

# SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KEITH ZON DOOLIN,

Defendant and Appellant.

CAPITAL CASE  
S054489

Fresno County Superior Court No. 554289-9  
The Honorable James Quaschnick, Judge

RESPONDENT'S BRIEF

SUPREME COURT  
FILED

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BILL LOCKYER  
Attorney General of the State of California

ROBERT R. ANDERSON  
Chief Assistant Attorney General

MARY JO GRAVES  
Senior Assistant Attorney General

ERIC CHRISTOFFERSEN  
Deputy Attorney General

LLOYD G. CARTER  
Deputy Attorney General  
State Bar No. 173081

2550 Mariposa Mall, Room 5090  
Fresno, CA 93721  
Telephone: (559) 477-1669  
Fax: (559) 445-5106

Attorneys for Plaintiff and Respondent

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF CALIFORNIA,**  
Plaintiff and Respondent,  
v.  
**KEITH ZON DOOLIN,**  
Defendant and Appellant.

**CAPITAL  
CASE  
S054489**

**STATEMENT OF THE CASE**

On October 20, 1995, a criminal complaint was filed charging appellant with two counts of attempted murder (Pen. Code, §§ 664/187)<sup>1/</sup> and two counts of murder (§ 187). Count one charged the attempted murder of Marlene Mendibles. Count two charged the murder of Lisa Gutierrez. Count three charged the attempted murder of Stephanie Kachman. Count four charged the murder of Peggy Tucker. Both attempted murder charges included weapons and great bodily injury enhancements pursuant to sections 12022.5, subdivision (a) and 12022.7. There was also a special circumstances murder allegation pursuant to section 190.2, subdivision (a)(3). (CT 1-2.)

On November 21, 1995, a first amended criminal complaint was filed adding a charge of attempted murder (§§ 664/187) in the shooting of Alice Alva. (CT 12.) On January 4, 1996, a second amended complaint was filed adding an attempted murder charge (§§ 664/187) in the shooting of Debbie Cruz. (CT 305-306.)

A preliminary hearing commenced on January 18, 1996. (CT 42.) At the

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1. All further statutory references are to the Penal Code unless otherwise stated.

conclusion of the preliminary hearing on January 19, 1996, appellant was ordered bound over to superior court for trial on all six counts, the enhancement allegations and the special circumstances allegation. (CT 300.)

On February 1, 1996, an information was filed in Superior Court, Case No. 554289-9, charging appellant with four counts of attempted murder (§§ 664/187) and two counts of murder (§ 187). Weapons and great bodily injury enhancements were alleged in connection with the four attempted murder charges. Special circumstances allegations were charged in connection with the two murder counts. (CT 307-310.)

On February 28, 1996, presiding Superior Court Judge Stephen J. Kane denied appellant's motion for appointment of co-counsel for "lack of cause." (RT 319.)

Trial commenced March 18, 1996. (CT 423.) On May 7, 1996, appellant was found guilty of two counts of murder and four counts of attempted murder. All enhancements and special circumstances allegations were found true. (CT 526-529; 656-662; RT 4598-4610.)<sup>2/</sup> Defense counsel then moved to set aside the verdict on counts one, two, four and six as contrary to the evidence and not supported by substantial evidence. The motion was denied. (RT 4611.)

On May 16, 1996, the court heard and denied a *Marsden*<sup>3/</sup> motion. (RT 4631-4632.) The court also denied a motion for mistrial based on jury misconduct. (RT 4666-4671.) On the same day, the penalty phase of the trial commenced. (RT 4672.)

On May 21, 1996, the jury recommended that the death penalty be imposed. (RT 4901-4903.)

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2. "AOB" refers to Appellant's Opening Brief; "CT" refers to the Clerk's Transcript On Appeal; "RT" refers to the Reporter's Transcript On Appeal.

3. *People v. Marsden* (1970) 2 Cal.3d 118.

On June 18, 1996, an automatic motion for modification of the death penalty was denied and appellant was sentenced to death on the two counts of special circumstances murder and given various terms of years totaling 56 years on the other counts and for the personal use of weapons enhancements, and serious bodily injury allegations. (RT 5015-5018.)

On or about January 27, 2003, appellant filed a motion in Fresno County Superior Court seeking DNA testing pursuant to section 1405. On April 14, 2003, the Fresno County District Attorney's Office filed a response to the motion. On or about April 25, 2003, appellant filed a reply to the opposition to the motion for DNA testing. A hearing on the motion was held on May, 2, 2003. The Superior Court denied the motion in a written ruling issued on June 2, 2003.

Appellant filed a petition for writ of mandate seeking DNA testing in this Court on June 17, 2003, Case No. S116759. Respondent responded informally to the petition on or about August 21, 2003. Appellant's reply to the informal response was filed on September 8, 2003. The petition for writ of mandate was denied on the merits on December 17, 2003. (2003 Cal. LEXIS 9893.)

Appellant's opening brief in the direct appeal, Case No. S054489, was filed on November 14, 2003.

## STATEMENT OF FACTS

### INTRODUCTION

Appellant was convicted of killing two prostitutes and wounding four other prostitutes between the first shooting on November 2, 1994, and his arrest on October 18, 1995. The four surviving prostitutes all identified him at trial as the man who shot them. They all said he was driving a small import pickup. The boyfriend of one of the murder victims said he saw his girlfriend get into a Lincoln Continental driven by appellant just before she was killed (the Lincoln belonged to appellant's mother). Of the four women who survived the murder attempts, appellant only had sex with one of them and wore a condom. Both murder victims were clothed when shot. Several of the victims (except those running) were shot in the area of their reproductive organs.

Ballistics evidence on the two handguns, bullet fragments and shell casings used in the shootings linked appellant to the handguns, one of which he owned and the other of which was owned by his sister and which he had access to. There was substantial other incriminating testimony regarding vehicles used by the shooter, tire track evidence, testimony of his hostility to prostitutes, and unused condoms found in his truck ashtray. Following is a summary of each crime and the pertinent penalty phase proceedings.

#### **Alice Alva, Shot And Seriously Wounded On The Night Of November 2, 1994**

Alice Ann Alva was 41 at the time of trial. She had a cocaine addiction and had worked as a prostitute. (RT 1068.) On the night of November 2, 1994, Alva was working as a prostitute in the area of Motel Drive near Olive Avenue in Fresno. She remembers that was the night she was shot. (RT 1069.) A man drove up to her and offered her \$30 for sex. He was driving a small pickup which she thought was a "real light tan" color. She assumed it to be a Toyota

or Nissan model truck but knew it was “foreign.” (RT 1070, 111 1.)

She got in his truck and said she didn’t have a room to go to and he told her that was no problem and they drove to a cul-de-sac. She told him to park a certain way so they could see if any cars were approaching. (RT 1071.) Ms. Alva examined photographs taken by district attorney investigator Raney and said they depicted the cul-de-sac where she was shot. (RT 1072.)

She said when the truck stopped, she kicked off her shoes and assumed they were going to have sex when she saw appellant had pulled a gun on her and was resting it in his lap. It was pointed at her. (RT 1073.) Appellant told her, “I’m going to fuck you all night.” (RT 1074.)

Alva said she was scared and knew she had to get out of the truck. She told appellant “Okay, just don’t hurt me. I’ll do whatever you want, but before we have sex, I need to use the bathroom.”<sup>4/</sup>

Appellant agreed to let her do that but told her as she was getting out of the truck, “Don’t try anything stupid because you won’t be the first girl I shot and killed.” Ms. Alva said she exited the truck, squatted down like she was going to relieve herself, and then took off running. (RT 1075.)

When she had run only five or ten feet, she said she heard three or four shots before she felt one hit her and she went down. (RT 1076, 1114.) A bullet had struck her in the right calf. (RT 1081.) “I slid on the pavement hands first like this because I was running so hard, and I just laid there,” she said. (RT 1076.) She looked back and could see appellant standing next to the cab of the truck. She pretended to be dead. (RT 1077.)

Ms. Alva could hear appellant walk over to her. “He just stood there. I was waiting for him to empty the rest of the shells in me. I figured he was going to shoot me in the back of the head. And so I was just quiet and still as I could be.

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4. Ms. Alva testified what she actually said was, “I need to take a piss.” (RT 1074.)

And then he walked away.” She heard appellant speed off in the truck, the wheels kicking up gravel. She then began screaming for help. (RT 1078-1079.)

When police arrived she didn’t tell them she was working as a prostitute that night because she worried she might be charged with prostitution and that they wouldn’t take her seriously. (RT 1080, 1118.) She still had the bullet in her leg at the time of trial. (RT 1082.)

Ms. Alva said she got a good look at her assailant on the night of the shooting. She described him to police that night as “being a white male, mid 20’s, real short brown hair, mustache, about my height or maybe a little shorter, stocky build, muscular build.” (RT 1082.)

She said she was shown a photo lineup of suspects on October 23, 1995, and picked appellant’s photo as that of the man who shot her. (RT 1083.) Detective Robert Schiotis said she looked at the photo lineup and “immediately” pointed to photo number three (appellant) and said, “This is the guy.” (RT 2056-2057.)

At the time she was shown the photo lineup, she was in jail for drugs and prostitution. (RT 1084.) She identified a photo of appellant’s truck as the one she got into that night. (RT 1084.)

Ms. Alva identified appellant in the courtroom as the man who shot her. (RT 1102.) At the time she identified appellant from the photo lineup, she had not seen any pictures on television or in the local newspaper of anybody who looked like appellant. (RT 1103.) She also identified appellant at the preliminary hearing. (RT 1104.)

On cross-examination, Ms. Alva admitted to being convicted of petty theft. (RT 1107.) She admitted to arrests for prostitution and drugs. She admitted to being arrested and jailed by police a few days before trial for “not keeping in touch the way I should have.” (RT 1107.)

Fresno Police Officer Timothy Hahn responded to the scene of Ms. Alva's shooting and saw her lying injured on the ground with an entry wound in the back of her right calf. (RT 1136-1137.) About 10 to 15 feet from where Ms. Alva was lying, he found three .25-caliber shell casings on the road. (RT 1140, 1142.) (RT 1142.)

According to Officer Hahn, Ms. Alva described the suspect vehicle as "tan" in color, being a 1970's or 1980's model Toyota or Datsun pickup truck with no special wheels or tires. She described the gunman as a white male, approximately five feet, seven inches tall, brown short hair, moustache, and muscular, heavy type build in his mid 20's. (RT 1139.)

Dr. Ralph Koo, an emergency room physician, testified that he treated Ms. Alva for a gunshot wound to the right calf early on the morning of November 3, 1994. (RT 1091-1092.) Dr. Koo said x-rays showed the bullet was embedded in the tibia bone below the knee. (RT 1092.) The tibia was fractured as a result. (RT 1093.) Dr. Koo said that because of the risk of complications it was decided, after consultation with orthopedic surgeons, to leave the bullet in the bone. (RT 1096, 1098.) Dr. Koo said there was a risk of paralysis if the bullet was removed. (RT 1100.)

### **Debbie Cruz, Shot And Seriously Wounded On The Night Of December 28-29, 1994**

Debbie Cruz, 33 at the time of trial, was in a methadone treatment program when she testified. She previously had been addicted to heroin and cocaine. (RT 1199.) She was working as a prostitute on the night of December 28-29, 1994. (RT 1200.) She said appellant picked her up at the corner of First and Belmont Avenues after he had circled the area several times. (RT 1201-1202.) They drove around for awhile and agreed on a price for sex of \$30. (RT 1204.) Appellant told her he worked in construction in Los Angeles. (RT 1223.) They

first drove to a neighborhood park but didn't like the location and then drove to an alley behind Clay Street. (RT 1206.)

She said she started to take her pants off and told appellant she wanted the money first. Appellant said something like "I guess you're waiting for money" and then pulled a gun from his pocket and shot her. She reached for the door and when it opened she fell out. (RT 1208-1209.) Her pants were below her knees. She struggled to pull her pants up and crawl away at the same time. (RT 1210.) She was yelling for help. (RT 1211.) Appellant ground the gears of his truck and "peeled out" toward Fresno Street. (RT 1211.) She went to a house to ask for help but no one responded so she went to a second house, the Perez house, when help was summoned. (RT 1212.)

She said the gun she was shot with was small and silver. (RT 1213.) She said the truck appellant was driving was an "off beige" with bucket seats. (RT 1214.)

She initially described her assailant as medium build with short hair "kind of military style." (RT 1215.) She said when detectives first visited her in the hospital she did not say she was a prostitute because she was embarrassed and thought she might get in trouble. (RT 1217.)

Ten months later, she identified appellant in a photo lineup. (RT 1218.) She identified appellant in the courtroom as her assailant. (RT 1220.) She saw appellant's picture on TV after she had identified him in the photo lineup. (RT 1221.)

She admitted initially denying to an officer that one of her "johns" had shot her because she was embarrassed. (RT 1230.) Policeman Jack Gordon said Ms. Cruz was shot with a small caliber weapon, possibly a .25-caliber handgun. (RT 1183.) Ms. Cruz said the bullet was left inside of her following emergency surgery. (RT 1213.) Dr. Paul Wagner testified bullets still in the body after shootings "tend to be left in place unless there's a specific reason to remove

them.” (RT 1160.)

**Marlene Mendibles, Shot And Seriously Wounded On The Night Of  
July 28-29, 1995**

Marlene Mendibles testified from a wheelchair. (RT 1266, 1269.) She admitted she had worked as a prostitute and had been a drug addict. (RT 1269.) She was walking along Maple Avenue toward the Fairgrounds shortly after 1 a.m. on July 29, 1995, when a man driving a small truck offered her a ride. She accepted. (RT 1270.)

He drove for awhile and asked her if she “dated.” He then pulled over and told her to take off her clothes or he would shoot her. (RT 1273.) She saw him pull out a shiny gun. (RT 1274.) She went to grab her bag, grabbed the door handle and told him that she would walk the rest of the way. She was out of the truck standing beside it when she heard a “pop.” She told him, “I bet you remember me” and he replied, “I bet you remember me, too.” (RT 1275-1276.) Appellant drove away and Ms. Mendibles then collapsed and fell to the ground. She rolled over and started crawling, yelling for help. It wasn’t until then that she realized she had been shot. (RT 1277-1278.)

Ms. Mendibles, who is divorced, said her maiden name is Sorando and she goes by either Marlene Sorando or her former married name, Marlene Mendibles. (RT 1279-1280.) She said her assailant had short hair and a big forehead. (RT 1281.) In a photo lineup on October 18, 1995, she picked appellant as her assailant. She also identified him in the courtroom as the man who shot her. She also said she had identified appellant at the preliminary hearing as the man who shot her. (RT 1283-1284.)

She thought the truck appellant was driving was a “dirty white” Toyota with some red letters spelling “Toyota” on the back. (RT 1285.) She later said she was “pretty sure” there were red letters on the back. (RT 1291.) Appellant

confirmed the word Toyota in “medium size” black letters was on the passenger side of the truck next to the door. (RT 3809-3810.)<sup>5/</sup>

Shown a picture of appellant’s truck, Ms. Mendibles said that it looked like the vehicle her assailant was driving. (RT 1286.)

Ms. Mendibles, who is four feet eleven inches tall, said she had been unable to walk since the shooting. (RT 1286.) She also requires a catheter because of her paralysis, which is permanent. (RT 1287.)

On cross-examination, Ms. Mendibles was again shown a picture of appellant’s truck and said it “pretty much” looked like the truck appellant was driving the night he shot her. (RT1288.) She had consumed six or seven beers the day before the shooting and had also used crack cocaine. (RT 1303.)

David Daggs, appellant’s close friend, was the boyfriend of appellant’s sister, Shana Doolin, from December of 1994, to September of 1995. Daggs said he spent the night of July 28, 1995, watching videos with appellant at appellant’s home. Daggs said that appellant then came over to Daggs’ residence the next morning, either at 4:00 a.m. or 7:00 a.m., he could not remember which time, to help unload motorcycles from a trailer. In an initial interview with police, Daggs said there was one motorcycle. At trial, Daggs claimed there were two motorcycles and a moped. (RT 3069-3071.)

Daggs also said he thought they were unfinished loading the motorcycles between 4:30 a.m. and 5:00 a.m. because he had to begin his Fresno Bee paper

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5. The prosecutor asked appellant about the word Toyota painted on the side of the truck as follows: “So that if I had been in your truck and I got out of your truck and was closing the door, and you shot me through my arm and into my body and through my spine, this word ‘Toyota’ just outside the door would probably be the last thing I see?” Before appellant could answer, the court sustained a defense objection to this question on grounds it was speculative. (RT 3810.) The prosecutor suggested in closing in argument that Ms. Mendibles, in her confusion, shock and fear at the time of the shooting, saw the word Toyota on the side, and not the back, of the truck after she got out of it. (RT 4367-4368.)

route at 5:00 a.m. Daggs said he transported himself to the paper route and that appellant did not take him. (RT 3031-3032.)

Daggs said he thought appellant had purchased a .25-caliber Lorcin handgun for his sister. Shana Doolin told Daggs that appellant had given her the gun. (RT 3084-3085.)

Daggs said when the prostitute shootings in Fresno during 1994-1995 began showing up in the news he “may have” discussed the news stories with appellant but doesn’t ever remember talking about prostitutes with him “in normal conversation.” (RT 3092-3093.) Daggs admitted that he paused a long time when an investigator initially asked him whether appellant had ever talked about prostitutes. (RT 3092.)

#### **Inez Espinoza, Slain Early On The Morning Of July 29, 1995**

Alice Trippel had lived at 2026 East Brown in Fresno for nearly half a century when on the morning of July 29, 1995, at 4:20 a.m., she heard a gunshot. (RT 1377.) Mrs. Trippel knew the exact time because she was awake and glanced at the clock when she heard the shot. She had heard gunshots in the neighborhood before so she didn’t bother to call 9-1-1. (RT 1379, 1382.) Later that morning she went to the store about 10:00 a.m. and when she returned, her neighbor was in the alley and told her there was a body two houses down in the alley. She knew the alley to be frequented by prostitutes. (RT 1381, 1383.)

Angel Cantu, 16 years old at the time of trial, is the daughter of victim Inez Espinoza, who died at age 30. (RT 1386.) She knew her mother to have a drug habit and engage in prostitution. The last time she saw her mother was late on the evening of July 28, 1995. They were living at the apartment of family friend Mary Aldava. (RT 1387.) Angel called police the next day when her mother did not return home and later learned her mother had been murdered.

(RT 1388.)

Fresno Police Officer Ronald Shamp responded to a call of a body in an alley and found Inez Espinoza's body early on the morning of July 29, 1995. (RT 1391.) There was a 16-ounce beer can by her head and one shell casing by her feet. (RT 1392.) There were ants on the body. (RT 1393.)

Detective Schiotis investigated Ms. Espinoza's murder. At the crime scene, he examined the body and saw that there was blood on her right knee, right arm and right hand and a pool of blood under the clothed body. The victim still had her jewelry on. (RT 1397, 1401.) The victim had \$10 in cash in her right watch pocket. (RT 1398.) He could see a gunshot entry wound in her lower right back. The exit wound was several inches below her navel. Detective Schiotis found a large caliber bullet between her skin and her green nylon shorts along with a piece of the copper jacket for the bullet. (RT 1399-1400, 1409.) There were powder burns near the entry point of the bullet, indicating she was shot at close range and that possibly the gun was actually held next to her back when she was shot. (RT 1400-1401.)

Near the victim's head was a condom out of the wrapper. About 15 feet away was a torn Trojan condom wrapper. Two feet from the victim's feet was a spent .45-caliber shell casing. (RT 1402.) Near the body were tire tracks and "traction marks of a car taking off in a hurry . . ." (RT 1403.)

Carmen Ramos, who lived near the Inez Espinoza murder scene, said that about 4:30 a.m. on July 29, 1995, she heard screaming. She could not make out any words. (RT 1413.) She didn't call the police because she thought she was dreaming but when she later learned there was a murder in the alley she knew she wasn't dreaming. (RT 1414-1415.)

Irma Fain is the daughter of Carmen Ramos. She was returning home from the store when she noticed a body in the alley. She thought it was a transient who had passed out from a drinking binge. (RT 1417.) She called police on

her cell phone and told them there was a body in the alley. After she parked, she approached the body and determined it was a female and “obviously dead.” She got no closer than 10 feet. Mrs. Fain took her nine-year-old son in the house. She called the police back and told them the victim was dead, not just drunk. (RT 1418.) Mrs. Fain and Mrs. Trippel then waited in the alley for the police to arrive. (RT 1419.)

Fresno Police Department ID technician David Marrone took photographs at the Inez Espinoza murder scene. (RT 1424-1425.) He and another ID technician at the crime scene collected a partially full beer can, a condom wrapper, a condom, a .45-caliber shell casing, a copper-jacketed bullet, and a fragment of the copper jacket. (RT 1426, 1430.) Those items were booked into evidence. (RT 1431-1437, 1442, 1445.)

Coroner George Pimental recovered \$10.60 in cash and jewelry from the body of Inez Espinoza. (RT 1470.)

Dr. Venu Gopal, a forensic pathologist who had conducted 5,500 autopsies, did the autopsy on Inez Espinoza. (RT 1474.) Her clothing was drenched in blood when he first observed her. (RT 1475.) In addition to the gunshot wound to the lower right back above her right hip, she also had a number of insect bites from ants. (RT 1476.) Because of powder marks, Dr. Gopal opined that the gun was held against her clothing when she was shot. (RT 1477.) The exit point of the bullet was the left front side. (RT 1482.) A major artery was severed and the cause of death was internal bleeding. (RT 1486, 1488.) The victim had heroin derivatives in her blood at the time of death. (RT 1489.) The drugs did not contribute to her death. (RT 1491.)

Nikki Aldava, 24 at the time of trial, last saw Inez Espinoza the night she was murdered walking down an alley near Fresno and Belmont Streets between 3:00 a.m. and 4:00 a.m. (RT 1516.) She had been with Espinoza during the previous evening along with a Mexican male with curly hair whose name she

could not remember. They had been in his car. Ms. Aldava said she may have told the police the man had a slight gray streak in his hair. She did tell them the man had small eyes and a big nose. (RT 1519.) She said he was interested in Ms. Espinoza. Ms. Aldava thought he drove a small dark colored car, maybe brown. (RT 1520, 1525.)

The man made Ms. Aldava uncomfortable and she wanted to be let out of his car. She was in the car with him for 25 to 40 minutes while Ms. Espinoza was gone. Ms. Aldava claimed not to know if Espinoza was looking for drugs when she was gone. They then drove around looking for Espinoza another 15 to 20 minutes. (RT 1522-1523, 1525.) Ms. Aldava later described this man to police. (RT 1523.)

### **Stephanie Kachman, Shot And Seriously Wounded Early In The Morning On August 11, 1995**

Stephanie Kachman, 28 at the time of trial, was working as a prostitute on August 11, 1995, about 3:00 o'clock in the morning on Belmont Avenue. (RT 1544.) Appellant pulled up in a small white truck (RT 1552, 1556 ) and they agreed to have sex. (RT 1546.) They drove around looking for a spot to park and finally drove into an alley. When they stopped, she asked for money and then noticed he had pulled a gun on her, pointing it at her head. (RT 1547-1548.)

He ordered her to take off her clothes. She told him okay but said she had hurt her leg in an accident and had problems stretching out to take off her clothes. She wanted to undress outside the car and he agreed. They both got out. (RT 1548-1549.)

She had partially taken off her clothes and noticed appellant had pulled out a condom and put it on. (RT 1585.) She lifted up one leg so they could have sex. Appellant left the gun on the truck seat. (RT 1587.) She started to lose

her balance and stumbled. She then started running. She escaped out of the alley and went down Mildreda Street. She heard the truck take off and looked back and then she saw appellant swearing and shooting at her out of the truck side window. She was hit by a bullet and fell to the ground. (RT 1552.)

She went to a nearby house to ask for help but no one answered the door. (RT 1552.) She went to a house across the street and kicked in the door “so they would call the police or do something.” An ambulance arrived about five minutes later. Police questioned her at the hospital. (RT 1553.)

She identified appellant as her assailant in an October 18, 1995, photo lineup. (RT 1558, 1567.) She identified appellant at the preliminary hearing and at trial as the man who shot her. (RT 1559-1560.)

On cross-examination, she said “it depends on who it is” on whether she could tell the difference between a Hispanic and Caucasian male. She said she did not recall telling an officer at the time of the shooting that her attacker was a Hispanic male. (RT 1573.)

Fresno policeman Art Rodriguez was one of the first officers to respond to the shooting of Stephanie Kachman. He found her hysterical and uncooperative. She collapsed on the front porch of a residence at 255 North Van Ness and began screaming. (RT 1591.)

Officer Rodriguez could see she was bleeding and summoned an ambulance. (RT 1592.) She gave the officer “bits and pieces” of information on the suspect as they waited for an ambulance. (RT 1592.) She described the shooter as a short, stocky male with short hair and a “very thin” moustache who she thought was a Hispanic male. He told her his name was “Joe.” (RT 1593, 1595-1597, 2704.) She described the suspect vehicle as a white mini-pickup with a dark interior, possibly a Dodge or Nissan. (RT 1594.)

On August 25, 1995, Detective Murrietta showed Ms. Kachman more than 2,000 photographs and she saw two or three that looked like her assailant. She

singled out one photo as looking “very close to the individual if it was not the individual.” (RT 1605-1606.) The detective did some research on the individual that Ms. Kachman thought might be her assailant and found that he had been in custody on the night that Marlene Mendibles was shot. (RT 1607.)

Murrietta said she identified appellant as her assailant in a October 18, 1995, photo lineup that included appellant’s driver’s license photo. (RT 1609.)

Officer Steve Vang searched the Kachman shooting scene on the morning of August 11, 1995, and found seven shell casings (at the southwest corner of Van Ness and Mildreda). A police technician, Ronald Williamson, photographed the shell casings where they lay on the ground and then collected them. No fingerprints were found on the shell casings. (RT 1621-1624.)

Dr. Kirsta Kaups, a trauma surgeon, treated Stephanie Kachman for two bullet wounds on August 11, 1995. (RT 1458-1459.) Ms. Kachman had been shot in one of her vertebrae and in the back. (RT 1459.) Dr. Kaups said it appeared both bullets had passed completely through Ms. Kachman’s body. (RT 1460.)

Appellant’s mother, Donna Doolin Larsen, was asked if appellant left their home on the night of August 10-11, 1995, and after first testifying that her son was watching a movie in his bedroom later added, “I do not recall that answer at this moment . . . I would have to refer to some notes that I have made to myself, and I don’t have them present.” (RT 2718-2719.)<sup>6/</sup>

When later asked again if appellant left the house that night, Mrs. Larsen

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6. On later cross-examination, Mrs. Larsen said she remembered her son watching his television in his bedroom on the evening of August 10, 1995, and she went to bed around 11:00 p.m. or 11:30 p.m. and still heard noise from his room. (RT 2904.) When pressed on how she knew her son was home on the evening of August 10, Mrs. Larsen said “I know he was. I will go to my death saying that he was at home on that date.” However, she admitted this was not based on any written notes or confirmation but solely on her recollection. (RT 2908.)

responded, "Not to my knowledge." (RT 2719.) On cross-examination, Mrs. Larsen invoked her Fifth Amendment right against self-incrimination when asked several questions if she had submitted false documents at her place of employment. (RT 2741.)

### **Peggy Tucker, Slain On The Night Of September 18-19, 1995**

Landscapeer Rick Arreola was Peggy Tucker's boyfriend in September of 1995. (RT 1710.) He knew that she sometimes worked as a prostitute and it bothered him. (RT 1711, 1732.) On the night of September 18, 1995, he and Ms. Tucker were at the Gables Motel near Church and Golden State Avenues. (RT 1711.) After watching the 11:00 p.m. news, they left the motel on foot and walked to G Street in West Fresno to an area near two motels. They walked separately, with Ms. Tucker in front. (RT 1711-1712.) She was working as a prostitute at that time. (RT 1714.)

Arreola noticed a Lincoln Town Car pass by Ms. Tucker and then circle back and stop where she was standing. She bent over and spoke to the driver through the passenger window. She then opened the car door and got in to the front passenger seat. (RT 1714-1716.)

The car drove a couple of blocks, took a right turn and drove to an empty lot near the railroad tracks. Arreola lost sight of it after that. (RT 1716-1718.)

Arreola waited for her to return. He later saw the Lincoln Town Car pass by him on Golden State Avenue when he was standing on the center divider. (RT 1719.) He said the dome light of the Lincoln was turned on as the driver passed by and the driver was looking down on the floorboard of the front passenger seat. No one else was in the car. (RT 1720-1721.) Arreola never saw Ms. Tucker alive again. (RT 1721.)

He learned of her death the next day and described the suspect vehicle and the driver to police. He described the Lincoln as a beige, champagne color but

wasn't certain of the exact color. (RT 1722, 1735.) He described the driver as white and having a round face, short brown hair and being clean cut, in his late 20's or early 30's. (RT 1723-1725, 1952.) The driver had a shadow under his nose but Arreola didn't know if it was a moustache. (RT 1731.) Arreola thought the license plate of the Lincoln started with 2EAV and then had a 289 or 389 or "something to that effect" but that he didn't remember it exactly. (RT 1724, 1727-1728.)

About a month after the murder, Arreola was shown a photo lineup and although three suspects looked somewhat familiar, one of those in particular -- appellant -- struck him as being the driver of the Lincoln the night Peggy Tucker got into that vehicle and disappeared, although appellant's face (in a driver's license photo) looked heavier and his hair seemed different than the man Arreola saw on the night of the murder. (RT 1725, 1728-1729.) Arreola identified appellant in court as the man who was driving the Lincoln the night Peggy Tucker was killed. (RT 1738.)

Arreola was convicted of a misdemeanor in 1984.<sup>7</sup> (RT 1736.) Before showing him the photo lineup, police told Arreola that they may have caught Ms. Tucker's killer. (RT 1737.)

