery and a kidnaping. The defendant was sentenced to death. The defendant drove his wife to a secluded area where he had intercourse with her and then shot her. To support the robbery special circumstance finding, the prosecution argued that the defendant had taken his wife's clothes, purse, and ring. The defendant challenged on appeal the sufficiency of the evidence to support the special circumstances findings. The Court concluded that the evidence was technically sufficient to support the defendant's robbery conviction. The Court noted that section 190.2 required the defendant to commit the murder "during the commission or attempted commission" of the crime

constituting the special circumstances.[27] (*People v. Green*, *supra*, 27 Cal.3d at p. 59, quoting former Pen. Code §190.2, subd. (c)(3). The occurrence of a crime listed as a special circumstance and a murder does not necessarily satisfy the "during the commission or attempted commission" requirement of the statute:

> in his closing argument, the district attorney correctly told the jurors that in order to find the charged special circumstances to be true they must first find defendant guilty of the underlying crimes of robbery and kidnaping. After discussing the evidence bearing on those crimes, however, the district attorney in effect told the jurors that was *all* they needed to do: i.e., that if they found defendant guilty of the underlying crimes, the corresponding special circumstances were ipso facto proved as well. The latter reasoning was unsound, as it ignored key language of the statute: it was not enough for the jury to find the defendant guilty of a murder *and* one of the listed crimes; the statute also required that the jury find the defendant committed the murder "during the commission or attempted commission of" that crime. (Former §§ 190.2, subd. (c)(3).) In other words, a valid conviction of a listed crime was a necessary condition to finding a corresponding special circumstance, but it was not a sufficient condition: the murder must also have been committed "during the commission" of the underlying crime.

(*People v. Green*, *supra*, 27 Cal.3d at p. 59.) In *People v. Green*, the jury asked a question which suggested that it believed that the robbery may have been incidental to the murder. This Court stated the following requirement in order for special circumstances to be found true:

> The Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death

[27] Similar language appears in section 190.2, subdivision (a)(17).

> penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a "willful, deliberate and premeditated" murder "during the commission" of a robbery or other listed felony. (Former §§ 190.2, subd. (c)(3).) The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim or witness to a holdup, a kidnaping, or a rape.

(*People v. Green*, *supra*, 27 Cal.3d at p. 61.) The *Green* opinion finally concluded:

> The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder -- "a second thing to it," as the jury foreman here said -- because its sole object is to facilitate or conceal the primary crime. In the case at hand, for example, it would not rationally distinguish between murderers to hold that this defendant can be subjected to the death penalty because he took his victim's clothing for the purpose of burning it later to prevent identification, when another defendant who committed an identical first degree murder could not be subjected to the death penalty if for the same purpose he buried the victim fully clothed -- or even if he doused the clothed body with gasoline and burned it at the scene instead. To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in *Gregg*. (428 U.S. at p. 189, [49 L. Ed. 2d at p. 883].) We conclude that regardless of chronology such a crime is not a murder committed "during the commission" of a robbery within the meaning of the statute.

(*People v. Green*, *supra,* 27 Cal.3d at pp. 61-62.)[28] The Court thus found the evidence insufficient as a matter of law to prove the special circumstances. (*Id.*, at p. 62.)

This Court has adhered to the holding of *People v. Green*. (E.g., *People v. Reyes* (2004) 32 Cal.4th 73, 113-114; *People v. Raley* (1992) 2 Cal.4th 870, 902-903; *People v. Kimble* (1988) 44 Cal.3d 480, 501-503; *People v. Weidert* (1985) 39 Cal.3d 836, 842; *People v. Thompson* (1980) 27 Cal.3d 303, 322-323.) The decision in *People v. Green* has been implicitly adopted and approved of by the Legislature. Section 190.2 was amended in 1998 to create an exception to the *Green* rule for the special circumstances of kidnaping and arson by the enactment of subdivision (a)(17)(m). (Stats. 1998, ch. 629, §1.) The holding of *People v. Green* has also been incorporated in the second paragraph of CALJIC 8.81.7. (*People v. Horning* (2004) 34 Cal.4th 871, 907.)

In *People v. Thompson*, *supra*, 27 Cal.3d 303, the defendant entered the victims' residence. He shot and killed one victim, and injured a second victim. The jury found true the special circumstances of robbery and first degree burglary, and sentenced the defendant to death. According to the Court, "[t]he question presented under *People v. Green* is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such thefts were `merely incidental to the murder.'" (*People v. Thompson, supra*, 27 Cal.3d at p. 324.) After reviewing the evidence, the Court concluded that "[w]hen the whole record is viewed in a light most favorable to the verdict, it establishes

[28] The holding of *People v. Green* has been incorporated in CALJIC 8.81.17.

at most a suspicion that appellant had an intent to steal independent of his intent to kill." (*Ibid.*) Hence, the evidence was insufficient as a matter of law to prove the true findings to the special circumstances.

In *People v. Ainsworth* (1988) 45 Cal.3d 984, the defendant kidnaped the victim, put her in his car, and let her bleed to death over several hours. The Court stated that "*Green* and *Thompson* stand for the proposition that when the underlying felony is merely incidental to the murder, the murder cannot be said to constitute a `murder in the commission of' the felony and will not support a finding of felony-murder special circumstance." (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1026.) This court adhered to that formulation of the *Green* decision to the present day. (*E.g., People v. Valdez*, *supra*, 32 Cal.4th at pp. 113-114 [*Green* simply made it clear that a robbery, in a special circumstance allegation, cannot be merely incidental to the murder].)

3. APPLICATION TO THE INSTANT CASE

Under *People v. Green*, the true findings to the special circumstances can be upheld only if appellant had an independent felonious purpose during the commission of the murder. If the felonies committed during Ms. Kennedy's murder were incidental to her murder, the true findings cannot be upheld.

The special circumstances found true were the commission of a burglary, kidnaping, sodomy, and robbery. The lack of evidence about how this incident occurred precludes this Court from finding that appellant had an independent felonious purpose when he committed

the above felonies during Ms. Kennedy's murder.

The first special circumstance found true was that appellant committed burglary. There was no evidence that appellant had an independent felonious purpose when he committed burglary because: (1) there was no evidence that appellant intended to commit a crime when he entered the building; and (2) even assuming that appellant intended to murder the victim, there was no evidence that appellant intended to commit a burglary separate and apart from that murder.

The police found no evidence of forced entry. It appears that the victim let appellant enter the building. There was no evidence that appellant intended to commit a crime when he entered the building. Appellant's decision to commit a crime could have occurred after he entered the medical office. Appellant's vehicle was allegedly parked on the parking lot of the Long John Silver restaurant. This evidence was too ambiguous to support a finding beyond a reasonable doubt that appellant intended to commit a crime when he entered the medical office. Appellant could have parked in the Long John Silver parking lot because he intended to eat at the restaurant. Hence, the true finding to the burglary special circumstance cannot be upheld based on appellant's entry into the building.

Movement of a victim from one room to another room in the same building will support a conviction for burglary. (Pen. Code §459, subd. (a): *People v. Young, supra*, 65 Cal. at p. 226.) The jury may have found appellant guilty of burglary because the victim

was moved from her office to the procedure room.[29] However, if appellant intended to murder the victim when that occurred–or even when appellant entered the building-- then appellant committed a burglary during the commission of a murder—and not a murder during the commission of a burglary. The prosecution had the burden of proving beyond a reasonable doubt that appellant had an independent felonious purpose. (But cf. *People v. Kimble, supra*, 44 Cal.3d at p. 501 [rejecting the argument that the holding of *People v. Green* had become an element of special circumstances].) There is simply no way to determine whether appellant committed murder in the commission of a burglary, or a burglary in the commission of a murder.

The next special circumstance found true was kidnaping.[30] Presumably, the kidnaping was based on the movement of the victim from her office to the procedure room. Appellant argued above that the true finding to the kidnaping special circumstance must be set aside because: (1) the evidence was insufficient as a matter of law to prove that crime; (2) the trial court gave an erroneous definition of asportation; and (3) the trial court failed

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[29] For purpose of this argument, Appellant is assuming that there was sufficient evidence to support the burglary conviction. Appellant's position is that there is insufficient evidence to support the burglary conviction. (See Argument VIII.)

[30] Ms. Kennedy was murdered on March 30, 1998. Penal Code section 190.2, subdivision (a)(17)(M), provides an exception to the rule in *People v. Green* for the crime of kidnaping in violation of Penal Code section 207, 209, or 209.5 when the defendant has a specific intent to kill. Subdivision (a)(17)(M) was enacted by Statute 1998, chapter 629, section 1. The statute was therefore effective after the date of Ms. Kennedy's death. (Cal. Const., Art. IV, §8, subd. (c)(1).) Furthermore, the 1998 Amendment to section 190.2 did not become effective until the voters approved Proposition 21 during the March 7, 2000 election. (Need cite.)

to instruct on the lesser included offense of false imprisonment. Assuming that the true finding to the kidnaping special circumstance is not set aside for any of the aforementioned reasons, it still must be reversed. If appellant intended to kill the victim when he moved her from the office to the procedure room, then he committed a kidnaping during the course of a murder—and not a murder during the course of a kidnaping. Speculation about how this incident occurred cannot be a substitute for proof. There was simply no evidence that appellant had an independent felonious intent to commit a kidnaping during the sequence of events that led to the victim's death.

The next special circumstance found true was sodomy. Presumably, this crime occurred after the victim entered the procedure room and had been tied up with shoestring. A sock was used as a gag to prevent the victim from making noise. The true finding to this special circumstance suffers from the same infirmity as the true finding to the other special circumstances. There is no way to determine if appellant intended to kill the victim when he committed sodomy, or committed sodomy and then decided to kill the victim. If appellant intended to kill the victim from the inception of the incident, and the sodomy occurred incident to the murder, then the true finding to the sodomy special circumstance cannot be upheld. Because there is no way to make this determination based on this record, the true finding to the sodomy special circumstances must be reversed.

The next special circumstance found true was robbery. This finding was based on the personal property allegedly taken from the victim. The prosecution presented evidence

that a watch and ring may have been taken from her. When appellant gave a watch and ring to his cousin, Gloria Salazar, he made the comment, "the bitch made me mad." (Vol. 7, R.T. pp. 1550-1551.) Assuming appellant's comment was directed towards Ms. Kennedy, it suggests that his taking of the watch and ring was incidental to her murder. There is no evidence that cash was taken from Ms. Kennedy during the incident, and her husband did not receive reports of any unlawful transactions occurring with her credit cards. (Vol. 4, R.T. p. 879.)

People v. Thompson demonstrates why the evidence in this case was insufficient to prove that appellant had the independent felonious intent of committing robbery. In that case, the defendant entered the victims' residence, who were the female occupant of the residence and her boyfriend. The defendant in *Thompson* forced the victims to go from the second floor to the first floor and sit on a loveseat in the family room. The defendant expressed little interest in the valuables in the house or money. The defendant said, "you know why I'm here and you know who sent me." The defendant then shot and killed the boyfriend, and wounded the female. Towards the end of the confrontation and before the shooting, the defendant asked the female victim for her car keys and automobile. The Court stated that "[t]he question presented under *People v. Green* is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such intended thefts were merely incidental to the murder." (*People v. Thompson*, supra, 27 Cal.3d at p. 324.) Because of the defendant's lack of interest in the valuables in

the home, the Court noted that "[t]he conclusion seems inescapable, then, that the evidence is insufficient to establish an intent to steal money." (*Id.*, at p. 323.) The Court found the taking of the car and keys insufficient to prove an independent felonious intent to commit robbery:

> The perpetrator's final remark to his victims as he held the pillow in front of his gun -- "you know why I'm here and you know who sent me" -- undeniably indicates that this confrontation was intended primarily (if not exclusively) to be a killing. The man's refusal without apparent reason to accept any of the victims' jewelry strongly imports that property gain was at most of secondary importance. According to an uncontradicted portion of his confession, appellant arrived at the home on foot. Therefore, he had a motive to take a car simply to effect his getaway from the shootings he intended; and the fact that his first demand for the car was made just prior to the shootings suggests that this was indeed his reason for demanding the car keys. It was well established by the record that appellant was an accomplished automobile thief, one who would have no need for car keys in order to make off with a vehicle.

(*People v. Thompson, supra*, 27 Cal.3d at p. 323.) Because the above evidence raised at most a suspicion of an intent to steal independent of an intent to kill, the true finding to the robbery special circumstance was reversed. (*Ibid.*)

Similar reasoning applies to the instant case. There is nothing to suggest that appellant's primary motive was to commit a robbery. Given appellant's comment that "the bitch made me mad," when he gave the watch and ring to Ms. Salazar, the conclusion is inescapable that appellant did not have an intent to steal independent of an intent to

murder.[31] The taking of the watch and ring was clearly an afterthought in connection with the murder. The evidence was insufficient to establish that appellant committed "a murder in the commission of a robbery [rather than] the exact opposite, a robbery in the commission of a murder." (*People v. Green, supra*, 27 Cal.3d at p. 60; *see also People v. Weidert*, *supra*, 39 Cal.3d at p. 842 [setting aside a special circumstance finding of kidnaping because the evidence established that the defendant intended to kill the victim when he kidnaped him].)

The decision in *People v. Green* also suggests that appellant's robbery of the victim was incidental to a murder. The Court in *Green* set aside the special circumstances of kidnaping and robbery because the commission of those crimes was incidental to the murder.