Viola Belt was in custody in Los Angeles County at the time of trial for probation violations for an earlier prostitution conviction. (RT 1742.) She had worked as a prostitute for the previous 10 years. (RT 1742.) On the morning of September 19, 1995, she had borrowed a friend's car and picked up a "john" as a customer when she pulled into an alley on Belgravia Street. She saw a female body laying in the alley and immediately backed out. She knew the body to be that of a prostitute she had seen at least three times on G Street in

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7. Out of the presence of the jury, the trial court put on the record that Arreola had been convicted of misdemeanor possession of a gun (§ 12020, subd. (a)).

West Fresno. She dropped off the “john” on G Street and then went to police to report the body. (RT 1743.) She identified the car she was driving that day in a photograph which was admitted into evidence and shown to the jury. (RT 1743-1744.)

Police Officer John Fowler was contacted by Ms. Belt about the body in the alley. (RT 1747.) Officer Fowler drove with Ms. Belt in a police car to the crime scene and found Ms. Tucker’s body. He had contacted his sergeant by radio on the way to the scene and other police units began arriving shortly after he did. (RT 1747-1748.)

Police Detective Michael Garcia examined tire tracks at the Tucker murder scene and could see what was considered an “acceleration mark,” i.e., tire tracks indicating a vehicle left the scene at high speed, with the wheels spinning on the dirt and gravel surface of the alley. (RT 1753.) He noticed Tucker had two packages of condoms in her right hand. (RT 1758.) She had blood on her back above the right hip and some blood in her mouth. (RT 1758.) There was some blood on the ground nearby. (RT 1759.)

Dr. Venu Gopal examined the body of Peggy Tucker on September 20, 1995. (RT 1670-1671.) She had been shot through her clothes in the right hip. (RT 1672.) Because of “stippling” and soot marks on the body, Dr. Gopal estimated the gun was held from one-half inch to twelve inches from the victim’s body when fired, but more likely from two to four inches. The bullet perforated two major blood vessels. Three fragments of the bullet were recovered from the body. (RT 1677-1678.)

Two condoms were found in Ms. Tucker’s right hand and dried grass strands were in her left hand. (RT 1679.) Opiates and cocaine metabolites were found in the victim’s blood sample and methamphetamine was found in the stomach. (RT 1685, 1688.) Cause of death was perforation of the two major blood vessels and the intestines by the bullet and subsequent blood loss

and shock. (RT 1685-1686.)

Appellant's mother, Donna Doolin Larsen, testified that on the night of September 11, 1995, her son left the house about 11:00 p.m. in her Lincoln and returned about 11:30 p.m. She said he left the house to buy gas for her car and get her some ice cream. (RT 2718.) She said she and her son cleaned house for several hours after he returned because the house was being put on the market and some realtors were going to inspect it the next day. (RT 2716-2717.)

### **Appellant's Capture And Arrest**

Detective Todd Fraizer was on undercover surveillance in an unmarked vehicle in a West Fresno neighborhood frequented by prostitutes during the midnight hour on the night of October 16-17, 1995. (RT 1800.) He noticed a champagne-colored (RT 1835) Lincoln Town Car on G Street and began following. It made a right turn on Church Avenue. (RT 1803.) The vehicle then turned northbound on Golden State Boulevard. (RT 1804.) When the vehicle returned to G Street, Detective Fraizer was able to get close enough to note the license plate number, 2XAY853. He had been previously given a partial possible license plate number of 2EAV by Rick Arreola, Peggy Tucker's boyfriend. (RT 1802, 1806.)

Detective Fraizer then followed the vehicle into an area of West Fresno known as "Chinatown." (RT 1806.) He pulled up next to the Lincoln at a stop light and noticed the driver was appellant, whom he identified in the courtroom. (RT 1807.)

Detective Fraizer continued to follow appellant and at Ventura and Highway 99, the detective said appellant ran a red light and proceeded southbound on 99. Detective Fraizer thought appellant may have discovered he was being followed. (RT 1810.) Detective Frazier accelerated to 90 miles an hour but still could not catch appellant on Highway 99. Detective Fraizer lost appellant

at the Jensen Avenue off ramp. (RT 1811.)

Detective Fraizer ran a check on the Lincoln license plate and other officers were dispatched to a residence at 1509 West Clinton Avenue. (RT 1812.) When Detective Fraizer got to the Clinton Avenue residence, around 1:40 a.m., he saw the Lincoln car in the driveway and appellant standing near the vehicle. (RT 1813 1831-1832.) When Detective Fraizer returned to the residence during the noon hour on October 17, 1995, he saw appellant preparing to leave in the Lincoln car. (RT 1815.) Detective Frazier recognized a DMV photo of appellant as the man he had seen in the Lincoln the night before. He said that appellant looked thinner than in the DMV photo. (RT 1816.)

That same evening, Detective Fraizer conducted a photo lineup for shooting victim Stephanie Kachman who picked appellant from the lineup. The detective said Ms. Kachman “stated emphatically that number five [appellant] was the man who had shot her. She was sure.” (RT 1818.)

Detective Arthur Buller participated in the arrest of appellant on October 18, 1995, at a medical office on the northwest corner of Spruce and Cedar Avenues, where he had taken his mother and his grandmother. (RT 1842-1843.) Appellant escorted the women into the medical office and when he later came out alone he was arrested. (RT 1844.) Three officers with guns drawn ordered him to lie on the ground and he complied. (RT 1849.)

Appellant was placed in a police car and read his rights. He said he understood them. He was then transported to police headquarters. (RT 1845-1846.) Detective Buller later transported appellant’s mother and grandmother to the mother’s home. (RT 1847.)

Detective Schiotis said an article appeared in the Fresno Bee on August 12, 1995, the day after Stephanie Kachman had been shot, about the string of prostitute shootings in Fresno up to that point and described the suspect vehicle as a smaller, white pickup, possibly a Toyota, and described the suspect as

“dumpy, overweight for his build and possibly in his 20’s.” (RT 1942.)

Two days after the Bee article ran, Detective Schiotis said he was in the area of First and Belmont, interviewing prostitutes and saw shooting victim Debbie Cruz who told him she had been shot by a white male in a pickup truck in December of 1994. He had not interviewed her previously. (RT 1942-1944.)

After his arrest on the afternoon of October 18, 1995, Detectives Schiotis and Murrietta interviewed appellant at the police station. (RT 1968.) Appellant was read his *Miranda*<sup>8/</sup> rights and waived them. (RT 1969-1970.)

Appellant told the detectives he was a long haul trucker for a South Dakota Company, Marquirdt Trucking. (RT 1971.) Appellant said he was certified to haul explosives and high clearance military equipment and had been hauling freight from New York armories and base closures. (RT 1972.) He also said he had recently been working for a Fresno towing company and had also worked at a recycling center in Watsonville. (RT 1972, 1974.)

Appellant said that on his trucking jobs he would be gone for eight to nine weeks at a time, come home for several days and then leave again. (RT 1973.) He said he was planning to leave Fresno again in a few days to transport military loads for Marquirdt Trucking. (RT 1974.)

Appellant acknowledged owning a 1984 Toyota pickup truck and said that his sister and her boyfriend, David Daggs, had also driven it. (RT 1975.) He said the water pump on the truck was broken and the truck had not been properly working since May of 1995, although it was still operable. (RT 1975.) Appellant said he had tried to drive the truck to Fowler but it had broken down and some friends had helped him get it running again. (RT 1976.)

The detectives asked appellant if he had heard anything about the prostitute shootings in Fresno and at first he said no, that he had not heard anything about them. (RT 1976-1977.) He was later asked again if he had heard about the

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8. *Miranda v. Arizona* (1966) 384 U.S. 436.

shootings and appellant said he had seen on Channel 30 news that the prostitutes were being robbed and shot. (RT 1977.)

Appellant was then told one of the victims had identified him as her assailant and that the detectives knew he had a .45-caliber “Firestar Compact” handgun. (RT 1978.) Appellant admitted he had a Firestar at his house on a coffee table “in the room where you first walk into the house.” (RT 1978-1979.)

Appellant said no one had used the gun but him and that it was his “personal gun.” (RT 1980, 2010.) He was asked if he had other guns and appellant said he had a .22-caliber long rifle with a scope, which he had sold, and a 12-gauge shotgun, which he obtained two days after his eighteenth birthday. He said he also had owned an antique Remington rifle but had later also sold it. (RT 1980-1981.)

Appellant claimed to be “holding” some guns for other people, including two .38-caliber police specials for a friend named Jerry Milburn. Appellant said he had kept those guns in a gun safe in his garage for the previous year. (RT 1981.) On further questioning, appellant said he did not think he kept the .38-caliber handguns in the safe any longer and that Jerry Milburn had retrieved them. (RT 1982.)

Appellant then said two other handguns in the safe, a .44-caliber automatic handgun and a .9-millimeter Taurus handgun, belonged to a friend named James Bernard Young. (RT 1982.) Appellant said he still had the .44-caliber in the safe but wasn’t sure about the .9-millimeter. (RT 1983.)

Appellant said he kept the handle for the gun safe on the TV in his bedroom. Appellant said a key to the safe was on a key chain taken from him by officers when he was arrested. (RT 1983.) Appellant told the detectives how to use the key to unlock the safe. (RT 1984.)

Appellant claimed he had been a civilian employee of the Army, Navy and

Marines and that he had been cleared to transport material for all the services. (RT 1985.)

Appellant was asked about a bullet proof vest found in his house and he said he bought it after being robbed at a Wal-Green's store two years earlier, and after also being robbed while clerking at a 7-11 store. (RT 1986.)

The detectives then informed appellant of the charges against him, including murder and attempted murder. Appellant said he was innocent and asked what he could do to vindicate himself, offering to supply truck logs to show his whereabouts at the time of the crimes. (RT 1987.) Appellant said he wanted a receipt from the officers if they took any weapons from his house. (RT 1988.)

Appellant said he did not leave the house at night, except to go to the store. When asked about the night he was seen near the bus station by Detective Fraizer, appellant claimed he had driven to a gas station store about 11:00 p.m. (on the night of October 16-17, 1995) and a girl that he did not know asked him for a ride to the bus depot. He said after he dropped the girl off, a guy pulled up beside him and gave him a "bad look" and that he (appellant) then took off at high speed and made a left turn (southbound) on Highway 99 and then took the Jensen exit. (RT 1991.)

When asked why he went to the store so late at night, appellant said there was a lot of "tension at home," adding "If I can get away, I do." (RT 1993.)

Appellant said there was tension because his mother just had a surgery and she wanted him to stay home and be able to help her. (RT 1993.)

Appellant also discussed that in the past he had gone "bar hopping" with a friend of his named Jim Young and that he had gone to the Black Angus and Woody's restaurants "to pick up babes." (RT 1993.) Appellant said Jim Young, whom he referred to as "Jim Bob," had a few African-American prostitute friends. (RT 1996.)

Appellant told the detectives he had seen prostitutes around the corner of

McKinley and Blackstone when he went to a nearby tavern but when asked if he had ever used the services of a prostitute he responded, "Not personally." (RT 1995.)

He again denied ever using the services of a street walking prostitute. (RT 1996.) He would also see prostitutes when he worked at a 7-11 convenience store at Fresno and McKinley. (RT 1996.)

Doolin said he could not be approached by prostitutes when he was hauling military equipment because he had a security escort with him. He said he was approached by a prostitute once near Blackstone and Ashlan Avenues but refused her services. He said the day before he was arrested he was with his mother and grandmother in a car at a Burger King on Blackstone Avenue when a prostitute approached the car. He then explained she didn't really approach the car but was standing on the corner and yelled to him, "Hi, Honey." He said his mother told the prostitute, "Isn't it too early to be out?" (RT 1996-1998.)

Appellant said both he and his mother believed prostitution should be made legal and that he felt Fresno was "flooded" with prostitutes. (RT 1998.)

Appellant told the detectives he bought the Firestar because he was ambidextrous and because the Firestar "shoots with both hands." (RT 2000.) He said he bought it for personal protection but said he did not carry it. He said he sometimes kept the gun in his headboard. He said he and his stepfather, Charles Larsen, had fired the gun about 150 times at an indoor shooting range but that Larsen had fired the gun more than he had. (RT 2001-2002.)

When told a witness had seen him pick up Peggy Tucker in the Lincoln the night she was murdered, appellant denied he had picked up a prostitute in that car. (RT 2003.) Appellant said that the night before he was arrested he saw a car make a U-turn with no lights on when he left his home to go to the store. He drove around and saw some other cars in the area. When he returned home, he took his dog for a walk and two girls approached him and said they thought

someone was following them. He said he walked to a pay phone and called police. (RT 2004.)

When appellant was asked again what he had heard on television about the prostitute shootings he said he had heard there was a white truck with red letters on the tailgate and a “larger Cadillac-type vehicle.” (RT 2005.)

Detective Murrietta then told appellant they had tire track evidence on him and appellant said he had put new tires on the Continental two weeks earlier at the Costco on West Shaw. Appellant said he believed he put tires on his pickup truck in May of 1995. (RT 2005-2006.)

Detectives told appellant that his Firestar handgun would be checked at a laboratory and they asked him what he thought would happen of if it turned out to be the murder weapon. He replied, “he would be an innocent man going to prison.” (RT 2006.)

Appellant was asked if he could have done the murders and not remembered. When asked if he had blackouts, appellant responded, “I don’t know” and recounted that his mother told him he used to sleep walk when he was younger. (RT 2007-2008.)

Repeatedly asked why the surviving prostitutes would pick his photo from a photo lineup, Appellant responded that he did not know and that he did not shoot them. (RT 2006-2009.)

When asked if he had any other .45-caliber handguns, he said he had been looking at one, a Thompson brand, but had not bought it. (RT 2011.)

Appellant denied using drugs, smoking or drinking. (RT 2015.)

Appellant said he had purchased a police scanner radio when he was working at a 7-11 and had been listening to it the night before he was arrested to see if officers would respond to his call about being followed by someone. (RT 2021-2022.)

When he was asked when was the last time he had sex he paused a long

time and then said “that doesn’t count.” Pressed by the detective about what he meant by that statement, Appellant said the last time he had sex was three weeks earlier with a girl named Michelle. He thought her last name was Parker. He said they only had oral sex and that is why he paused before answering. He said that was the first time something like that had ever happened to him. (RT 2023-2024.)

When the interview ended, appellant continued to profess his innocence and asked detectives for an opportunity to vindicate himself and said he was willing to talk to them the next day. (RT 2025.)

Throughout the initial interview, Detective Schiotis was under the impression there was only one Firestar handgun involved. Later that day, he learned there was a second .45-caliber Firestar, only one serial number off from the one found at appellant’s home, and that an empty box for the second gun had been found in appellant’s home. (RT 2025-2026.)

Detective Schiotis then had appellant return to the interview room that same evening and told him that officers searching his home had discovered the box for a second Firestar and that they now knew the guns had consecutive serial numbers. Detective Schiotis asked appellant where the second gun was. Appellant said he thought it would be at his home in the headboard of his bed. Another detective told appellant the gun was not in the headboard. Appellant said the gun would be in a cedar box on the headboard. (RT 2028-2029.)

The detectives asked why Doolin had not revealed the existence of the second Firestar when the officers first questioned him about the guns he possessed. Appellant responded that “it just didn’t come up when we were talking” and that the second gun “hardly ever had been used.” Appellant insisted the Firestar he carried was the one found on the coffee table. (RT 2029.)

After further questioning from detectives, appellant, after sitting and

thinking about where the second gun might be, said “maybe his cousin’s wife [Michelle Moses] might have borrowed the [second Firestar] gun” because she liked it and wanted to buy one like it. He said he had given his cousin Bill Moses the second Firestar over a month earlier.<sup>9/</sup> Appellant claimed not to know his cousin’s wife’s name [Michelle] but said his cousin’s name was Bill Moses. Appellant said his mother would have Bill Moses’s phone number. (RT 2030-2031.)

Detective Schiotis then called appellant’s mother and obtained the phone number for Bill Moses. (RT 2031.) The detective called Bill Moses and arrangements were made to go pick up the second Firestar. (RT 2033.)

When Detective Schiotis returned to the interview room, he asked appellant again why he hadn’t mentioned the second Firestar, and appellant responded that “there were a lot of things going on with the move of his dad and mom to Stockton. He advised his [step]father had just gotten a job in Stockton.” (RT 2034.)

Appellant then said he believed he had given the second Firestar handgun to Bill Moses when it was loaded and that he had given Moses two full clips of ammunition. (RT 2035.)

Appellant was then asked if his sister had any guns and he told them she had a .25-caliber handgun she had purchased in Los Angeles. (RT 2038-2039.)

On October 19, 1995, about 3:35 p.m., the detectives interviewed appellant again a third time for about 10 minutes after he waived his *Miranda* rights and asked him when he had given the second Firestar handgun to Bill Moses and appellant said “three or four weeks ago.” (RT 2045, 2050.)

Appellant clarified that the second Firestar had only been loaned to the Moses couple and that he did not intend to sell it to them. (RT 2047.) The

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9. Appellant later changed this estimate of when he had given the Moses the Firestar to “three weeks ago, if even that.” (RT 2040.)

detectives told appellant another victim had identified him in a photo lineup. Appellant looked at the photo lineup and said one of the suspects “looked close enough to be his brother.” Appellant then said “We’re going in circles here” and the interview was terminated. (RT 2049-2050.)

In his trial testimony, appellant testified that on the night of October 16-17, 1995, he watched the 11:00 p.m. news and then drove to a gas station at West and McKinley to get some junk food. He said there was a “lady” carrying a “suitcase-style thing” who approached him in the station parking lot and asked him for a ride to the Greyhound station downtown. (RT 3704, 3707.)

He said he dropped the woman off at the bus station and was stopped at the light when he noticed a man “in grunge-type clothes preferably identified by like gang members,” which he described as “checkers like Bulldog gangs,” unshaven with what “looks like a goatee,” who gave him a “pretty dirty look” but he decided to just continue driving. (RT 3704, 3707.) He said he was worried about getting car-jacked. (RT 3709-3710.)

Appellant acknowledged the man was Detective Fraizer, who testified at trial, but appellant claimed the detective’s appearance had “changed drastically” from that night and when the officer testified in court. (RT 3708.)

Appellant drove on to Highway 99 southbound and noticed the man was following him and said he “wanted to see what this vehicle was going to do” so he pulled off at Jensen Avenue but lost sight of the vehicle so he headed home. (RT 3704-3705.)

He said he didn’t call 9-1-1 that night because “I had no phone with me or in the car. I -- basically on the presumption after I did exit 99 and Jensen area, he didn’t follow me, so I figured, you know, you can always double-guess. Well, maybe he gave me a bad look, you know, so forth. You just -- You just don’t know.” (RT 3777.)

Appellant admitted that on the evening of October 17, 1995, when he called

police to report suspicious vehicles, he failed to also mention the suspicious man following him the night before. He said he did so because he was “more concerned” about his immediate safety and because he had two women friends with him. (RT 3712.) He said he actually feared for his life on the night of October 17. (RT 3777.)

Detective Marcus Gray searched appellant’s home the day he was arrested. (RT 1855.) Found in appellant’s home was a video entitled “Pro Sniper” which showed techniques of being a sniper, including type of guns, sitting positions, targeting, etc. (RT 1860.) The detective also found a live round of .9-millimeter ammunition in a cabinet next to appellant’s bed. (RT 1860.) Also found in appellant’s bedroom were a bullet proof vest with the letters “FBI” stenciled on the back, three ski masks, night vision goggles, a black pair of military pants and black military style shirt, camouflage shirt, magazines entitled “Soldier of Fortune” and “Combat Arms,” an adult men’s magazine, and two boxes of .45-caliber ammunition located in the bed headboard. (RT 1864-1866, 1871-1872.)

A loaded Firestar .45-caliber handgun in a black nylon case or waist holster, a full magazine for the handgun, and a radio scanner were found in the front room. (RT 1861.) In one room, Detective Gray found photographs of appellant with guns along with pictures of other people with guns. (RT 1863, 1876.)

In the garage of appellant’s home was a gun safe in which was located a Taurus PT-99 nine-millimeter handgun, three magazines for that gun, two empty gun case boxes with the serial numbers 2064980 and 2064981, and two sets of handcuffs. There was also a metal belt buckle with an opening for a .22-caliber handgun, an Omega taser and paperwork showing purchases of, and repairs to, guns owned by appellant. Also in the gun safe was a .44-magnum handgun, which was unloaded, and three starter guns with the barrels drilled out to make them look real. (RT 1866, 1873, 1883.) There were also rifles and

shotguns in the gun safe, along with a variety of ammunition, including over 600 rounds of .22-caliber ammunition. The rifles and shotguns were not collected. (RT 1867.)

Detective Schiotis checked appellant's gun purchase records and found he had purchased two .45-caliber Firestar handguns with consecutive serial numbers. (RT 1964.)

On October 24, 1995, Detective Fraizer contacted appellant's sister, Shana Doolin, in Stockton. She provided the detective a Lorcin .25-caliber semi-automatic handgun, serial number 066138. He booked it as evidence in the shooting of Alice Alva. (RT 1821-1822.)

#### **Ballistics And Other Physical Or Circumstantial Evidence Linking Appellant To The Shootings And To The Vehicles And Weapons Involved**

Appellant's sister, Shana Doolin, lived in a house with her mother, appellant, and their stepfather at the time the shootings occurred. (RT 2293-2294.) Asked about how she acquired her handgun, she said her brother took her to a gun show at the Fresno Fairgrounds and she met a gun dealer who lived in Southern California and she said she was moving there and concerned about her safety so she bought the gun from the Southern California gun dealer at his home. (RT 2299-2300.)

She fired the gun twice at a Fresno firing range and numerous times at their grandmother's ranch near Wasco. Her brother was with her on these occasions. (RT 2296.) She said her brother showed her how to fire the .25-caliber Lorcin, cocked it for her because it was difficult to cock, knew where she stored it in a closet, and was present on occasions when she removed it from the closet and returned it to the closet. (RT 2296-2298.) She said the gun was "cheap" and occasionally jammed. (RT 2297-2298.)

She claimed to be unaware ("not that I know of") if her brother ever

borrowed the gun while they were not together at the shooting range or their grandmother's Wasco ranch. (RT 2300.)

She gave the gun to her brother in mid-July of 1995, when she was planning to move to Stockton. She said her brother told her that "one of our relatives needed it." (RT 2301.) She claimed she got the weapon back from appellant in mid-August 1995. She never saw anyone else in possession of the weapon. (RT 2301-2302.)

She confirmed she said at the preliminary hearing that she retrieved the weapon from appellant when she moved to Stockton in early September 1995, but that what she actually meant was that she had received the weapon from him two weeks earlier before she moved. (RT 2303-2307.)

George Kayajanian, owner of GK Guns, testified appellant first came to his business on January 10, 1995, seeking to sell a .9-millimeter semiautomatic handgun on consignment. (RT 2372, 2380.) Kayajanian sold this weapon for appellant on March 1, 1995, for \$3,566. (RT 2382-2383.)

On March 4, 1995, appellant applied to purchase two Firestar .45-caliber handguns from Kayajanian and took possession on March 19, 1995, following the mandatory 15-day waiting period. He paid \$1,016.50 for the two handguns. (RT 2380, 2382-2383.) Kayajanian said the Firestar, which had only been on the market a few months, was considered the smallest gun available that "would carry the greatest power – most powerful bullet for its size." (RT 2387.)

Appellant also purchased two holsters for the handguns that could be worn inside the pants. (RT 2384.) Kayajanian was also shown bullets seized from appellant and he described them as an "SXT bullet." He explained these were "hydroshock"<sup>10/</sup> bullets that were "more aggressive" and expand upon impact with a soft surface such as human flesh. (RT 2391-2394.) They cost more than

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10. The correct spelling of the brand name is Hydra-Shok.

twice as much as regular bullets. (RT 2398.) In his opinion, Kayajanian said appellant's Hydra-Shok bullets would not be used for target practice, and, were actually prohibited by police from use in target shooting. (RT 2397.) Kayajanian said the Firestar was not a target shooting pistol and was specifically designed "for concealment and carry. It is still one of the smallest, most powerful handguns offered on the market." (RT 2398-2399.)

Department of Justice criminalist Stephen O'Clair examined the tires on appellant's Toyota pickup and found that three of them were the same and the fourth tire had a different tread design and appeared to be newer than the other three. (RT 2460.) O'Clair made impressions of the Toyota's tires, created photographic transparencies, and then overlaid them on actual size photographs of tire tracks found at some of the crime scenes in order to compare them. (RT 2460-2461.) O'Clair found the tread marks from the Toyota front tires and right rear tire were similar to the crime scenes except the impressions were not as deep as the crime scene photos, which could be accounted for by tread wear because of the passage of time (months) between the time the crime scenes were photographed and the time the Toyota tires were examined. (RT 2461, 2465.)

Regarding the Marlene Mendibles crime scene, O'Clair said that except for the differences in tread wear the tires were similar except for the left rear tire and regarding "the other tires, all I can say is that they had more wear on them [three months of driving] and it's possible that they could have made the impressions, but again they had more wear then [*sic*] what was depicted in the depressions." O'Clair said he could not rule out appellant's Toyota as the vehicle that left the tire impressions at the Mendibles crime scene. (RT 2462, 2465.)

At the Espinoza murder scene, O'Clair said he also had the opinion that the same three tires on appellant's Toyota matched *both front tires and the right*

*rear tire* a vehicle had left at the crime scene, except for the depth of the tread wear. (RT 2463.) The Toyota's tire tracks did not match tire tracks left at the Peggy Tucker murder scene. (RT 2467.)

O'Clair also examined the Lincoln automobile owned by appellant's mother and driven by appellant. He said the tread characteristics of the tires on the Lincoln did not match any of the tire impressions photographed at the Peggy Tucker murder scene, which occurred in an alley. (RT 2466.)

O'Clair examined the two .45-caliber Firestar semi-automatic handguns owned by appellant. (RT 2489.) He examined a .45-caliber shell casing found near the body of Inez Espinoza, and seven shell casings found at the scene of the attempted murder of Stephanie Kachman and determined that all eight bullets had been fired from the same gun. (RT 2509-2512.) O'Clair also determined that the shell casings from both shootings most likely or "probably" had contained Hydra-Shok bullets, Federal brand, but he wasn't "positively sure." (RT 2514-2515, 2519.)

Bullet fragments from the bodies of Peggy Tucker and Inez Espinoza were examined and compared by O'Clair, who determined they had the "same rifling or class characteristics" and "could have been" fired from the same handgun but he could not positively say they were fired from the same gun. He did this comparison in late September of 1995, before appellant had been arrested, and before O'Clair had access to appellant's Firestar handguns. (RT 2518.)

O'Clair said he later examined and test-fired both of appellant's Firestar handguns that were only one serial number apart (2064980 and 2064981). (RT 2520-2521.) O'Clair said just because the serial numbers were numbered consecutively did not mean they were manufactured one right after the other and thus would not necessarily have "individual characteristics that would carry over." (RT 2521.)

O'Clair said that as a result of testing he excluded the Firestar handgun with

the serial number ending in zero as being the weapon that fired any of the recovered shell casings from the Kachman and Espinoza shootings or bullet fragments from the Tucker and Espinoza murders. (RT 2522-2523.)

O'Clair compared test bullets fired from appellant's Firestar handgun (with the serial number ending in the number one) with bullets recovered from the bodies of Peggy Tucker and Inez Espinoza and concluded that it was the weapon used to kill both women. This was the weapon provided to police by Bill Moses. (RT 2524-2525.)

O'Clair also examined the Lorcin .25-caliber handgun owned by appellant's sister, Shana Doolin. (RT 2526.) He compared the characteristics of test-fire shells fired from the Lorcin with three .25-caliber shell casings found at the cul-de-sac shooting of Alice Alva. (RT 2528.) He concluded that although there were "some real good gross marks that – that I could find that were consistent and reproducible, [but] as far as finding fine striation types of marks, I really couldn't." (RT 2530.) He said that as a result he had to conclude that the shell casings found at the Alva crime scene "could have been fired in that weapon [Shana Doolin's Lorcin] and probably would, but again I wasn't able to make a positive identification on that." (RT 2530, 2542.)<sup>11/</sup>

Charles Morton of the independent Institute of Forensic Sciences

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11. When asked later to explain why he thought the shell casings found at the Alva crime scene were "probably" shot from Shana Doolin's Lorcin handgun, O'Clair responded:

It was more than just class characteristics, I'd say they're more subclass and bordering on individual characteristics that I was able to find there that lend [*sic*] me to say that they probably were. But again I can't say positively to the exclusion of all of these other types of, you know, makes and models of this weapon. You know, it's either this weapon [Shana Doolin's Lorcin handgun] or, you know, very similar Lorcin 25 caliber of the same – same type.

(RT 2533-2534.)

Criminalistics Laboratory in Oakland, with more than 30 years experience, also examined appellant's two .45-caliber Firestar handguns, which had consecutively numbered serial numbers, and also examined the .25-caliber handgun owned by appellant's sister. He test-fired these weapons and compared bullets and casings from those three weapons with those found at the various shooting and murder scenes. (RT 3336-3338.)

Morton determined the shell casings found at the crime scenes were fired by appellant's .45-caliber Firestar with the serial number ending in the number one. (RT 3339.) He specifically said appellant's Firestar handgun was used in the Inez Espinoza murder, based on the one shell casing found at the murder scene. (RT 3340.)

He also concluded appellant's Firestar handgun with the serial number ending in one was the gun used in the Peggy Tucker killing. (RT 3341.)

Morton was able to say that a .25 caliber weapon of the type owned by appellant's sister was used in the Alice Alva shooting but he was unable to say for certain that Shana Doolin's gun fired the shell casings found at the crime scene. (RT 3342.)

Police detective Frank Rose said he obtained the murder weapon (the .45-caliber Firestar with the serial number 2064981) from appellant's cousin, Bill Moses, on October 18, 1995, at Moses' residence. (RT 2248-2349.) The weapon was unloaded. (RT 2355.)

Detective Rose said Moses told him at the time that he (Moses) had received the gun from appellant either the last week of September or the first week of October (1995). (RT 2351.) Moses told the detective he had not fired the gun. (RT 2352.) Moses said his wife wanted a gun and he borrowed the gun from appellant to see if his wife liked that type of gun. (RT 2353.)

However, Bill Moses testified at trial that he remembered receiving the gun from appellant on September 1, 1995, because it was his father's birthday. (RT

2754.) When confronted with the fact he had told Detective Rose he could be off by a period of two or three weeks, Moses said that was because he “was on a double dose Interferon for Hepatitis C” and it interfered with his short term memory. (RT 2754, 2757.) Moses then said he had the gun for a month before he got the holster and an extra clip of ammunition on October 1. (RT 2755.)

Moses claimed he had told Detective Schiotis, “I said I had it for two or three weeks, give or take a couple weeks.” (RT 2762.)

Moses said he had also borrowed Shana Doolin’s .25-caliber Lorcin handgun from appellant from the end of July, 1995, until August 18, 1995. (RT 2759.)

Moses said he also owned three handguns. (RT 2760.)

Moses said he got the .45-caliber Firestar from appellant because his wife was having trouble with her ex-husband and she wanted it for protection. (RT 2810-2811, 2833.) Moses admitted he told Detective Schiotis that Moses’ wife, Michelle, wanted to look at the Firestar to see if she could handle it but that, in fact, Michelle did not actually say she wanted to look at it. (RT 2762, 2764.)

When Moses was read his preliminary hearing testimony in which he said he told Detective Rose he obtained appellant’s gun the last weekend of September or the first weekend of October, Moses said he was “still having problems with the chemo” during his preliminary hearing testimony. (RT 2765.)

Moses said the Firestar was loaded when he took possession of it from appellant in appellant’s bedroom but that appellant unloaded it before handing it to Moses. (RT 2769.) Moses conceded that at the preliminary hearing he had said the gun contained Hydra-Shok bullets when appellant unloaded it but claimed at trial he also saw “black Teflon” bullets and another type of bullet laying on appellant’s bed. (RT 2769-2770.)

Moses also said that at one time he and appellant went into Shana Doolin’s

room and took her .25-caliber Lorcin handgun without her knowing about it. He claimed they had to search her room to find the gun and that appellant did not appear to know where it was stored. (RT 2776.)

Michelle Moses, Bill Moses' wife, said she was positive they received the Firestar weapon from appellant on September 1, 1995. (RT 2819.)

She said she "borrowed" Shana Doolin's .25-caliber Lorcin handgun from the week of July 1, 1995, until August 18. (RT 2825.) She testified at trial that she assumed her husband had obtained the gun from Shana Doolin. But when confronted with her preliminary hearing testimony in which she testified she was present when Bill Moses went "outside and Shana gave it to him" she responded that she did not actually see Shana Doolin hand her husband the .25 caliber handgun. (RT 2854.) Mrs. Moses said she never fired Shana Doolin's gun when she possessed it. (RT 2855.)

She said she and her husband were in Las Vegas on August 11, 1995, the date Stephanie Kachman was shot with appellant's .45-caliber Firestar handgun. (RT 2827-2828.) Mrs. Moses said she and her husband spoke to appellant after his arrest when he would call them from a jail phone. (RT 2863.) Mrs. Moses said she knew appellant "had an interest in guns" and read a lot about them. (RT 2871.)

Department of Justice criminalist Richard Kinney inspected appellant's 1984 Toyota pickup truck after his arrest and found three unopened condoms in the ashtray. (RT 2429-2430.)

Prostitute Florence Chavez, who is a heroin addict, was on methadone maintenance at the time she testified. (RT 3811-3812.)<sup>12/</sup> She said she was shown a photo lineup on October 20, 1995, and selected appellant's photo as

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12. Police officer Charles Mart testified Chavez was a "male/female cross dresser," and he was not sure which sex he/she was but he got the impression she was a male. She had filed a complaint that she had been sodomized. (RT 3822.)

that of a man who had twice approached her on Belmont Avenue between July and September of 1995, soliciting an act of prostitution. (RT 3812-3814.) She said she turned him down because she “just felt funny” about him because he was “a little too persistent.” She said he was driving a small white truck. She identified appellant in the courtroom as the man who had approached her. (RT 3814-3815.)

Marjorie Galloway testified that her son, Justus Swigart, was friends with appellant and that appellant had been at her home many times. (RT 3827.) She said appellant had spent the night at her home a few times and on occasions when he had been drinking and she felt it was unsafe for him to drive. (RT 3829.)

Mrs. Galloway also said appellant frequently carried a duffel or gym bag that had guns in it. (RT 3829, 3842.) He would leave the guns in her bedroom. (RT 3841.) Appellant had sold her son a gun that turned out to be stolen. (RT 3842.) She also heard him make disparaging remarks about “girls who were sluts and whores.” (RT 3830, 3833, 3836.)

Sherry Saar said she is a “niece”<sup>13/</sup> of Mrs. Galloway and knows appellant. (RT 3846.) Sherry and her young daughter and Justus Swigart and another girl visited appellant at his apartment. (RT 3847.) Appellant asked Sherry to lunch and she said she wanted to take her sister along. He agreed. Over lunch, appellant said he didn’t like his mother. (RT 3847-3848.) She said he later asked her for a date and she declined and he got upset and called her a “bitch” and wanted to know if she was going to “fucking wash my hair.” (RT 3850, 3856.)

Justus Swigart, a security guard and friend of appellant, said almost every time he saw appellant, appellant was carrying weapons in a duffel bag. (RT

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13. It is not clear from the record if Ms. Saars was an actual niece of Mrs. Galloway or just a very close family friend. (RT 3851.)

3865-3866.) On two occasions, they took the guns into the foothills and mountains and shot them on what appellant claimed was a relative's property. (RT 3875-3876.)

Swigart said he saw appellant get drunk on schnapps and beer and spend the night at his house. (RT 3866, 3873.) Appellant also told Swigart he had used cocaine but Swigart had never seen him use it. (RT 3866-3867, 3874.) Swigart said he rode in a car with appellant to Donna Doolin Larsen's house once but appellant said it was better if Swigart waited outside. Swigart had to wait 20 to 30 minutes. (RT 3867, 3874.) Swigart said he saw shotguns and handguns at appellant's apartment. (RT 3868.)

Swigart said he got six months informal probation for possessing a stolen gun provided him by appellant. (RT 3870-3871.) Swigart said he did not blame appellant for the fact that Swigart got caught carrying the stolen gun but was upset because he felt appellant had lied to him about its legality when appellant sold it to Swigart. (RT 3878.) Swigart said he confronted appellant about the gun and appellant claimed he did not know it was stolen and that he (appellant) had got it from a friend. (RT 3879-3880.)

Christina Bills, Marjorie Galloway's daughter and 19 at the time of trial, testified she went to parties at appellant's apartment at the Casa Del Rey complex -- at Fresno and Barstow Streets -- where alcohol was being consumed and marijuana was being smoked. (RT 3882-3883.) She did not see appellant smoking marijuana. (RT 3887.)

She considered appellant a liar because he was always claiming he was wealthy and had Mafia contacts and only drove an old truck so women would be attracted to him for who he was, and not for his money. (RT 3884, 3887-3888.) She saw appellant on numerous occasions carrying a duffel bag containing guns. (RT 3884.) He kept the bag in his truck. (RT 3919.)

Ms. Bills felt appellant mistreated his girlfriend at the time, Denise

Hamblen, and that appellant had made comments about how ice cubes were “good sexual toys.” (RT 3885.) She said on one occasion appellant told her that he didn’t respect his mother. (RT 3886.)

Denise Hamblen was appellant’s girlfriend and lived with him for a time in the Casa Del Rey apartments for about six weeks. They met in continuation high school and spent approximately one year together, most of it dating and six weeks living together, in 1990-1991. (RT 3896-3897, 3920-3921.) They had sex at his mother’s home when no one else was at home. (RT 3897-3898.)

She said that on one occasion she had a fight with her parents and got kicked out and asked appellant if she could stay with him. But he told her she had to work to help pay the bills. (RT 3913.)

She was a virgin the first time they had sex and she asked him to be gentle but he was very forceful and she began screaming and he put his hand over her mouth. (RT 3898.) She said she bled for about a week and a half after that incident. (RT 3899.)

She said he got very upset and angry if she did not do what he wanted to sexually, recounting one time when he put four or five ice cubes on her private parts before inserting his penis. She said she told him it was very painful but that he would not stop. She remembered another time when he had sex with her on the bathroom floor and she wanted to stop because it was hurting her back but he would not stop. (RT 3901-3902.)

She said appellant did not like condoms and would wash his penis with soap before sex, claiming the soap would kill the sperm. She said the soap burned her badly and she would not want him to do that but he kept doing it. (RT 3903.)

She said he would open pornographic magazines and look at them on the headboard while they were having sex. (RT 3904.) She said she saw an advertisement appellant had placed in a pornographic magazine. He also asked

her if she wanted to become a “swinger” and she said no. (RT 3905.)

Ms. Hamblen said when she lived with appellant and people came by, he would have her (Ms. Hamblen) hide because he did not want his family to know she was living with him. (RT 3906-3907, 3932-3933.) She also said he would take her entire paycheck and deposit it in his bank account. He also went out socially frequently and ordered her to stay home. She was not allowed to answer the door. (RT 3906-3907.) He also hit her on the side of the face on one occasion and made her cry. (RT 3908.)

She said she was very ill on one occasion and had back pain and thought she might have a kidney infection and he became very angry and said she could not go to the “fucking hospital because we can’t afford the bills.” She sought medical attention anyway at a hospital and learned she had a severe kidney infection. (RT 3910.)

She said she had to hitchhike home from the hospital that night and appellant the next day flushed her medications down the toilet, claiming his mother had told him they were no good. (RT 3910-3911.)

She never reported a fire at the Casa Del Rey apartments. (RT 3926.)

### **DNA Evidence**

Department of Justice criminalist Rod Andrus testified he used the PCR DQ-alpha typing method in analyzing DNA evidence in the Inez Espinoza murder. (RT 3243.) He had been involved in forensic testing for almost 24 years. (RT 3386.)

Andrus tested fingernail scrapings from the left and right hands and a vaginal swab from Ms. Espinoza and found sperm in all three places. (RT 3440, 3345.) Andrus said the sperm DNA found under the right hand fingernails “was a combination of DNA from more than one individual.” “The primary alleles represented were a 3, 4, and there was a lesser concentration of

a 2 allele or a 2 factor, if you wish.” (RT 3447.) No. 3 and 4 alleles were found in the left fingernail scrapings and the vaginal swab (which also had a minor component known as 1.2). (RT 3448.) Andrus explained that the victim had 3 and 1.2 alleles but not the 4 allele so that he knew that the 4 allele had to come from another person. (RT 3449.) He said the 1.2 could have come from the victim. (RT 3464.) Andrus said appellant’s blood tested positive for the DQ-Alpha type 3 and 4 alleles. (RT 3450.)

Andrus said the “bottom line” was that he could not exclude appellant as the source of the 3 and 4 alleles in the sperm from the DNA tested. (RT 3451.) Andrus later explained that the 2 allele found in the right fingernail scrapings could not have come from appellant or the victim. (RT 3453-3454, 3456-3458.) Andrus estimated the 3, 4 alleles would be found in roughly 10 percent of a Caucasian population, including both men and women but that you could exclude women (who don’t produce sperm), prepubertal males and people not in the United States on the night of the murder. (RT 3454-3455.)

### **Dana Daggs Guilt Phase Evidence**

Dana Daggs testified after appellant claimed he had never had sex with her. (RT 3618.) Ms. Daggs testified she met appellant when she was 13 years old. Her stepmother was friends with appellant’s family. (RT 3941-3942.) She eventually began having sex with appellant. (RT 3942.)

She remembered an occasion when they were driving by prostitutes gathered in the area of Blackstone and McKinley Avenues and appellant described them as “dirty” and “disgusting” and that someone “should remove them . . . remove them period. They shouldn’t be -- they shouldn’t exist.” (RT 3943-3944.)

Dana Daggs said appellant liked and collected guns and frequently showed them to her. (RT 3944.) She said he claimed to have “mob” connections and said that he could get guns any time he wanted. (RT 3945.)

She said she lived with appellant briefly when she was homeless and reported a fire at his apartment three weeks after she had moved in on November 28, 1991. (RT 3945-3946, 3965-3966.) She said he occasionally took her to a motel and he would lay a “bunch” of his own towels on the bed before they had sex and later wipe the walls and anything they touched - door knobs, the room phone, the light switches, shower handles - with the towels and would never leave stains behind or any evidence that they had been in the room. They used his towels to dry off after showering in the motel room. (RT 3945, 3962, 3967-3968.)

Even after moving out of his apartment, Dana continued to occasionally have sex with appellant, at his apartment or at his mother’s home when appellant moved back there. No one was ever home when they had sex. (RT 3947-3948.)

In early 1992, Dana got pregnant. Appellant wanted her to sign a letter he had drafted saying it was not his child. She did so on April 2, 1992. Doolin also signed the letter, in which it was written that he was nothing more than a friend. (RT 3948.)<sup>14/</sup>

Dana said she felt she had become pregnant from her former boyfriend, Donald, and not appellant (she later miscarried). She continued to see appellant for six or seven months after April 1992, and they would continue to have sex. He would page her on a pager and she “usually all the time” would call him back and they would meet and have sex at his residence. (RT 3951-3952.)

She remembered one occasion at his home when appellant wanted to have sex and she did not. She said she had gone to his house to take a shower and did not want any sex and appellant agreed. She was temporarily homeless at the time. (RT 3952.)

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14. The letter was read into the record and attributed Dana Daggs’s pregnancy to a former boyfriend, “Don.” (RT 3949-3950.)

She said he then entered the shower with her and she told him she did not want to and kicked at him but he told her “yes, you do” and he pressed her up against the wall with his arm across her neck and shoulder and had sex with her anyway. (RT 3954.)

She tried to get away but he pinned her down in a kind of bear hug that hurt. He put soap on his hands and began to penetrate her vagina with his soapy fingers. (RT 3955-3956.) She said appellant had used soap on previous occasions when they had consensual sex contending it would prevent her from getting pregnant. (RT 3958.) After a few minutes he got off of her and left the bathroom. (RT 3956.) She then got dressed and told him to open the garage door or she was going to drive through it. (RT 3958.)

She said she waited seven or eight hours and then notified police what had happened. She then went to a hospital and was examined. She said she spoke to the police several times but nothing ever happened regarding prosecution. (RT 3958-3959, 3973.) She was encouraged to report the incident by a friend named Sean Johnson. (RT 3972.)

On cross-examination, Ms. Daggs said she was pregnant at the time but later lost the baby in a miscarriage when she was struck by her former boyfriend, Donald, who was drunk and angry. After that, she ceased all contact with Donald. (RT 3960-3961.) She admitted to having sexual relationships with Donald and appellant at the same time. (RT 3961.)

She confirmed her relationship with appellant was “purely sexual” but explained they were also friends who “did have quite a bit of sex.” (RT 3963.)

She said she visited appellant at his apartment when he had a girlfriend living there (Denise Hamblen) and she would have sex with him when the other girl was not around. (RT 3965.)

David Daggs said his sister, Dana Daggs, had been less than truthful in the past, stating “In our family situation we had experiences of her going through

periods of telling a lot of lies.” (RT 3042.) David Daggs said appellant’s mother had urged him not to meet with district attorney investigators without appellant’s attorney present. (RT 3062.)

Daggs said at the time his sister made her rape claim against appellant in 1992, she had “run away from home” and was living in Fresno at different friends’ houses, and “somehow became acquainted again” with appellant. Daggs, who was living in Oregon at this time, knew his sister had accused appellant of a sexual assault and that appellant had denied it and the police had interviewed them both. Daggs knew that at the time of appellant’s trial his sister still contended appellant had sexually assaulted her. (RT 3098, 3125.) Daggs said he had a hard time believing his sister on this charge even though she was his “little sister.” (RT 3099.)

Daggs confirmed he said in an interview with a district attorney’s investigator that appellant had told him that Dana Daggs had stayed at appellant’s place, adding, “Keith [appellant] claims that they never – although she stayed at his place, I think it’s a little hazy, but she stayed a night at his place or something. They never formally lived together, they never – I don’t know, but the Bible says that it takes two or more witnesses to accuse someone. So all I can say it’s hearsay both ways. I don’t know who to believe on that” later adding that he would believe appellant because his sister lied so much. (RT 3099, 3127.)

Daggs said he knew his sister had “fabricated many stories” and had falsely claimed she had been hit by a truck while riding a bicycle. (RT 3126.)

David Daggs also said he knew nothing of appellant’s sex life. (RT 3101.)

Appellant said he did not mention Dana Daggs when he was interviewed by Dr. Howard Terrell claiming “there was no conversation about these unfounded allegations.” He said he might have mentioned her family to Dr. Terrell. (RT 3733.)

Appellant said that when Dana Daggs accused him of rape, he told police he would provide a blood sample and turn himself in. (RT 2616.) He said he had a letter that was signed by Dana Daggs “admitting her guilt” and witnessed by him. He said he faxed it to police and police decided not to pursue the matter further. (RT 3616, 3750-3751, 3789.)

During his second interview by telephone with police in 1992, the female officer interviewing appellant wrote in her report she could hear appellant’s mother talking in the background. The officer wrote on her report that Doolin might be denying any intimate prior relationship with Dana Daggs because he did not want his parents to find out. Appellant said at trial he did not know if he said anything to cause the officer to write that. (RT 3792.)

Appellant described Dana Daggs as a family friend and said she had never been his girlfriend nor had he told anyone she was his girlfriend. (RT 3617.) He denied ever having sex with Dana Daggs. (RT 3618, 3746.) He said she had visited his apartment on maybe two occasions but had never spent the night. (RT 3619.)

Appellant said he did not remember telling police that if they had found any semen on Dana Daggs it would be because she “had saved it in a cup and poured it on herself” but that the statement “might have been made” because he was very upset at the allegation. (RT 3619-3620.) Appellant denied knowing at the time he was questioned about the Dana Daggs incident that he knew semen had been found in her body. (RT 3620.)

Appellant denied ever putting soap into a woman’s vagina. (RT 3622.) Appellant said he had viewed part of the 1992 report on the Dana Daggs rape allegation but had not read the parts where it stated she had a bruised leg, mentioned him using soap on her, and that sperm was found on her body. (RT 3735.)

On re-direct examination, appellant said the last time he saw Dana Daggs

was three or four years before his trial. He asked her to move in with a friend of his, Denise Hamblen, also known as Denise Nagy, who lived near her parents. (RT 3742.) Appellant said Denise Hamblen had lived with him for a month and a half to two months. (RT 3743.) He said she (Denise Hamblen) initially asked to stay with him after she had a fight with her family and moved out. (RT 3743.) He said he did have sex with Denise Hamblen but was never aware she bled after intercourse. (RT 3746-3747.)

On November 28, 1991, there was a fire at appellant's apartment at 5426 North Fresno Street, Apartment 204, and the reporting person was Dana Daggs. The report was People's Exhibit 132. (RT 3784.) The police report stated Daggs got up to get a drink of water and noticed the fire on the porch and that appellant was at work. (RT 3786.) Appellant described this as "very odd" because he remembered it was Denise Hamblen who had reported that fire, which he said occurred when somebody threw a can on his porch with a burning rag in it. (RT 3786.)

Police Officer Dennis Montellano said he took the report of the arson attempt at appellant's apartment on November 28, 1991, at just before 1:00 a.m. and the reporting party was Dana Daggs. (RT 3936.) There were no suspects. (RT 3937.) In making the report, Dana Daggs listed another address in Madera as her address. Appellant was not home at the time. There was no evidence Dana Daggs had broken into the apartment. (RT 3939-3940.)

Appellant later admitted on re-direct that Denise Hamblen's name did not appear in the fire report. (RT 3794.) Appellant testified that he felt Dana Daggs hated him so much she would file a false rape claim against him. (RT 3798.)

Regarding who actually reported the fire, appellant said he found it "amazing to me that one individual stated almost the same exact thing and another one is doing the same thing." (RT 3787.)

The prosecutor asked whether it was late in 1991 that Dana Daggs was appellant's roommate for a short period. Appellant said he only remembered that Denise Hamblen lived with him during this period, not Dana Daggs. (RT 3787.) Appellant insisted the police report did not jog his memory about Dana Daggs and he continued to insist that Denise Hamblen reported the fire, not Dana Daggs. (RT 3788.)

Dawn Garcia, a secretary on the sexual assault team of the Fresno County District Attorney's Office, testified to the contents of a police report on Dana Daggs' complaint that appellant had sexually assaulted her. (RT 3996-3998.) Ms. Garcia said the case file indicated that forcible rape charges would not be filed because of a "Previous ongoing consensual relationship" between Ms. Daggs and appellant. (RT 3999.) On cross-examination, she said a filing determination would be made by the district attorney's office, not the police. (RT 4002-4003.)

### **Appellant's Defense Testimony**

Appellant said he had never seen any of the attempted murder victims before they appeared in court and did not know or had never seen the two murder victims. (RT 3547-3548.)

He did not hate women, had nothing against prostitutes and thought prostitution should be legal, stating "those who seek those services, let them do it." (RT 3548, 3602.) He said he didn't think prostitution was a problem. (RT 3602.)

He described himself as a gun collector. (RT 3584.) He claimed that he "stacked" his ammunition, i.e., loaded ammunition of different types, although he was aware "some people look down upon it . . ." (RT 3585.)

He said he liked different kinds of ammunition, including hollow points, which do not go through the target but are made to expand upon impact and

were more accurate at short distances. (RT 3585, 3587.)

Appellant acknowledged he had a video about snipers<sup>15/</sup> but claimed he had never viewed it. (RT 3600.)

He said he did purchase one mail order bride magazine from overseas but other similar magazines were sent to him unsolicited. He said he had corresponded with three women from the Philippines. (RT 3600-3601.)

Appellant said he bought a matching set of .45-caliber Firestar handguns because he's ambidextrous. (RT 3549.) He said he fired both guns at the Auberry Gun Range in the Sierra foothills and an indoor firing range in Fresno. (RT 3633.) He said he could not remember if he fired Hydra-Shok bullets at the gun ranges (RT 3634) but does remember firing hollow point bullets at the target range even though they were more expensive. (RT 3636.)

Appellant was asked what happened to 18 Hydra-Shok hollowpoint bullets in a box found at his home that had originally contained 20 bullets (only two remained in the box). Appellant responded, "I can't honestly answer that. I know from what I've seen as evidence entered in the courtroom where some of them are. But I don't know where the others are. Were they test-fired, what was done with them[?]" (RT 3637.)

Appellant said he had a Taser gun because he had been robbed several times while working at a 7-11 by robbers with baseball bats or knives and he wanted protection. (RT 3638.) Appellant said he owned two pairs of handcuffs "just to have them." (RT 3640.)

Appellant said the similarities between his truck and his cousin Bill Moses' truck "might implicate my cousin might be involved in some way . . . I cannot say that for a fact. I have not heard anything of him implying such a thing."

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15. Appellant said this video was called "The History of Snipers." (RT 3600.) Detective Marcus Gray testified the video was entitled "Pro Sniper" and showed techniques of being a sniper, including type of guns, sitting positions, targeting, etc. (RT 1860.)

(RT 3647.)

However, appellant then suggested it might be his cousin behind the shootings. (RT 3648.) He later said he was “very hurt” by the suggestion that Bill Moses may have committed the murders but that there are “still a lot of unanswered questions, of course” about Moses’ possible involvement. (RT 3765-3766.)

When asked by the prosecutor whether he could be guilty of the crimes, appellant responded,

Well, we’ve already proven my DNA doesn’t match. The investigation have [*sic*] basically have [*sic*] proven myself that the blood doesn’t match. No fingerprints have been found. Tire tread didn’t work. I have proven myself to you of your case in that you presented [*sic*].

(RT 3650.)

Appellant said he was either out of town, at home, cleaning house, or sleeping when the shootings occurred. (RT 3556, 3565-3566, 3575-3576, 3655-3656, 3661-3662, 3676-3679, 3696, 3699, 3714.)

In the early morning hours of July 29, 1995, appellant said he awakened about 2:45 a.m. or 3:00 a.m. and went to a Versatel machine in Fashion Fair and deposited a check before going to David Daggs’ house (1.5 miles from the Espinoza murder scene) to unload motorcycles. (RT 3678-3680.) Appellant did not initially have a receipt from the Versatel transaction to show the time he made the deposit as 2:59 a.m. (RT 3682-3683.)

He said he got up so early that day because:

There was a chain of things. Of course, I had to meet his time schedule and also I had to be available after that in the early morning after I had to come back to the residence to go and get a U-Haul trailer which was not available for us until the next day.

(RT 3781-3782.)

Appellant said he remembered dropping David Daggs off so Daggs could do his paper route even though Daggs had testified appellant did not drop him

off. (RT 3782.)

Appellant said he did not know why his mother wrote in her diary that appellant left the house that night around 2:00 a.m. but that it was closer to 3:00 a.m. when he left. (RT 3685.)

Appellant said when he left the bank about 3:00 a.m. it took him seven to ten minutes to reach Daggs' house and he stayed there about an hour to an hour and a half. He claimed it took 90 minutes to unload the two motorcycles and the moped in his truck because the motorcycle tires were flat and the brakes were locked up on one motorcycle. (RT 3688-3699, 3781.)

Although he initially said he arrived home around 5:30 a.m., when he was asked what he did between 4:30 a.m. -- when he left Daggs' house -- and 5:30 a.m., he said he got gas. He also said he only estimated it was 5:30 and that was "proximity." (RT 3689.)

On cross-examination, appellant denied he had ever been with a prostitute, or approached one and asked for a date. (RT 3602-3603.) He specifically denied ever approaching a prostitute in Fresno in 1995 along Belmont Avenue. (RT 3603.)

He denied ever saying to anyone that prostitutes were dirty, sleazy and cheap or that they should be removed from the Earth. (RT 3604.)

Appellant did acknowledge he had tried alcohol but did not like beer because it makes him gag. (RT 3605.) He denied ever drinking beer at Marjorie Galloway's house and spending the night there because he was too intoxicated to drive. (RT 3606.) He denied ever discussing any cocaine use with Justus Swigart. (RT 3606.)

Appellant denied ever mistreating Denise Hamblen or any female. (RT 3608, 3616.) When asked if he made Denise Hamblen bleed during a sex act he responded, "not to my knowledge." (RT 3609.)

Appellant said that to his knowledge he had never placed an advertisement

in a sex magazine. (RT 3610.)

Appellant said that unless he was going to a firing range or going hunting he never carried his guns around with him. (RT 3610, 3710.) He denied ever carrying a bag of weapons around in his pickup. (RT 3611.)

He admitted selling a handgun that had been stolen but said he did not know it was stolen at the time he purchased it in good faith from a man named Jeff Langley and then sold it to Justus Swigart. (RT 3612.)

He denied ever swearing at a girl named Sherry Saar after she turned him down for a date. (RT 3613.) Appellant said he had lunch once with Ms. Saar and never asked her out again. (RT 3614.)

When he lived in an apartment, he denied having a girl hide when his mother came by to visit. (RT 3614.)

Appellant said he had a police scanner in his home but also listened to fire department and aircraft radio traffic. (RT 3622.)

Appellant admitted that when he was first arrested and questioned about the two murders and the two attempted murders he told detectives his trucking logs would establish where he was on the crime dates but that he already knew that he was no longer working as a trucker when the shootings occurred. But he said the detectives were also asking him other questions. (RT 3730.)

Appellant said he had, at times, his hair cut as short as the thickness of a finger, or roughly three-quarters of an inch. (RT 3736.)

### **Other Defense Testimony**

Dr. Howard Terrell testified for the defense as an expert in psychiatry. (RT 2962.) He said 14 percent of patients being treated with Interferon for Hepatitis C suffer short term or long term amnesia, and up to 16 percent suffer irritability. (RT 2963-2964.) Dr. Terrell said the doubling of the dose of Interferon for Bill Moses could increase the possibility of side effects. Dr.

Terrell admitted he did not prescribe Interferon himself and was not familiar firsthand with the effects. (RT 2965.)

Terrell visited appellant at the jail to conduct tests to determine if he was sane. Terrell reviewed some of the facts of the case (some, but not all, of the police reports) and interviewed appellant and “found a man who showed no evidence that I could see of mental disorder, either in my examination of him or my review of the documents” made available to him. (RT 2967.)

Terrell said that based on the evidence made available to him he saw no evidence of appellant having an antisocial personality disorder or being a sadist or sexual sadist, a gang member killer, a psychotic murderer, or murdering under the influence of drugs or alcohol. (RT 2968-2972.)

Terrell said he had examined over 100 murderers in his career and estimated about a dozen were serial killers, whom he described as “much more unique” than someone who kills just one person. (RT 2969.)

Terrell said it would be “very hard” for him to give an opinion on what type of person might have committed the six shootings, assuming it was one person. (RT 2973-2974.)

Terrell said that based on the material he had reviewed, plus talking with appellant and his mother “I’ve seen no evidence to indicate that he would meet any of the typical profiles that I would expect to see in a murderer, let alone a serial killer.” (RT 2974-2975.)

Terrell said he did not know, as a matter of fact, that appellant did not commit the crimes. (RT 2976.) Terrell was not provided the police forcible rape report in the Dana Daggs 1992 incident. (RT 2976.) The defense did not give to Terrell the 1995 police report of an interview with Dana Daggs in which she recounted that appellant had expressed hostility to prostitutes and had described them as “dirty, sleazy, and cheap.” (RT 2977.)

The defense did not provide Dr. Terrell the police report on an interview

with Dana Daggs in which she recounted that appellant took her to motels and wiped down the walls with towels after sex, or police reports indicating he was rough with females when having sex, or that he had girlfriends hide when his mother or sister visited. Dr. Terrell was not provided a report that appellant would also place a pornographic magazine on the bed headboard when having sex with Denise Hamblen. (RT 2978-2980.)