In this case, there was no evidence of an independent felonious purpose. There was no evidence why appellant went to the medical office. Indeed, appellant had been a patient once and had legitimate business reasons for going to the medical clinic, such as scheduling an appointment, obtaining copies of records, or arranging payment for services. There is no evidence that appellant intended to commit certain felonies and the incident transpired into a murder, or whether appellant planned a murder and felonies were committed incident to that murder. The evidence in *People v. Kimble* showed planning for a robbery and burglary. There was no evidence of planning for any of the four felonies found true as special circumstances. The defendant in *People v. Kimble* committed the murder to perpetrate the felonies of burglary and robbery of the electronics store. No such finding can be made in the

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[31] Appellant is assuming for purpose of argument that appellant's comment, "the bitch made me mad" referred to Ms. Kennedy.

instant case.

In *People v. Ainsworth*, the special circumstances of robbery and kidnaping were found true. The defendant and his co-defendant kidnaped the victim from a parking lot, drove her to a remote location, and left her to die. After the victim's body was found several months later, the cause of death was determined to be a gunshot to the hip. The lack of medical help following the shooting led to the victim's death.

The defendant argued that the evidence required an instruction that to find the kidnaping special circumstances true, it must be proved that the murder was committed in order to carry out or to advance the commission of that crime. The Court rejected this argument because there was nothing in the record to indicate that a kidnaping had occurred during the commission of a murder, rather than vice-versa. The Court stated that "there was substantial evidence from which the jury could have found the robbery and kidnaping were not merely `incidental' to the murder within the meaning of *Green* and *Thompson* and that defendant harbored an independent felonious purpose as to those crimes." (*People v. Ainsworth, supra*, 45 Cal.3d at p. 1026; see also *People v. Raley, supra*, 2 Cal.4th at pp. 902-903 [upholding a kidnaping special circumstance because the jury could reasonably infer that the defendant formed the intent to kill the victim after the asportation commenced].) The evidence in *People v. Ainsworth* suggested that "defendant knowingly and intentionally permitted the victim to bleed to death as he kept her captive during the lengthy car ride after the shooting." (*Id.*, at p. 1023.)

In the instant case, appellant did not commit a prolonged kidnaping. There was no basis for the jury to conclude appellant intended to commit a kidnaping, and a murder occurred during its commission. The evidence in *People v. Ainsworth* supported a finding of a desire to rob and kidnap the victim without necessarily intending a murder at the inception of those crime. The lack of evidence in this case about how Ms. Kennedy was killed precludes a similar finding in the instant case. If appellant intended to kill the victim from the inception of the incident, and the sodomy occurred incident to the murder, then the true finding to the sodomy special circumstance cannot be upheld. Because there is no way to make this determination based on this record, the true finding to the sodomy special circumstances must be reversed.

4. THE FEDERAL AND STATE DUE PROCESS CLAUSE REQUIRED THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT HAD AN INDEPENDENT FELONIOUS PURPOSE WHEN HE COMMITTED THE FELONIES

Under *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Booker v. United States*, the requirement of an independent felonious purpose constituted an element of an offense which the prosecution had to prove beyond a reasonable doubt.

In *People v. Kimble, supra*, 44 Cal.3d 480, the jury found true special circumstance allegations of two counts of robbery, and one count of burglary and rape. The defendant argued that the special circumstances had to be reversed for instructional error and insufficiency of the evidence. The defendant argued that the instructions should have been tailored to incorporate the holding of *People v. Green*. The Court rejected the defendant's

argument that Green's clarification of the felony-murder special circumstances had become an element of special circumstance findings which required instructions in all cases regardless of the evidence. (*People v. Kimble, supra*, 44 Cal.3d at p. 50; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 767 [citing *People v. Kimble* for the proposition the *People v. Green* did not add an element to felony-murder or special circumstance allegations but simply clarified the scope of those doctrines]; *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204.)

The Ninth Circuit has not agreed with this Court's characterization of the "independent felonious purpose" requirement, and suggested that an "independent felonious purpose" is an element of a special circumstances finding. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476 [stating that the requirement of an independent felonious purpose for a special circumstance finding provides the narrowing function required to make California's death penalty statute constitutional].)

The Supreme Court's recent decisions affirm that the characterization in *Williams v. Calderon* of the "independent felonious purpose" as an element of a crime which must be proved beyond a reasonable doubt was correct. Under *Apprendi v. New Jersey* and *Blakely v. Washington*, the trier of fact had to find beyond a reasonable doubt the facts which make the defendant eligible for the maximum sentence that may be imposed for the crime of which or she was convicted. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; *Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.) *Ring v. Arizona* clearly demonstrates that the

"independent felonious purpose" requirement constitutes an element of an offense with regard to the special circumstance allegation. The Court decided in that case that special circumstance allegations which made a defendant eligible for the death penalty had to be found by the jury beyond a reasonable doubt rather than the trial judge. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ibid.*) The felonies alleged as special circumstances against appellant operated as the functional equivalent of a greater offense. This Court has concluded that an "independent felonious purpose" must be found in order for the aggravating circumstances to be found true. *Ring v. Arizona* thus requires that the jury find beyond a reasonable doubt that appellant had an "independent felonious purpose" when he committed the felonies which were alleged as special circumstances.

For the reasons above, all of the special circumstances findings must be reversed. The reversal of the special circumstance findings requires reversal of the penalty of death for count 1.

XIII

THE GUILTY VERDICTS, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE: (1) THE PROSECUTOR COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL IN VIOLATION OF *GRIFFIN V. CALIFORNIA* (1965) 380 U.S. 609, 613-615, 14 L. Ed. 2d 106, 85 S. Ct. 1229; ALTERNATIVELY, THE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS DURING HIS GUILT PHASE AND PENALTY PHASE CLOSING ARGUMENTS

1. SUMMARY OF ARGUMENT

Appellant did not testify during either the guilt or penalty phase of the trial. The prosecutor, during his guilt phase closing argument, argued that the evidence was uncontradicted. The prosecutor, during his penalty phase closing argument, argued that appellant committed the crime without showing any empathy towards the victim or remorse over what he had done. In *Griffin v. California*, the Supreme Court held that a prosecutor violates a defendant's constitutional right to silence by commenting at trial on the defendant's failure to testify. The above arguments by the prosecutor commented on appellant's failure to testify in violation of *Griffin v. California*. This Court has held that federal constitutional error can be reviewed in the absence of an objection. If an objection was required to preserve the *Griffin* error for appellate review, then appellant was denied the effective assistance of counsel guaranteed by the federal and state constitutions. The

prosecutor's comments on appellant's failure to testify was prejudicial with regard to the guilt phase and penalty phase. Hence, the findings of guilt and/or the judgment of death must be reversed.

2. SUMMARY OF PROCEEDINGS BELOW

During the prosecutor's guilt phase closing argument, he commented as follows:

> And the victims out of desire and understandable desire —and the witnesses out of a desire, understandable desire, to help their relative and friend, their uncle, their brother, their boyfriend, ex-boyfriend, to help him out in this situation, tried to remember things that simply were not true but that were based upon a factual incident.
>
> This is the evidence in this case. The evidence in this case is not contradicted by any other evidence in this case.

(Vol. 11, R.T. pp. 2759-2760.)

During the prosecutor's penalty phase closing argument, the prosecutor argued as follows:

> He showed no sympathy, no empathy for her whatsoever. We can only imaging what she was doing during this attack, and in spite of that input that she was giving, the cries, the sounds, he continued his attack upon her.
>
> . . .
>
> And finally, this particular crime, so casual, in that the defendant, it appears, simply went to that place on a fantasy that he had, a thought he had, knocked on the door, went in, did all this in a short period of time and then casually leaves the scene. Casually leaves the scene. That's one of the horrors in this case. The two people, three people inside the restaurant where he parked the car didn't hear any squealing of tires as he left. He

> casually leaves the scene.
>
> We didn't hear any evidence of, you know, being struck by the horror of the crime he had committed here, as so often you do see in other types of murder cases. In fact, this is a rather unique case in that the defendant, the crime in this particular case, has no remorse attached to it whatsoever. Whatsoever.

(Vol. 16, R.T. pp. 3803-3804.)

3. THE PROSECUTOR'S ARGUMENTS ABOVE IMPROPERLY COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL

In *Griffin v. California, supra*, 380 U.S. 609, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt. (*People v. Lewis* (2001) 25 Cal.4th 610, 670.) *Griffin* has been interpreted as prohibiting the prosecution from so much as suggesting to the jury that it may view the defendant's silence as evidence of guilt. (*United States v. Robinson* (1988) 485 U.S. 25, 32, 99 L. Ed. 2d 23, 108 S. Ct. 864, quoting *Baxter v. Palmigiano* (1976) 425 U.S. 308, 319, 47 L. Ed. 2d 810, 96 S. Ct. 1551.) This Court has declared, that *Griffin*, error is committed whenever the prosecutor comments, either directly or indirectly, upon defendant's failure to testify in his defense. (*People v. Hughes* (2002) 27 Cal.4th 287, 372; *People v. Medina* (1995) 11 Cal. 4th 694, 755.)

Griffin v. California does not, however, extend to bar prosecution comments based upon the state of the evidence, or upon the failure of the defense to introduce material evidence, or to call anticipated witnesses. (*People v. Johnson* (1992) 3 Cal. 4th 1183, 1229;

People v. Morris (1988) 46 Cal. 3d 1, 35.) A prosecutor may commit *Griffin* error by arguing to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided only by the defendant, who therefore would be required to take the witness stand. (*People v. Hughes, supra*, 27 Cal.4th at p. 371; *People v. Johnson, supra*, 3 Cal. 4th 1183, 1229; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1051.) The prosecutor may also commit Griffin error by referring to the absence of evidence that only the defendant's testimony could provide. (*People v. Hughes, supra*, 27 Cal.4th at p. 372, citing *People v. Murtishaw* (1981) 29 Cal.3d 733, 757 & fn. 19.)

Here, the prosecutor's guilt phase closing argument constituted *Griffin* error. After making reference to the testimony of defense witnesses who had provided exculpatory testimony, the prosecutor stated that "[t]his is the evidence in this case. The evidence in this case is not contradicted by any other evidence in this case." (Vol. 11, R.T. p. 2760.) The phrase, "not contradicted by any other evidence in this case," did not refer to the defense witnesses who provided exculpatory testimony because their testimony did contradict the prosecution evidence. The jury could only have interpreted the phrase, "not contradicted by any other evidence in this case," as a reference to appellant's failure to testify and to contradict the prosecution evidence. Appellant obviously knew whether he was present when the victim was killed. He was the single person best situated to answer the question of who killed the victim. What other evidence would the jury want to hear to answer the prosecution evidence but appellant's testimony? Griffin error occurs when the prosecutor

comments indirectly on the defendant's failure to testify at trial, (*People v. Hughes, supra*, 27 Cal.4th at p. 372), or refers to the absence of evidence that only the defendant's testimony could provide. (*People v. Hughes, supra*, 27 Cal.4th at p. 372.) The prosecutor's comment about the prosecution evidence not being contradicted by any other evidence commented on appellant's failure to testify, and also directed the jury to evidence which naturally would have been provided by appellant's testimony. Hence, the prosecutor committed Griffin error during his guilt phase closing argument.

The prosecutor also committed *Griffin* error during his penalty phase closing argument. The prosecutor argued, "[h]e showed no sympathy, no empathy for her whatsoever." (Vol. 16, R.T. p. 3803.) This comment in isolation perhaps did not constitute Griffin error because it referred to appellant's state of mind at the time of the crime. However, the prosecutor exacerbated the error by commenting that "[w]e didn't hear any evidence of, you know, being struck by the horror of the crime he had committed here, as you so often see in other type of murder cases. In fact, this is a rather unique case in that the defendant, the crime in this particular case, has no remorse attached to it whatsoever." (Vol. 16, R.T. p. 3804.) The above arguments constituted *Griffin* error for several reasons. The arguments referred to hearing evidence about appellant's state of mind at trial. Appellant could have provided that evidence only through testifying. The prosecutor's argument did not refer to appellant's state of mind at some time other than at trial. The comment also referred to the lack of evidence of remorse by appellant. Who but appellant, through

testifying, could have provided evidence that he was remorseful? *Griffin* error occurs when the prosecutor refers to the absence of testimony which could be provided only by the defendant. (*People v. Hughes, supra*, 27 Cal.4th at p. 372.) The prosecutor's reference to appellant's failure to demonstrate remorse clearly directed the jury's attention to testimony which could have been provided only by appellant. Hence, the prosecutor committed *Griffin* error during his penalty phase closing argument.

The defense counsel did not object to the prosecutor's arguments which constituted *Griffin* error. The general rule is that an objection or motion to strike is required in order to preserve for appellate review a prosecutor's improper reference to the defendant's failure to testify. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) This Court should alter that rule and hold that *Griffin* error can be reviewed in the absence of an objection based on it application of the waiver rule to fundamental constitutional right. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (*People v. Vera* (1997) 15 Cal.4th 269, 276.) *Griffin* error involves fundamental constitutional rights and should not be subject to the waiver rule.

4. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IF APPELLATE REVIEW OF THE GRIFFIN ERROR WAS WAIVED BECAUSE THE DEFENSE COUNSEL FAILED TO MAKE AN OBJECTION

Assuming this Court finds the *Griffin* errors to be waived because of the lack of an objection, then appellant was deprived of the effective assistance of counsel under both the

Sixth Amendment to the United States Constitution and Article I, section 15 of the California Constitution, a defendant in a criminal case has a right to the assistance of counsel. *Holloway v. Arkansas* (1978) 435 U.S. 475, 481-487, 98 S.Ct. 1173, 1177-1180, 55 L.Ed.2d 426, *People v. Ledesma* (1987) 43 Cal.3d 171, 215. "The constitutional guaranty 'entitles the defendant not to some bare assistance but rather to effective assistance.'" (*People v. Ledesma, supra*, 43 Cal.3d at p. 215.)

A claim of ineffective assistance of counsel requires a showing of a deficient performance and prejudice. In order to demonstrate that his counsel's performance was deficient, "a defendant must show that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and that counsel's performance was prejudicial in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*People v. Mayfield* (1997) 14 Cal.4th 668, 784, citing *Strickland v. Washington* (1984) 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 and *People v. Wader* (1993) 5 Cal.4th 610, 636.) Hence, "the defendant must show that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense or that it is reasonably probable a decision more favorable to the defendant would have resulted in the absence of counsel's failings." (*People v. Cox* (1987) 193 Cal.App.3d 1434, 1440, citing *People v. Pope* (1979) 23 Cal.3d 412, 425; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) A claim of ineffective assistance of counsel may be premised on the failure to object to inadmissible evidence or

argument. (See *People v. Sundlee* (1977) 70 Cal.App.3d 477, 484-485.)

The defense counsel failed to object to the prosecutor's improper reference to appellant's failure to testify or to make a motion to strike that argument. To the extent Griffin error must be objected to in the trial court in order to be reviewed on appeal, (*People v. Berryman, supra*, 6 Cal.4th at p. 1072), appellant received ineffective assistance of counsel because of his defense counsel's failure to object to the above argument. There could have been no strategic reason for the prosecutor to not have objected to the Griffin error. The prosecutor's argument about appellant's lack of remorse was especially damaging because it would make the jury more likely to see appellant as a cold blooded killer who needed to be executed.

This Court may be tempted to conclude that appellant's defense counsel was not ineffective in failing to object, or to move to strike, the prosecutor's argument because such actions would have drawn the attention of the jury to appellant's failure to testify. (C.f., *People v. Padilla* (1995) 11 Cal.4th 891, 947 [defense counsel did not render ineffective assistance of counsel by failing to object to prosecutor's comment on witness's exercise of Fifth Amendment right against self-incrimination].) Assuming this Court were to resolve the ineffective assistance of counsel issue in this manner, then appellant should be entitled to review on the merits the *Griffin* error. The requirement of an objection or a motion to strike prosecutorial misconduct is only a general rule. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) The requirement of an objection or motion to strike will be excused if either would

be futile or if an admonition would not have cured the harm. (*Ibid.*) If a defense counsel refrains from objecting to or moving to strike *Griffin* error because he does not want to draw the jury's attention to the defendant's failure to testify, defendants are put in a no-win situation regarding this type of error. If the defense attorney does not object to, or move to strike the prosecutor's improper argument, this Court will conclude that he had a strategic reason for not doing so– – which is the desire of the defense counsel to avoid additional emphasis on the defendant's failure to testify. Hence, a defendant will not prevail on the ineffective assistance of counsel claim. Similarly, the defense counsel's failure to move to object to, or move to strike, the prosecutor's improper argument will result in application of the waiver rule, which means that the *Griffin* error is not reviewed on the merits. This result is fundamentally unfair and gives carte blanche to prosecutors to commit *Griffin* error, knowing that it is unlikely any consequences will be imposed as a result of this misconduct. Hence, the general rule of waiver should not be applied to this type of error and this Court should review the *Griffin* error on the merits.

5. PREJUDICE

To reverse a conviction based on ineffective assistance of counsel, "the defendant must show that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense or that it is reasonably probable a decision more favorable to the defendant would have resulted in the absence of counsel's failings." (*People v. Cox, supra,* 193 Cal.App.3d at p. 1440.) Because the defense counsel's omission was the failure to

object to *Griffin* error, the standard for prejudice from *Griffin* error should be applied in assessing prejudice. The Chapman harmless beyond a reasonable doubt applies to *Griffin* error. (*People v. Cahill* (1993) 5 Cal.4th 478, 523, fn. 5.)

The prosecutor's *Griffin* error was prejudicial with regard to the guilt and penalty phases of the trial under the Chapman reasonable doubt standard or the Strickland reasonable probability of a different outcome standard. In determining the degree of prejudice flowing from *Griffin* error, the court must "focus upon the extent to which the comment itself might have increased the jury's inclination to treat the defendant's silence as an indication of his guilt." (*People v. Miller* (1996) 46 Cal.App.4th 412, 429.) In order for *Griffin* error to be prejudicial, the improper comment must either serve to fill an evidentiary gap in the prosecution case or touch a live nerve in the defense case. (*People v. Vargas* (1973) 9 Cal.3d 470, 478-481.) There were two people who knew what happened in the medical clinic; the victim and the perpetrator of the murder. By arguing to the jury that "the evidence in this case is not contradicted by any other evidence in this case," (Vol. 11, R.T. p. 2760), the prosecutor touched a live nerve in the defense case. The jury must have looked to appellant to contradict the evidence which the prosecutor claimed was uncontradicted. Appellant failed to do so through testifying. The prosecution had the DNA evidence and the palm print to connect appellant to the crime scene. The jury was not required to accept this evidence. Appellant had been a patient at the Medical Clinic and his DNA and palm print could have been there for that reason. Because the prosecutor's guilt phase Griffin

error during closing argument was prejudicial, the judgment of guilt must be reversed.

The prosecutor's penalty phase Griffin error especially prejudicial. He argued at length that appellant had failed to demonstrate remorse. (Vol. 16, R.T. pp. 3803-3804.) Appellant's alleged lack of remorse had to be a significant factor in the jury's decision to impose the death penalty. Because of the manner in which the prosecutor phrased his argument regarding appellant's lack of remorse, the only reason the jury would have concluded that he lacked remorse was because he failed to testify.

This was a close case with regard to imposition of the death penalty. The jury asked what would happen if it could not decide the penalty. (Vol. 2, C.T. p. 508.) The jury had before it significant mitigating evidence. Appellant obviously had a troubled youth and lacked any positive role models. Appellant's family members dragged him back into destructive behavior every time he showed signs of rehabilitation. (Vol. 13, R.T. pp. 3165, 3282.) When appellant was not being negatively influenced by his brothers, he was a productive member of society. Leo Moreno, appellant's father-in-law, testified that appellant maintained employment while he was living with him and behaved appropriately. (Vol. 13, R.T. pp. 3281-3282.) Remorse, or the lack of remorse, was not specifically listed in the jury instructions as a factor in aggravation or mitigation of the sentence. (Vol. 2, C.T. pp. 807-808; Vol. 16, R.T. pp. 3850-3851.) However, because the prosecutor's argument was received without objection, the jury obviously considered appellant's alleged lack of remorse in aggravation.

The argument that appellant lacked remorse was especially damaging because of Dr. Baca's opinion that appellant had an antisocial personality disorder. (Vol. 15, R.T. p. 3712.) She testified that appellant did not suffer from subjective distress. (Vol. 15, R.T. p. 3726.) Testimony that appellant was a psychopath, combined with argument that he lacked remorse, must have convinced the jury that appellant could not be incarcerated in any environment and not be a threat to other individuals.

The cumulative effect of the errors during the guilt phase of the trial was also prejudicial. The trial court excluded from evidence testimony from Dr. Morales about the role of genetics in shaping appellant's behavior and documentary evidence, i.e., exhibit 61, which would have explained his opinions. (See Issue XVI, infra.) The jury was allowed to deliberate with the erroneous belief that appellant would receive a new trial regarding his guilt if the jury did not decide the penalty. (See Issue XV, infra.) The prosecutor improperly argued the absence of mitigating evidence as factors in aggravation. (See Issue IXX, infra.) The combined effect of these errors, along with the *Griffin* error, was to deprive appellant of a fair penalty phase hearing.

For the reasons above, the judgment of guilt and/or the penalty must be reversed.

PENALTY PHASE ISSUES

XIV

THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS, AND THE FEDERAL AND STATE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT, REQUIRES REVERSAL OF THE JUDGMENT OF DEATH BECAUSE OF THE REVERSAL OF THE TRUE FINDINGS TO THE AGGRAVATING CIRCUMSTANCES

1. SUMMARY OF ARGUMENT

Appellant argued above that the true findings of each of the special circumstances must be reversed both for insufficiency of the evidence and instructional error. If all of the special circumstances are reversed, then appellant will no longer be eligible for the death penalty. If one, but less than all, of the special circumstances are reversed, this Court must determine whether the judgment of death must be reversed. In *Brown v. Sanders* (2006) ____U.S. ____, 126 S.Ct. 884, the Supreme Court articulated a new standard for determining prejudice when an aggravating factor is reversed. Under *Brown v. Sanders*, the reversal of any of the aggravating circumstances found true by the jury in this case must result in reversal of the judgment of death. The judgment of death must therefore be vacated.

2. LEGAL STANDARD GOVERNING SPECIAL CIRCUMSTANCE FINDINGS AND THE JURY'S DECISION TO IMPOSE THE DEATH PENALTY

In *Brown v. Sanders*, the defendant and his companion invaded a home where they bound and blindfolded the male inhabitant and his girlfriend. Both individuals were struck

in the head with a blunt object. The girlfriend died from the blow. The jury found four special circumstances listed in Penal Code section 190.2 to be true. The special circumstances were robbery, burglary, the killing of a witness to a crime, and the commission of a murder in a heinous, atrocious, and cruel manner. This Court set aside the burglary special circumstance under the merger doctrine, and set aside the heinous, atrocious, and cruel manner of killing special circumstance based on unconstitutional vagueness. Because the jury properly considered the two remaining special circumstances, this Court affirmed the judgment of death.

The defendant argued in the United States Supreme Court that reversal of the two special circumstance findings required reversal of the judgment of death. When deciding what sentence to impose, the jury was instructed to consider the existence of any special circumstances found to be true. The defendant argued that the jury's sentencing decision was erroneously skewed by the consideration of the aggravating factors which were reversed on appeal by this Court. The Supreme Court considered whether "the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 888.)

The Court first discussed the distinction in its death penalty jurisprudence between weighing and non-weighing States. In a weighing state, the only aggravating factors to be considered by the sentencer were the specified eligibility factors. (*Id.*, at p. 890.) In a

weighing state, reversal of the judgment of death was required under the following circumstances:

> Since the eligibility factors by definition identified distinct and particular aggravating features, if one of them was invalid the jury could not consider the facts and circumstances relevant to that factor as aggravating in some other capacity--for example, as relevant to an omnibus "circumstances of the crime" sentencing factor such as the one in the present case. In a weighing State, therefore, the sentencer's consideration of an invalid eligibility factor necessarily skewed its balancing of aggravators with mitigators, *Stringer*, 503 U.S., at 232, 112 S.Ct. 1130, and required reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors), *Ibid.*

(*Brown v. Sanders, supra*, 126 S.Ct. at p. 890.)

In a non-weighing state, the sentencer was allowed to consider aggravating factors different from, or in addition to, the eligibility factors. The skewing process referred to above would not necessarily occur in a non-weighing state. (*Ibid.*) The skewing process would not occur if the aggravating factors were different from the eligibility factors, or if the invalidated eligibility factor could be considered by the sentencer as aggravating evidence under some other rubric, such as an omnibus "circumstances of the crime" factor. (*Ibid.*) Prejudice in a non-weighing state was therefore determined as follows:

> The sentencer's consideration of an invalid eligibility factor amounts to constitutional error in a non-weighing State in two situations. First, due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or

> that it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, ... or to conduct that actually should militate in favor of a lesser penalty." *Zant,* 462 U.S., at 885, 103 S.Ct. 2733. Second, the death sentence must be set aside if the jury's consideration of the invalidated eligibility factor allowed it to hear evidence that would not otherwise have been before it. See *id.,* at 886, 103 S.Ct. 2733; see also *Tuggle v. Netherland,* 516 U.S. 10, 13-14, 116 S.Ct. 283, 133 L.Ed.2d 251 (1995) *(per curiam).*

(*Brown v. Sanders, supra*, 126 S.Ct. at pp. 890-891.)

The Supreme Court concluded that "[t]his weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations." (*Id.*, at p. 891.)

The Court adopted a new test for when a judgment of death must be reversed:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.)

Justice Breyer filed a dissenting opinion stating that the sentencer's consideration of an invalid aggravator must be found by the reviewing court to be harmless beyond a reasonable doubt regardless of the form of the State's death penalty law. (*Brown v. Sanders, supra*, 126 S.Ct. p. 896 [J. Breyer dissenting].) The majority opinion in *Brown v. Sanders* addressed Justice Breyer's arguments. The Court first noted that "[i]f the presence of the

invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.) The Court distinguished that situation from the situation in the case before it. "The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Ibid.*) The test for prejudice under that situation was as follows:

> such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

(*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.)

The Court then applied the above test to the case before it. The Court noted that the special circumstances listed in section 190.2 are the eligibility factors that satisfy *Furman v. Georgia* (1972) 408 U.S. 238, 192 S.Ct. 2736, 33 L.Ed.2d 346. (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.)[32] Reversal of the judgment of death was not required for the following reason:

> the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the

[32] The Court concluded that the instruction to the jury to consider the circumstances of the crime had, "the effect of rendering all the specified factors nonexclusive, thus causing California to be (in our prior teminology a non-weighing State." (*Brown v. Sanders*, supra, 126 S.Ct. at p. 893.) The Court analyzed prejudice, however, under the new standards it adopted in *Brown v. Sanders*.