Dr. Terrell was not provided police reports from witnesses who said they saw appellant carrying a duffel bag full of guns on numerous occasions. (RT 2978-2981, 2983-2984.) The defense did not provide Dr. Terrell a police report of an interview with a prostitute who said she had been approached by appellant on two occasions in the summer of 1995. (RT 2980.) He was provided no police report in which witnesses recounted appellant's alcohol use. (RT 2981.)

Tyrone Kursh said that on July 29, 1995, he was with his cousin in the 4500 block of East Florence Avenue near his home when he heard a gunshot and then later heard a woman screaming in a field and then saw the woman in the field kicking up dust and hollering that she had been shot. (RT 3009-3009, 3015.)

Kursh was running to his grandmother's house to tell her to call the police when he saw a friend's mother. He told her what had happened but she did not believe him. She drove him to the scene and they saw that the victim (Marlene Mendibles) had, indeed, been shot. His friend's mother put a towel on the victim to try and stop the bleeding. They then went to his grandmother's house to call police. (RT 3015-3018.)

He later told the police he saw a car circle the shooting area twice and that he thought it was a Monte Carlo or Buick Regal because of the taillights. (RT 3010, 3019, 3025.) He said he saw a man driving the Monte Carlo get out of the car, look around, and leave the scene. (RT 3020.)

Kursh denied telling police he could not tell if the vehicle was a car or a

truck. He denied telling police he could not be sure if he saw somebody emerge from the vehicle. (RT 3021.)

He said he did not hear the screaming right after the shot. (RT 3025.)

Appellant's mother testified appellant was only gone from about 11:00 p.m. to 11:30 p.m. on the night of September 19, 1995, the night Peggy Tucker was murdered. He went to the store. When he returned, they began cleaning the house to ready it for sale. (RT 2717-2718.) She said that to her knowledge appellant did not leave the house the evening of August 11, 1995, the night Stephanie Kachman was shot. (RT 2719-2720; see fn. 6 on p. 16.)

James Bacon, who had known appellant since 1985 or 1986, and had employed him at Bacon's recycled newspaper business in Watsonville, said that in the first week of November, 1994, appellant had called him and asked to come stay for awhile because appellant said "his mom was getting on his edge and that he needed to get away . . ." (RT 3145, 3165.) Appellant had complained previously about his mother "getting on his edge." (RT 3165.)

Appellant arrived in Watsonville on Tuesday, November 2, 1994. (RT 3147.) Bacon testified he "can't say positive" but thought that appellant left Watsonville for Fresno on Friday, November 5, 1994, and that his usual habit was to leave at the end of the day around 5:00 or 6:00 p.m., but sometimes he would stay over and leave on Saturday morning. (RT 3148.) Appellant would visit on other occasions. (RT 3148-3149.) Appellant stayed with Bacon in late July, 1995, and returned to Fresno on July 28, 1995, late in the afternoon carrying two motorcycles, a moped, and a heavy steel rack to mount engines on for repairs. (RT 3179, 3183.)

On cross-examination, Bacon admitted he refused to be interviewed by a district attorney's investigator. (RT 3154.) Bacon admitted telling the investigator he would not talk to him without appellant's defense attorney present. (RT 3154.) Bacon attended the preliminary hearing and listened to the

witnesses testify and took notes. (RT 3155.) Bacon also compared his notes of the preliminary hearing with notes taken by appellant's sister, Shana Doolin. Bacon also looked at preliminary hearing notes taken by appellant's mother. (RT 3156-3157, 3162.)

Bacon estimated he saw appellant three times in 1994 and twice in 1995. (RT 3159.) Bacon said appellant has "always" had kind of short hair. (RT 3176.)

On re-direct examination, Bacon said he loved appellant like he was his own son but would not lie for him. (RT 3184-3185.)

### **Penalty Phase**

Nurse Dana Peterson examined Dana Daggs on November 3, 1992, along with Dr. Brian Sutton. (RT 4682.) Nurse Peterson said there was a whitish fluid in the vaginal vault, which, upon inspection under a microscope, was found to contain both nonmotile and motile sperm. (RT 4684, 4688.) Nurse Peterson also said Ms. Daggs had a fresh or "early" bruise on her right lower leg, which Ms. Daggs said she incurred while struggling against appellant. (RT 4685, 4693.)

Ms. Peterson said semen that had been on the outside of the body would ordinarily be washed off during a shower. No sperm on Ms. Daggs' external body was revealed by a test to determine its presence. (RT 4869, 4697.) Ms. Peterson said the victim told her, in response to a question, that appellant had raped her in the shower, using soap as a lubricant. (RT 4690.)

Ms. Peterson said soap is not a spermicide. (RT 4697.)

In addition to a sperm slide, Ms. Peterson said the Department of Justice Crime Laboratory was also provided clothing and fingernail scrapings and pubic hair combings. (RT 4700.)

Department of Justice criminalist John Hamman, testifying as an expert on

bullets, said the purpose of a hollowpoint bullet is to mushroom upon impact and cause almost twice as large a wound cavity as a regular bullet of the same caliber. (RT 4706, 4714.)

Angel Cantu, the daughter of Inez Espinoza, said she and her two half brothers and a half sister all missed their mother. (RT 4726, 4728.) Although she knew her mother was a drug addict and prostitute she said it was hard to lose her because, "I mean, she was always my mom, and I felt like I lost a big part of my life . . ." (RT 4727.) Ms. Cantu said her mother was trying to end her drug habit when she was murdered. (RT 4729.)

Nina Mandrell, Peggy Tucker's sister, said Ms. Tucker left behind two small children, ages five and three. (RT 4732.) Mrs. Mandrell said she and her sister were very close and the murder had been devastating to her. (RT 4735.)

### **Defense Case In Penalty Phase**

Prior to his testimony, Dr. Allan Hedberg, a clinical psychologist, spent eight and a half hours with appellant at the county jail over a four day period. (RT 4737.) Dr. Hedberg said he was attempting to assess appellant's personality, attitudes and general behavior patterns in order to prepare a report for the penalty phase of the trial. (RT 4737.)

Dr. Hedberg described appellant as respectful and pleasant. (RT 4738.) There was no indication of drug or alcohol abuse. (RT 4750.) Dr. Hedberg administered a number of tests and said he found that appellant did not have a "profile" indicating he was psychotic or mentally ill or psychopathic or sociopathic in nature. (RT 4740, 4753.) However, he did describe appellant as "a little guarded and a little paranoid," later describing the paranoia as "mild." (RT 4741, 4743.)

Dr. Hedberg also described appellant as a person who has difficulty dealing with conflict, dealing with threat, dealing

with anger, dealing with feelings of resentment and wants to be seen as favorable by other people, wants to be accepted by other people, . . .

(RT 4741.) Dr. Hedberg said appellant also seemed to be highly dependent on other people for support, self-esteem and emotional strength. (RT 4742.) Appellant could become argumentative and sarcastic. (RT 4746.)

The psychologist said appellant seemed to carry “some unresolved resentment from his childhood that he has not worked out” creating feelings of sadness, mild depression and anxiety or hostility. (RT 4742.)

Dr. Hedberg noted appellant’s mother had been married four times and that two of the stepfathers had been verbally and emotionally abusive to appellant, who suffered from a learning disability. (RT 4744-4746.)

Based on his observations, Dr. Hedberg said appellant seemed to have “adjusted quite well” to the jail environment and interacted well with other inmates and guards. (RT 4749.) The psychologist said he did not detect that appellant had any problems with his mother or his sister. (RT 4751.)

On cross-examination, Dr. Hedberg admitted he spoke to no other persons about appellant and based his opinion solely on appellant’s statements. (RT 4752.) He said he based his opinion that appellant had no drug or alcohol addictions solely on appellant’s denial of such addictions. (RT 4754.)

Both the defense and prosecution offered appellant’s school records. (RT 4767-4770.)

## ARGUMENT

### I.

#### **FRESNO COUNTY'S FLAT FEE COMPENSATION SYSTEM DOES NOT CREATE AN INHERENT AND IRRECONCILABLE CONFLICT OF INTEREST<sup>16/</sup>**

Appellant contends Fresno County's Flat Fee Compensation System in capital cases is "impermissible" and requires reversal because it creates an inherent and irreconcilable conflict of interest between *any* attorney's desire to maximize his/her income from a case and his/her duty to provide his/her client full and zealous representation and to fully utilize funds authorized under section 987.9.<sup>17/</sup> (AOB 57.) Appellant is incorrect.

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16. Appellant's first four arguments present different facets of the same argument: that the payment method for trial counsel's services was inherently unconstitutional and that the superior court committed an abuse of discretion in utilizing the flat fee system in this capital case. For simplicity's sake, respondent will respond separately to each of appellant's four arguments although some overlap is inevitable.

17. Section 987.9, subdivision (a) states:

In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

The first thing to note is that this Court also has an optional fixed fee system for capital case appeals (which became effective on January 1, 1994) in which, under appellant's theory, a capital case appellate attorney would also be inevitably compromised. That is, the appellate attorney, unable to resist the economic attraction of a flat fee contract's arrangement, would seek to maximize his/her income from an appeal by scrimping on research, legal aides and researchers, or other related costs, or not putting in as many hours writing as he/she could, thus depriving an appellant of adequate representation. (See California Rules of Court, Guidelines for Fix Fee Appointments, on Optional Basis, To Automatic Appeals, And Related Habeas Corpus Proceedings in the California Supreme Court, 2004 Edition, beginning on page 755.)

Thus, if appellant's theory is correct, this Court must, presumably, also invalidate the fix fee system it has utilized in capital case appeals over the past decade as well as flat fee systems for capital case trials now in place in Fresno County and other California counties and undo every capital case conviction which involved a flat fee arrangement. Indeed, under appellant's theory of the case, even flat fee arrangements between a criminal defendant and a *privately retained* attorney could be challenged on appeal as creating an irresistible and inherent financial disincentive.

However, the second thing to note is that Fresno County's flat fee system is not actually a "flat fee", i.e., *a final compensation system that can never be altered*. Fresno County's system (like this Court's)<sup>18/</sup> provides a safety valve for defense attorneys who, at any point in the proceedings, if circumstances or new developments warrant, can seek additional public funds (either under section 987.9 or the county system) in order to adequately represent their client. That safety valve is fatal to appellant's theory.

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18. California Rules of Court, Guidelines For Fixed Fee Appointments, Section 3, Requests for Additional Fees, p. 757.)

In 1994, the Fresno County Superior Court system adopted a new capital case compensation system and policy that provided three categories of fixed fee compensation for capital case trial counsel depending on the complexity of the case. (See “Notice of Adoption of a Joint Court Policy On Capital Case Appointments / Request for Applications for Appointments to Capital Cases” attached as Exhibit A.)<sup>19/</sup> This compensation system, patterned after the one operating in Los Angeles County, was in effect at the time of appellant’s 1996 trial.

The Fresno County policy provides for three categories of compensation: Category 1, \$40,000 for a “relatively non-complex” capital case with one defendant and one victim; Category 2, \$60,000 for a more difficult case involving multiple victims or defendants, or complicated special circumstances, or complex factual or legal issues; and Category 3, \$80,000, for cases involving multiple defendants or victims, complicated special circumstances or complex factual or legal issues. (Exhibit A, p. 2.) The Fresno County Superior Court designated this case a Category 3 case, presumably because it involved multiple victims.

Importantly, the Fresno County policy also provides that the Superior Court has the authority to authorize *additional payments* based upon a showing of good cause by appointed counsel and approval by a Capital Case committee from the Court. (Exhibit A, p. 2.) This is the county’s safety valve.

Thus, if defense counsel legitimately felt he/she needed to seek additional compensation, for example, because section 987.9 investigative and expert costs had consumed his/her entire fee, she/he was free to make a showing of good cause for additional compensation.

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19. Respondent asks that this Court take Judicial Notice of the Fresno County Superior Court policy document on capital case compensation pursuant to Evidence Code section 459.

Respondent submits no conflict of interest arises simply because an attorney - any attorney - agrees to represent a criminal defendant pursuant to a flat-rate fee agreement. (Cf. *People v. Knight* (1987) 194 Cal.App.3d 337, 346-348; *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 117.) Under such circumstances, “an attorney’s duty runs to his client, not the attorney’s pocket.” (*Phillips v. Seely, supra*, 43 Cal.App.3d at p. 117.)

As noted by this Court, any fee arrangement can *theoretically* give rise to a conflict of interest:

“An attorney who received a flat fee in advance would have a ‘conflicting interest’ to dispose of the case as quickly as possible, to the client’s disadvantage; and an attorney employed at a daily or hourly rate would have a ‘conflicting interest’ to drag the case on beyond the point of maximum benefit to the client. [¶] The contingent fee contract so common in civil litigation creates a ‘conflict’ when either the attorney or the client needs a quick settlement while the other’s interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of ‘conflict’ are infinite. . . .”

(*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 618-619, fn. 8 [citing Second Appellate District Division Four Presiding Justice Files’s dissent in the lower appellate decision in the *Maxwell* case.])

In *People v. Knight, supra*, 194 Cal.App.3d at page 346, the court rejected the defendant’s claim that defense counsel’s county contract resulted in a conflict of interest because it failed to provide for additional remuneration if the case went to trial rather than settling, and it simultaneously permitted defense counsel to engage in private practice. The defendant had claimed his attorney had a financial disincentive to go to trial and failed to investigate his case appropriately. In rejecting the defendant’s claims, the Court of Appeal noted that it would be “sheer conjecture,” rather than “informed speculation,” to conclude that the alleged failure to investigate was linked in any way to lack of funds or that defense counsel neglected the defendant in favor of private clients. (*Id.* at p. 348; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009-1010

[record does not support “informed speculation” that defense attorneys were influenced by thoughts of compensation rather than concern about protecting defendant’s interest].)

In his Argument I, appellant relies almost entirely on *People v. Barboza* (1981) 29 Cal.3d 375, 379 for the claim that flat fee arrangements by themselves create a “financial disincentive” to provide appellant effective assistance of counsel. As will be shown below, *Barboza* is distinguishable, primarily because there was no “safety valve” as there is under Fresno County’s system.

In *Barboza*, codefendant brothers appealed their assault convictions claiming ineffective assistance of counsel due to a conflict of interest because one public defender represented them both through a contract with the county, which provided financial disincentives for finding conflict or hiring conflict counsel. (*People v. Barboza, supra*, 29 Cal.3d at p. 377.)

The *Barboza* Court specifically found that the terms of the contract between the County of Madera and the public defender’s office “do not permit *the usual judicial reliance on the attorney’s ethical responsibilities* to protect the interests of both of the criminal defendants and the judicial system.” (*Id.*, emphasis added.)

Under the Madera contract, the public defender’s office was paid \$104,000 a year with \$15,000 of this amount deducted and deposited in a reserve fund which was required to be maintained for payment of other defense counsel who might be appointed when the public defender perceived a conflict of interest. The public defender was paid monthly and at the end of the year, any unexpended amount in the reserve account was paid to the public defender and, conversely, the public defender was liable for any deficiency in the reserve account. (*Barboza, supra*, 29 Cal.3d at pp. 378-379.)

This Court noted:

Pursuant to the contract, the fewer outside attorneys that were engaged, the more money was available for the operation of the public defender's office. The direct consequence of this arrangement was a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel.

(*Barboza, supra*, 29 Cal.3d at p. 379.)

Moreover, a conscientious public defender who honestly found an unusual number of conflicts in a given year would still be *forced to pay out of his own pocket* any expenses exceeding the \$15,000 limit for exercising his ethical obligations without any recourse to recoup his undeserved losses.

This intolerable situation did not exist in Fresno County during appellant's trial because the Superior Court was always willing to consider a good faith showing of need for additional expenditures under section 987.9, or under the flat fee contract.

The factual and procedural posture of *Barboza* is a far cry from the instant matter where defense counsel had only one client and negotiated his overall fee in advance in an arm's length negotiation with the Superior Court.

The fact that defense counsel expended the funds differently during the proceedings than his original pre-trial ball park estimate creates neither an "inherent" conflict or ineffective assistance of counsel. Notably, privately retained attorneys paid a flat fee are always entitled to "the usual judicial reliance on the attorney's ethical responsibilities to protect the interests both of the criminal defendants and the judicial system." (*People v. Barboza, supra*, 29 Cal.3d at p. 378.)

The only other directly relevant case cited by appellant, *Tran v. Superior Court* (2001) 92 Cal.App.4th 1149, (at AOB 60) is also distinguishable. In *Tran*, the defendant's family hired counsel to represent him. In the fee agreement, defendant's family agreed to pay for counsel's services, and counsel agreed to seek funds from the trial court for expert and investigative fees.

Defendant's motion for ancillary defense funds under section 987.9 was denied by the trial court, which concluded that the defendant had sufficient funds available under the retainer agreement to cover the costs. (*Id.* at pp. 1151-1152.)

The writ court in *Tran* noted that the test of indigency for the purpose of funding investigators and experts was whether a defendant had the financial means to secure those services. Defendant had no funds of his own. The writ court elaborated that the payment of his attorney by his relatives did not alter that. It held that the trial court's rote application of an ordinary-and-customary-charges test to the fee agreement was inappropriate, because it effectively rewrote counsel's contract and forced her to underwrite defense expenses or face a potential conflict. That, in turn, impinged on defendant's right to counsel. The fees charged did not exceed the bounds of reason or shock the conscience, so the court could not conclude that the money was held for the benefit of defendant's defense expenses. (*Id.* at pp. 1157-1158.)

The difference between *Tran* and the instant matter is that defense counsel in *Tran* specifically negotiated a representation contract for services with the understanding that any investigative costs, etc., would be covered under a separate application for section 987.9 funds. In the instant matter, defense counsel's negotiated contract *included* both representation costs *and* the ability to apply for additional section 987.9 costs.

As will be discussed and explained in the following arguments, appellant attempts to specifically show that his defense counsel indeed succumbed to greed and neglected his client's interests, as evidenced by his initial estimate of various costs of presenting a defense and the final tabulation of expenses. This Monday morning quarterbacking assumes that a significant reduction in initially estimated costs for experts, investigation, and ancillary 987.9 costs can *only* be

attributable to attorney greed and not to the dynamics of an evolving trial strategy, a change in defense strategy (the dropping of an insanity defense), abandoning dead end leads, or an obligation not to expend county funds on unfruitful or unnecessary strategies.

Respondent submits that when considering the permissibility of flat fee compensation systems which permit additional payments upon a showing of good cause, this Court may depend on the usual judicial reliance on the attorney's ethical responsibilities to protect the interests of both of the criminal defendants and the attorneys.

In the instant matter, Fresno County's presiding judge of the Superior Court reviewed and approved defense counsel's final accounting of trial expenses. The presiding judge also presumably followed this highly publicized and lengthy trial (spread out over seven weeks) and inferably knew the amount of time and resources invested by counsel. The Fresno County Superior Court found no red flags indicating attorney misconduct or irresistible conflict of interest.

The United States Supreme Court has made clear a defense attorney's highest obligation is to his/her client.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, *a duty to avoid conflicts of interest*. [Citation.] From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. [Citation.]

*(Strickland v. Washington (1984) 466 U.S. 668, 688, emphasis added.)*

Respondent also notes that the Rules of Professional Conduct, Rule 4-101, of the State Bar of California, regulating attorney behavior, forbids collection

of an illegal or unconscionable fee, which is what appellant alleges, in essence, that Mr. Petilla actually did.

Moreover, California Business and Professions Code, section 6068, subdivision (h) makes it the duty of an attorney “never to reject, for any consideration personal to himself . . . the cause of the defenseless or the oppressed.”

Mr. Petilla may not have conducted a defense perfectly suitable to appellant’s retrospective analysis of his trial. But appellant ignores that defense counsel was faced with overwhelming evidence of appellant’s guilt. Defense attorneys are not miracle workers. A “reliable adversarial testing process” occurred in this trial. Appellant offers no possible credible defense theory that was not raised at trial.

A review of facts leading to the flat fee contract is in order. Mr. Petilla was appointed defense counsel on January 4, 1996. On January 18, 1996, he filed his proposal setting compensation in which he stated he understood that section 987.9 costs were included in the total compensation package “unless additional amounts are authorized by the Capital Case Review Committee.” (Supplemental Clerk’s Transcript on Appeal, #3, p. 2.) At that point, with much about the case still unknown and due to the “bizarre circumstances” of the shootings it was Mr. Petilla’s intent to enter pleas of not guilty *and not guilty by reason of insanity*. He anticipated three phases of the trial, guilt, sanity and penalty.

Mr. Petilla also anticipated “extensive out-of-town investigations” of appellant’s work as a trucker to verify his claim that his work records would provide an alibi for his whereabouts during some of the shootings. (Supplemental Clerk’s Transcript on Appeal, #3, p. 3.) This did not pan out.

Obviously, upon learning from Dr. Howard Terrell<sup>20/</sup> that appellant did not fit the profile of a serial killer and that the doctor himself wondered if police “had the right man,” defense counsel abandoned a possible insanity defense, *after submitting his proposed expense estimate*, and instead focused on a strategy raising the suspicion that appellant’s cousin might be the actual shooter (in at least some of the charged crimes) and that the surviving victims might be mistaken in their identification of appellant as the man who shot them. (See RT 2789, 2932.)<sup>21/</sup>

If an attorney strongly believes her client is outright innocent presumably she does not need to spend a lot of money on experts or background investigation trying to prove he’s insane or unbalanced, or worthy of mercy in the penalty phase because of these problems, based on his/her original estimation that an insanity defense might be appropriate.

Mr. Petilla also noted in his proposal, “The capital case I tried in 1994, and the one to be tried this month, tells me that, really, *it is impossible to rationally place dollars and cents for various possible 987.9 costs at so early a stage.*” (Emphasis added.) He then added:

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20. Dr. Terrell testified at an Evidence Code section 402 hearing that he examined appellant *after* Mr. Petilla had submitted his original proposal for compensation indicating he might seek an insanity defense, and found “no evidence of mental disorder at all. And I think I commented just on the side to you [Mr. Petilla] that based upon the murderers that I’ve seen over the years, and I’ve seen lots of murderers, that this man was not typical of any murderer I’ve ever seen. *That I had to wonder if maybe they had the wrong man.* I can’t say that for sure, but it was just not consistent with the many murderers I’ve seen. (RT 2941, emphasis added.) The court later instructed Dr. Terrell, “your comment concerning you wondered whether they have the right man will not be testified to.” (RT 2953.) Presumably, Dr. Terrell conveyed his doubts about appellant’s actual guilt to Mr. Petilla before trial.

21. Mr. Petilla claimed that neither appellant nor Bill Moses committed the shootings in 1994 and that those crimes were situations of mistaken identity. (RT 2446.)

As far as these fixed-compensation appointments were concerned, panelists are expected to bear with the reality that their net compensation is uncertain, that if panelists are not allowed to pick and choose their cases, we will all win some and lose some, financially speaking, but will be reasonably compensated over the long haul.

(Supplemental Clerk's Transcript on Appeal, #3, pp. 3-4.)

Mr. Petilla also noted that at a recent seminar he had attended it was estimated that psychiatric and social study costs averaged \$50,000 in a capital case but

that average may *or may not* be true in this case, under this compensation plan, where it is hoped that zealous advocacy will go hand in hand with entrepreneurial responsibility.

(Supplemental Clerk's Transcript on Appeal, #3, p. 3, emphasis added.)

Thus, from these statements, it is reasonable to infer that Mr. Petilla had no particular financial incentive to cut corners in researching appellant's case because he knew that in the "long haul" he would be adequately compensated under the flat fee system.

Even veteran Fresno murder case defense attorney Katherine Hart, in an amicus brief filed on behalf of one of appellant's *Marsden* motions, acknowledged that Mr. Petilla had "a reputation for strong advocacy." (CT 808.) She also noted that "Mr. Petilla has a good track record in handling homicide cases and is certainly an experienced trial attorney . . ." (CT 810.)

However, defending counsel's performance is not the purpose of respondent's Argument I since appellant contends initially that the flat fee arrangement itself raises a conflict pursuant to *Barboza for any attorney* and must be struck down as *inherently* an irreconcilable conflict. As argued above, respondent disagrees.

In summary, respondent submits flat fee systems do not create inherent irreconcilable and irresistible conflicts for Mr. Petilla or any other capital case defense attorney and thus this claim must fail.

## II.

### **FRESNO COUNTY'S FEE AGREEMENT WITH DEFENSE ATTORNEY PETILLA DID NOT CREATE A CONFLICT OF INTEREST VIOLATING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GRANTED BY THE CALIFORNIA CONSTITUTION**

Appellant contends there is “ample evidence” that defense counsel “pulled his punches” at trial because of his flat fee contract with the county and that this contract deprived appellant of effective assistance of counsel guaranteed by the California State Constitution.<sup>22/</sup>

In order to prove this claim that counsel abandoned his paramount duty to appellant in order to further line his own pockets, appellant retrospectively reviews counsel’s performance and his investigative and expert expenditures, and specifically contends the record shows: (1) counsel went to trial unprepared; (2) failed to consult necessary experts; (3) failed to interview witnesses; (4) failed to adequately investigate defendant’s background and social history; and, (5) presented little mitigating evidence at the penalty phase of the proceedings. (AOB 64.) This record, he contends, supports his “informed speculation” that counsel “pulled his punches” in order to maximize his income from the flat fee arrangement.

The standard of review for this claim depends upon whether it is concluded that the flat fee contract, by itself, constitutes at least a potential conflict. If so, in *People v. Sanchez* (1995) 12 Cal.4th 1, 45, this Court summarized the relevant general principles as follows:

“... A criminal defendant’s right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. (*Wood v. Georgia* (1981) 450 U.S. 261, 271 []; *People v. Jones* (1991) 53 Cal.3d 1115,

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22. Article 1, sections 15 and 24.

1134 [.] To establish a violation of the right to unconflicted counsel under the federal Constitution, ‘a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.’ [Citation.] To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an ‘informed speculation’ that counsel’s representation of the defendant was adversely affected by the claimed conflict of interest.’” (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009 [.] )

In *People v. Jones* (1991) 53 Cal.3d 1115 [.] we also observed that “[c]onflicts of interest may arise in various factual settings. Broadly, they ‘embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.’” (*Id.* at p. 1134, quoting *People v. Bonin* (1989) 47 Cal.3d 808, 853 [.] )

(*Id.* at p. 45; see also *People v. Frye* (1998) 18 Cal.4th 894.)

Even if the record reflects a potential conflict, there must be some “discernible” grounds to believe that prejudice occurred. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014.) In other words, the “existence of even a potential conflict of interest must be accompanied by some evidence of ineffective representation before reversal is required.” (*People v. Clark* (1993) 5 Cal.4th 950, 995, quoting *People v. Marshall* (1987) 196 Cal.App.3d 1253, 1257-1258.)

A claim that counsel was burdened by a conflict of interest is a subset of the general claim of denial of effective assistance of counsel guaranteed by the Sixth Amendment and the state constitution in which an appellant must show both incompetence of counsel *and* prejudice. (*Strickland v. Washington, supra*, 466 U.S. at pp. 684-686, 692; *Maxwell v. Superior Court, supra*, 30 Cal.3d at p. 612.)

Appellant’s Argument II (AOB 62-69) proceeds on the assumption that there *was a conflict* as evidenced by the fact that defense counsel’s original estimate of investigatory and expert witness costs was far higher than what was ultimately needed and that this was because he scrimped on those costs in order

to increase his percentage of the flat fee.

Based on this selective hindsight, appellant then invokes a standard of review for the harm done based on this assumption and states that, under the circumstances of a flat fee arrangement, all that he is required to establish is an “informed speculation” that appellant’s right to effective representation was prejudicially affected. Proof of an actual conflict is not required. (See AOB 62-63 citing *People v. Clark, supra*, 5 Cal.4th at p. 995.)

Respondent submits the record in this case does not support an “informed speculation” that appellant’s right to effective representation was subverted by counsel’s “pulling his punches” in order to maximize his return from the flat fee agreement.

Respondent submits that comparing the original rough estimate of funds needed to consult and pay experts to testify, conduct ballistic tests, and interview witnesses (who might have had something material to add to a credible defense) *changed* when defense counsel abandoned a possible insanity defense, and abandoned what would have been a fruitless investigation of appellant’s whereabouts on his out-of-state trucking forays (because they provided no alibi), and instead focused on the strongest possible defense: third party liability for the murders and the possibility of mistaken identification by the surviving victims.

As respondent contended in Argument I, defense counsel was not required to go out and hire additional mental health experts, particularly after he got a glowing report from Dr. Terrell that appellant did not display any of the personality disorders of serial killers and, indeed, manifested no mental illness at all raising doubts in the doctor’s mind whether police had arrested the right man. In the penalty phase, Dr. Allan Hedberg testified that appellant did not have a “profile” indicating he was psychotic or mentally ill or psychopathic or sociopathic in nature. (RT 4740, 4753.) Indeed, Dr. Hedberg described

appellant as respectful and pleasant although he acknowledged appellant exhibited a “mild” guardedness or paranoia (RT 4741, 4743) and difficulty dealing with conflict and anger. (RT 4741.) Dr. Hedberg also revealed appellant’s mother had been married four times and two of appellant’s stepfathers were verbally and emotionally abusive (RT 4744-4746), but the doctor did not find that appellant had any problems with his mother or sister. (RT 4751.)

It appears there were not any deep, hidden secrets about appellant’s childhood, no head injuries, drug addictions, mental health history, criminal acts, that went undiscovered and appellant identifies no specific “social history” now indicating any of these problems that should have been brought forth. Defense counsel obviously could not conjure up a depraved and unspeakable childhood that might cause jurors to have sympathy for appellant. Consultation with more doctors would not have changed appellant’s lack of a significantly abnormal childhood.

As noted below, defense counsel argued that appellant still claimed innocence and warned jurors his execution would thus preclude the possibility of establishing his innocence on appeal.

Trial counsel is not required to pursue futile courses of action or spend money lavishly to exhaust every theoretical possibility of defense in order to stave off post-conviction claims of ineffective assistance of counsel. (Cf. *People v. Berry* (1990) 224 Cal.App.3d 162, 170; *People v. Saldana* (1984) 157 Cal.App.3d 443, 462.) Appellant has not specified here what defense he was prevented from establishing as a result of the flat fee contract.