> "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Brown v. Sanders, supra*, 126 S.Ct. at p. 894.) In response to the defendant's argument that the instruction to the jury to consider the special circumstances found true in determining the penalty placed prejudicial emphasis on the invalid eligibility factors, the Court concluded that any such impact was inconsequential. (*Ibid.*)

3. APPLICATION TO THE INSTANT CASE

The jury found true the special circumstances that appellant committed the murder during the course of a burglary, robbery, sodomy, and kidnaping. (Vol. 12, R.T. pp. 2871-2877.) In determining the penalty, the jury was instructed to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (Vol. 16, R.T. p. 3850; Vol. 2, C.T. p. 807.) Appellant argued above that each of the special circumstances must be reversed for insufficiency of the evidence and instructional error. Assuming this Court agrees that one or more of the special circumstance findings must be reversed for insufficiency of the evidence or instructional error, the holding of *Brown v. Sanders* compels reversal of the judgment of death.

Brown v. Sanders concluded that "[i]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due

process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892.) That is the situation in the instant case. The jury considered, in determining whether to impose the death penalty, the fact that appellant allegedly robbed, sodomized, and kidnaped the victim, and committed burglary. The fact that the jury considered appellant's alleged sodomy of the victim in determining the penalty had to be especially prejudicial because of the degrading nature of that act. Because the evidence was insufficient as a matter of law to prove that appellant committed any of the special circumstances found true, the jury should ultimately not have considered evidence pertaining to those allegations as aggravators.[33]

When the Court in *Brown v. Sanders* noted that due process requires reversal of a judgment of death if an invalid sentencing factor allowed the sentencer to consider evidence that would otherwise not have been before it, it cited page 891 of its opinion and footnote 6. On page 891, the Court discussed the situations in which an invalid aggravating factor requires reversal of a judgment of death in a non-weighing state. Those situations were when the jury was allowed to draw adverse inferences from constitutionally protected conduct, attaches the label "aggravating" to constitutionally impermissible or irrelevant factors or factors which should militate in favor of a lesser penalty. (*Id.*, at p. 891.) In the instant case, the label "aggravating" was attached to the constitutionally irrelevant factors of robbery, sodomy, kidnaping, and burglary. Those factors were irrelevant because of the lack of proof

[33] The same conclusion applies if one of the special circumstances is reversed for instructional error.

that those crimes occurred in connection with the murder.

The Court in *Brown v. Sanders* concluded it was inconsequential that the jury had considered as aggravating the special circumstances which were found to be invalid. The key difference between *Brown v. Sanders* and the instant case is the basis upon which the special circumstances were reversed on appeal. In *Brown v. Sanders*, the first special circumstance reversed on appeal was burglary. It was reversed because of the merger doctrine and not insufficiency of the evidence. The second special circumstance reversed on appeal was the commission of a murder in a heinous, atrocious, or cruel manner. It was reversed because of vagueness. This special circumstance merely applied a label to conduct and could not have impacted in any manner the evidence considered by the jury. In *Brown v. Sanders*, "all of the facts and circumstances admissible to establish the `heinous, atrocious, or cruel' and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 894.)

Conversely, the reversal of special circumstances for insufficient evidence, or instructional error, means that the facts and circumstances incident to each of those allegations should not have been considered as a "circumstance of the crime," because the crime associated with each special circumstance was not committed.[34] The jury's findings

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[34] Assuming that a special circumstance finding was reversed because of instructional error, it would be possible to conclude that the jury should have considered that special

that appellant committed a burglary, robbery, kidnaping, and sodomy in association with the murder cannot be characterized as "inconsequential," (*Brown v. Sanders, supra*, 126 S.Ct. at p. 894), when: (1) those findings are factual in nature but unsupported by the evidence; (2) the jury was specifically told to consider those factual findings in determining the appropriate penalty; and (3) each of those crimes, especially the sodomy and kidnaping, made the murder significantly more aggravating in terms of the degradation and terror experienced by the victim.

The decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 [hereinafter *Blakely*] also compel reversal of the judgment of death because of the reversal of the true findings to the special circumstances.[35] This Court has consistently rejected the argument that California's capital sentencing scheme violates the holding of these cases. (E.g., *People v. Ward* (2005) 36 Cal..4th 186, 219-220; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Snow* (2003) 30 Cal.4th 43, 126-127; *People*

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circumstance in assessing the penalty if the case were retried and the jury found the special circumstance to be true.

[35] This Court decided in *People v. Black* (2005) 35 Cal.4th 1238, 1246-1247, that California's determinate sentencing scheme did not violate the holding of *Blakely v. Washington*. The decision in *People v. Black* has already been rejected by at least one other state supreme court. (*New Jersey v. Natale* (2005) 184 N.J. 458, 878 A.2d 724.) *People v. Black* did not discuss how *Apprendi v. New Jersey* impacted California's capital sentencing scheme.

v. Anderson (2001) 25 Cal.4th 543, 589.)

The impact of *Apprendi*, *Ring*, and *Blakely* on the legality of California's death penalty scheme is discussed more fully in Argument XXIII, but will be briefly discussed herein because of its relevance to how reversal of the special circumstances impacts the judgment of death. In *Apprendi v. New Jersey*, the Supreme Court held that "the judge's role in sentencing is constrained it its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise prescribed were by definition elements of a separate offense." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 483, fn. 10.)

In *Ring*, the jury found the defendant guilty of first-degree murder. The trial court, sitting without a jury, determined the presence or absence of aggravating factors and imposed the death penalty. In *Walton v. Arizona* (1990) 497 U.S. 639, 649, 110 S.Ct. 3047, 111 L.Ed.2d 511, the Supreme Court upheld the constitutionality of the Arizona sentencing scheme on the basis that the aggravating factors found by the trial court were sentencing factors and not elements of the crime. The Court in *Ring* overruled *Walton v. Arizona* and concluded that "[b]ecause Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' (*Apprendi*, 530 U.S. , at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ring v. Arizona, supra*, 536 U.S. at p. 609; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111, 122 S.Ct. 2428, 154 L.Ed.2d 588.)

In *Blakely v. Washington*, the defendant in that case pled guilty to kidnaping. The maximum sentence for that crime was 53 months in state prison. The trial court, after an evidentiary hearing, decided to impose a sentence of 90 months because the crime was committed with deliberate cruelty. The Supreme Court concluded that the Washington State enhancement statute was unconstitutional because "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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop*, *supra*, §§ 87, at 55, and the judge exceeds his proper authority." (*Blakely v. Washington*, *supra*, 452 U.S. at pp. 303-304.) Under Washington law, the facts which justify an exceptional sentence must be facts other than those used in computing the standard range for the sentence. Because "[t]he judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea," (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2537), the sentence enhancement for commission of the crime with deliberate cruelty was unconstitutional.

Under *Apprendi*, *Blakely*, and *Ring*, the aggravating factors found true by the jury in this case were elements of capital murder. Those cases hold that there is no distinction between sentencing factors and elements of a crime when fact finding is necessary to trigger the defendant's eligibility for increased punishment. In the instant case, the four special

circumstances found true by the jury were elements of the crime of capital murder because those findings made appellant eligible for the death penalty. The jury, when it decided which sentence to impose, considered all four special circumstances. Because the aggravating factors constituted elements of the crime of capital murder, reversal of any one of the special circumstances must result in reversal of the judgment of death. "[A] jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 542 U.S. at p. 328 [J. Breyer dissenting].)

Reversal of any one of the special circumstances means that the jury did not reach unanimous agreement, within the meaning of the Sixth and Fourteenth Amendments, about the manner in which appellant carried out the crime. The jury elected to impose the death penalty based on the false belief that appellant had committed all of the special circumstances which were found true. The jury's erroneous belief about how appellant committed the crime was not simply a matter of erroneously considered sentencing factors but a constitutional defect in proof of the crime of capital murder. What distinguishes this case from *Brown v. Sanders* is the reversal of findings of fact concerning the special circumstance allegations. In *Brown v. Sanders*, the special circumstance allegations that were reversed were not findings of fact.

Reversal of the judgment of death is required, furthermore, even if the harmless beyond a reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct.

824, 17 L.Ed.2d 705 is applied to the reversal of the special circumstance findings. The jury's belief that appellant kidnaped and sodomized the victim was especially prejudicial. The terror experienced by the victim was undoubtedly increased if she had been kidnaped, albeit for a short distance. The jury's erroneous belief that appellant committed sodomy substantially increased the likelihood that he would receive death because of the degradation involved in such an act. The jury's erroneous finding that appellant committed burglary contributed to the notion that appellant planned this murder rather than it being an event which spontaneously spiraled out of control. The jury's belief that appellant committed robbery was also prejudicial. If the jury believed that appellant committed the murder in order to commit a robbery, it would be more likely to perceive him as an utterly depraved individual. As argued below, appellant presented substantial mitigating evidence. He had a difficult childhood and never had the proper role models every child needs. The jury struggled with its sentencing decision. It asked what would happen if it could not decide upon a verdict. (Vol. 2, C.T. p. 508.) This Court cannot conclude that the reversal of any one of the special circumstances for insufficient evidence, or instructional error, was harmless beyond a reasonable doubt with regard to the jury's sentencing decision.

For the reasons above, the judgment of death must be reversed.

XV

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND APPELLANT'S RIGHT TO DUE PROCESS OF LAW, THAT THERE WOULD NOT BE A RETRIAL ON THE CRIMES OF WHICH APPELLANT HAD BEEN FOUND GUILTY, IF IT COULD NOT REACH A VERDICT ON THE APPROPRIATE PENALTY

1. SUMMARY OF ARGUMENT

During jury deliberations following the penalty phase of the trial, the jury asked a question about what would happen if it could not reach a decision. The trial court told the jury that it could not answer the question. The trial court erred when it responded to the question because the question suggested that some of the jurors believed that appellant would receive a new trial on the charges if it did not reach a verdict. The jury needed to know that appellant would not get the benefit of a new trial on the charges if it could not reach a verdict regarding the appropriate punishment. There was no question that appellant could not be retried on the merits if the jury failed to reach a verdict regarding the penalty, and there was no conceivable prejudice to the People or appellant from informing the jury of this fact. The trial court's erroneous response to the jury's question violated appellant's right to due process of law under the Fifth and Fourteenth Amendments and Article I, sections 7 and 15 of the California Constitution, and the prohibition against cruel and

unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17 of the California Constitution. Because the trial court's response to the jury's question was not harmless beyond a reasonable doubt, the judgment of death must be reversed. .

2. SUMMARY OF PROCEEDINGS BELOW

The jury commenced deliberations during the penalty phase of the trial at 2:39 p.m. on November 30, 1999. (Vol. 16, R.T. pp. 3821, 3857.) The jury resumed deliberations at 9:30 a.m. on December 1. (Vol. 16, R.T. p. 3860.) During the afternoon session on December 1, the jury asked the trial court the following question:

> We want to know what happens if we cannot reach a unanimous decision?
>
> * Judge makes decision?
>
> * re-trial/entirely?
>
> * re-trial/penalty phase only?

(Vol. 2, C.T. p. 508.)

The trial court asked the attorneys how it should respond to the question. The defense counsel commented that, "I have never had this occur before. I don't think that's —my concern is that those three questions they are asking are irrelevant to what their decision is. I just don't know what position to take in this situation." (Vol. 16, R.T. p. 3861.) The trial court responded that it had reviewed *People v. Hines* (1997) 15 Cal.4th 997, 1075, and that it believed the appropriate response was to instruct the jury that it could

not answer the question. (Vol. 16, R.T. p. 3862.) The defense counsel agreed that the question should be answered in that manner. (*Ibid.*) The prosecutor stated that "I would make a request that the Court remain neutral, simply state that we can not answer your question, period. No directions as to what they should or should not do with that information.." (Vol. 16, R.T. p. 3863.) The trial court stated that it had also reviewed *People v. Bell* (1989) 49 Cal.3d 502, 552, and still believed that the jury should be told that the its question could not be answered. (Vol. 16, R.T. pp. 3863-3864.) The defense counsel agreed with that response. (Vol. 16, R.T. p. 3864.)

The jury was told that "the Court cannot answer these questions." (Vol. 2, C.T. p. 508.) The jury deliberated until 3:00 p.m. on December 1. (Vol. 16, R.T. p. 3865.) The jury deliberated during the morning session of December 2. (Vol. 16, R.T. p. 3866.) The jury announced that it had reached a verdict during the afternoon session of December 2. (Vol. 16, R.T. p. 3867.) The clerk then read the verdict of death. (Vol. 16, R.T. p. 3868.)

3. THE TRIAL COURT COMMITTED ERROR WHEN IT RESPONDED TO THE JURY'S QUESTION ABOUT WHAT WOULD HAPPEN IF IT COULD NOT REACH A VERDICT REGARDING THE APPROPRIATE PENALTY

Case law from the United States Supreme Court, and this Court, establish that a jury in a capital case should not be told of the consequences if it could not render a verdict regarding the appropriate penalty. All of the cases which establish this rule of law are distinguishable from the instant case. There was a reasonable likelihood that the jury applied the trial court's response to its question about the consequences of its inability to

reach a penalty phase verdict in a manner that resulted in jurors voting for death for improper reasons.

In *Jones v. United States* (1999) 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370, the defendant argued that the Eighth Amendment required the trial court to instruct the jury that "[i]n the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release . . . ." The Court rejected the defendant's argument, and stated that "[t]he truth of the matter is that the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." (*Jones v. United States, supra*, 527 U.S. at p. 382.)

In *People v. Kimble, supra*, 44 Cal.3d 480, 511, the jury asked the trial court, "[i]f the jury feels the possibility at this time that we will not be able to find a unanimous decision, what will then be the court's decision?" The trial court responded, "that is not your province." (*Ibid.*) The defendant argued on appeal that the trial court erroneously failed to tell the jury that he would receive a sentence of life without the possibility of parole if it were unable to reach a unanimous verdict. The Court discussed the case of *State v. Williams* (La. 1980) 392 So.2d 619, in which the Louisiana Supreme Court found no error on facts identical to those in *People v. Kimble*. Following a petition for rehearing, a plurality of the

court found error because the trial court failed to explain that the jury's failure to reach a verdict would require the imposition of a life sentence:

> In the present case the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. They were not told that, by their failure to decide unanimously, they would in fact decide that the court must impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. Instead, the members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. **Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required**.
>
> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action.

(*State v. Williams, supra*, 392 So.2d at pp. 634-635)[emphasis added].)

The Court then reviewed and cited with approval a number of cases which were distinguishable from the decision in *State v. Williams*. (*People v. Kimble, supra*, 44 Cal.3d at pp. 512-515.) The Court concluded that jury's failure to render a verdict was a procedural issue addressed to the trial court, and not a substantive factor for the jury's consideration. (*People v. Kimble, supra*, 44 Cal.3d at p. 515; see also *People v. Bell, supra*, 49 Cal.3d at pp. 552-553 [holding that the jury should not be told of the consequences of its inability to

render a verdict regarding the punishment]; *People v. Hines, supra*, 15 Cal.4th at p. 1074 [to the same effect as *People v. Bell*].) The Court also noted that instructing the jury that its inability to reach a verdict would result in imposition of a life sentence would give veto power over the sentence to any juror who did not want to impose the death penalty. (*Id.*, at pp. 515-516.)

The instant case is distinguishable from the above cases. Here, the jury gave an affirmative indication that some jurors believed that a new trial on the guilt phase could occur if it could not reach a verdict concerning the penalty. When the jury asked what would happen if it could not reach a verdict, its second alternative was "re-trial/entirely?" (Vol. 2, C.T. p. 508.)

Appellant would obviously have received a huge windfall if the jury's inability to reach a verdict regarding the penalty resulted in a new trial on the substantive charges. The perception by even a single juror that appellant would receive a new trial on the substantive charges compromised the jury's verdict of death in several ways. That belief would convince jurors that a verdict must be rendered to prevent the possibility that appellant would somehow be acquitted in a new trial, or found guilty of lesser charges, and thus escape responsibility for the crimes of which he had already been found guilty. It also provided an unfair tool for jurors who supported imposition of death to pressure jurors who were holding out for a life sentence. It is reasonable to conclude that jurors wanted to save the taxpayers and the court system the cost and burden of another trial on the substantive

charges by reaching a verdict on the penalty. The cases discussed above which found no error when the trial court told the jury that it could not be informed of the consequences of not being able to reach a verdict regarding the penalty did not address a situation in which the jury affirmatively indicated that it believed a new trial on the substantive charges would occur if it did not render a verdict regarding the penalty. For the reasons below, the trial court's failure to tell the jury that a new trial on the substantive charges would not occur if it failed to reach a verdict regarding the penalty violated the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments and in Article I, section 17 of the California Constitution, and appellant's right to due process of law under the Fifth and Fourteenth Amendments and Article I, sections 7 and 15 of the California Constitution.

In *State v. Williams, supra*, 392 So.2d 619, 634-635, the plurality opinion following the petition for rehearing held that jurors' false belief that a defendant could receive a new trial on the substantive charges if a verdict was not reached on the penalty "may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses, and court officials to undergo additional proceedings." In *People v. Kimble*, there was no affirmative indication that the jury had expressed a belief that a new trial on the substantive charges would occur if it did not decide the penalty. Hence, the Court in *People v. Kimble* did not address the language in *State v. Williams* that error occurs if jurors falsely believed that the defendant will obtain a new trial on the substantive charges if a the penalty was not decided. There was no dispute that appellant

would not have received a new trial on the substantive charges if the jury failed to decide the penalty. Some of the jurors in the instant case erroneously believed that appellant would receive a new trial on the substantive charges if the penalty was not decided. It was essential for the trial court to correct this false belief in order for the jury to return a fair verdict regarding the penalty.

United States Supreme Court case law also supports the above language from *State v. Williams*. The Eighth Amendment requires that a sentence of death not be imposed arbitrarily. (*Jones v. United States, supra*, 527 U.S. at p. 381; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275, 139 L.Ed.2d 702, 118 S.Ct. 757.) Article I, section 17 of the California Constitution also forbids imposition of cruel and unusual punishment. It also requires heightened reliability in the guilt and penalty phase of a capital case. (*People v. Ayala* (2000) 23 Cal.4th 225, 263.) .) A jury cannot be "affirmatively misled regarding its role in the sentencing process." (*Romano v. Oklahoma* (1994) 512 U.S. 1, 9, 129 L.Ed.2d 1, 114 S.Ct. 2004.) "Accurate sentencing information is an indispensable prerequisite to a [jury's] determination of whether a defendant shall live or die." (*Gregg v. Georgia* (1976) 428 U.S. 153, 190, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.).) Due process is violated when the jury decides whether to impose the death penalty based on erroneous information. (*Ibid.*) The California Constitution also guarantees a defendant due process of law in Article I, sections 7 and 15.

Here, the jury's belief that appellant would receive a new trial on the substantive

charges if it failed to decide the penalty affirmatively misled the jury into believing that it had to prevent appellant from receiving that windfall by returning a verdict.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, the defendant was sentenced to death for beating an elderly woman to death. The defendant was ineligible for parole because of his past criminal record. The prosecution argued the defendant's future dangerousness as a reason for imposing the death penalty. The defendant was not allowed to inform the jury that he was not eligible for parole. The defendant argued that the Eighth Amendment and due process of law were violated because the prosecutor argued his future dangerousness while not allowing the defendant to inform the jury of his parole ineligibility. The Court noted that the jury could reasonably have believed that the defendant could be released on parole if he were not executed. The Court concluded that "[t]o the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration . . . We think it is clear that the State denied petitioner due process." (*Simmons v. South Carolina, supra*, 512 U.S. at pp. 161-162.)

The reasoning of *Simmons v. South Carolina* applies to the instant case. *Simmons v. South Carolina* found a due process violation because "[t]he Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain." (*Simmons v. South Carolina*, 512 U.S. at p. 161, quoting *Gardner v.*

Florida (1977) 430 U.S. 349, 362, 51 L.Ed.2d 393, 97 S.Ct. 1197.) Because the jury could have falsely believed that the defendant might eventually be released on parole if not sentenced to death, the jury's deliberation process was infected with error. The jury was allowed to consider a possibility–that the defendant might be released on parole—that was not true.

In the instant case, appellant was informed of the jury's question about what would happen if it could not reach a verdict, and his defense counsel did not object to the trial court refusing to answer the question. However, the Court in *Simmons v. South Carolina* found a due process violation not merely because the defendant was not allowed to inform the jury of his parole ineligibility, but because the withholding of that information impaired the jury's decision making process. Similarly, withholding from the jury the fact that appellant would not receive a new trial on the substantive charges if a verdict was not reached on the penalty resulted in the jury considering a possibility–that appellant may receive a new trial on the substantive charges–that was not true. The Due Process requirement that a sentencing jury in a capital case receive accurate information required the trial court to inform the jury that appellant would not receive a new trial on the substantive charges if it failed to decide the penalty.

In *Morris v. Woodford* (9th Cir. 2001) 273 F.3d 826, the defendant was found guilty of first-degree murder and robbery. The jury found true the special circumstance that the defendant committed the crime during a robbery. The trial court erroneously instructed the

jury that if it had a reasonable doubt which penalty to impose, it had to give the defendant the benefit of the doubt and return a sentence of life with the possibility of parole. The jury should have been told that the sentence would be life without the possibility of parole. The trial court corrected the mistake when it read the instructions to the jury, but the written version which contained the error went to the jury during deliberations.

During deliberations, the jury asked what sentence would be imposed if it could not reach a verdict. The trial court told the jury that it could not answer the question. The defendant moved to set aside the verdict when the error was discovered after the return of the verdict.

The defendant argued on direct appeal in federal habeas proceedings that the erroneous instruction confused the jurors and led them to believe that he would receive a sentence of life with the possibility of parole if they could not reach a verdict. The Ninth Circuit agreed with the defendant's analysis, and distinguished *Jones v. United States, supra*, 527 U.S. 373:

> *Jones* is not controlling because, in that case, there was no indication that the jury actually was confused by any of the instructions. The petitioner parsed the instructions and verdict forms and suggested an interpretation of those materials that arguably conflicted with the law, but there was no evidence to suggest that the jury actually interpreted the instructions in that manner or was confused by them in any way. By contrast, here the jury zeroed in on the single mistyped instruction and asked the court to explain it. This jury was confused by the challenged instruction and, as noted, was reasonably likely to have interpreted it incorrectly, in a manner unfavorable to Petitioner.

(*Morris v. Woodford, supra*, 273 F.3d at p. 842.)

In the instant case, there is an affirmative indication that the jury erroneously believed that a retrial on the substantive charges may occur if it did decide the penalty. Hence, *Jones v. United States* does not apply to the instant case for the same reason that it did not apply in *Morris v. Woodford*.

Given all the facts and circumstances, it is reasonably likely that at least one juror erroneously believed that appellant would receive a new guilt phase trial if the jury failed to reach a verdict regarding the penalty. The jury would not have asked a question which included that possibility unless some jurors believed that it would occur. For the reasons above, the trial court violated appellant's right to due process of law, and the prohibition against cruel and unusual punishment in the Eighth Amendment, by failing to inform the jury that appellant would not receive a new trial on the charges if it could not reach a verdict.

4. THE WAIVER DOCTRINE DOES NOT PRECLUDE APPELLATE REVIEW OF WHETHER THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTION WAS ERRONEOUS

When the trial court first raised the question in court about the jury's question, the defense counsel initially stated that "my concern is that those three questions they are asking are irrelevant to what their decision is. I just don't know what position to take in this situation." (Vol. 16, R.T. p. 3861.) When the trial court stated that it intended to tell the jury that the question could not be answered, the defense counsel responded, "I think that would be appropriate." (Vol. 16, R.T. p. 3862.) When the trial court stated a second time that it

was not going to answer the question, the defense counsel stated "I concur with that approach." (Vol. 16, R.T. p. 3864.)

The waiver doctrine does not apply despite the above exchange between the trial court and the defense counsel. The defense counsel stated that he had not read any of the cases cited by the trial court. (Vol. 16, R.T. p. 3862.) Hence, he did not make an informed decision about how the question from the jury should be answered. The hallmarks of a valid legal waiver of rights requires that the waiver be knowing, intelligent and voluntary. (See e.g., *Johnson v. Zerbst* (1938) 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 [waiver of probationer's rights]; *Godinez v. Moran* (1993) 509 U.S. 389, 400, 113 S.Ct. 2680, 2687, 125 L.Ed.2d 321 [waiver of counsel rights].)

The trial court's response to the jury can be reviewed under Penal Code section 1259:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant.

The trial court's response to the jury's question presented a "question of law" regarding a "ruling, order, instruction, or thing whatsoever said or done at the trial." A pure question of law is presented when the facts are undisputed. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

The question asked by the jury was undisputed. The appropriate response to the

jury's question constituted a pure question of law. The trial court's response to the jury question was a "ruling, order, instruction, or thing whatsoever said or done at trial." Under section 1259, the trial court's response to the jury's question may therefore be reviewed on appeal despite the defense counsel's failure to object. (See e.g. *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199 [reviewing whether CALJIC No. 2.71 should have been given despite the lack of an objection in the trial court]; *People v. Carpenter* (1997) 15 Cal.App.4th 312, 381.) An appellate court will review on appeal pure questions of law despite the lack of an objection in the trial court. (*People v. Yeoman, supra*, 31 Cal.4th at p. 118.) This is a rule of appellate review independent of section 1259.

The invited error doctrine does not preclude appellate review of whether the trial court correctly responded to the jury's question. It precludes appellate review of a trial court's erroneous ruling when that error was the result of an objection by the defendant. (*People v. Barton* (1995) 12 Cal.4th 186, 198.) The defense counsel did not make a strategic decision to request the trial court to respond to the jury's question in the manner that it did. He simply acquiesced to the trial court's decision.

5. PREJUDICE

The trial court's failure to inform the jury that appellant would not be retried on the substantive charges if it failed to determine a penalty violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, and violated the prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth

Amendments. Hence, the judgment of death must be reversed unless that error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The above error also violated appellant's right to due process of law and right to be free from cruel and unusual punishment in the California Constitution. Because appellant had a due process right to have the State follow its own laws and procedures, (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346), the violations of California state law must also result in reversal of the judgment of death unless those errors were harmless beyond a reasonable doubt.