If this Court concludes the flat fee arrangement *did not create* an inherent and irreconcilable conflict, then appellant’s Argument II is really an ineffective assistance of counsel claim and since there could be many sound tactical reasons for the defense strategy counsel undertook, appellant’s recourse should

be by way of habeas pursuant to *People v. Pope* (1979) 23 Cal.3d 412, 426 [if the record is silent regarding counsel's reasons for his actions, and if a rational tactical purpose for his act or omission exists, appellant is relegated to habeas corpus proceedings]. This would give counsel an opportunity to explain his tactics.

However, respondent will still address the general areas where appellant claims defense counsel's actions demonstrate that he was conflicted because of his desire to maximize his return from the flat fee agreement.

#### **A. Counsel Allegedly Went To Trial Unprepared**

Regarding the specific claim that counsel went to trial "unprepared," it must be noted it was *appellant who insisted on a going to trial within 60 days of his Superior Court arraignment* (§ 1049.5) even though he was aware that Mr. Petilla would like to take more time and presumably was aware that prosecution DNA testing (which could be exculpatory) would not be ready at the start of the trial.

The record shows after appellant was bound over for trial, a Superior Court arraignment was held on February 5, 1996.<sup>23/</sup> Mr. Petilla informed the court at that time that he had met with appellant the night before and "he told me he wants his trial right respected. We request the trial be set within the statutory period."<sup>24/</sup> (See also RT 4617 [prosecutor notes appellant's insistence on speedy trial].) The prosecutor asked that the trial be set as late as possible within the 60-day statutory period because he had other trials already scheduled.

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23. The Information had been filed on February 1, 1996. (Vol. I-D, RT [2-5-96] 127.)

24. In an undated letter to the Superior Court special circumstances committee seeking second counsel, Petilla again stated "the defendant has refused to waive time; trial is set to start on March 18, 1996." (CT 5733A.)

The prosecutor estimated the deadline for going to trial was April 1, 1996.<sup>25/</sup> The court said it would set the trial date for March 18, 1996, to provide the presiding judge some flexibility. (Vol. I-D, RT [2-5-96] pp. 126-128.)

It is true that on the morning of opening statements in the trial, Mr. Petilla apologized to the court for not “reading individual cases” on the proposed defense of third party liability, attributing that to lack of second counsel. (RT 1005.) Not having read the latest third party liability cases on a particular motion in the case, however, did not mean Mr. Petilla was not ready overall to go to trial. Mr. Petilla specifically informed the court at that point that he had been “busy preparing for this case.” (RT 1005.)

In any event, it is clear Mr. Petilla understood the basic requirements of establishing third party liability, even without reading the latest individual cases on the issue. It is also true that through Mr. Petilla’s persistence and tenaciousness during trial the defense repeatedly (to the consternation of the prosecutor and occasionally the court) raised the possibility of appellant’s cousin, Bill Moses, being a third party suspect for at least one of the murders and perhaps more.

Defense counsel was prepared for trial and raised a rather inventive defense strategy, given the mountain of evidence against his client. He cannot be faulted for failing to win an acquittal. Appellant offers no specifics on what witnesses, experts or investigation in the case *would have made a difference in the outcome.*

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25. The prosecutor also noted later in the trial that the DNA evidence had not been ready before trial “because [of] the defendant’s wanting his trial within 60 days . . .” (RT 3221.) Again, this delay should not be blamed entirely on defense counsel.

## B. Defense Counsel Allegedly Failed To Consult Necessary Experts

Dr. Howard Terrell interviewed defendant before trial and concluded he had no mental disabilities or impairments and did not fit the profile of a murderer, much less a serial killer. Dr. Terrell expressed doubts, presumably conveyed to Mr. Petilla, that police even had the right man. The defense could not have asked for a more favorable expert witness.<sup>26/</sup>

Once defense counsel concluded an insanity defense was not appropriate, the “extensive psychiatric and social study” that appellant complains Mr. Petilla initially stated might be needed was no longer necessary.

In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, *applying a heavy measure of deference to counsel’s judgments.*

(*Strickland v. Washington, supra*, 466 U.S. at pp. 690-691, emphasis added.)

Appellant concedes that the defense had an expert look at the ballistics evidence four days before trial began. (AOB 66.) There is no magic number of days preceding trial that a defense attorney must interview witnesses in order to provide adequate representation. Indeed, it is a daily occurrence in courtrooms across America for defense attorneys to interview witnesses *just minutes before they take the stand* without being subjected to claims of ineffective assistance. There is no case law that says mere failure to interview a witness before trial, as a matter of law, constitutes ineffectiveness.

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26. It is true that Mr. Petilla did not provide Dr. Terrell with prosecution interviews of possible rebuttal witnesses who would accuse appellant of drug and alcohol use, fascination with guns, the alleged rape of Ms. Daggs and other damaging character evidence. But he tried to minimize this by arguing such accusations were biased, false, or inaccurate. Mr. Petilla told the court he felt Dr. Terrell had “goofed” in the way he responded to the prosecutor’s cross-examination, presumably because Terrell could have responded that his testing of appellant alone, coupled with *relevant* police reports, yielded no evidence of mental abnormality and was sufficiently trustworthy even absent the biased opinions of third parties. (RT 4937.)

Because defense counsel originally thought he might need a blood analysis expert (AOB 65) does not mean he was ineffective for not consulting one. There was no evidence that the shooter left blood at any of the crime scenes. The fact that no victim blood was found in the Toyota or the Lincoln was not significant. (RT 2455, 2464, 2561, 2570.) Only one victim was known to have been shot inside the Toyota and a prosecution expert, Dr. James Davis, explained that one can be shot and not bleed externally. (RT 2218; see also RT 4359-4360.)

Given all the other incriminating evidence, failure to consult a tire tread expert (AOB 66) did not, by itself, constitute ineffectiveness.

The prosecution's tire expert, Stephen O'Clair, testified that unless there was a particular nick or unique cut or damage to a tire on a suspect's vehicle, that particular vehicle *could not be traced* to a crime scene. Examining a tire tread mark without any unique characteristics, an investigator could only say that the same type of tire (model, etc.) on the suspect's car was also noticed at a crime scene. (RT 2459.)

O'Clair said he examined appellant's Toyota tires in late October of 1995, and three of the tires on appellant's truck were Goodyear Invicta G1 tires, model number P19570R14 M and S (for mud and snow). The left rear tire<sup>27/</sup> was similar but a different model with a slightly different tread design and newer than the other three. (RT 2460.)

At the Inez Espinoza murder scene (the murder occurred on July 29, 1995), O'Clair found tire tracks indicating the same model of tires on appellant's truck except they had more tread. O'Clair opined that the difference in tread wear might be attributable to the time difference to when the tire impressions were

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27. O'Clair originally said the right rear tire of the Toyota pickup was different from, and newer than, the other three but later corrected himself and said he meant to say the left rear tire was different from the other three. (RT 2460, 2465.)

made on the night of Espinoza's murder and his examination of appellant's truck (which had more wear on the tread) nearly three months later. (RT 2461.) O'Clair said it was "possible" that appellant's tire tracks could have been those seen at the Marlene Mendibles<sup>28/</sup> shooting scene. (RT 2462.) O'Clair said he compared tire tracks at the Mendibles and Espinoza crime scenes and said they were "similar" as far as "general pattern and tire design." (RT 2463.)

O'Clair said tire impressions similar to appellant's mother's Lincoln or to his Toyota pickup truck *were not found* at the Peggy Tucker murder scene. (RT 2466.)

On cross-examination, Mr. Petilla asked O'Clair:

Now, the tire – the tire impressions that you compared, you did not see any individual characteristics, is that correct? That's why you said it could have been the tire, but you can't really say it is?

(RT 2572-2573.) To which O'Clair responded:

That's correct. I couldn't find any individual characteristics. And I noted there were more – there was more wear on the tires on the Toyota than what was depicted in the scene, the photographs at the scene.<sup>29/</sup>

(RT 2573.)

O'Clair was unable to say how many tires of the type seen at the crime scenes were manufactured each year or existed in the period between November of 1994, and September 19, 1995. (RT 2574.)

In other words, there was no tire tread impression evidence at all for the Peggy Tucker murder crime scene and no direct linkage of appellant's pickup truck tires to the Mendible and Espinoza crime scenes, only the "possibility"

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28. Apparently no prosecution tire track evidence was gleaned from the other three attempted murder crime scenes.

29. Although he is referring to one crime "scene," O'Clair later clarified he was referring to both the Mendibles and the Espinoza crime scenes. (RT 2574.)

because of the similarity of tread impressions from a Goodyear type tire. Thus, the prosecution tire tread evidence was hardly a “smoking gun” and defense counsel did a good job in minimizing what impact it had even without consulting a tire tread expert who would have undoubtedly said the same thing O’Clair did. Jurors were also free to examine the various photographs of the tire treads and draw their own conclusions on whether the crime scene tracks matched appellant’s pickup tires.

Appellant complains (at AOB 66) about the extensive psychiatric and social study” that Petilla “deemed necessary” at the outset of the case that was never done. As explained above, this was not necessary because the defense abandoned the idea of an insanity defense.

Appellant claims when the trial was started, Mr. Petilla did not know what the DNA testing would show. When asked about this at appellant’s June 18, 1996, *Marsden* hearing, he responded:

DNA testing, the DNA testing on the victims was really not very relevant in this case, although we got – I thought we got good results from the prosecution presenting the DNA evidence that they had. But the whole theory here was that those people were shot because they refused to have sex with Mr. Doolin or whoever their assailant was without getting paid money first. So, of course, obviously the conclusion and apparently I think the jury believes is that any semen around here . . . any semen around here belonged to johns who paid because otherwise those people didn’t want to have sex with this assailant until they paid, and he shot them for not having sex with them.

(RT 4938-4939.)

Appellant complains there was no “blood analysis” performed but neglects to say no blood was found in either the Toyota pickup or the Lincoln Continental and that the only blood found at any crime scene was that of the victims, which proves only that they bled, not who shot them. (RT 2644.)

Appellant acknowledges that the ballistics evidence was examined by a defense expert four days before trial began. (AOB 66.) Again, the point here

is that the ballistics expert was questioned *before* trial. The number of days before trial is not critical. That expert found no fault with the prosecution evidence and Petilla said he made a tactical decision not to put on a defense expert who agreed with the prosecution. (RT 4939 [Mr. Petilla said he did not want to put on the defense ballistic experts and have him testify, “The People’s ballistics experts are right.”].)

### **C. Defense Counsel Failed To Interview Witnesses**

Appellant’s claim that defense investigator Jeff Gunn’s invoices show only 13.5 hours of investigation prior to March 7, when defense counsel announced he was ready to go to trial, is misleading. (AOB 65.) Appellant does not clarify how much investigation Gunn did as the investigator for the public defender’s office for two-and-a-half months *prior* to Mr. Petilla’s appointment

as defense counsel.<sup>30/31/</sup>

Moreover, appellant contends that Gunn should have spoken to defense alibi witnesses Jim Bacon and David Daggs *before* trial instead of before the defense case opened. (AOB 65-66.) The fact remains that those two witnesses, who were shaky and unconvincing alibi witnesses at best, were interviewed before taking the witness stand.

Appellant also claims Gunn's invoices fail to show he contacted prospective witnesses Dana Daggs, Denise Hamblen, Faith Ruacho and April Chavez. (AOB 67.) A claim of failure to investigate must show what information would

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30. Appellant was arraigned on October 23, 1995. He was represented by Public Defender Nancy Kops. A preliminary hearing was scheduled for November 30, 1995, after appellant waived time. (RT [10-23-95] 10-11.)

At a hearing on a first amended complaint on November 22, 1995, appellant again waived time until the November 30, 1995, scheduled preliminary hearing which was later delayed at the request of both sides. (RT [11-22-95] 13-14; CT 17.) At a hearing on December 14, 1995, appellant again agreed to a time waiver. (RT [12-14-95] 1.) At a hearing on January 4, 1996, the public defender declared a conflict and Rudy Petilla was named defense counsel. The court, the Honorable Brad Hill, said counsel had indicated a preliminary hearing date of January 18, 1996, would *provide defense counsel adequate time to prepare*. The prosecutor said he had provided all discovery to the public defender who stated he had just given Mr. Petilla all the investigative files. Appellant waived time and was arraigned on a second amended complaint adding an additional count. (RT [1-4-96] 3-5.) We do not know from the record what investigative files the public defender provided Mr. Petilla at that point but it presumably included the materials that Mr. Gunn had compiled during the previous two-and-a-half months.

31. In a *Marsden* hearing held on June 18, 1996, Mr. Petilla said,

Mr. Gunn was already on this case from the – when the public defender was handling this. Mr. Doolin was arrested on October 18, and I didn't get that case until January 1986. And the family insisted on Mr. Gunn. A lot of things I did in this case to please Mr. Doolin and his family that I may not have done if I didn't have any . . . consideration for their feelings.

(RT 4934.)

be obtained with investigation, and whether, assuming the evidence is admissible, it would have produced a different result. (See *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1157.) Claims of failure to interview or call witnesses are deficient where there is no showing what the interview would obtain and how it might change the outcome. (*United States v. Berry* (9th Cir. 1987) 814 F.2d 1406, 1409.) Moreover, those invoices under Mr. Petilla's flat fee contract do not establish that Gunn did not interview those persons when he worked for the public defender nor do they establish that Mr. Petilla did not interview them in advance. We simply do not know from the record.

Mr. Petilla did say at a *Marsden* hearing on June 18, 1986:

Mr. Gunn was already on this case [before Mr. Petilla came into it]. So when the family [appellant's family] said they wanted him to continue the case, I asked him for what information he had gathered in the meantime when he was working for the public defender's office. At least I assume he has been paid for through that office. And then he told me in writing based on his knowledge of the – advance knowledge of the case even before I had entirely started the case that he needed only one hundred hours to continue the investigation including serving subpoenas, everything that an investigator does including time in court if he was needed. [¶] Now, he submitted about 99.97 hours of something and of course on top of it I paid expenses for reports and photographs, anything that he took. So this was based on his written statement to me about what else was needed and how many hours more were needed to complete the investigation. As the case went along I certainly had him do other things he had not done before. But, well, he completed it within the one hundred hours he had estimated. And I agreed with him only at the very end. [¶] Now there was certainly no statement to Mr. Gunn that if we decided that there was something really crucial that I will not pay for and ask you to do it.

(RT 4934-4935.)

When it comes to such matters as deciding which witnesses to call, deference is given to the attorney's tactical decisions. The decision to subpoena a witness rests upon the sound professional judgment of the trial attorney, not the defendant. (*Gustave v. United States* (9th Cir. 1980) 627 F.2d 901, 904.)

A decision not to call a witness, based on sound logic and tactics, is not ineffectiveness of counsel. (*United States v. Opplinger* (9th Cir. 1998) 150 F.3d 1061, 1071- 1072.) A tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel. (*Strickland*, 466 U.S. at p. 692; *Guam v. Santos* (9th Cir. 1984) 741 F.2d 1167, 1168.)

Appellant complains that Dr. Allan Hedberg, testifying as an expert witness on the limitations of eye witness testimony, did no work on this aspect of the case until the day he testified. Respondent submits that Dr. Hedberg, as an expert in this area, already had considerable expertise, and did not need to do a lot of “boning up” in preparation for his testimony on the problems of eye witness testimony.

#### **D. Defense Counsel Failed To Investigate Defendant’s Background And Social History**

Appellant complains that an “extensive psychiatric and social study” that defense counsel Petilla “deemed necessary” was never done and that psychiatrist Dr. Howard Terrell only spent one hour with appellant. By implication, he thus contends that defense attorney increased his percentage of the flat fee by scrimping on these costs. (AOB 66.)

As argued above, Mr. Petilla initially thought he might have to mount an insanity defense, thus, his original supposition that an extensive psychiatric and social study needed to be done. When learning from Dr. Terrell that not only did appellant *not* manifest any psychological disorders but that Dr. Terrell openly wondered if police had the wrong man, Mr. Petilla chose to abandon any insanity defense, thus, dramatically lowering the need for an “extensive” psychiatric study.

Appellant also complains that Dr. Hedberg did not complete his

examinations of appellant for the penalty phase until three days before the penalty phase started. (AOB 67, 68.) Again, this cannot reasonably be attributed to Mr. Petilla's desire to maximize his percentage of the flat fee. Nor does it show Mr. Petilla was not ready to go to trial. The fact that defense counsel had no invoices indicating he did no work on the penalty phase before the guilt phase of the trial does not mean either that he had done no work, or, even if he did no work, that this constituted ineffectiveness and was attributable to the flat fee agreement.

Appellant contends that "it is plain to see here that counsel's performance fell far below professional standards for capital cases." (AOB 69.) In fact, respondent submits that defense counsel did a very capable job given all the evidence pointing the finger directly at appellant. That counsel was unable to avoid a guilty verdict and a death penalty does not make his performance unconstitutional under a *Strickland* standard or even under an informed speculation standard.

#### **E. Defense Counsel Presented Little Mitigating Evidence At The Penalty Phase Of The Proceedings**

The short answer to this claim is that there was little, if any, mitigating evidence to offer beyond what was provided. There was expert testimony that appellant's mother had married multiple times when he was a boy and that his stepfathers were verbally abusive at times. But Dr. Terrell had also testified that appellant showed no signs of being a murderer, much less a serial killer.

It is important to remember that appellant continued to profess his outright innocence (and continues to do so to this day) and thus counsel's closing argument in the penalty phase (presumably insisted on by his client) focused on the possibility that he would be executed *before* he could prove his innocence. For example, counsel told jurors the following:

Because it is a human system where humans make the judgment determining which witness to believe, which witness not to believe, *mistakes are made*. And it calls for you to be very careful, very careful when deciding to take the life of Mr. Doolin away.

(RT 4857, emphasis added.)

The wheels of justice turn on as long as there is hope. Where there is life, there is hope. *There have been people found guilty of crimes and later found to be not so guilty*. But when a man is executed, there is no longer any reason for anyone to work for their freedom. You cannot free them from death. Life is not like a bulb that you can flick off and on and off and on again.

(RT 4857, emphasis added.)

Defense counsel quoting God: “I know everything that happened here. I know what justifications there might be, and so I cannot give that guy the death penalty *and twenty years later find out he didn't do it.*”

(RT 4868, emphasis added.)

You found him guilty on the 7th. It would not be unreasonable to expect he's been losing sleep feeling bad *about being found guilty of something he feels he didn't do*. Not being able to sleep because he's thinking you might decide to give him the big sleep.

(RT 4874, emphasis added.)

Mr. Cooper said there was nothing unusual in Mr. Doolin's behavior, demeanor during the times that these assaults happened. Well, it's consistent with all he says, isn't it? *If he says, "I didn't do it," then there is no reason for him to look alarmed or excited or feeling guilty or worried or distressed at the time these things happened because he didn't do anything*. You found that he did this, *but does that give you some lingering doubt that this guy did this?* If it did, then there is no death penalty called for in this case.

(RT 4875, emphasis added.)

Regarding the number of witnesses available at the penalty phase, Mr. Petilla noted that appellant and appellant's family wanted friends and family to testify but Mr. Petilla didn't think they needed to be subpoenaed, explaining that meant he did not have to provide the prosecutor their names (because of

attorney-client confidentiality) if appellant simply suggested names to him in attorney-client conversations. This trial tactic would keep the prosecution from “digging up dirt on them (potential defense penalty phase witnesses) seeing if they have any rap sheets or batter them as he did with Mrs. Larsen.” (RT 4938.)

Mr. Petilla said he specifically asked defense witness Jim Bacon, a Doolin family friend, if any of the supporters or friends of appellant attending the trial wanted to testify in the penalty phase but that it became apparent to him that “people preferred to stay to listen to the [penalty phase] proceedings instead of being told to stay out of the court proceedings as witnesses.” (RT 4938.)

Respondent submits that there were no family members or friends who could have testified in the penalty phase who would have made a difference in the outcome. Nor does appellant suggest any such witnesses. Nor does he suggest any kind of critical evidence that was not introduced that would have made a difference in the outcome of the penalty phase.

What kind of evidentiary showing will undermine confidence in the outcome of a penalty trial that has resulted in a death verdict? *Strickland, supra*, 466 U.S. 668, and the cases it cites offer some guidance. *United States v. Agurs* (1976) 427 U.S. 97, the first case cited by *Strickland*, spoke of evidence which raised a reasonable doubt, although not necessarily of such character as to create a substantial likelihood of acquittal. (See p. 113, fn. 22.) *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 873, the second case cited by *Strickland*, referred to evidence which is “material and favorable . . . in ways not merely cumulative . . . .” In *Strickland* itself, the majority found trial counsel’s failure to investigate additional mitigating evidence nonprejudicial, citing the weight of the aggravating evidence and the fact that the essence of the mitigating evidence had already been presented to the trier of fact through defendant’s own words. That is the case here.

In summary, appellant has failed to show that Mr. Petilla provided ineffective assistance of counsel either because of the flat fee contract or the tactical decisions he made during trial (penalty and guilt phase) in terms of expert witnesses, ballistics, DNA testing, and penalty phase witnesses. It was the defense strategy early on (after a possible insanity defense was abandoned) that appellant was, in fact, actually innocent and that the 1994 shootings were attributable to other assailants (and the victims had mistakenly identified appellant as their assailant) and that the two murders were either committed by appellant's cousin, Bill Moses, who actually possessed the murder weapon at the time of appellant's arrest, or perhaps an unknown killer.

Mr. Petilla continued the defense theory of outright innocence through the penalty phase, in part, presumably, because of a lack of any evidence of mental disorder, childhood head injuries or trauma, or any other compelling evidence sufficient to persuade a jury convinced appellant was a serial killer that his life should still be spared. That Mr. Petilla failed in this task is not due to his ineffectiveness, or the flat fee contract, but the mountain of evidence he was unable to overcome.

### III.

#### **THE FRESNO COUNTY FLAT FEE COMPENSATION SYSTEM DID NOT DENY APPELLANT'S (1) FEDERAL DUE PROCESS RIGHT; (2) RIGHT TO PRESENT A DEFENSE; (3) OR HIS RIGHT TO A RELIABLE JURY DETERMINATION IN THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL; NONE OF HIS RIGHTS UNDER THE FIFTH, SIXTH, FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WERE ABRIDGED**

Appellant reiterates that his federal constitutional rights to due process, the right to present a defense and the right to a reliable jury determination in the guilt and penalty phases of his capital trial, were abridged by the flat fee system and Mr. Petilla's resulting conflict, which caused him to deny appellant an effective defense while increasing his fee from the contract. (AOB 70.)

Under federal law, to prevail on a conflict of interest claim, an appellant must show both an actual conflict of interest and an adverse effect on his attorney's performance. (*Nave v. Delo* (8th Cir. 1995) 62 F.3d 1024, 1034, cert. den. (1996) 517 U.S. 1214.)

In a somewhat different factual setting, retained counsel are often required to represent clients without being paid in full. Courts have presumed that although a defendant's failure to pay may cause some divisiveness between an attorney and his client, *a lawyer will subordinate his pecuniary interests and honor his primary professional responsibility to the client.* (*Roll v. Bowersox* (1998) 16 F.Supp.2d 1066, 1078, citing *United States v. Taylor* (D.C. Cir. 1998) 139 F.3d 924, 932, and *United States v. O'Neil* (2nd Cir. 1997) 118 F.3d 65, 71-72, cert. den. (1998) 522 U.S. 1064.)

A conflict of interest arises "when the defense attorney . . . [is] required to make a choice advancing his own interests to the detriment of his client's interests." (*United States v. Horton* (7th Cir. 1988) 845 F.2d 1414, 1419. The classic conflict of interest situation arises when a lawyer represents two or more

codefendants (as was the case in *Cuyler*) or two clients with opposing interests. A conflict may also arise when a client's interests are adverse to his lawyer's pecuniary interests. (See *Winkler v. Keane* (2nd Cir. 1993) 7 F.3d 304, 308 [contingent fee in criminal case created actual conflict of interest], cert. den. (1994) 511 U.S. 1022; *United States v. Marrera* (7th Cir. 1985) 768 F.2d 201, 207 [attorney's interest in movie rights to client's story created potential conflict of interest], cert. den. (1986) 475 U.S. 1020; *United States v. Marquez* (2nd Cir. 1990) 909 F.2d 738, 741 [noting that prosecutor's attempt to use release of confiscated funds, which would be used to pay defense attorney, as bargaining chip in criminal case could create a conflict of interest], cert. den. (1991) 498 U.S. 1084; *Motta v. District Director, Immigration and Naturalization Service* (D. Mass. 1994) 869 F. Supp. 80, 89 [attorney's dissatisfaction with fee arrangement not legitimate excuse for filing untimely appeal]; but see *United States v. Wright* (D. N.J. 1994) 845 F. Supp. 1041, 1073 [nonpayment of legal fees "does not establish a conflict of interest of the type which would establish ineffective assistance; lawyers are required to provide zealous advocacy regardless of a criminal defendant's failure to pay legal fees"], affd. (3d Cir. 1994) 46 F.3d 1120.)

In this argument, appellant claims:

The situation would be completely different if counsel had retained only the \$20,000 originally projected as his fee, either spending the balance on authorized 987.9 services or returning the monies to the county. In that case, there would at best be only a potential conflict, and it could not [be] said that counsel's performance was affected by the conflict. However, the facts here show that counsel gained substantial profit by choosing to forego investigation into potential defenses, including a background investigation of the defendant that is required in capital cases. Counsel's conversion of those approved 987.9 funds for his own personal use constitutes an actual conflict of interest, i.e., a conflict that adversely affected defendant's representation.

(AOB 75.)

Again, appellant does not state what potential defenses were foregone by

defense counsel's actions. His theory here would also lock in rough estimates of investigative costs at the onset of a case, even when they were no longer needed (as in the abandonment of an insanity plea). The contract offered by the county for this case was \$80,000 overall, with discretion granted to the defense attorney as to how to conduct his defense and where, within reasonable limits, to best spend the \$80,000.

For all of the above reasons elucidated in respondent's Argument I, and II, respondent submits that appellant got a fair but not perfect trial, that he was not prevented from presenting any credible defense, that defense counsel was not ineffective and that there was a reliable determination of both guilt and penalty and appellant was not denied any due process rights under the federal Constitution. Therefore, this claim must also fail.

#### IV.

### **FRESNO COUNTY'S FLAT FEE COMPENSATION SYSTEM DID NOT VIOLATE APPELLANT'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION**

Appellant contends that Fresno County's flat fee contracts for capital case representation violated his equal protection rights under the Fourteenth Amendment because

[u]nder the Fresno County system, a subset of criminal defendants is forced to exchange the professional conflict of interest of the Public Defender for the personal financial conflict of interest of their private appointed counsel.

(AOB 96.)

If appellant is correct in his claim that a flat fee arrangement, even one with a safety valve for unanticipated expenses, is inherently a conflict creating irresistible temptations for a defense attorney, then he is also probably correct that this might constitute a violation of equal protection for indigent criminal defendants faced with either a representational conflict facing their public defender or a financial conflict faced, in the alternative, by their flat fee appointed private counsel.

However, for the reasons elucidated in Arguments I, II and III, *supra*, which respondent incorporates in this argument by reference, respondent submits Fresno County's flat fee arrangement does not violate equal protection principles nor was Mr. Petilla's flat fee contract in this particular case a violation of appellant's equal rights protections.

Appellant argues that "[b]y placing a cap on the amount of money that can be spent in a capital case, the Fresno County system seeks to preserve the financial resources of the County." (AOB 101.) This claim, of course, ignores the fact that the capital case contracts had a "safety valve" for additional

expenses and, thus, did not place a cap on the amount of money.

Therefore, for all the reasons above in Arguments I, II and III, his federal equal protection claim must also fail.

V.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
OR VIOLATE ANY OF APPELLANT'S FEDERAL  
CONSTITUTIONAL RIGHTS BY DENYING A DEFENSE  
REQUEST FOR SECOND COUNSEL**

Appellant contends the superior court's denial of second counsel amounted to an abuse of discretion under *Keenan v. Superior Court* (1982) 31 Cal.3d 424. (AOB 112.) He specifically claims the superior court abused its discretion by (a) failing to investigate the need for second counsel, and (b) failing to appoint second counsel. (AOB 113.) He claims there was "simply no way that defendant could be effectively represented by a single attorney." (AOB 16.)

He claims denial of second counsel deprived him of due process of law under the Fourteenth Amendment, the right to counsel under the Sixth Amendment, and the right to a reliable guilt and penalty phase determination under the Eighth Amendment. As a result, he claims reversal of both conviction and the death sentence is required. (AOB 19.)

He specifically argues:

[T]he record here provides ample grounds to show that the failure to appoint second counsel actually denied defendant the adversarial testing of the charges contemplated required [*sic*] by the Sixth Amendment. It is abundantly clear that counsel was unprepared for both the guilt and penalty phases of the trial and failed to undertake even a rudimentary investigation of the case. The defense witnesses were unprepared, counsel went to trial without knowledge of critical facts, and there was not a semblance of the social history background investigation that is constitutionally required in a death penalty case.

(AOB 118-119.)

Respondent herein incorporates by reference Arguments I, II, III and IV, rebutting any claims of ineffective assistance, either due to an alleged irreconcilable conflict created by the flat fee contract itself or the actual performance of Mr. Petilla.

Although appellant initially seems to contend that co-counsel in a capital

case is a “right,” he later acknowledges that whether to grant co-counsel lies within the discretion of the trial court. (AOB 112.) Of course, *Keenan* said that whether to appoint second counsel lies within the “sound discretion of the trial court” in order to “guarantee a defendant a full defense.” (*Keenan, supra*, at p. 430.)

In *People v. Staten* (2000) 24 Cal.4th 434, 447, this Court noted:

In *Keenan v. Superior Court* (1982) 31 Cal. 3d 424, 430 [180 Cal. Rptr. 489, 640 P.2d 108], we held that a trial court may appoint a second attorney in a capital case. “If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on [a] request. Indeed, in general, under a showing of genuine need . . . a presumption arises that a second attorney is required.” (*Id.* at p. 434.) “The initial burden, however, is on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to his defense against the capital charges.” (*People v. Lucky* (1988) 45 Cal. 3d 259, 29 [247 Cal. Rptr. 1, 753 P.2d 1052].) An “abstract assertion” regarding the burden on defense counsel “cannot be used as a substitute for a showing of genuine need.” (*Id.* at p. 280; *People v. Jackson* (1980) 28 Cal. 3d 264, 287 [168 Cal. Rptr. 603, 618 P.2d 149] [no abuse of discretion in denying application for second counsel when counsel merely relied on the circumstances surrounding the case].)

(*Id.* at p. 447.)

In his written application<sup>32/</sup> for second counsel, clearly filed after the Preliminary Hearing and presumably filed after the Superior Court arraignment on February 5, 1996, Mr. Petilla indicated one reason he was seeking second counsel was that “recently discovered material indicates that there may be an insanity plea.” (CT 5733A.) He requested a specific second counsel, David Mugridge, and suggested that Mugridge could either “concentrate” on two of the six charged shootings or “second counsel may concentrate on the conduct of one of the three phases [sanity, guilt, penalty] of trial.” (CT 5733A.)

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32. This application does not appear to be dated, but appears from the context to have been written in mid-February, 1996.

Among the circumstances surrounding the case, Mr. Petilla listed the fact there were six different victims in six different incidents, and that there were complex issues of ballistics, possible blood spatter evidence (although he noted the prosecution apparently had no blood evidence [and did not use any at the preliminary hearing]), eyewitness identification, and “intricate circumstantial evidence.” Mr. Petilla said he expected second counsel “to give general assistance during trial preparation and to be present at trial.” Mr. Petilla said it would “probably” be legal malpractice for him not to request second counsel. (CT 5733A.)

On February 28, 1996, Superior Court Presiding Judge Stephen J. Kane denied the request for second counsel for “lack of cause.” (CT 349.)

Respondent submits the presiding judge did not abuse his discretion in concluding Mr. Petilla lacked cause for second counsel. And even assuming arguendo it was error, any error was harmless under a *Watson*<sup>33/</sup> or *Chapman*<sup>34/</sup> standard, as will be argued below.

In support of his argument, appellant first contends the facts in the instant case are “no different” than *Keenan* but later softens the claim by saying the facts here are “largely indistinguishable” from *Keenan*. Thus, he contends an abuse of discretion must be found. (AOB 112.)

Respondent submits the instant matter is distinguishable from *Keenan* in several respects. First of all, there were not 120 witnesses to interview in the instant matter. The prosecution put on a total of only 56 witnesses in its case-in-chief and only 70 witnesses overall (including the defense investigator). The defense put on 14 witnesses, including several members of appellant’s family. Second, having undergone the preliminary hearing, Mr. Petilla was already

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33. *People v. Watson* (1956) 46 Cal.2d 818.

34. *Chapman v. California* (1967) 386 U.S. 18.

familiar with much of the evidence against appellant, unlike the attorney in *Keenan*, who still had to familiarize himself with his new client's murder charge and five other pending criminal cases.

In *Keenan*, the defendant was arraigned early in October<sup>35/</sup> of 1979. Counsel M. Gerald Schwartzbach was appointed<sup>36/</sup> on October 7, 1980 and two days later trial was set for November 24, 1980, despite Schwartzbach's protestations he could not be ready before January 1981. Counsel then unsuccessfully sought and made *two requests* for second counsel, pleading the complexity of the factual and legal issues, before seeking a writ of mandate, which was ultimately granted. (*Keenan v. Superior Court, supra*, 31 Cal.3d at pp. 427-428.) In *Keenan*, counsel stated it would be necessary to interview 120 witnesses and become familiar with five other pending criminal cases to prepare the defense. (*Id.* at p. 432.) Moreover, an early trial date compounded counsel's problem. (*Id.* at p. 433.) In the face of this specific and tangible demonstration of need, this Court found a second counsel was appropriate. (*Keenan v. Superior Court, supra*, 31 Cal.3d at p. 434.)

The *Keenan* court specifically found that Keenan's trial court erred as a matter of law when it ruled that a defense attorney should be able to singlehandedly represent any capital case and that Keenan's attorney should have had "ample time" to prepare because he already represented codefendant Linda Keenan<sup>37/</sup> (charged as an accessory after the fact), was familiar with the

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35. This Court does not specify the exact day of the arraignment. (*Keenan, supra*, 31 Cal.3d at p. 427.)

36. Defendant had been assigned private counsel at his arraignment after the public defender declared a conflict. A conflict arose between Keenan and his counsel and Mr. Schartzbach was appointed. (*Keenan, supra*, 31 Cal.3d at p. 427, fn. 3.)

37. The Keenans waived the interest of conflict facing an attorney who would represent both of them. (*Keenan, supra*, 31 Cal.3d at p. 427, fn. 4.)

facts of the case, and thus had no need for another attorney to aid in trial preparations. (*Id.* at pp. 433-434.) The *Keenan* majority also noted Keenan's defense attorney, Schwartzbach, had detailed the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the "extensive pretrial rulings, as to some of which review would be sought in the event of adverse rulings." (*Ibid.*)

The presiding judge in the instant matter, of course, simply denied the motion for second counsel for "lack of cause" without commenting on the adequacy of Mr. Petilla's claim. Petilla made no additional requests for second counsel.

In the instant matter, defense investigation of the charges against appellant began long before Mr. Petilla even entered the case and this material, plus prosecution discovery, was turned over to him at the time that he became counsel.

Appellant was arrested on October 18, 1995, and arraigned on October 23, 1995, on two counts of attempted murder and two counts of special circumstances murder. Deputy Public Defender Nancy Kops was appointed to represent him. Appellant waived time for the preliminary hearing. (CT 3; RT [10-23-95] 11.)<sup>38/</sup> Appellant was re-arraigned on an amended complaint adding two additional counts of attempted murder on November 22, 1995. (CT 13, 15; RT [11-22-95] 12-14.)

On December 5, 1995, two vehicles suspected of being involved in the shootings were released to defense investigator Jeff Gunn. (CT 20.) Acting Public Defender Charles Dreiling appeared as counsel for appellant at a hearing on December 14, 1995. (CT 22.) On January 2, 1996, Acting Public Defender

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38. This transcript was identified by the court reporter as Volume 1-A. (RT [11-22-95] 14.) It includes the transcripts of an arraignment on October 23, 1995, and a re-arraignment on November 22, 1995.

Charles Dreiling declared a conflict in writing and sought removal as counsel. (CT 24.) At a scheduled preliminary hearing on January 4, 1996, when a second amended complaint was filed, Dreiling again declared a conflict and Rudy Petilla was present and accepted appointment as new counsel. At Petilla's request, the preliminary hearing was continued to January 18, 1996. (CT 24A.) Information gathered by the public defender was provided Petilla. (RT Volume I-C [January 4, 1996] unnumbered last two pages of transcript [prosecutor states all discovery turned over to public defender who in turn tells court all defense material and discovery have been provided to Mr. Petilla].)

At the preliminary hearing commencing on January 18, 1996, the following people testified: victims Marlene Mendibles, Alice Alva, Debbie Cruz and Stephanie Kachman; appellant's sister Shana Doolin; appellant's cousin Bill Moses (whom the defense implied was the killer); police officers Todd Fraizer and Robert Schiotis; and Rick Arreola, the boyfriend of murder victim Peggy Tucker who identified appellant as the man driving a vehicle Ms. Tucker was last seen alive in. (CT 214.) Petilla cross-examined all of these witnesses.

The only critical defense witnesses at trial were the two psychiatrists who found no sign of mental abnormality in appellant, appellant's mother, James Bacon, and David Daggs, who were ostensibly alibi witnesses on the night of *some* of the crimes. Petilla's own ballistics expert confirmed what the prosecution ballistics experts (one of them independent) had determined: bullets and shell casings matched appellant's gun or his sister's gun.

It is wishful thinking to speculate that a second attorney would have made any difference in the guilt phase or penalty phase. Appellant professed his outright innocence and pointed a finger at his cousin for at least one of the murders. On appeal, he does not indicate what alternative defense could have been proffered or how, specifically, a second attorney would have made a difference.

Moreover, the error, if any, of failing to ensure that defendant was represented by two unconflicted counsel must be judged under the standard enunciated in *People v. Watson, supra*, 46 Cal.2d at page 836, i.e., whether it is “reasonably probable” a result more favorable to the defendant would have been reached had the error not occurred. (*People v. Clark, supra*, 5 Cal.4th at p. 997, fn. 22.)

Respondent submits that because of overwhelming evidence of guilt it is not reasonably probable, under a *Watson* standard, that a result more favorable to appellant, in either the guilt or penalty phases, would have been reached with a second defense attorney. There was no abuse of discretion here such that the presiding judge’s ruling was beyond the bounds of reason. Moreover, to the extent that appellant makes a federal constitutional claim, this claim also fails under a *Chapman* standard because of overwhelming evidence of guilt. (*Chapman, supra*, 386 U.S. at p. 24.)

## VI.

### THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S UNTIMELY REQUEST FOR SELF-REPRESENTATION, WHICH WAS MADE *AFTER* HIS TRIAL AND PENALTY PHASE

Appellant contends the trial court erred in denying his request, made at his sentencing hearing, that the proceedings be delayed in order to allow him to represent himself and prepare a motion for new trial. (AOB 120.) He is incorrect.

#### A. The Record

On the day scheduled for his sentencing, June 18, 1995, appellant first made a *Marsden* motion in closed proceedings, also seeking a two-week continuance, and when those were denied, made a *Faretta*<sup>39/</sup> motion to represent himself while being aided by an “assistant.”

In a written *Marsden* motion filed with the court on June 13, appellant stated:

I have new and compelling reasons for requesting that the court revisit the issue of my relationship with my court-appointed counsel, Rudy Petilla. On the basis of the new information, I am hereby alleging that there is a total and irremediable breakdown in the attorney/client relationship.

(RT 4909.)

When the trial court asked for specifics, appellant replied: “It is – actually it is just preknowledge for the conclusion at the end that I have written and of various things.” (RT 4909.)

Appellant then read from his written motion that he had no confidence in Mr. Petilla, that he could not trust him with confidential information and that

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39. *Faretta v. California* (1975) 422 U.S. 806.

he could not communicate with Petilla about trial matters. (RT 4909.)

Appellant said he wanted a new attorney to represent him in a motion for new trial, a motion to reduce the verdict and at sentencing. He also complained he had learned, through his mother's investigation, that Mr. Petilla had sought federal bankruptcy protection because of a gambling problem and that Petilla had committed fraud in running up credit card debt to pay his gambling bills. (RT 4910, 4912.)

Appellant said Mr. Petilla had falsely represented himself as a CPA (RT 4919), that Petilla had failed to seek the medical records of the victims to see if they had sexually transmitted diseases, which he claimed was "vital information" (RT 4921, 4945), and that Mr. Petilla should have obtained the medical records of former girlfriend Denise Hamblen to see if she sought medical attention for the painful intercourse she experienced with appellant. (RT 4922.) Appellant also claimed all the medical records of Dana Daggs should have been obtained. (RT 4922-4923.)

Appellant claimed his family had faxed defense investigator Jeff Gunn a list of 22 people who knew appellant dating back to junior high school and would be willing to vouch for his character as penalty phase witnesses. (RT 4923.)

He also complained about the lack of defense DNA testing and adequate ballistics testing. (RT 4924.) Appellant contended there should have been as many as 1,500 to 2,000 hours of investigation in his case and that he had consulted "different lawyers" in the community to obtain that estimate but that investigator Jeff Gunn had only been allowed to investigate up to 100 hours. (RT 4925.) He said Mr. Petilla continually told him they were on a "tight budget." (RT 4917.)<sup>40/</sup>

Appellant, in his written *Marsden* motion, contended Mr. Petilla had told

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40. Mr. Petilla denied telling appellant they were on a tight budget. (RT 4933-4934.)

him that he was a “one-man show” and would not accept second chair assistance from anyone, even pro bono assistance. Appellant contended two local attorneys, David Gottlieb and Harry Drandell, offered second chair assistance for 15 percent of Mr. Petilla’s flat fee contract “[a]nd it’s very blatantly [*sic*] that it was felt that would take too much money out of the budget, and that wasn’t pursued.” (RT 4927.)

In his defense, Mr. Petilla essentially denied all of appellant’s claims, denied that his bankruptcy and gambling problem in any way affected his representation of appellant, and said appellant was being manipulated by his family and outside attorneys. He said investigator Jeff Gunn had already been on the case for the public defender’s office and that it was Gunn who estimated he needed another 100 hours to investigate, not Petilla who ordered Gunn to limit his investigation to 100 hours. Petilla denied ever telling Gunn that even if something crucial in the investigation came up that he would not pay for it out of the flat fee contract. (RT 4930-4940, 4942-4943.)

The trial court noted that defense counsel had joined in a motion to have DNA testing done and that Mr. Petilla had obtained an order from the court to do ballistics testing and that Mr. Petilla had stated it would be redundant to call a defense ballistics expert to confirm the findings of the prosecution’s ballistic expert.<sup>41/</sup> (RT 4948.)

Following further argument, the court ruled on the *Marsden* motion as follows:

The Court has given the defendant an extensive *Marsden* hearing, and the Court is going to deny the motion to relieve counsel and appoint new counsel. The Court also finds there is no evidence to support a

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41. Mr. Petilla said it was his tactic to challenge the prosecution ballistics testing as “unreliable” and to have brought in a defense ballistics expert who would have confirmed the prosecution findings would have undermined the defense tactic. The court agreed “That would have given the District Attorney’s position more credibility.” (RT 4949.)

finding that counsel be appointed to investigate whether or not the defendant was denied effective assistance of counsel.

(RT 4951.)

Appellant then asked if he could represent himself and also have “um, an assistant to prepare a motion for new trial, motion for reduction of sentence.”

(RT 4954.)

The court responded:

You are asking to represent yourself. That means you represent yourself. And you’re not going to be appointed an assistant to assist you. If you’re going to represent yourself, you’re going to represent yourself in total. In effect what you’re asking is to represent yourself and have this Court do exactly what it denied you already, that is, a *Marsden* motion to relieve your attorney and appoint a new attorney. You’re not going to come in the back door.

(RT 4954.)

To which appellant responded that “I’m allowed to have an assistant to prepare a motion for new trial and --” but the court cut him off and said,

That motion is denied. If you’re going to represent yourself, the Court is not going to appoint an assistant because by appointing an assistant is doing [*sic*] exactly what you wanted done in the beginning is to relieve Mr. Petilla on a *Marsden* motion and get another attorney appointed.

(RT 4955.)

The court then asked if appellant knew what a motion for a new trial was and appellant responded it was to point out “differences” in the trial proceedings and “also try to enter any new evidence that might open the court’s eyes and allow for a new trial.” (RT 4955.)

When the court asked if appellant had any new evidence, he responded, “Not at this exact moment, but maybe in a period of time, yes.” (RT 4956.) The court asked if appellant could find any new evidence over the next two weeks, and appellant responded, “I can assure the Court that, yes, there are still things that need to be done that could be presented to the Court in fact of, yes, new evidence.” (RT 4956.)

At this point, Mr. Petilla reminded the court the only issue in the *Faretta* request was whether appellant was “competent to act as his own attorney.” (RT 4956.)

The court then inquired about appellant’s educational background and learned that although he was a high school dropout he had obtained a GED certificate while in custody. The court also inquired about how appellant would address motions for new trial and a motion for reduction in penalty. (RT 4956-4958.)

The court then advised appellant that if he were permitted to represent himself, he could not later complain to an appellate court that he was inadequate to represent himself. Appellant said he understood, adding that was why he was asking for an “assistant” to “draw up that way different timelines” for the various motions.

The court said if appellant was allowed to represent himself the court did not have to grant a continuance and asked if appellant was ready to proceed that day. Appellant said he was not ready and needed a continuance to “draw up the proper papers and also present the Court with my findings . . .” (RT 4959.)

The court then ruled as follows:

Well, the Court is very concerned and going to deny your *Faretta* motion to permit you to represent yourself on the basis that the Court feels that you are not adequate to represent yourself, that is, the evidence during the course of the trial was that you did not finish high school, that – and that by itself is not the reason, but you were described as being a slow learner and that you had problems in school. And the Court is not going to grant you a continuance *in order for you to prepare to represent yourself*. Therefore, the Court is going to deny your motion to represent yourself.

(RT 4959, emphasis added.)

## **B. Applicable Principles Of Law**

A defendant in a criminal proceeding has two constitutional rights with

respect to representation that are mutually exclusive. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) A defendant has a right to be represented by counsel at all critical stages of the criminal prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 223-227.) On the other hand, a defendant possesses the right to represent himself. (*Faretta v. California, supra*, 422 U.S. at p. 835; see *Meeks v. Craven* (9th Cir. 1973) 482 F.2d 465, 467; *People v. Marshall, supra*, 15 Cal.4th at p. 20.) The right to counsel is self-executing. (*Carnley v. Cochran* (1962) 369 U.S. 506, 513.) Moreover, the right to counsel persists unless the defendant affirmatively waives that right. (*Brewer v. Williams* (1977) 430 U.S. 387, 404.)

However, “unlike the right to be represented by counsel, the right of self-representation is not self-executing.” (*Faretta v. California, supra*, 422 U.S. at p. 834.) Rather, in order to invoke the right of self-representation, a defendant must knowingly and voluntarily make a timely and unequivocal request for self-representation after having been apprised of its dangers. (*Id.* at pp. 835-836; *People v. Valdez* (2004) 32 Cal.4th 73, 98-99.) Indeed, the “*Faretta* right is forfeited unless the defendant “articulately and unmistakably” demands to proceed in propria persona.” (*People v. Valdez, supra*, 32 Cal.4th at p. 99, quoting *People v. Marshall, supra*, 15 Cal.4th at p. 21, quoting *United States v. Weisz* (D.C.Cir. 1983) 718 F.2d 413, 426; *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1443-44 [“If [a defendant] equivocates, he is presumed to have requested assistance of counsel.”]; *Lacy v. Lewis* (C.D.Cal. 2000) 123 F.Supp.2d 533, 547 [a request for self-representation must be unequivocal, timely, and not a tactic to secure delay]; see *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888, citing *United States v. Weisz, supra*, 718 F.3d at p. 426 [“the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*”].)

“[A] motion made out of temporary whim, or out of annoyance or

frustration, is not unequivocal -- even if the defendant has said he seeks self-representation.” (*People v. Marshall, supra*, 15 Cal.4th at p. 21; see *Reese v. Nix* (8th Cir. 1991) 942 F.2d 1276, 1281 [defendant’s statement that he did not want counsel deemed an impulsive response to the trial court’s denial of a request for new counsel]; *Jackson v. Ylst, supra*, 921 F.2d at pp. 888-889.)

Moreover, as noted by the California Supreme Court,

[s]ome courts have held that vacillation between requests for counsel and for self-representation amounts to equivocation or waiver or forfeiture of the right of self-representation.

(*People v. Marshall, supra*, 15 Cal.4th at p. 22, citing *Williams v. Bartlett* (2nd Cir. 1994) 44 F.3d 95, 100-101; *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607, 611; *United States v. Bennett* (10th Cir. 1976) 539 F.2d 45, 49-51.)

Finally, as recognized by the California Supreme Court, since courts must indulge every reasonable presumption against the waiver of the countervailing right to counsel (*Brewer v. Williams, supra*, 430 U.S. at p. 404),

[i]t follows, as several courts have concluded, that in order to protect the fundamental constitutional right to counsel, one of the trial court’s tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself.

(*People v. Marshall, supra*, 15 Cal.4th at p. 23, citing *Jackson v. Ylst, supra*, 921 F.2d at p. 889 [the court must be reasonably certain that the defendant in fact wishes to represent himself] [parenthetical added]; *Adams v. Carroll, supra*, 875 F.2d at p. 1444 [same]; *Hodge v. Henderson* (S.D.N.Y. 1990) 761 F.Supp. 993, 1001 [the court must “determine whether a defendant genuinely means what he says”]). The motion must be timely made. (*People v. Burton* (1989) 48 Cal.3d 843, 852; *People v. Frierson* (1991) 53 Cal.3d 730, 742.)

### **C. Analysis**

Respondent acknowledges the trial court was incorrect in referring to appellant’s limited educational background and status as a “slow learner” as

part of the calculus in rejecting his request for self-representation. Appellant was competent to both stand trial and represent himself, whatever the wisdom of doing so, provided he made a timely and unequivocal request. He failed to do so.

A review of the entire transcript of the *Faretta* hearing, however, reveals the court was more concerned that appellant was trying to “come in the back door” by seeking self-representation along with an “assistant” (i.e., an attorney) who would prepare the motion for new trial and the automatic motion for reduction of sentence. (RT 4954.)

The court was also concerned about the lateness of the request when appellant was asked whether he (1) was ready to proceed that day; (2) had any new evidence to support a motion for new trial; or (3) whether he could gather any new evidence during the next two weeks if a continuance was granted. Appellant first admitted he had no new evidence “at this exact moment” but then vaguely claimed there were “still things that need to be done” that would result in “new evidence.” What that new evidence might be was left unsaid.

Respondent submits it can clearly be implied from the court’s inquiries and statements that appellant’s self-representation request was not timely, would needlessly delay the proceedings, and that perhaps appellant was engaged in playing the “*Faretta* game” that appellant refers to in his brief at AOB 128-129. Appellant, of course, claims “no such [*Faretta*] gamesmanship is evident here.” (AOB 129.) Respondent disagrees.

It can also be reasonably inferred that appellant’s *Faretta* request was equivocal, in that he was really asking for a new attorney by seeking an “assistant.” (See *People v. Danks* (2004) 32 Cal.4th 269, 295-296 [Court concludes defendant’s repeated *Faretta* requests were equivocal, born primarily of frustration].)

Appellant also claims the trial court:

was well-aware that defendant's appointed counsel had not been equal to the task of defending a man accused of a capital crime. As noted above, the trial court judge *had personal knowledge* that defense counsel's performance fell below the minimum standards of effective counsel guaranteed by the Constitution.

(AOB 133, emphasis added.)

This, of course, is equivalent to a claim of judicial misconduct in that appellant is alleging the trial court *knew* Mr. Petilla was incompetent but did nothing about it. Appellant also claims the court's alleged knowledge of defense counsel's incompetency "was enough to present a 'colorable claim' of the inadequacy of counsel, sufficient to warrant the appointment of new counsel" or, in the alternative, to allow defendant himself "the final opportunity to present his case to the court." (AOB 134.)

Respondent disagrees with both of these assertions. The trial court observed Mr. Petilla conduct a creative, if unorthodox, defense against overwhelming evidence.<sup>42/</sup> Moreover, the court ruled it found "no evidence" to support appellant's motion for appointment of new counsel to look into the ineffective of assistance counsel claim against Petilla. (RT 4951.) Had it found obvious incompetence respondent submits the trial court would have granted one of appellant's three *Marsden* motions. A more reasonable interpretation of the transcript of the *Faretta* hearing is that the Court concluded appellant's belated request was untimely, was equivocal (he was really just seeking a new lawyer through the "back door"), and that appellant was playing the *Faretta* game. The court's conclusion that appellant lacked sufficient legal skills was unfortunate but was not determinative in the denial of the motion.

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42. The trial court, in denying a section 1405 request for DNA testing, noted the evidence presented at trial "overwhelmingly proved beyond a reasonable doubt the defendant committed the two murders and the four attempted murders . . ." (Respondent's Answer to Petition for Writ of Mandate, Capital Case S116759, p. 61, citing Exh. 4, p. 4.)

Appellant acknowledges a competent but untimely waiver of counsel is committed to the sound discretion of the trial court. (AOB 124 citing *People v. Windham* (1977) 19 Cal.3d 121, 124.) Appellant cites no case law in which a defendant first asserts his right to self-representation *at sentencing*.

Respondent has found no case law in which a trial court was overturned, as a matter of law, for denying a self-representation request at sentencing even assuming a credible argument that the proceedings could have been postponed without undue inconvenience to the court or parties.

The trial court did not abuse its discretion in denying appellant's *Faretta* request. This claim must be denied.

## VII.

### **THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF APPELLANT'S WITNESSES REGARDING HIS PRIOR ACTS OR PERMITTING THE PROSECUTION TO INTRODUCE EVIDENCE OF PRIOR ACTS; APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE EXTRINSIC EVIDENCE OR CROSS-EXAMINATION**

Appellant contends prosecution rebuttal evidence and testimony about his alleged alcohol and drug use, abuse of girlfriends and hostility toward prostitutes as well as “possession of pornography, mail-order bride materials, and gun-culture magazines and paraphernalia” was not relevant (AOB 157), was prejudicial and should not have been admitted under any Evidence Code section. He claims that even assuming some relevance or impeachment value of the challenged evidence it was substantially outweighed by its undue prejudice under Evidence Code section 352. (AOB 178-179.) He contends any error was not harmless under either a state or federal standard. (AOB 183.) He is incorrect.

Respondent submits the challenged testimony and evidence was relevant to impeach either appellant or defense witnesses. Moreover, if there was error related to the introduction of some of this evidence, it was harmless under both federal and state standards due to the overwhelming evidence of appellant's guilt.

#### **A. The Record**

On April 15, 1996, the trial court questioned counsel prior to an Evidence Code section 402 hearing on the proposed testimony of defense witness Dr. Howard Terrell about his interview of appellant. Defense counsel Petilla said Dr. Terrell planned to testify about three things: (1) tests revealing appellant

*did not have* a sociopathic personality; (2) his review of police reports of the killings and shootings convinced him that the actual perpetrator *was a sociopath*; and (3) about the effects of Interferon A, which had been taken by appellant's cousin, Bill Moses, who was identified by appellant and defense counsel as possibly being the actual killer. (RT 2779.)

The prosecutor objected to all three areas of proposed testimony, contending they were inflammatory and prejudicial under Evidence Code section 352. (RT 2779-2780.) Defense counsel insisted the evidence was admissible as *character evidence*. "This is his character, and there is the absence of character traits that would make him be violent," Mr. Petilla said. (RT 2780.)

Following a noon recess, Mr. Petilla reiterated that the defense should be permitted to argue that Bill Moses might be the actual perpetrator. (RT 2787.) He also said that Dr. Terrell had "concluded there is no way Mr. Doolin could do this. It's always possible, but he'd be very surprised if he did this [commit the murders]." <sup>43</sup> Petilla said Dr. Terrell's testimony would be opinion evidence which was admissible under Evidence Code section 1102. The court tentatively agreed to permit this testimony, but would hold another Evidence Code section 402 hearing just before the psychiatrist testified. (RT 2789-2790, 2931-2932.)

In his testimony during the Evidence Code section 402 hearing (out of the presence of the jury), Dr. Terrell confirmed he had been asked to interview appellant to see if an insanity defense was appropriate. Instead, Dr. Terrell said:

I found no evidence of mental disorder at all. And I think I commented just on the side to you [Petilla] that based upon the murderers that I've seen over the years, and I've seen lots of murderers, that this man was not typical of any murderer I've ever seen. That I had to wonder if maybe they had the wrong man. I can't say that for sure,

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43. Petilla later said he originally had appellant evaluated by Dr. Terrell to determine if there was an insanity defense but that Dr. Terrell had told him that not only was appellant sane but that the doctor did not believe that appellant fit the profile of a serial killer. (RT 2932.)

but it was just not consistent with the many murderers I've seen. . . . I found no evidence of him suffering from any psychotic mental disorder, hallucinations, no delusions, I found him – I did not find him suffering from any affected disorder such as manic depressive illness, depression. I didn't see any evidence of him suffering from personality disorder. I saw no evidence of a substance abuse disorder. I didn't see any of the things that I often or almost always see in the murderers I've seen over the years . . . I'm sure I've seen over a hundred killers or murderers. Probably more than a hundred. Serial – serial killers are much more rare. I've probably seen maybe – maybe a dozen people who have killed more than one person. I think that would probably be what most of us would call a serial killer.

(RT 2941-2942.)

Dr. Terrell said he saw “no evidence” that appellant had a drug or alcohol problem. He said he saw “no evidence” that appellant had an antisocial personality or sadistic traits. (RT 2943.) He again repeated that he “had to wonder if maybe the wrong man was on trial.” (RT 2945.)<sup>44/</sup>

On cross-examination, Dr. Terrell acknowledged his opinion was based on one interview with appellant, and discussions with defense counsel and appellant's mother, and the police reports of the crimes. He said appellant's mother had told him that appellant “felt sorry for prostitutes and wished there was more available to help them.” (RT 2945-2946.)

On cross-examination, Dr. Terrell said he was unaware of information that appellant had: (1) expressed his dislike of prostitutes and had said that someone should remove them from the world; (2) was obsessed with cleanliness when he would take girlfriends to motel rooms; (3) that he had been accused of rape; (4) that he was rough with his girlfriends during sex; (5) that appellant would show others photographs of people he claimed to have killed; (6) that appellant's family had pressured appellant's friends and acquaintances not to report these things; (7) that appellant reportedly carried around multiple guns

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44. The court later instructed Dr. Terrell not to offer the opinion that he wondered if authorities had the “right man.” (RT 2953.)

in a duffel bag in his car; and (8) that appellant had been identified by prostitutes as soliciting them for sex. (RT 2946-2950.) Dr. Terrell did say that had he known those things and confirmed they were accurate it would “of course” change his opinion about appellant. He said such reports would have been “very important” to consider. (RT 2950.)