The jury commenced deliberations on November 30, 1999 at 3:05 p.m. (Vol. 2, C.T. pp. 501-502.) The jury resumed deliberating on December 1 at 9:40 a.m. (Vol. 2, C.T. p. 503.) The jury recessed from deliberations between 12:00 to 1:30 p.m. The trial court discussed with counsel for the parties the jury's question at 2:05 p.m. (Vol. 2, C.T. p. 503.) The jury recessed from deliberations at 3:00 p.m. (*Ibid.*) The jury resumed deliberations on December 2, 1999 at 9:40 a.m. The jury took a 15 minute break from deliberations at 10:45 a.m. At 11:45 a.m., the jury informed the trial court that it had reached a verdict. (Vol. 2, C.T. p. 509.) Hence, approximately two and one-half hours elapsed from the time the trial court responded to the jury's question to when it reached a verdict of death. Because of the alacrity with which the jury returned its verdict following the trial court's response to its question, it is reasonably likely that the verdict was influenced by the trial court's erroneous response to the question.

Any juror who believed that appellant would receive a new guilt phase trial if the

penalty was not decided felt enormous pressure to submit to the desire of other jurors to return a verdict of death. The jury reached a verdict on the thirty-second day of trial. (Vol. 2, C.T. p. 509.) Significant judicial resources, and time of the jurors, had been expended. Any juror who believed that all that effort would have to be replicated if he or she prevented a penalty from being reached felt enormous guilt and pressure to agree to a verdict. The possibility that appellant would somehow either be found not guilty, or guilty of lesser charges, during a second trial also put strong pressure on any holdout jurors.

The crime in this case was obviously a terrible tragedy. There is no case, however, in which death must be the presumed penalty. The jury had mitigating evidence before it which could have influenced it to return a verdict of life without the possibility of parole.

Appellant was raised in a dysfunctional environment. Dr. Armando Morales, Professor of Psychiatry and Biobehavioral Sciences at the U.C.L.A. School of Medicine, testified about appellant's family background. (Vol. 13, R.T. pp. 3089-3249.) Appellant's mother had a long- standing problem with alcohol. (Vol. 13, R.T. p. 3139, 3141.) Appellant had four brothers and a sister. With the exception of Dianne, all of appellant's siblings have criminal records and substance abuse problems. (Vol. 13, R.T. pp. 3143-3144.) Appellant's half-brothers also had criminal records and substance abuse problems. (Vol. 13, R.T. p. 3144.) Appellant turned his life around for the positive in his early twenties when he lived with the parents of his wife. (Vol. 13, R.T. p. 3165.) Appellant's brothers pulled him away from this positive influence and got him into drugs. (Vol. 13, R.T. p. 3165.) Because

appellant's mother worked, his grandparents watched him between the age of three and 12. Appellant's grandparents did not have control over appellant and his siblings because of their age. Hence, appellant started to affiliate with a gang. The most influential individuals in appellant's life during his adolescent years were his brothers and the gang. (Vol. 13, R.T. p. 3167.) His value system came from them. (*Ibid.*) According to Dianna Castaneda, the children raised themselves. (Vol. 14, R.T. p. 3472.) Appellant's step-father, Luis Arroyo, used heroin when appellant was at home. (Vol. 14, R.T. p. 3396.) He regularly asked appellant and his brothers to purchase heroin and alcohol for him. (Vol. 14, R.T. p. 3519.)

Appellant had a significant substance abuse problem. (Vol. 12, R.T. pp. 3022, 3044.) He started using heroin at the age of 24, and remained a heroin abuser the rest of his life. (Vol. 9, R.T. p. 2045.) Appellant started using drugs at the age of 12, which indicated a permissive environment regarding drug use. Drug use impairs an individual's maturation in two ways. (Vol. 12, R.T. pp. 3047-3048.) A drug abuser will not pick up social and moral signals from society. The abuser's capacity to remember the adverse consequences of behavior is impaired. (Vol. 12, R.T. p. 3048.) Dr. Gawin explained how appellant's drug use impaired his capacity to make correct choices:

> We all know that when one goes from 12 to 30, changes occur that we call maturation. And if one is intoxicated starting age 12, all of the steps of maturation are impinged upon. They are impinged upon from two respectives. The first is if one is intoxicated all the time, one doesn't have the opportunity to perceive the world correctly. One doesn't pick up the signals out there in the world, the social signals or the moral signals that may be out there. And at the same time, if that disruption

> occurs because one is intoxicated and intoxication itself prevents picking that up, one also has an immediate disruption of memory processes as well based also on the drug effect. One capacity to remember, say, adverse consequences of actions becomes impaired as a direct consequences of the drug itself.

(Vol. 12, R.T. pp. 3047-3048.) Dr. Gawin further explained that "Mr Castaneda, is going through this development in a context where his drugs of abuse readily available, where his role models are using drugs of abuse, and where the family, if you would, mode that he might have for correct social or societal behavior is substantially distorted because we have a drug gang–like subculture and within the subculture one has a certain set of norms that aren't normal." (Vol. 12, R.T. p. 3048.) When appellant started to have success during his early 20s, he believed that he could control his drug use and started abusing drugs. (Vol. 12, R.T. pp. 3049-3050.) Dr. Hall believed that appellant could function successfully in state prison. (Vol. 12, R.T. p. 2983.)

The jury had significant mitigating evidence before it. "Any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial." (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) Any substantial error requires reversal because it is impossible to determine when the decision for death was reached for each juror. (*Id.*, at pp. 54-55.) The jury's decision to impose a verdict of death was influenced by the belief of some jurors that appellant would receive a new guilt phase trial if the penalty was not decided. Hence, the judgment of death should be vacated and the case remanded to the Superior Court.

XVI

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, AND THE STATE AND FEDERAL DUE PROCESS CLAUSE, TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

1. SUMMARY OF ARGUMENT

During the penalty phase, the defense counsel called Armando Morales to testify about appellant's family background and its influence on him. Dr. Morales held a doctorate in social work and was a Professor of Psychiatry and Behavioral Sciences at the University of California Medical School. (Vol. 13, R.T. pp. 3088-3090.) During the direct examination of Dr. Morales, the trial court prevented him from referring to the role of genetics in the opinions he had formed about appellant. The trial court also erroneously refused to admit Exhibit 61 into evidence, which was a chart showing how depression affects individuals who have been associated with gangs. The use of this chart was critical to explain how appellant's depression impacted his behavior. The prohibition against the imposition of cruel and unusual punishment in federal and State Constitutions, as well as the state and federal due process clauses, required the trial court to admit all relevant mitigating evidence. The trial court erred by preventing Dr. Morales from explaining the role of genetics in the opinions he had formed and by excluding Exhibit 61 from evidence. Because the above errors were not harmless beyond a reasonable doubt, the judgment of death should be

reversed.

2. SUMMARY OF PROCEEDINGS BELOW RELATING TO THE EXCLUSION OF DR. MORALES'S TESTIMONY ABOUT THE ROLE OF GENETICS IN THE OPINIONS HE FORMED ABOUT APPELLANT

In 1971, Dr. Morales earned a doctorate in social work from the University of Southern California. (Vol. 13, R.T. p. 3089.) Since that time, he had been a faculty member in the Department of Psychiatry at the School of Medicine at the University of California, Los Angeles. (Vol. 13, R.T. p. 3089.)

Social workers look at an individual's total environment and attempt to understand the interaction between the environment and the individual. They also examine the individual in the context of the family and the community. (Vol. 13, R.T. p. 3100.) Dr. Morales had specialized in the assessment and treatment of Hispanic individuals and juvenile and adult offenders. Much of his research was devoted to understanding gangs. (Vol. 13, R.T. pp. 3090-3091.) Dr. Morales had worked as a consultant to the California Youth Authority and lectured to law enforcement officers about gangs. (Vol. 13, R.T. pp. 3091-3092.)

Dr. Morales was asked by the defense counsel to offer opinions about the subculture of Hispanic gangs and the role of appellant's family background in his formation. (Vol. 13, R.T. p. 3092.) Dr. Morales interviewed appellant for about two and one-half to three hours. He also contacted appellant's family members to develop a family history. (Vol. 13, R.T. p. 3094.) The purpose of obtaining a family history was to learn about the social factors and

genetic factors that influenced appellant. (Vol. 13, R.T. pp. 3094-3095.) After providing background about Hispanic culture and its development in the United States, (Vol. 13, R.T. pp. 3102-3110), Dr. Morales explained the role of appellant's family background in his formation. (Vol. 13, R.T. pp. 3110-3111.) Exhibit 53 was a genogram of appellant's maternal grandparents. (Vol. 13, R.T. p. 3111.) Appellant's maternal grandmother was born in Jalisco, Mexico in 1902. His maternal grandfather was born Jalisco in 1900. Appellant's grandmother died in 1992 and suffered from depression. Appellant's grandfather was a heavy user of alcohol. (Vol. 13, R.T. p. 3114.) They had a male child born in 1917 who was an alcoholic. He died in 1980. Appellant's maternal grandparents came to the United States in 1920 and worked as farm workers. (Vol. 13, R.T. p. 3114.) The prosecutor objected to this testimony based on foundation and relevance. (Vol. 13, R.T. p. 3115.)

The jury was excused and a section 402 hearing was held. The defense counsel explained that "the relevance, your Honor, these are family, this is a family history and it flows through with alcohol addiction, with family history that relates to diseases, mental, that affected this man during his lifetime. His mother was raised in this environment, he was also raised in this environment, so it relates to his family history, his–the causation of drug abuse." (Vol. 13, R.T. p. 3115.) The trial court then asked the defense counsel if evidence would be offered that appellant's aunts and uncles played a role in raising him. (Vol. 13, R.T. p. 3116.) The defense counsel explained that "[i]t's not mere presence. It's also the biological factor of genetics. And historically with alcoholism, that flows through families.

They are a genetic -----." (Vol. 13, R.T. p. 3116.) The trial court then stated, "disposition." (*Ibid.*) The defense counsel further explained, "[p]redisposition. And I think we have a right to show this man's entire history . . . . The prejudice, the bias, the lack of work, the poverty, all of these aspects relates to what happens to these young men when they get involved in gangs and I think we have a right to show that information." (*Ibid.*) The prosecutor objected that "I have heard nothing from the doctor that he plans to testify as to the genetics of this family or that he is qualified to do so." (Vol. 13, R.T. p. 3117.) After a further offer of proof from the defense counsel, the trial court overruled the objection. (*Ibid.*)

Following a recess, the trial court and the parties resumed discussion of the scope of Dr. Morales' testimony. The prosecutor had another objection: "[t]he doctor informed me that the reason he is including a —well, actually for the defendant a great uncle and a great aunt in the genome is that he feels that this information somehow transfers to the defendant, reflects upon the defendant and has affected the defendant genetically. There is no information that the doctor knows of that these relatives ever had contact with the defendant who was born in 1960. Now I've heard no basis of information to support the use of that information or to support that conviction on the part of the doctor." (Vol. 13, R.T. pp. 3119-3120.) Dr. Morales explained the importance of family history in assessing an individual: "We need to look at issues related to whether or not any suicides occurred in the family, whether or not there is any evidence of addiction to drugs or alcohol, even nicotine, because increasingly they are finding research information to show certain genetic connections

between alcoholism and drug dependence in offspring." (Vol. 13, R.T. p. 3121.) Hence, "this becomes a very important part of our evaluations of parents or subjects as we evaluate them." (*Ibid.*) During cross-examination, the prosecutor elicited from Dr. Morales that he was not a psychiatrist or psychologist, and did not have any specific training in genetics. (Vol. 13, R.T. pp. 3122-3123.) Dr. Morales stated that "[w]hether one is a psychiatrist, whether one is a psychologist or a licensed clinical social worker, as part of evaluations we have to look at all these biological, historical family issues in drawing our conclusions with regard to patients." (Vol. 13, R.T. p. 3122.) Dr. Morales had also not done any gene testing on appellant. (Vol. 13, R.T. p. 3125.)

The trial court then questioned Dr. Morales about the basis of his opinions. He explained why the extended family history was important:

> Q. In this particular case, what is the relationship that you place on the aunts, the grandaunts and uncles? of what importance are they in this particular case?
>
> A. In looking at the grandparents, for example, we see the fact that there was an alcohol problem with the grandfather, there was an alcoholism problem with his particular son. So when you begin to see evidence of these types of things, it gives us more information to be able to draw a conclusion, whether or not there appears to be a linkage in a heredity–type of factor to a particular patient.
>
> And when we look at the mother's history and all her sons, we begin to see a very strong preponderance of addiction in the family, which again makes more solid a particular point of alcoholism or drug addiction in this particular family that might have a very powerful genetic basis to it.

(Vol. 13, R.T. pp. 3126-3127.) On redirect examination, Dr. Morales explained that "there is an interplay of the heredity issues, genetic issues, and the environment and the parenting and nurturing that might have occurred. All these things, there is an interplay in all these different factors." (Vol. 13, R.T. p. 3129.)

The trial court then ruled that "Mr. Hardy, I am prepared to allow the doctor to testify but not with regard to any issues involving genetics." (Vol. 13, R.T. p. 3129.) The defense counsel agreed to instruct Dr. Morales not to refer to genetics during his testimony. (Vol. 13, R.T. p. 3129.) The trial court instructed the defense counsel not to ask Dr. Morales any questions that dealt with genetics. (Vol. 13, R.T. p. 3130.) The trial court ruled that the evidence regarding the aunts and uncles would be admitted. (*Ibid.*) The prosecutor made a motion to strike the testimony regarding the aunts and uncles based on lack of relevance. (Vol. 13, R.T. pp. 3130.) The defense counsel stated that the foundation for Dr. Morales' opinions about alcoholism in appellant's family came from appellant's relatives. (Vol. 13, R.T. pp. 3130-3131.)