At the conclusion of the Evidence Code section 402 hearing, the prosecutor protested that Dr. Terrell’s opinions should be excluded under Evidence Code section 352 as speculative character evidence masquerading as opinion evidence but the court agreed to permit Dr. Terrell to testify as to his opinions. (RT 2953-2956.) The court also told the prosecutor that he could ask Dr. Terrell, in front of the jury, the same questions he had asked during the Evidence Code section 402 hearing if he “had a basis” for the questions. (RT 2956.) The court also ruled the prosecutor could inquire before the jury about the original purpose of consulting Dr. Terrell, i.e., to determine whether an insanity plea was appropriate. (RT 2957.)

In his direct testimony in the presence of the jury in the guilt phase, Dr. Terrell again repeated his testimony about the effects of Interferon A on memory, and behavior. (RT 2962-2966.)<sup>45/</sup> He confirmed that Mr. Petilla had originally approached him to investigate whether an insanity defense might be appropriate. (RT 2967.) Instead, Dr. Terrell, after interviewing appellant, concluded “I found a man who showed no evidence that I could see of mental disorder, either in my examination of him or my review of the documents that I have available.” (RT 2967.)

Dr. Terrell repeated that he had evaluated over 100 murderers and probably a dozen serial killers in his psychiatric career. (RT 2969.) He repeated much of the testimony he gave in the Evidence Code section 402 hearing, including

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45. On cross-examination, Dr. Terrell clarified he was talking about “Intron A” and “Interferon Alpha 2-B Recombinant.” (RT 2975.)

profiles of mentally ill murderers, sexual sadists, killers under the influence of drugs or alcohol, mercy killers or anti-social personalities. (RT 2967-2970.)

Dr. Terrell said he found no evidence to his knowledge that appellant was anti-social, sadistic or sexually sadistic, drug or alcohol addicted, a hit man, a gang member, a mercy killer, or psychotic. (RT 2969-2973.)

Dr. Terrell was asked, before the jury, if the six shootings were “the kind of crimes you would expect Keith Doolin to do?” and the psychiatrist replied:

Based upon what information I have of Mr. Doolin, barring any additional, new information, based upon what information I currently have on him, talking with him, his mother, reviewing the documents [police reports] I’ve mentioned, I’ve seen no evidence to indicate that he would meet any of the typical profiles that I would expect to see in a murderer, let alone a serial killer.

(RT 2974.)

On cross-examination, Dr. Terrell acknowledged he did not know whether or not appellant had actually committed the murders and shootings. (RT 2976.) Dr. Terrell also confirmed he had not been provided the 1992 Dana Daggs alleged rape report or Dana Daggs’ statements to police after appellant’s arrest that he had expressed a dislike of prostitutes. (RT 2976-2977.)

Dr. Terrell said he was also unaware of all the reports mentioned by the prosecutor in the Evidence Code section 402 hearing regarding appellant’s dislike of prostitutes, his fetish for cleanliness in motel rooms he and his girlfriends used, his carrying around a duffel bag full of guns at times, or that he led “two lives,” and acted differently around his family than when he was not around his family. (RT 2976-2979.)

Dr. Terrell was unaware of reports appellant would hide his girlfriends when his mother came around, that he had advertised in adult magazines, and that he had approached a prostitute on Fresno streets but had been rebuffed. Dr. Terrell said he had not seen police reports of interviews with Margie Galloway, Sherry Saar, Christina Bills, Justus Swigart, or had been informed of appellant’s

reported use of intoxicants to the point of becoming intoxicated. (RT 2980-2982.)

Appellant testified on direct examination as follows:

1. He denied hating women. (RT 3547.)
2. He denied ever meeting any of the women he was accused of shooting. (RT 3547-3548.)
3. He denied any hostility toward prostitutes and, in fact, thought prostitution should be legalized. (RT 3548.)
4. He said he bought two Firestar .45-caliber handguns because he was ambidextrous. (RT 3549.)
5. He said he bought a Penthouse magazine because it was a Tanya Harding Collector's Edition. (RT 3599.) Appellant had earlier testified he likes to collect things.
6. Appellant denied ever viewing the videotape which he said was titled "The History of Snipers" and which was found in his home. He implied law enforcement officers had removed the sealed plastic wrapper from the videotape. (RT 3600.)
7. He said he ordered one mail-order bride magazine but his name and address must have been sold because he began receiving magazines from all over the world, including Russia, the Philippines and Europe. He said he saw nothing wrong with ordering a bride through a magazine. (RT 3601.)
8. Appellant reiterated he didn't consider prostitution a problem and felt it should be legalized. (RT 3602.)

On cross-examination:

1. Appellant denied ever utilizing a prostitute. (RT 3602-3603, 3734.)<sup>46/</sup>
2. He specifically denied ever approaching a prostitute along Belmont Avenue in Fresno in August of 1995. (RT 3603.)

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46. An objection on foundational grounds was overruled. (RT 3603.)

3. He denied ever saying to anyone that prostitutes were dirty, sleazy and cheap and that they should be removed from the earth. (RT 3604.)

4. He denied ever consuming beer to the point he had to stay at a friend's house rather than drive home. He did say he had "tried" mixed drinks. (RT 3605.) He specifically denied spending the night at Margie Galloway's house because he was too intoxicated to drive home. (RT 3605.)

5. He denied using drugs. He denied ever discussing cocaine use with Justus Swigart or ever permitting drug use or marijuana smoking in a residence where he lived. (RT 3606-3607.)

6. He denied treating females any differently when he was away from his family. (RT 3607.)<sup>47/</sup>

7. Appellant admitted he did not divulge his relationship with Denise Hamblen to Dr. Terrell. (RT 3607.)

8. He denied ever striking Denise Hamblen or being aware of pain and discomfort she experienced during sex. (RT 3608.)

9. He denied making Denise Hamblen bleed during sex in high school, "No. I -- not to my knowledge." (RT 3609.)

10. He denied ever placing an advertisement seeking sex in an adult magazine. (RT 3610.)

11. He denied ever carrying a bag of weapons around with him although he said he might have taken some handguns to a firing range or taken both a rifle and pistol on a hunting trip. (RT 3610-3611.)

12. He denied ever calling a girl (Sherry Saar) he had lunch with "bitch" when she turned him down for a date. He denied ever asking Saar out. (RT 3613.)

13. He denied ever asking a girlfriend to hide when his mother came by.

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47. An objection to this question as beyond the scope of direct examination was overruled. (RT 3697.)

(RT 3614.)

14. He denied ever telling anyone that Dana Daggs was his girlfriend. (RT 3617.) He denied ever having sex with her. (RT 3618.) He denied that she ever stayed at his apartment or was ever his roommate. (RT 3619.)

15. He denied making a statement to police in the investigation of Dana Daggs' rape accusation that "if they had found any semen, it would be because she had saved it in a cup and poured it on herself," contending, "I – I don't remember that – that statement. It might have been made. I don't know. I was very upset of course, you know somebody making that allegation, but -- " Appellant later said he might have made such a statement but had "no idea" because it had been such a long time since that incident. (RT 3619-3620.)

16. He denied ever using soap during intercourse. (RT 3622.)

17. He first said he could not remember if he had fired Hydra-Shok bullets at the firing range and then later said he "might have. I might indeed have." (RT 3634-3635.)

18. Appellant claimed he bought a "taser" - an electronic device that sends a high volt of electricity and can incapacitate an assailant - for self defense. (RT 3618.)

19. Appellant said he bought a set of handcuffs "just to have them." (RT 3640.)

20. Appellant said his cousin, Bill Moses, might be the actual killer. (RT 3648.)

21. Appellant stated in his testimony that the defense had disproved the prosecution case, i.e., that "my DNA doesn't match. The investigation have basically have [sic] proven myself [sic] that the blood doesn't match. No fingerprints have been found. No hair samples have been found. Tire tread didn't work. I have proven myself to you of your case in that [sic] you presented." (RT 3650.)

22. When asked if his attorney had told him there were police reports that prostitutes had stated he had approached them, appellant responded, "I wasn't aware of that. It might have come up, but it did not mean anything." (RT 3734.)

On redirect examination, appellant stated:

1. He had never advertised in a pornographic magazine. (RT 3748.)
2. No one had ever shown him a pornographic magazine. (RT 3748.)
3. He bought the taser for self-protection when he worked at a 7-11 and Walgreen's. He said three robberies occurred at the 7-11 and seven robberies occurred at the Walgreen's while he was working at those places. (RT 3762.) He said he had never used the taser on anyone but had displayed it to intimidate. (RT 3763.)

4. Appellant said he could not identify a specific individual who first raised the possibility of Bill Moses as the actual killer but "[t]here was a number of questions raised." (RT 3764.) Appellant testified his defense counsel had raised the possibility that Moses may have been the killer. Appellant said he was "very hurt" that attorney Petilla had alleged that "one of my loved ones" was "actually involved in this" but that there were still "a lot of unanswered questions" about Moses's involvement. (RT 3765-3766.)<sup>48/</sup>

5. Appellant denied hating his mother. (RT 3767.)

On recross-examination:

1. Appellant claimed it was Denise Nagy (Hamblen) and not Dana Daggs who reported the arson fire at his apartment on November 28, 1991. He could not explain why the police report listed Dana Daggs as the reporting party. He

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48. On direct examination appellant had earlier testified that his cousin "might have" borrowed the .45-caliber Firestar handgun involved in the shootings from "time to time" but that he couldn't really "recall if he had or hadn't." This statement was ordered stricken from the record on an objection by the prosecutor that it was speculative. (RT 3555.)

again claimed Dana Daggs was never his roommate. (RT 3785-3788.)

On re-redirect, appellant was asked by his defense counsel if he could think of anybody who hated him so bad they would want him to go to prison for rape and appellant responded, “Dana Daggs.” (RT 3798.)

At the conclusion of the defense case, defense counsel objected on relevance grounds and Evidence Code section 352 grounds to the proposed rebuttal testimony of prostitute April Chavez, Dana Daggs, Margie Galloway, Sherry Saar, Christina Bills, Justus Swigart and Denise Hamblen.<sup>49/</sup> Counsel noted he had earlier objected to the prosecutor’s questioning of appellant about alleged drug and alcohol use and solicitation of prostitutes on the ground it was beyond the scope of direct examination. (RT 3801-3802.)

Prosecutor Dennis Cooper responded that the law permitted him to impeach Mrs. Doolin Larsen “by matters relevant to her credibility which acts of dishonesty or misrepresentation under the law are relevant, especially because she wouldn’t answer questions about it.” (RT 3803.)

Mr. Cooper reminded the court there was no mention of Dana Daggs’ rape allegations or the other damaging character evidence about appellant:

[U]ntil the defense chose to present a character witness, Dr. Terrel[l]. And when they did, when he testified to his opinion with respect to the defendant’s character, he was subject to cross-examination, character witness cross-examination. The classical have you heard or did you know questions which were the questions that were put. The defense apparently knew that was going to happen. It had happened in a – in a 4 – what I guess would characterize a 402 hearing. They chose not to provide him with that information. He was subject to that kind of cross-examination.

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49. Defense counsel said the testimony of these witnesses would be “super prejudicial,” would “confuse the jury,” and deter the jury from concentrating on the main issues of the trial, which were whether appellant shot the victims. He said the prejudice had been compounded by the prosecutor’s impeachment of appellant’s mother, Donna Doolin Larsen, “over some alleged unproved charges.” (RT 3802.)

Now, at that point in time, contrary opinions would have been relevant, specific instances of conduct would not. But the defense didn't stop there. They went on to ask questions specifically of David Daggs regarding the defendant's conduct, regarding the defendant's character, to ask him about instances of conduct, his knowledge of the defendant's character, and even they – and they even brought up specifically the Dana Daggs incident with David Daggs<sup>50/</sup> on their direct of David Daggs. Beyond that, they went on to have the defendant's sister testify to the defendant's good character, the defendant himself testified to the defendant's good character. And as – if that were not enough to make these matters relevant, the simple act of placing the defendant on the stand makes him – places him in the position as any other witness vis-a-vis his credibility and matters relevant to his credibility.

(RT 3803-3804.)<sup>51/</sup>

The court then found that the proposed rebuttal evidence was relevant and admissible pursuant to Evidence Code section 352 and its materiality outweighed its prejudice. (RT 3805.)

The rebuttal witnesses then testified as follows:

Margie Galloway saw appellant drunk on two occasions. (RT 3829.) She also had frequently seen him carry a satchel or gym bag with guns in it. (RT 3829-3830.) She heard him make disparaging remarks about “sluts and whores.” (RT 3830, 3833, 3836.)

Sherry Saar testified appellant “flew off the handle” and called her a “bitch”

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50. In his testimony, David Daggs said his sister, Dana went through periods “of telling a lot of lies to our family.” Daggs, a close friend of appellant, also said he had not known appellant to lie or be violent. Daggs also testified appellant had been respectful to women. (RT 3042-3044.) However, Daggs was not asked on direct examination about his sister's rape allegations against appellant.

51. It is well established that the prosecution may inquire of a defense reputation witness whether he has heard of acts or conduct by the defendant inconsistent with the witness's testimony so long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place. (*People v. Siripongs* (1988) 45 Cal.3d 548, 578.)

when she refused a date with him. She said he told her if she did not want to go out with him all she had to say was she needed to “fucking wash my hair.” (RT 3849-3850, 3856, 3858.)

Justus Swigert testified he became a friend of appellant and almost every time he saw appellant that appellant was carrying a gun. (RT 3865.) Swigert said he had seen appellant drink to the point of intoxication and that appellant was so drunk one night he had to stay at Swigert’s residence. (RT 3866.)

Christina Bills attended a party at appellant’s residence where alcohol and marijuana were used but did not personally see appellant smoke any marijuana. (RT 3883, 3887.)

Dana Daggs testified about appellant’s obsession with cleanliness when they had sex in motels, his comments that someone should “remove” prostitutes (RT 3942-3946) and how he forced her to have sex when she went to his apartment to use his shower. She said she reported this as a rape but never heard back from authorities despite repeated inquiries. (RT 3953-3954, 3958, 3974.)

Denise Hamblen, appellant’s former girlfriend, said appellant was rough with her when they had sex and that he used soap on his penis during intercourse even though it caused her a painful burning sensation. He also put posters of naked women over his headboard when they had sex and told her he had advertised himself in sex magazines. (RT 3903-3905.) He was callous, neglectful or cruel to her on other occasions. (RT 3907-3911.)

Prostitute Florence April Chavez said appellant approached her on the street soliciting sex on two occasions in the fall of 1995. She felt funny about him and declined his offer. (RT 3813-3814.)

The jury was instructed at the close of the guilt phase, inter alia, with the following pertinent instructions:

1. CALJIC No. 1.02, statements of counsel [“Do not assume to be true any insinuation suggested by a question asked a witness.”] (CT 5.54; RT 4555.)

2. CALJIC No. 2.13, prior consistent or inconsistent statements. (CT 558; RT 4556.)

3. CALJIC No. 2.20, credibility of witnesses. (CT 559-560; RT 4556-4557.)

4. CALJIC No. 2.22, weighing conflicting testimony. (CT 563; RT 4558.)

5. CALJIC No. 2.40, character traits of defendant. (CT 568; RT 4559-4560.)

6. CALJIC No. 2.42, cross-examination of a character witness [“Such questions and answers are not evidence that the reports are true, and you must not assume from them that the defendant did, in fact, conduct himself inconsistently with such traits of character.”]. (RT 4560.)

## **B. Analysis**

Respondent submits the cross-examination of Dr. Terrell was permissible because, under California law,

a party seeking to attack the credibility of the expert may bring to the attention of the jury material relevant to the issue on which the expert has offered an opinion of which the expert was unaware or which he did not consider.

(*People v. Bell* (1989) 49 Cal.3d 502, 532.)

Certainly, reports of appellant’s repulsion-attraction to prostitutes, his mistreatment of girlfriends, his drug and alcohol abuse, his fascination with guns, the sniper video and his desire for hydro-shok bullets (since he claims he was just a target shooter) are all relevant to the validity and soundness of Dr. Terrell’s claim that appellant did not appear to exhibit any of the traits of serial killers, including those impelled by drug or alcohol abuse, or sadism or sexual sadism.

Similarly, the prosecution’s rebuttal witnesses’ testimony weakened appellant’s own testimony that he was not hostile to prostitutes or women and

had not abused his girlfriends and also contradicted Dr. Terrell's opinion that appellant did not exhibit any of the character traits of serial killers.

Perhaps appellant's possession of adult magazines or mail order bride magazines was only marginally relevant but even if not relevant at all, was hardly the kind of inflammatory evidence that constitutes prejudice under an Evidence Code section 352 analysis. The fact that a young man might have an adult magazine is hardly startling nor likely to induce a jury to convict him of two murders and four attempted murders.

The most damaging rebuttal evidence was Dana Daggs' claim that appellant had raped her. But jurors knew that the district attorney's office had declined to prosecute appellant for this and that he and Ms. Daggs, according to her testimony, had an ongoing relationship in which she freely had sex with him on numerous occasions. Thus Dana Daggs' testimony probably had little, if any, effect on the jury's decision-making. Her testimony, if true, was certainly relevant but not so inflammatory as to trigger Evidence Code section 352 prejudice.

### **C. Any Error Was Harmless**

Even assuming arguendo the court erred by allowing evidence of appellant's alcohol or drug use, abusive sexual behavior toward former girlfriends, and possession of adult magazines, or other damaging character testimony, the error was harmless. Evidence Code section 353, subdivision (b) provides that a verdict shall not be set aside unless a reviewing court is of the opinion that the evidence should have been excluded on the ground of objection stated *and* that the error or errors complained of resulted in a miscarriage of justice. And, of course, Evidence Code section 353 is subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. The standard of review to be used on this issue is that of *People*

*v. Watson, supra*, 46 Cal.2d at pages 835-836, i.e., whether it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. Overwhelming evidence, including confirming ballistics that his gun was the murder weapon along with eyewitness identification, showed that the right man was on trial. Even absent the challenged evidence, appellant clearly would have been convicted. All four surviving victims identified him as their assailant. The defense could have made no credible challenge to the accuracy of the prosecution ballistics evidence or the solid evidence that appellant's (or his sister's) gun were used in the shootings. The defense only raised the specter that appellant's cousin may have been the shooter.

The jury was not improperly impassioned or prejudiced by the prosecution's rebuttal witnesses or the questions asked in the cross-examination of Dr. Terrell. As noted above, multiple eyewitness identification and ballistics made this an overwhelming case. Thus, any error, if there was error, was harmless under either *Watson* or the reasonable doubt standard of *Chapman*.

## VIII.

### **THERE WAS NO CUMULATIVE ERRORS RENDERING THE TRIAL FUNDAMENTALLY UNFAIR AND VIOLATING APPELLANT'S DUE PROCESS RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION**

Appellant contends that a “series of evidentiary errors” and prosecutorial misconduct resulted in cumulative error and rendered his trial fundamentally unfair, violating his due process rights under the Fourteenth Amendment. (AOB 188.) Among these errors were the prosecution’s impeachment of appellant’s mother, Donna Doolin Larsen, by presenting evidence that she had falsely represented herself as a registered nurse and that she reportedly had attempted to take a classroom computer without authorization before returning it when she learned a person had reported seeing her remove it from the classroom. (AOB 190.) It was error, he alleges, when the prosecutor was permitted to question Mrs. Larsen about these other matters and force her to invoke her Fifth Amendment rights against self-incrimination in front of the jury seven times. (AOB 192; RT 2741-2743.)

He also claims that the prosecutor committed misconduct in closing argument by pointing out to the jury that it was a matter of “common knowledge” that defense counsel Petilla would cry during Petilla’s closing argument and that the jury should disregard that if it happened. (AOB 208.)

Respondent submits Mrs. Larsen was properly questioned by the prosecutor and that there were no evidentiary errors. Respondent further submits the prosecutor committed no misconduct and that there was no cumulative error in appellant’s trial rendering the proceedings fundamentally unfair or creating doubt in the conduct and outcome of the proceedings. He was not denied due process of law.

## A. Mrs. Larsen

Appellant's mother, Donna Doolin Larsen, took the witness stand on April 15, 1996, as a defense witness. On direct examination, she testified that she and appellant spent the night of September 18-19, 1995,<sup>52/</sup> cleaning their home and getting it ready for a real estate agent to show. She said appellant left the house about 11:00 p.m. that evening to buy her ice cream<sup>53/</sup> but returned about 11:30 p.m. She remembered the time he returned because they watched late night television comedian Jay Leno's monologue which began just after 11:30 p.m. They then began cleaning and the cleaning lasted for "Hours. Hours." (RT 2715-1718.)

She remembered that on August 11, 1995,<sup>54/</sup> appellant spent the day helping her clean her classroom and running errands. She later said she believed he had spent the previous evening at home. (RT 2908.)

Before cross-examination, prosecutor Dennis Cooper asked for a hearing out of the presence of the jury. (RT 2721.) He informed the court that during pre-trial hearings he had said that if the defense chose to put Mrs. Larsen on the stand, the prosecution would seek to impeach by introducing evidence she had falsely represented herself to police and others (the State Bureau of Nursing and Fresno City College officials) that she was a nurse, that she had altered her daughter's nursing license in order to use it herself, and that she had been suspected of trying to illegally remove a computer from the school where she worked. (RT 2722-2724.) Mr. Cooper said the matters he intended to raise in

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52. The night Peggy Tucker was killed.

53. She later testified he also left at that late hour to also buy cleaning supplies. (RT 2897.) She later said he also bought gas at that time. (RT 2899.)

54. Stephanie Kachman was shot about 3:00 a.m. on August 11, 1995. (RT 1544.) Appellant concedes Mrs. Larsen did not testify about appellant's whereabouts at that time. (AOB 190, fn. 16.)

cross-examination were relevant and more probative than prejudicial. (RT 2725.)

Mr. Petilla then contended the prosecution had informed him pre-trial that it did not intend to use that information at trial and that he had relied on that representation in putting Mrs. Larsen on the stand. (RT 2725-2726.) Mr. Cooper denied he had made any such promise and said he had only stated he would raise the issue with the court when, and before, the defense put Mrs. Larsen on the stand and would only use such information to impeach if the court ruled it admissible. (RT 2726-2727.)

The court then recessed, and the record was retrieved from a March 18, 1995, hearing in which impeachment of Mrs. Larsen had been discussed. The court read from the March 18<sup>55/</sup> record, which corroborated Mr. Cooper's version of events. (RT 2730-2735.) Mr. Petilla then contended the prosecution had made this representation at another hearing and he asked for the cross-examination of Mrs. Larsen to be delayed until he could find the transcript confirming his claim that the prosecution had said it would not use the material damaging to Mrs. Larsen's credibility. (RT 2735.)

Mr. Cooper again denied he had ever promised the defense he would not attempt to impeach Mrs. Larsen with the aforementioned material and the trial court also said it did not remember any such promise. (RT 2735-2736.)

The court then reminded Mr. Petilla he did not ask for a hearing outside the presence of the jury before he brought Mrs. Larsen into the courtroom and "put her immediately on the stand without saying who you were calling next." (RT 2736-2737.)

Mr. Cooper did not agree to stipulate to delaying the cross-examination

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55. At that March 18 hearing, Mr. Petilla stated that Mrs. Larsen had been charged with a misdemeanor for misrepresenting herself as a registered nurse and that if she was asked about the matter while testifying in appellant's case she would invoke her Fifth Amendment rights. (RT 2731-2732.)

pending a hearing. (RT 2737.) Mr. Petilla said he then understood that Mrs. Larsen might invoke her Fifth Amendment right against self-incrimination if Mr. Cooper questioned her about the aforementioned matters of misrepresenting herself as a nurse in various settings and taking the computer from the school. (RT 2738.)

Prosecutor Cooper confirmed the misdemeanor charge was “one of the subject matters” that he intended to impeach Mrs. Larsen with. (RT 2739.)

Harry Drandell, an attorney representing Mrs. Larsen on the misdemeanor charge brought by the Department of Consumer Affairs, Bureau of Nursing, then spoke up and the court told Drandell that it had ruled she could be impeached by Mr. Cooper. (RT 2739.) Drandell said she would invoke the Fifth Amendment if she was asked anything about the misdemeanor charges. Mr. Petilla then moved that she be permitted to invoke the Fifth Amendment outside the presence of the jury. (RT 2740.)

The trial court denied that motion as follows:

*The Court is going to deny the motion. You deliberately brought her in here and asked her questions, and now the District Attorney wants to ask her questions and impeach her, and now you want it all done outside the presence of the jury.*

(RT 2740, emphasis added.)

Mrs. Larsen then took the stand in the presence of the jury and when Mr. Cooper asked if she had ever been untruthful, she responded, “I suppose all of us have.” When he asked her if she had ever lied, she responded, “Again I suppose all of us have.” He then asked her if she had ever been dishonest and she responded “I choose to exert [*sic*] the fifth amendment.” (RT 2741.)

He then asked her if she had ever submitted false documents at the school where she previously worked and she invoked the Fifth Amendment. (RT 2741.) Mr. Cooper asked that she be directed to answer the question and Mr. Drandell objected. The objection was sustained. (RT 2741.) Mr. Cooper then

asked that her testimony be stricken. Mr. Petilla objected and the objection was “denied at this point.” The court said Mr. Cooper, if he wished, could ask more questions. (RT 2742.)

Mr. Cooper asked Mrs. Larsen if she had submitted a false copy of a nursing license to an official at a local high school, and if she had altered a nursing license to add her name, or used a business card falsely holding herself out to be a registered nurse, and she invoked her Fifth Amendment rights. (RT 2742-2743.)

Mr. Cooper then asked if she had applied for a job at Fresno City College falsely representing herself as a registered nurse and both Mr. Drandell and Mr. Petilla objected. The objections were sustained.

She was asked if she had written letters to a Gary Kirby falsely representing herself as a registered nurse and the court again sustained an objection by Mr. Drandell. Mr. Cooper asked one more question about falsely representing herself as a nurse to a John Locky and an objection to that was also sustained. (RT 2743.)

Mrs. Larsen denied stealing computer equipment from Duncan Polytechnical High School but confirmed she had been asked by a school program director if she had taken the equipment. (RT 2744.)

She said any computer equipment she took from the school was her own personal equipment and that she asked a school employee to let her in to the school at 6:00 a.m. to return her own equipment to the school. (RT 2745.)

Mrs. Larsen said she was unable to recall if, after appellant’s arrest, she told anyone at the Fresno Police Department that she was a registered nurse. (RT 2746.) After a few more questions, Mr. Cooper renewed his motion to strike all her testimony. (RT 2746.)

Mr. Petilla again raised a general objection to the line of questioning stating that Mr. Cooper had stated at the March 18 hearing that if Mrs. Larsen admitted

she had lied he would not question her about specific acts. He said he remembered her testifying when Mr. Cooper asked her if she lied that “Everyone does, I suppose, everyone does.” To which the court responded: “That’s it exactly. So I do too. She didn’t say she has. I suppose everyone does. She was being evasive. Anything further?” Mr. Petilla responded, “No.” (RT 2747.) The court said it would take Mr. Petilla’s motion under submission to give Mr. Petilla an opportunity to find a hearing transcript in which Mr. Cooper had stated he would not impeach Mrs. Larsen on these subjects if she were called. (RT 2747-2748.)

The court ruled Mr. Petilla could not re-question Mrs. Larsen on re-direct because Mr. Cooper had not been able to complete his cross-examination because of her invocation of the Fifth Amendment. The court also said it was taking Mr. Cooper’s motion to strike her entire testimony under submission and invited the parties to provide the court points and authorities on their respective motions. (RT 2479.)

After the lunch hour, the court denied the prosecutor’s motion to strike Mrs. Larsen’s earlier testimony and ruled he could continue to cross-examine her “on other issues.” (RT 2784.)

Mrs. Larsen retook the witness stand the next day and when the prosecutor asked her if she had urged defense witnesses David Daggs and Michelle Moses not to talk to the district attorney’s office during the pre-trial investigation she responded she told them to “think about it twice.” (RT 2878, 2881-2882.) She did admit that she told Michelle Moses to have appellant’s attorney, Mr. Petilla, present, if she was interviewed by district attorney’s office investigators. (RT 2882.)

On further cross-examination, Mrs. Larsen said she remembered her son watching his television in his bedroom on the evening of August 10, 1995, and she went to bed around 11:00 p.m. or 11:30 a.m. and still heard noise from his

room. (RT 2904.) When pressed on how she knew her son was home on the evening of August 10, Mrs. Larsen said “I know he was. I will go to my death saying that he was at home on that date.” However, she admitted this was not based on any written notes or confirmation but solely on her recollection. (RT 2908.)

On re-direct examination, Mr. Petilla elicited from Mrs. Larsen that after she several times refused to be interviewed by Mr. Cooper and a district attorney’s investigator a misdemeanor charge was filed against her. She said she had never been convicted of a crime. (RT 2929-2930.)

However, on rebuttal, prosecution witness Glenn Sutton, an investigator for the Department of Consumer Affairs, said a complaint was filed by nurse Sharon Richie against Mrs. Larsen with the Board of Registered Nursing on August 18, 1995. Ms. Richie alleged Mrs. Larsen was misrepresenting herself as a registered nurse. The Nursing Board referred the complaint to his office on September 20, 1995. Sutton began his investigation of Mrs. Larsen on October 5, 1995, almost two weeks before appellant was arrested for the murders. (RT 3781-3782.)

Sutton said Gary Kirby, a regional occupational program coordinator for the Fresno Unified School District, provided him (Sutton) with documents in which Mrs. Larsen had misrepresented herself as a registered nurse. (RT 3784-3785.)

Sutton said John Lockey, a curriculum coordinator for the school district, also provided him with a letter in which Mrs. Larsen had identified herself as a registered nurse. (RT 3786.) Sutton said when he interviewed Mrs. Larsen about the allegations she initially tried to explain but then said she wanted to consult her attorney. She did not specifically invoke her constitutional right to remain silent. Her attorney later advised Sutton she did not want to talk to him. (RT 3787-3790.)

Sutton said he later learned Mrs. Larsen was using her daughter’s registered

nursing license number. (RT 3791-3792.) Sutton said he went to Mrs. Larsen's daughter, Shana Doolin, who signed a statement stating she had no idea why anyone would use her registered nurse license, and that no one, including her mother, had a right to use the license or license number. (RT 3794.)