The trial court asked Dr. Morales what was the basis for his opinion about alcoholism in appellant's family. He replied, "based upon what they reported to me and my asking certain types of questions about how much drinking was going on . . . But other than that, all you have is just this history that is being reported of a drinking problem or alcoholism and so forth." (Vol. 13, R.T. p. 3131.) The trial court stated that Dr. Morales did not have a sufficient foundation to determine that appellant's family members were alcoholics. (*Ibid.*)

The trial court granted the prosecutor's motion, and agreed to instruct the jury to disregard any reference to appellant's relatives being alcoholics. (Vol. 13, R.T. p. 3133.)

The trial continued with direct examination of Dr. Morales in front of the jury. (Vol. 13, R.T. p. 3134.) Dr. Morales testified that appellant's family reported the heavy use of alcohol, but he could not independently confirm that any family members were alcoholics. (Vol. 13, R.T. p. 3137.) Appellant's mother reported moderate to heavy drinking from the ages of 17 to 22 years of age. (Vol. 13, R.T. p. 3139.) Appellant's mother's second marriage lasted from 1956/1957 to 1966. Appellant was the product of that relationship. Appellant's father was a heavy drinker and a womanizer. (Vol. 13, R.T. pp. 3141-3142.)

All of appellant's five male siblings had problems with drugs and the criminal justice system. (Vol. 13, R.T. pp. 3143-3144.) Appellant's mother's third marriage lasted from 1968 to 1988. That husband also had a history of drug problems and served time in state prison. (Vol. 13, R.T. p. 3144.) Appellant's mother tried to commit suicide when she was 42 years old because of a conflict in the relationship with her third husband. (Vol. 13, R.T. p. 3144.) Both male children born to appellant's mother's during her third marriage also had drug problems and a criminal record. (Vol. 13,R.T. p. 3144.) Dr. Morales then explained appellant's involvement with gangs when he was a youth, (Vol. 13, R.T. pp. 3163-3164), appellant's disassociation from negative influences when he lived with wife and parent-in-laws, (Vol. 13, R.T. pp. 3164-3166), and how appellant was watched by his grandparents as a youth because his mother worked to support the family. (Vol. 13, R.T. pp. 3166-3167.)

3. THE TRIAL COURT ERRED BY EXCLUDING MATERIAL PORTIONS OF DR. MORALES' TESTIMONY ABOUT THE ROLE OF GENETICS

The trial court ruled that Dr. Morales could not explain how genetics formed part of the basis for his opinions about appellant. (Vol. 13, R.T. p. 3129.) According to the defense counsel's offer of proof, appellant's family history of alcohol abuse played a contributing role to appellant's dysfunctional and criminal behavior. Appellant had a genetic predisposition for such behavior. (Vol. 13, R.T. pp. 3115-3117.) Dr. Morales explained during the section 402 hearing that social scientists such as himself look at the biological and historical family issues in forming opinions about patients. (Vol. 13, R.T. p. 3122.) Despite the role of genetics in the formation of Dr. Morales' opinions about appellant, he was prevented from explaining any genetic information to the jury. When Dr. Morales explained appellant's family background to the jury, he did not offer the opinion that there was a genetic link between the many substance abuse problems and antisocial behavior exhibited by appellant's family members and appellant's substance abuse and criminal behavior. (Vol. 13, R.T. pp. 3134-3194, 3209-3212.) He was limited to offering general background information about appellant and his family, depression experienced by gang members, and his DSM-IV diagnosis of appellant. (Vol. 13, R.T. pp. 3134-3194, 3209-3212.)

Evidence Code sections 801 through 805 govern the scope of expert witness testimony. Section 801 provides in part as follows:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

. . .

> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably relied upon by an expert in forming an opinion upon the subject to which it relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Section 802 provides as follows:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Dr. Morales testified that social scientists such as himself commonly rely on biological links in assessing individuals. (Vol. 13, R.T. p. 3122.) He explained that by examining the family background and observing behavior such as alcohol abuse, "it gives us more information to be able to draw a conclusion, whether or not there appears to be a linkage in a heredity—type of factor to a particular patient." (Vol. 13, R.T. p. 3126.)

The trial court erred by excluding Dr. Morales' testimony about the role of genetics in appellant's behavior and development because it was a "matter . . . reasonably relied upon by an expert in forming an opinion upon the subject to which it relates . . . ." (Evid. Code §801, subd. (b).) The trial court excluded Dr. Morales' opinion about the role of

genetics in appellant's development and behavior because Dr. Morales did not have any special scientific training in the field of genetics. The trial court applied the wrong test. Dr. Morales' testimony that social scientists commonly look for genetic links between a patient and his family by examining the family background established that genetics was a matter reasonably relied upon by experts in Dr. Morales' field.

Case law establishes that the trial court erred by excluding Dr. Morales' testimony that genetics played a role in appellant's development and behavior. In *People v. Stoll* (1989) 49 Cal.3d 1136, the defendants were charged with molestation of children. The defendants attempted to introduce into evidence the testimony of a psychologist who was going to testify that the defendants did not display any signs of deviance or abnormality. The psychologist performed standard psychological tests on the defendants in order to form this opinion. The trial court excluded the evidence. This Court concluded that the trial court should have admitted the evidence because it was based on matters routinely relied upon by psychologists:

> No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior. In effect, however, California courts have deferred to a qualified expert's decision to rely on "standardized" psychological tests such as the MMPI to reach an opinion on mental state at the time acts were committed. [Citations omitted.] Such deference is no less appropriate here. Indeed, voir-dire testimony indicated that qualified professionals routinely use raw materials from the MMPI and MCMI as a basis for assessing personality, and drawing behavioral conclusions therefrom.

(*People v. Stoll, supra*, 49 Cal.3d at p. 1154.)

Similar reasoning applies to the instant case. The trial court should have deferred to Dr. Morales' testimony that social scientists routinely base their opinions on the assumption that there is a genetic link between the patient and his family. Dr. Morales did not need the level of scientific knowledge and skill required to identify a specific gene in appellant's family and link that gene to appellant in order to testify that his assessment of appellant was based on the assumption that a genetic link existed between the traits of his family and appellant. The reasonableness of information relied upon by an expert is a question of degree and may vary with the circumstances. (People ex. rel. *Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1085.) It is beyond dispute in today's society that genes play a role in an individual's emotional and physical makeup.[36] The debate is between the relative roles played by genes versus the environment. The jury should have been allowed to hear Dr. Morales' opinion that genes played a role in appellant's emotional composition and criminal behavior.

The trial court also committed error under Evidence Code section 802. Section 802

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[36] An article published by the National Association of Social Workers entitled *NASW Standards for Integrating Genetics into Social Work Practice* (2003) demonstrates beyond dispute that genetics have been part of the social worker's practice for many years. The article notes that "[f]or more than 40 years, social work as a profession has recognized the importance of genetic disorders in relation to social work practice and education." (*Id.*, at p. 3.) The article further states that "[a]n NASW Social Work Practice Update in 1998 defines the role of social workers in genetics , emphasizing practice, policy, and ethical issues " (Taylor-Brown & Johnson, 1998.) The article appears at http://www.naswdc.org/practice/standards/GeneticsStdFinal4112003.pdf.

allows an expert to state the reasons for his opinion and the matter upon which the opinion was based. Dr. Morales testified during the section 402 hearing that his opinions about appellant's development and behavior were based in part upon the existence of a genetic link between the traits exhibited by appellant's family and appellant. Dr. Morales should have been allowed to tell the jury that genetics were a factor in the opinions he had formed. (Cf. *People v. Gardeley* (1997) 14 Cal.4th 605, 618 [noting that because an expert is allowed to disclose to the trier of fact the basis for his expert opinion, the expert often testifies to evidence even though it is inadmissible under the hearsay rule].)

The trial court, furthermore, lacked any factual foundation for concluding that social workers could not rely on genetics in forming their assessments of individuals. In *People v. Mickey* (1991) 54 Cal.3d 612, the defense called two expert witnesses who testified that the defendant did not have the capacity to appreciate the criminal nature of his conduct or conform his conduct to the requirements of the law because of psychopathology and long term substance abuse. The prosecution called a psychiatrist as a rebuttal witness. He testified that the defendant did appreciate the criminality of his conduct and could conform his conduct to the requirements of the law. He based his opinion in part on a telephone conversation he had with the defendant's ex-wife, in which she discussed his drug history. The defense objected to the admission of the testimony, and argued that an expert would not rely on such information in forming an opinion about the defendant's mental state. The trial court admitted the testimony. This Court affirmed the trial court's ruling: "On this record,

no abuse appears. At trial, defendant did not introduce any evidence in support of his position that the information provided to Dr. Yago by Allison [i.e., the defendant's ex-wife] was not reasonably reliable for a psychiatrist forming a psychiatric opinion . . . He simply does not show that the challenged information was not reasonably reliable for a psychiatrist forming a psychiatric opinion." (*People v. Mickey, supra*, 54 Cal.3d at p. 688.)

In the instant case, the prosecutor failed to present any evidence that social scientists such as Dr. Morales would not reasonably incorporate genetics in their assessment of individuals. The prosecutor did establish that Dr. Morales did not have any technical scientific training in the field of genetics. However, Dr. Morales' lack of training in that technical scientific area was a different issue from whether it was reasonable him, as a social scientist, to consider how genetic factors influenced appellant's emotional, behavioral, and psychological makeup. (Vol. 13, R.T. pp. 3122-3123.)

For the reasons above, the trial court erred by excluding Dr. Morales' opinion that genetics played a role in his diagnosis and assessment of appellant.

4. SUMMARY OF PROCEEDINGS BELOW RELATING TO THE EXCLUSION OF EXHIBIT 61 FROM EVIDENCE

Dr. Morales explained his diagnosis of appellant with substance abuse dependence, mood disorder and occasional depression, and dependent personality disorder. (Vol. 13, R.T. pp. 3181-3192.) Exhibit 61 was a chart he prepared which contrasted the depression described in DSM-IV with the depression commonly experienced by gang members. (Vol. 13, R.T. pp. 3190-3192.) Exhibit 61 showed "how the manifestations of depression are

filtered through the culture of the gang and how gangs show their depression. Often clinicians miss depression in gang members because they are not familiar with the cultural expression of the depression in gang members." (Vol. 13, R.T. p. 3190.) Dr. Morales gathered the information in Exhibit 61 from his years of clinical work with gang members. (Vol. 13, R.T. p. 3191.) He had given lectures to parole officers and held workshops which incorporated the information in Exhibit 61. The data collected in Exhibit 61 was scheduled to be discussed in an article in a major publication. (Vol. 13, R.T. pp. 3191-3194.)

Outside the presence of the jury, the prosecutor objected to Dr. Morales testifying about the information in Exhibit 61 based on lack of foundation. (Vol. 13, R.T. p. 3196.) Dr. Morales explained Exhibit 61: "Based upon my years of observation of this specific population that I have specialized in, I am trying to report what I have seen as phenomena of depression in gang members to the field in general, whether it's the psychiatrist, psychologist, parole officers, probation officers, other people in the mental health field, to try and understand the behavior of gang members." (Vol. 13, R.T. p. 3200.) The trial court ruled that Dr. Morales could testify about depression in gang members, but it excluded Exhibit 61 from admission into evidence. (Vol. 13, R.T. pp. 3200-3201.) The exhibit was marked as a trial exhibit for purpose of identification. (Vol. 13, R.T. pp. 3200-3201.) The exhibit displayed the following information:

DSM-IV CRITERIA FOR DEPRESSION VS. GANG MEMBER DEPRESSION

DSM-IV 296, MAJOR DEPRESSION	GANG MEMBER DEPRESSION
1. Depressed Mood almost daily	1. Often angry, irritable, negative, frequent fights, anti-authority
2. Loss of interest and pleasure nearly every day	2. Passive, reactive behavior, gang determines activities
3. Weight gain/loss, increase or decrease in appetite.	3. Lack energy, in poor physical condition; weight gain or loss.
4. Insomnia or hypersomnia nearly every day	4. Goes to bed late, gets up late, needs alcohol/drugs to sleep.
5. Psychomotor agitation or retardation	5. Restless, uncomfortable with strangers.
6. Fatigue, or loss of energy almost every day.	6. Frequently complains of boredom, "kicking back" (doing nothing) with gang is primary activity; poor employment history
7. Feels worthless and guilty often	7. Masks feeling of inadequacy by feeling empowered by gang.
8. Diminished ability to think or concentrate, indecisive.	8. School failure, can't concentrate, lets gang make his/her decisions.
9. Recurrent thoughts of death, suicidal ideation without plan, or with a specific plan, prior suicide attempt.	9. Thoughts of premature death, funeral fantasies, thoughts of being killed by rival gang or police. Prior injuries due to police or gang physical, knife, or firearm assaults.

When testimony resumed before the jury, Dr. Morales testified that he observed the following signs of depression in appellant: (1) anger towards authority figures, (Vol. 13, R.T. p. 3209); (2) lack of energy when not in a structured setting, (Vol. 13, R.T. p. 3210); and (3) going to bed late and getting up late when not incarcerated. (*Ibid.*) Based upon all the information he reviewed, Dr. Morales diagnosed appellant with major depression

recurrent in partial remission. The remission part of the diagnosis meant that appellant had suffered at other times from more acute depression. (Vol. 13, R.T. p. 3211.) Depression can be caused by both biological and environmental components. (Vol. 13, R.T. p. 3212.)

5. THE TRIAL COURT COMMITTED ERROR BY EXCLUDING EXHIBIT 61 FROM EVIDENCE

The trial court excluded Exhibit 61 because "it does suggest, especially when he starts to explain the chart, that he is —has done some scientific studies or that scientific studies will in some way invalidate this that have not occurred yet." (Vol. 13, R.T. p. 3201.)[37]

The admission of Exhibit 61 was required by both Evidence Code sections 800, 801 and 802. Under section 800, subdivision (a), the opinion of an expert may be based on his or her own perceptions. Under section 801, subdivision (b), an expert may base his opinion on matters perceived or personally known to the witness before the hearing and is of the type of matter upon which an expert may reasonably rely. Under section 802, an expert may state on direct examination the reasons for his opinion and the matters upon which that opinion was based.

Dr. Morales had an extensive background in assessing and treating gang members, especially Hispanic gang members. (Vol. 13, R.T. pp. 3090-3091.) He developed Exhibit 61 from his years of observation of gang members. (Vol. 13, R.T. pp. 3191, 3200.) Exhibit 61 had been displayed to parole officers and during workshops, and was to be included in

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[37] The quotation of the trial court is correct. It is not clear why the trial court excluded Exhibit 61 from evidence.

a major article scheduled for publication. (Vol. 13, R.T. pp. 3191-3194.)

Exhibit 61 was admissible under the plain wording of the above Evidence Code sections. Dr. Morales had personally observed the symptoms of depression listed in Exhibit 61 in numerous gang members. Hence, the information in Exhibit 61 was "[r]ationally based on the perception of the witness," (Evid. Code, § 800, subd. (a)), and "based on matter[s] . . . perceived by or personally known to the witness . . . at or before the hearing . . . ." (Evid. Code §801, subd. (b).)

Dr. Morales diagnosed appellant with major depression recurrent in partial remission. (Vol. 13, R.T. p. 3211.) Dr. Morales had learned through his extensive dealings with gang members that depression manifested itself on those individuals by the qualities listed on Exhibit 61, which were: (1) anger, irritability, frequent fights, and an anti-authority attitude; (2) passive reactive behavior with the gang determining activities; (3) lack of energy, poor physical condition, and weight gain and loss; (4) going to bed late and getting up late, and the need for alcohol and drugs to sleep; (5) restlessness and lack of comfort with strangers; (6) frequent complaints of boredom and poor employment history; (7) masking feeling of inadequacy by feeling empowered by the gang; (8) failure in school and letting the gang make decisions for the individual; and (9) thoughts of premature death, funeral fantasies, and thoughts of being killed by a rival gang or police. Because all the information on Exhibit 61 was made known to Dr. Morales through his personal perceptions, and formed the basis for his opinions about why and how depression manifested itself in appellant, the exhibit

should have been admitted.

The trial court excluded Exhibit 61 because it suggested that Dr. Morales had scientifically validated its contents. (Vol. 13, R.T. p. 3201.) That was not a proper basis to exclude Exhibit 61. Dr. Morales' observations were not similar to a scientific procedure that had to be validated through testing, publication, and peer review. The Kelly-Frye rule applies to "the unproven technique or procedure [which] appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data." (*People v. Stoll, supra*, 49 Cal.3d at p. 1156.) "Absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to Kelly-Frye." (*Id.* at p. 1157.) The Kelly rule applies only to new scientific techniques. (*People v. Leahy* (1994) 8 Cal.4th 587, 605.)

Dr. Morales was not offering any new scientific process or procedure through Exhibit 61. This Court has found the Kelly-Frye requirement inapplicable to numerous forms of testimony dealing with mental health issues and physical findings. (E.g. *People v. Stoll, supra*, 49 Cal.3d at pp. 1155-1157 [expert psychiatric opinion testimony that a defendant prosecuted for sexual offenses against minors does not display signs of sexual deviance or abnormality is not subject to the *Kelly* test because the opinion was based on the accepted interview techniques and interpretation of the results of generally accepted, standardized written personality tests, and did not carry a "misleading aura of scientific

infallibility"]; *People v. Rowland* (1992) 4 Cal.4th 238, 266 [*Kelly* test is not applicable to expert medical opinion testimony that "the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse]; *People v. McDonald* (1984) 37 Cal.3d 351, 372-373, [expert opinion testimony on accuracy of eyewitness testimony is not subject to the Kelly test because it was not based on unproven scientific mechanism, instrument or procedure].)

The Courts of Appeal have followed this Court's lead and limited the Kelly-Frye rule to new scientific techniques and processes. (E.g. *People v. Therrian* (2004) 113 Cal.App.4th 609, 615 [Static-99, which predicts the likelihood of a sex offender committing a sex offense in the future, was not subject to the Kelly-Frye test] ; *People v. Bui* (2001) 86 Cal.App.4th 1187, 1195-1196, [expert scientific opinion testimony that ingestion of quantities of methamphetamine exceeding therapeutic dosage causes impaired driving ability is not subject to the Kelly test because it is not based on any "novel process or new scientific technique or device," but, rather, on accepted epidemiological studies correlating methamphetamine blood levels with driving impairment]; *Wilson v. Phillips* (1999) 73 Cal.App.4th 250, 253-257, [expert medical opinion testimony that a person had repressed real memories of childhood sexual molestation and recalled them accurately during adulthood is not subject to the *Kelly* test because it was derived from established medical interview techniques and the physician's personal evaluation of the victim]; *People v. Ward* (1999) 71 Cal.App.4th 368, 373 [testimony of a psychologist assessing whether a convicted sex offender is a sexually violent predator and likely to re-offend is not subject to the *Kelly*

test because the opinion was based on conventional interview techniques].)

California distinguishes between expert medical opinion and scientific evidence. Medical opinion is not subject to the Kelly-Frye rule. (*Roberti v. Andy's Termite & Pest Control, Inc.* (2004) 113 Cal.App.4th 893, 903; *People v. Ward*, *supra*, 71 Cal.App.4th at p. 373.) Hence, Dr. Morales' opinion about how depression manifested itself in gang members was admissible in the form of Exhibit 61 because it was a medical or psychological opinion and not scientific evidence.

As explained below, furthermore, the Eighth and Fourteenth Amendments, and Article I, Section 17 of the California Constitution, also required the admission of Exhibit 61.

6. THE TRIAL COURT'S EXCLUSION OF DR. MORALES'S TESTIMONY ABOUT THE ROLE OF GENETICS IN HIS OPINIONS ABOUT APPELLANT'S MENTAL STATES, AND EXHIBIT 61, VIOLATED THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, AND MUST RESULT IN REVERSAL OF THE JUDGMENT OF DEATH

"[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 [plurality opinion of J. Burger].) The risk of arbitrary and capricious application of the

death penalty can be prevented "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." (*Gregg v. Georgia* (1972) 408 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859.) "[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944.)

Mitigating evidence in a capital proceeding only has to meet the low threshold of "relevance" under the Evidence Code in order to be admissible. "[T]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence applies." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284, 124 S.Ct. 2562, 2570, 159 L.Ed.2d 384, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369.) Once the test for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." (*Tennard v. Dretke*, 124 S.Ct. at p. 2570, quoting *Boyd v. California* (1990) 494 U.S. 370, 377-378, 110 S.Ct. 1190, 108 L.Ed.2d 316.) For the reasons explained below, the trial court's exclusion of Dr. Morales' testimony about genetics, and Exhibit 61, violated appellant's federal

constitutional rights and was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Dr. Morales' testimony about the role of genetics in the opinions he had formed about appellant's mental state met the low test of relevance. It had the tendency of making the jury less likely to impose the death penalty. Dr. Morales would have testified that "when we look at the mother's history and all her sons, we begin to see a very strong preponderance of addiction in the family, which again makes more solid a particular point of alcoholism or drug addiction in this particular family that might have a very powerful genetic basis to it." (Vol. 13, R.T. p. 3127.) The trial court excluded this opinion. The jury would have been less likely to impose the death penalty if Dr. Morales had been allowed to testify about the role of genetics in appellant's behavior and mental composition because evidence that appellant was genetically predisposed to dysfunctional behavior would have minimized his degree of culpability for the many problems he had experienced in life.

Dr. Morales' opinions about the role of genetics was especially important because of Dr. Baca's testimony that appellant developed an anti-social personality disorder very early in life, perhaps as early as the age of five, and his personality could not be altered through drugs or therapy. (Vol. 15, R.T. pp. 3717, 3733.) Dr. Morales' testimony about the role of genetics in appellant's mental composition and behavior, along with Dr. Baca's testimony that appellant developed an anti-social personality disorder by the age of five, would have convinced the jury that sentencing appellant to death was unfair.

Case law establishes that Dr. Morales' testimony about the role of genetics in appellant's behavior and mental composition constituted mitigating evidence under the Eighth and Fourteenth Amendments, and Article I, Section 17. For instance, in *Eddings v. Oklahoma*, the defendant introduced evidence testimony that he had an emotionally troubled youth and his emotional and mental state was several years below his age. The sentencing judge expressly declined to consider the defendant's background as mitigating evidence. The Court stated that "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (*Eddings v. Oklahoma, supra*, 455 U.S. at pp. 113-114.) The Court concluded that "[n]or do we doubt that the evidence *Eddings* offered was relevant mitigating evidence." (*Id.* at p. 114.)

The trial court's ruling in the instant case was similar to the trial judge's ruling in *Eddings v. Oklahoma* which precluded it as a matter of law from considering mitigating evidence. The trial court's ruling preventing Dr. Morales from testifying about the role of genetics in appellant's behavior and mental composition precluded the jury, as a matter of law, from considering that mitigating evidence.

In *Penry v. Lynaugh* (1989) 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, the defendant presented evidence that he was mildly to moderately mentally retarded, had the mental age of a six and a half year old, suffered from organic brain damage which resulted in poor impulse control and inability to learn from experience. During the penalty phase, the

jury was instructed to consider all the evidence presented in answering the following three questions: (1) was the defendant's conduct committed deliberately and with the reasonable expectation that death would result; (2) was there a reasonable probability that the defendant would be a continuing threat to society; and (3) whether the killing was unreasonable in response to any provocation by the victim.

The defendant argued that requiring the jury to answer the aforementioned questions failed to give the jury an adequate opportunity to decline to impose the death penalty based on the mitigating evidence. The Court stated:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock v. Dugger, supra.* Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson,* 428 U.S., at 304, 305, 96 S.Ct., at 2991, 2992. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown, supra,* 479 U.S., at 545, 107 S.Ct., at 841 (O'CONNOR, J., concurring) (emphasis in original).

(*Penry v. Lynaugh, supra*, 492 U.S. at p. 319.) The Court agreed with the defendant because "[i]n light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." (*Id.* at p. 326.)

Here, a reasoned moral response to whether appellant should be sentenced to death required the jury to consider Dr. Morales' opinion about the role of genetics in appellant's behavior and mental composition. Like the jury instructions in *Penry v. Lynaugh*, which prevented the jury from giving expression to the defendant's mitigating evidence, the trial court's ruling regarding Dr. Morales' testimony about genetics precluded the jury from considering that mitigating evidence.

Article I, Section 17, of the California Constitution requires the jury to consider mitigating evidence in capital proceedings. The test is whether the penalty imposed was grossly disproportionate to appellant's culpability in light of the nature of the crime, his personal characteristics, and background. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1016; *People v. Dillon* (1983) 34 Cal.3d 441, 477-482.) Assessment of appellant's personal characteristics required the jury to consider Dr. Morales' testimony about genetics and appellant's behavior and mental composition.

Exhibit 61 was mitigating evidence which should have been admitted under the Eighth and Fourteenth Amendments, and Article I, Section 17. Appellant was involved with

a gang as a youth, but that association decreased in his early twenties. (Vol. 13, R.T. pp. 3145-3146, 3164.) The exhibit would have explained how appellant's association with the gang contributed to his dysfunctional behavior. Appellant had been incarcerated at the California Youth Authority as a youth and for much of his adult life. Exhibit 61 displayed how depression manifested itself in gang members. Dr. Morales diagnosed appellant with depression. (Vol. 13, R.T. pp. 3211-3212.) There was a nexus between the traits of gang members reflected in Exhibit 61 and appellant's emotional condition. The jury would have been less likely to impose the death penalty if Exhibit 61 had been admitted into evidence because it would have had a written document before it during deliberations that explained how the early influences in appellant's life contributed to his problems.

The trial court allowed Dr. Morales to testify about the symptoms he had observed in appellant that were typical of the depression experience by gang members, including frequent fights, irritability, an anti-authority attitude, lack of energy, failure to function adequately in a non-structured setting, use of alcohol and/or drugs, and failure in school. (Vol. 13, R.T. pp. 3200-3201, 3209-3210.) This was not an adequate substitute for the admission of Exhibit 61. To decide the penalty, the jury had to consider the testimony of numerous witnesses from the guilt phase and penalty phase. The presence of Exhibit 61 during deliberations would have reminded the jury of appellant's problems as a youth. It is unlikely that the jury gave the same weight to Dr. Morales' testimony about how depression experienced by gang members impacted appellant as it would have given to Exhibit 61.

The trial court's exclusion of Dr. Morales' testimony about genetics, and Exhibit 61, was not harmless beyond a reasonable doubt. The jury asked what would happen if it could not reach a verdict regarding the penalty. (Vol. 2, C.T. p. 508.) The jury heard mitigating and aggravating evidence. The jury's decision to impose the death penalty was based on the crime committed by appellant and all the facts and circumstances of his life. Evidence that appellant's difficulties were caused in part by genetic factors beyond his control would have tipped the balance with the jury towards life. Exhibit 61 would have reminded the jury during deliberations of the many difficulties appellant faced as a youth, and tipped the jury's decision towards life.

For the reasons above, the judgment of death must be reversed.