Sutton said his investigation led him to believe that Mrs. Larsen was violating Business and Professions Code sections 2795 and 2796, impersonating a nurse or improperly utilizing a nursing license number. He said he submitted his final report to the district attorney's office on December 13, 1995, and a misdemeanor complaint was later issued. (RT 3795-3796.)

On cross-examination, Sutton admitted he never uncovered any evidence that Mrs. Larsen was actually engaged in the profession of a registered nurse. (RT 3798.)

The court instructed the jury pursuant to CALJIC No. 2.25 (requested by the defense and the People) and was read as follows:

When a witness refuses to testify to any matter relying on the constitutional privilege against incrimination, you must not draw from the exercise of such privilege any inferences as to the believability of the witness or as to the guilt or innocence of the defendant.

(CT 566; RT 4559.)

Appellant asserts that the trial court erred when it required Mrs. Larsen to "reassert" her privilege in the presence of the jury. (AOB 195.) She had not, of course, personally asserted it earlier, other than through representations of Mr. Petilla and Mr. Drandell. (RT 2731-2732, 2740.)

Appellant further contends the prosecutor "milked" the court's ruling "for all it was worth" by forcing Mrs. Larsen to invoke her privilege seven times and twice moving to strike her testimony on the grounds he could not cross-examine her. (AOB 198.) Appellant calls the prosecutor's conduct "unfair." (AOB 199.)

As appellant must acknowledge, juries are not permitted to infer anything

from a witness's exercise of the Fifth Amendment privilege against self-incrimination. (Evid. Code, § 913;<sup>56/</sup> *People v. Mincey* (1992) 2 Cal.4th 408, 441, 827 P.2d 388.) This is because

[a] person may invoke the constitutional privilege against self-incrimination for a reason other than guilt. The privilege may be asserted, for example, simply to insure that the prosecution against a person charged with a crime is not helped by that person's own statements. Thus, inferring guilt from the mere exercise of the privilege would be improper and is at best based on speculation, not evidence. [Citations.]

(*People v. Mincey, supra*, at p. 441.)

In order to enforce this rule, California courts have long advocated the sort of pre-trial evidentiary hearing where a witness is given the opportunity to invoke the privilege outside the hearing of the jury. (See *id.* at pp. 441-442.) Once that occurs, the parties do not have a right to force the witness to invoke the privilege a second time in the presence of the jury, and if the jury learns about the invocation of the privilege, the court is required to instruct them not to draw any inferences from it. (*Ibid.*)

However, in the instant matter, defense counsel, presumably for tactical reasons, decided not to have Mrs. Larsen invoke her right against self-incrimination *in advance of her testimony* by putting her on the stand without such a hearing. The record belies Mr. Petilla's claim he thought the prosecutor had promised not to question her about the misdemeanor charge or other

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56. Evidence Code section 913, subdivision (a) prohibits the trial court and counsel from commenting on a witness's assertion of a privilege. It further provides that "the trier of fact may not draw any inference [from the assertion of a privilege] as to the credibility of the witness or as to any matter at issue in the proceeding." And Evidence Code section 913, subdivision (b) requires the court, at the request of an adversely affected party, to instruct the jury that it may not draw any inferences from the exercise of a privilege as to the credibility of a witness or as to any matter at issue in the proceeding. The statutory prohibition applies to witnesses as well as parties litigant.

allegedly dishonest acts.

Any inference that the prosecutor's motive for questioning Mrs. Larsen was to elicit her invocation of her Fifth Amendment rights is incorrect. The computer theft allegation also had nothing to do with the misdemeanor.

Respondent submits the trial court did not err in permitting the prosecutor to impeach Mrs. Larsen on questions of honesty. When the prosecutor asked her if she ever lied she responded, "I suppose everyone does." The trial court rightly concluded that was an evasive, non-responsive answer opening the door to questions about the misdemeanor charge. When the prosecutor asked her if she was ever dishonest she invoked the Fifth Amendment. (RT 2740, 2741, 2747.)

Appellant cites *People v. Cornejo* (1979) 92 Cal.App.3d 637, 659 for the proposition that it is not improper for the trial court to determine in advance that a witness will not respond to questions which may tend to incriminate them, a proposition which respondent does not dispute. Of course, appellant's defense, in effect, waived the opportunity to obtain an advance ruling that Mrs. Larsen would invoke her Fifth Amendment rights in response to any allegations about falsely representing herself as a registered nurse or any accusations that she improperly removed a computer from a high school. The defense chose to put her on the stand without a prior ruling, in order to get in her alibi testimony for appellant, and thus risked that she might face impeachment on the criminal charge or the alleged acts of dishonesty.

In any event, respondent submits that the giving of CALJIC No. 2.25 cured any alleged harm. It is presumed the jury followed that instruction and did not utilize Mrs. Larsen's invocation in assessing her credibility on matters related to appellant's guilt or innocence. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Respondent submits that even assuming error in permitting Mrs. Larsen to

be subjected, in the presence of the jury, to questions requiring her to invoke her Fifth Amendment rights, any error was harmless under a state or federal standard because of the jury admonition *and* the overwhelming evidence of appellant's guilt. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.) It is unreasonable to conclude that the jury convicted appellant of murder because jurors learned his mother was facing a misdemeanor charge of misrepresenting herself as a registered nurse and did not want to answer questions about that alleged crime.

Nor was there prosecutorial misconduct. (AOB 205.) The prosecutor sought, and obtained, permission of the court to ask questions about Mrs. Larsen falsely representing herself as a registered nurse *in several situations*. The prosecutor ceased the line of questioning after several objections were sustained when the court asked him if he had any other questions, implying he should address a different subject. He did so. (RT 2743.)

This series of questions, involving different situations when Mrs. Larsen allegedly held herself out as a nurse, do not constitute the deceptive or reprehensible methods that constitute prosecutorial misconduct. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The trial court could have imposed sanctions at that point had it felt the prosecutor was acting reprehensibly. It did not.

Regarding the claim that the trial court abused its discretion in permitting the prosecutor to question Mrs. Larsen about the removal of the computer from the high school (AOB 200), appellant claims there was no evidence that she was not authorized to remove the computer, either expressly or impliedly, and that the "notion that [Mrs.] Larsen was committing a crime is sheer speculation." (AOB 202-203.)

Appellant cites *People v. Wheeler* (1992) 4 Cal.4th 284, 292 and concedes that acts of moral turpitude can be introduced to challenge the credibility of a

witness but appellant claims the offer of proof by the prosecutor established no evidence she intended to steal the computer. (RT 202.)

Appellant cites *Wheeler* for the proposition that trial courts should take into account the circumstances, fairness, efficiency and moral turpitude when considering, under Evidence Code section 352, whether to admit evidence other than felony convictions for impeachment. (AOB 203.) He contends “the trial court failed to consciously weigh these factors, all of which stand in favor of exclusion of the evidence, against the slight probative value the evidence held.” Appellant suggests there is no suggestion in the record the trial court engaged in any weighing of the prejudice against probative value pursuant to Evidence Code section 352. Respondent disagrees.

If Mrs. Larsen was, indeed, stealing the computer, that goes to her honesty and, thus, her credibility and reliability as a witness. The court inquired about the computer incident and the prosecutor made an adequate offer of proof that she had attempted to steal the computer, which went to her honesty and, on this subject, she could be impeached. The court agreed to allow him to question her about it. (RT 2727-2728.) This was not an abuse of discretion nor is it prosecutorial misconduct.

Again, in closing instructions, the court instructed jurors, pursuant to CALJIC No. 2.23.1 that:

Evidence has been introduced for the purpose of showing that a witness engaged in past criminal conduct amounting to a misdemeanor. Such evidence may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, *if it is established*, does not necessarily destroy or impair a witness’ believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such witness.

(RT 4558-4559, emphasis added; CT 564.)

In her responses to Mr. Cooper’s questions about the computer incident, Mrs. Larsen claimed any computer equipment she took from the school was her

own personal equipment and that she asked a school employee to let her in to the school at 6:00 a.m. to return her own equipment to the school. (RT 2745.) The jury was entitled to assess her credibility on this issue in determining her overall credibility in appellant's case.

And, even assuming error, any error was harmless under a state or federal standard because of the jury admonition *and* the overwhelming evidence of appellant's guilt. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.) It is beyond a reasonable doubt that the outcome of the trial would have been the same even absent any questioning of Mrs. Larsen about the computer incident.

Finally, appellant claims the prosecutor committed misconduct by telling the jury, at the end of his closing argument, that it was "common knowledge" that Mr. Petilla, in his closing argument in criminal cases, "cries, so when that happens --." (RT 44544-4455.) To which, Mr. Petilla immediately objected but the trial court overruled the objection. The prosecutor then added, "When that happens, I want you to understand that it's nothing unique to this case." (RT 445.) No further mention of this subject was made.

Appellant now claims it is misconduct to attack the integrity of a defense attorney (AOB 209) and that Mr. Cooper's comments implied to the jury that Mr. Petilla "was a dishonest charlatan, an attorney without integrity, who would resort to theatrical gestures to sway a jury." (AOB 210.)

Appellant goes too far. Jurors were instructed they were not to be swayed by sentiment, sympathy, passion or prejudice. (RT 4554.) They were further instructed that the statements of attorneys during the trial are not evidence. (RT 4554.) Presuming they followed these instructions, which we must, absent evidence to the contrary, the jury ignored Mr. Cooper's comments and if Mr. Petilla did, in fact, get emotional during closing argument, jurors also ignored that "sentiment" and "passion" and decided the case on the facts in evidence.

Mr. Cooper's comments were not so reprehensible or outrageous as to constitute misconduct.

Finally, appellant contends that these combined errors: (1) Mrs. Larsen's invocation of the Fifth Amendment in front of the jury; (2) her being questioned about the computer incident in front of the jury; and (3) Mr. Cooper's comment to the jury on Mr. Petilla's possible emotional state during closing argument, cumulatively constituted a violation of his federal due process rights. (AOB 211.) Respondent submits none of these things were error, but if they were error, they were harmless individually under either a *Watson* or *Chapman* standard and they were harmless cumulatively.

Appellant cites two cases (without explication) for this claim, *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and footnote 15, and *People v. Holt* (1984) 37 Cal.3d 436, 459, (apparently) for the general proposition that cumulative error, in the right case, should result in reversal. (AOB 211.) That may be so but this is not such a case.

When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*) Applying that analysis to the instant case, appellant's contention should be rejected. Notwithstanding appellant's arguments to the contrary, the record contains few errors, and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless.

Review of the record without the speculation and interpretation offered by appellant shows that appellant received a fair trial. The Constitution requires no more. Even when considered together, it is not reasonably probable that, absent the alleged errors, appellant would have received a more favorable

result, and any errors were harmless. As argued throughout this brief, evidence of appellant's guilt was overwhelming. The trial judge, in denying a post-trial request for DNA evidence, called the evidence of guilt overwhelming. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1278 [a defendant is entitled to a fair trial, but not a perfect one, citing *People v. Williams* (1988) 45 Cal.3d 1268, 1333]). Even under a *Chapman* standard, appellant's cumulative error claim also fails for the aforementioned reasons.

The cumulative error argument must fail.

## IX.

### **THE TRIAL COURT DID NOT VIOLATE APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT OR HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE GUILT AND PENALTY PHASE DETERMINATION BY PERMITTING ADMISSION OF DNA EVIDENCE**

Appellant contends the trial court erred by permitting admission of unreliable DNA evidence, thus violating appellant's due process rights under the Fourteenth Amendment and his right to a reliable guilt and penalty phase determination under the Eighth Amendment. (AOB 212.) He further contends the jury was prejudicially swayed by this DNA evidence, which "created" the illusion" that appellant "was the only possible perpetrator." This evidence, he contends, coupled with the "less than conclusive ballistics evidence" and the "impeachable eyewitness identifications" led to his conviction. (AOB 236.) He implies that absent the allegedly flawed DNA evidence there would have been a different outcome to the proceedings.

The issue here, he contends is:

(1) whether the *interpretation* of the test results, based upon the "dot-intensity analysis" was a novel scientific procedure and (2) if so, whether the State established by a preponderance of the evidence that "dot-intensity analysis" had gained general acceptance in the relevant scientific community.

(AOB 213.)

Respondent submits the trial court did not abuse its discretion in ruling the PCR DQ-Alpha testing method is generally accepted in the scientific community and that it was never asked to rule on the "dot-intensity analysis" method of interpretation nor did appellant's counsel object, specifically, to the use of the dot-intensity method of analysis.

Thus, appellant has waived this claim by failing to object at trial. Lastly, even assuming error in the admission of the DNA evidence, any error was

harmless in view of the overwhelming evidence of guilt based on eyewitness identification, ballistics and other non-DNA evidence.

#### **A. The Record**

On the morning of April 22, 1996, mid-way through the guilt phase of the trial, the prosecutor announced he would be ready to introduce DNA evidence that afternoon. Prosecutor Cooper identified the testing methodology as PCR HLA DQ-Alpha. The jury was not present. (RT 3221.)

Cooper said tests were done on semen found in a condom located near the body of Inez Espinoza, a vaginal swab taken from her body at the time of the autopsy, and scrapings from underneath her fingernails on her left and right hand. (RT 3221-3222.) The seminal fluids were tested “pursuant to this PRC analysis” and appellant was included among the results found in the samples from the body “as a possible contributor.” Appellant’s semen was not in the condom. (RT 3222.)

Cooper said there was no seminal fluid located on any sample taken from the body of murder victim Peggy Tucker. (RT 3225.)

Cooper offered the case of *People v. Morganti*,<sup>57</sup> a First Appellate District opinion, as support for the contention that “this kind of testing is generally acceptable in the scientific community.” (RT 3222.)

Cooper said Department of Justice analyst Rod Andrus was completing

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57. *People v. Morganti* (1996) 43 Cal.App.4th 643, 662-669 [processing and matching under the PCR method], 669-670 [statistical analysis under the PCR method].) Cooper later also cited *People v. Amundson* (1995) 34 Cal.App.4th 1151 (RT 3308) which was subsequently granted review and then later ordered depublished. (*People v. Amundson* (1995) 43 Cal.Rptr.2d 827, 899 P.2d 896, 6357, (Cal. 1995). Review dismissed by, Remanded by *People v. Amundson*, Supreme Court Minute 10-27-1999, 90 Cal. Rptr. 2d 225, 987 P.2d 695, 1999 Cal. LEXIS 7464, 99 Cal. Daily Op. Service 8670, 99 D.A.R. 11053 (Cal. 1999).

corroborating tests and reviews on the results that very morning and should be able to testify that afternoon. (RT 3223-3224.) Mr. Petilla said he had not seen the results and did not know if he would object until he saw those results. (RT 3223-3225.) Petilla said he had understood that the prosecution was going to conduct RFLP<sup>58/</sup> testing, a more refined method of analysis, but Cooper disputed that the prosecution had ever offered to do RFLP tests. (RT 3225-3226.)

Petilla said appellant had told him that if DNA testing was done on the bodies of the murder victims, he would be eliminated as a source of any semen found. (RT 3227.)

At a hearing that afternoon, DOJ criminalist Rod Andrus took the witness stand and described his qualifications and backgrounds. (RT 3230-3244.)

Mr. Petilla complained that he still had not been provided a copy of Andrus' written report and Andrus said he needed another day to complete the written report. (RT 3244.) Andrus said preliminary results he had reported to Mr. Cooper he did not consider final until he had "double-checked everything." (RT 3245.)

At which point, Mr. Cooper said the purpose of the hearing was not to challenge or verify the specific results of Andrus' testing but to determine the scientific reliability of "the type of testing and testing procedures generally." (RT 3245.)

Mr. Cooper reminded the court that the hearing was to determine the reliability of PRC analysis and testing and whether it was generally accepted in the scientific community, and not to challenge the specific results obtained by Andrus. (RT 3246.)

The court then stated the purpose of the hearing was to conduct the familiar

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58. Petilla misspoke and identified it as "FRLP" testing. (RT 3224.)

“three-prong” *Kelly-Frye*<sup>59/</sup> determination to ascertain (1) the generally acceptability in the scientific community of the PCR methodology; (2) Andrus’ qualifications; and (3) “whether or not a correct scientific procedure was utilized.” (RT 3246-3247.)

The Court then read from the *Morganti* decision, in part, as follows:

Quote, the Kelly-Frye rule tests the fundamental validity of a new scientific methodology, not the degree of professionalism with which it is applied. Careless testing affects the weight of the evidence and not its admissibility, and must be attacked on cross-examination or by other expert testimony. Once the Court acts within its discretion and finds the witness qualified, as it did in this case, the weight to be given the testimony is for the jury to decide.

(RT 3247-3248.)

Mr. Petilla continued to object that he could not challenge Andrus’ qualifications as an expert witness without knowing the results of Andrus’ testing. Mr. Cooper explained that there were separate issues involved: (1) the reliability of the PCR method in general and (2) whether Andrus conducted the PCR analysis “with the sufficient amount of precision” so that his results and opinion were considerably reliable. (RT 3250.)

Mr. Andrus then continued to testify at length about the PCR analytical method, DQ-Alpha testing, electrophoresis and the amplification process. (RT 3251-63, 3265-79.) He specifically said it was “not new or novel technology.” (RT 3263.) He said HLA DQ-Alpha testing was used “all over the world . . . in fact, to be very honest with you, this is -- this is becoming old hat.” (RT 3279-3280.)

On cross-examination by Mr. Petilla, Andrus said he considered the DQ-Alpha methodology an exclusionary test in that it could positively exclude a specific individual as the source of a DNA sample tested. He said it could be

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59. *People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 1013, 1014.

inclusive in that an individual could be part of a population group that *could have* contributed the DNA in a specific sample. (RT 3284.)

In his cross-examination, Mr. Petilla asked no questions about the validity of the “dot-intensity analysis method of interpretation of DNA test results. He did ask whether an expert opinion that a suspect was included in a pool of contributors was “really not that reliable.” (RT 3290.) Andrus responded as follows:

Well, I think the opinion is reliable that he’s included. The opinion that is uncertain is how significant that reliability is far as, you know, is he really included or would another test eliminate him.

(RT 3291.)

On re-direct examination, Mr. Andrus explained that while appellant was in a pool of 10 percent of the possible contributors of the semen found on Ms. Espinoza’s body, further tests under the more refined RFLP method, which would take a considerable amount of time, could eliminate him if an inconsistency were found. (RT 3294-3295.)

Asked by the court if there were sufficient DNA material for additional testing, Mr. Andrus said there was, but further PCR testing would take at least an additional two weeks. (RT 3296.) Andrus said RFLP testing would take even longer. (RT 3297.)

Department of Justice criminalist Edwin Scruggs, who works at the same laboratory as Mr. Andrus, said he also conducted PCR HLA DQ-Alpha testing. (RT 3301.) He testified to his background in PCR testing and said it was his opinion that PCR HLA DQ-Alpha testing “is most definitely acceptable in the scientific community.” (RT 3304.) He said the protocol utilized in his laboratory for DQ-Alpha testing was the same as utilized by the FBI and was generally accepted in the scientific community. (RT 3305.)

Scruggs said that in February of 1996, the American Society of Crime Lab Directors accredited the Fresno DOJ laboratory for DNA testing of the type

discussed here. (RT 3306-3307.)

In argument, Mr. Petilla he had no objection to the reliability of DQ-Alpha testing insofar as it excluded people from being the source of DNA which was tested but did object on Evidence Code section 352 grounds that it would confuse the jury and because, he contended, the testing was “unreliable” insofar as it included a person in a pool of potential sources. (RT 3310.)

The court then ruled as follows:

All right. The Court finds there is general acceptance in the relevant scientific field. The Court finds there is no significant controversy or dispute with respect to the reliability of the method. The Court further finds that both witnesses were eminently qualified and that they are experts in this particular area. [¶] The Court further finds that the correct scientific procedure was utilized. Concerning the 352 argument, the Court finds that the Court has weighed the effects and finds that the probative value outweighs the prejudicial effect. Therefore, the Court finds that the PCR analysis is admissible.

(RT 3312.)

Mr. Cooper later reminded the court that because appellant had insisted on a speedy trial the prosecution was prepared to proceed to trial without any DNA results. He wanted the court not to permit Mr. Petilla to pursue a line of questioning that the prosecution had not sought to conduct the more refined, but lengthier, RFLP testing that might have definitely excluded appellant as a donor of the semen samples found on Inez Espinoza’s body. (RT 3314.)

Mr. Petilla stated that when the prosecution wanted to test appellant’s blood that is when appellant communicated to Mr. Petilla that he wanted DNA testing. Petilla said he had not sought DNA testing earlier because was uncertain “what that would have turned on us.” But he said when the prosecution blood tests were requested he decided to seek DNA testing in accordance with appellant’s wishes. (RT 3315.)

Mr. Petilla said he thought the defense had a right to request the RFLP tests. The court reminded Mr. Petilla the prosecution had been prepared to proceed

to trial without any DNA tests. (RT 3317-3318.)

Mr. Petilla said he should be able to challenge the reliability of the DQ-Alpha tests results by pointing out to the jury that much more reliable DNA testing (RFLP) had been available to the prosecution. Mr. Cooper reminded the court that the prosecution only conducted the DNA tests that it did perform at the request of the defense. (RT 3319.)

On Wednesday, April 24, 1996, the court denied the prosecution's motion to deny Mr. Petilla from inquiring about whether the RFLP procedure could have been utilized. (RT 3321.) Mr. Andrus began testifying before the jury that afternoon. (RT 3385.)

Mr. Andrus then testified at length about his qualifications, blood testing and DNA testing. (RT 3385-3410.) He then described the DQ-Alpha testing methodology. (RT 3410-3439.)

Mr. Andrus then testified about the results of DNA testing on the body of Inez Espinoza. (RT 3440--3447.) Andrus said DNA samples from underneath Ms. Espinoza's right hand fingernails revealed sperm from more than one individual, as did the sample from the left hand fingernails. (RT 3447-3448.)

Andrus said he compared these samples with DNA from appellant's blood and "bottom line is I cannot eliminate him as a possible contributor. This is not an exclusively identifying system. I would have to do additional testing." (RT 3450.) Andrus said it was "possible" appellant was the source of the mixed-sperm found under the fingernails. (RT 3451.)

Andrus said appellant also could not be excluded as a possible contributor of the mixed sperm found in Ms. Espinoza's vagina. (RT 3451.) Mr. Andrus's only mention of dot intensity came at RT 3453 as follows:

The relative concentration as depicted by dot intensity on the test strips you can – I think if you remember the little pattern that went around on the margin, quite often when we see mixed specimens [DNA from two different individuals], they're not of equal ratios. And we can pick out the minor components from the major by the relative dot

intensity. One is significantly less than the other.  
(RT 3453-3454.)

Andrus testified ten percent of the Caucasian population (including appellant) theoretically could have been a source of one of the DNA samples found on Ms. Espinoza's body but that percentage would be reduced by the female percentage of that group as well as young boys and adult males not in the United States (or Fresno) at the time of the murder. (RT 3455-3456.)

Andrus said appellant *was not* the source of the semen in the condom found near Ms. Espinoza's body. (RT 3457.)

On cross-examination, Mr. Petilla got Andrus to concede he could not be sure if the DNA found on Espinoza's body came from appellant and that there was a greater chance a Hispanic was the source of the DNA than a Caucasian. (RT 3458-3459.)

Mr. Petilla got Andrus to concede that a second source of semen DNA could have come from a *subsequent* customer of prostitute Espinoza after the first DNA sample was identified as coming from a gene pool that included appellant. (RT 3471.)

Andrus conceded that more DNA tests could definitively exclude a given individual. (RT 3477.) Andrus testified RFLP, or restriction fragment length polymorphism, is the best, most comprehensive DNA test available. (RT 3480.) Andrus said that RFLP testing could have been done in this case, as well as a test known as PGM. Other PCR tests could also have been done. (RT 3481-3482.)

Andrus conceded if he had sneezed on the tested condom found at the Espinoza murder site he could have added DNA to the sample semen and thus would be considered a "suspect." (RT 3489.)

Andrus said he didn't remember if prosecutor Cooper had asked him to get a DNA sample from appellant's cousin, Bill Moses. (RT 3489-3490.) Andrus

said appellant's blood DNA sample was not provided him until after the trial had actually started. (RT 3490.)

## **B. Applicable Principles Of Law**

The *Kelly-Frye* rule requires the proponent of expert testimony based on the application of a new scientific technique to satisfy three criteria:

(1) general acceptance in the relevant scientific community; (2) testimony by properly qualified experts; and (3) the application of correct scientific procedures in the case under review. [Citations.]

(*People v. Fierro* (1991) 1 Cal.4th 173, 214; *People v. Kelly, supra*, 17 Cal.3d at p. 30.) A trial court's rulings during a *Kelly-Frye* proceeding are reviewed for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 971.)

Even assuming error, an error in admitting DNA statistics does not require reversal under the harmless-beyond-a-reasonable-doubt test of *Chapman v. California, supra*, 386 U.S. at page 24. With respect to statistical blood group evidence, error is reviewed under *People v. Watson, supra*, 46 Cal.2d at page 836, which requires a "reasonable probability" that the defendant would have obtained a more favorable result in the absence of error. (*People v. Poggi* (1988) 45 Cal.3d 306, 324; compare *People v. Brown* (1985) 40 Cal.3d 512, 535-536 [overwhelming evidence of guilt rendered statistical use of inadmissible evidence harmless]; cf. *People v. Wallace* (1993) 14 Cal.App.4th 651, 663, fn. 4 [declining to address defense claim that DNA statistics were unduly prejudicial after finding that a *Kelly/Frye* violation was harmless under either standard].)

The exercise of a trial court's discretion under normal rules of evidence does not ordinarily implicate the federal Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

### C. Analysis

Respondent first submits appellant never challenged the “dot-intensity” interpretation of DQ-Alpha DNA testing by objecting at trial. Accordingly, appellant has waived the claim. (Evid. Code, § 353 [objection to admission of evidence must “make clear the specific ground of the objection. . . .”]; see *People v. Clark* (1992) 3 Cal.4th 41, 125-126 [objection must alert trial court to the basis on which exclusion of evidence is sought and must afford People an opportunity to establish its admissibility]; *People v. Fierro, supra*, 1 Cal.4th at p. 215 [failure to object to admissibility of population frequency statistics associated with electrophoresis evidence waives issues on appeal]; *People v. Coleman* (1988) 46 Cal.3d 749, 777 [objection to appropriateness of test performed by expert insufficient to preserve challenge to expert’s conclusion of statistical probabilities suggested by blood typing test].)

Should appellant attempt to cast the claim as one of ineffective assistance of counsel (because of defense counsel’s failure to object), the claim would still fail because defense counsel may have had legitimate tactical reasons for not objecting and because there was no reasonable probability that the outcome would have changed had counsel objected on the ground appellant now urges. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-694; *In re Wilson* (1992) 3 Cal.4th 945, 950.)

Respondent submits the trial court did not abuse its discretion in concluding, based on *Morganti*, and the evidence presented by the experts, that the proposed DQ-Alpha evidence met the *Kelly-Frye* three-prong test. There was no mention of the dot-intensity method of interpretation in the *Kelly-Frye* hearing and even though Mr. Andrus mentioned it in his testimony, there was no objection from defense counsel. *Morganti*, newly published at the time of trial, made clear that the PCR technique *and* method of analysis were generally accepted as reliable in the scientific community. (*People v. Morganti, supra*, 43 Cal.App.4th 643,

671; see also *People v. Wright* (1998) 62 Cal.App.4th 31, 34; *People v. Reeves* (2001) 91 Cal.App.4th 14, 28-32.)

The fact that *Morganti* involved only one person's DNA, and not the two DNA specimens in the instant matter (AOB 227), does not invalidate the DQ-Alpha methodology. It only complicates it. Jurors are free to assess the expert's interpretation of DNA samples involving more than one person's DNA.

Appellant's reliance on *People v. Pizarro* (2003) 110 Cal.App.4th 530, is also misplaced. (AOB 225, 227-228.) In *Pizarro*, the Fifth District Court of Appeal considered the admissibility of RFLP test results. It mentioned DQ-Alpha testing in dicta and quoted with approval the dissent in an out-of-state case, *State v. Harvey* (1997) 151 N.J. 117, 699 A.2d 596, questioning the scientific validity of dot-intensity analysis. (AOB 228.) The opinions of a lower appellate court are not binding on this Court, much less their dicta.

Appellant also fails to state that the *Pizarro* Court acknowledged the majority in *Harvey* concluded dot-intensity analysis in DQ-Alpha testing "was generally accepted" in the scientific community.<sup>60</sup> (*People v. Pizarro, supra*,

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60. The *Harvey* court, at 699 A.2d at page 624, also cited six other state and federal courts affirming the scientific reliability PCR and DQ Alpha testing methodology: *United States v. Beasley* (8th Cir. 1996) 102 F.3d 1440, 1448, cert. denied 520 U.S. 1246 [holding that DQ Alpha and polymarker testing are sufficiently reliable and have achieved general acceptance within relevant scientific community]; *United States v. Shea* (D.N.H 1997) 957 F. Supp. 331, 338 [finding PCR testing, including polymarker testing, reliable under FRE 702]; *United States v. Lowe* (D.Mass. 1996) 954 F.Supp. 401, 418 [finding that polymarker and another PCR-based test, D1S80, are sufficiently reliable]; *Brodine v. State* (Alaska Ct. App. 1997) 936 P.2d 545, 550-51 [finding polymarker testing generally accepted in scientific community]; *People v. Pope* (Ill. Ct. App. 1996) 672 N.E. 2d 1321, 1326 [finding that DQ Alpha and polymarker typing are generally accepted in scientific community under *Frye*]; *Keen v. Commonwealth* (Va. Ct. App. 1997) 24 Va. App. 795, 485 S.E.2d 659, 664 [rejecting defendant's challenges to the polymarker test]. In *Pope, supra*, the Illinois Court of Appeals found polymarker testing generally accepted in the

110 Cal.App.4th at p. 618, citing *Harvey* at 699 A.2d at pp. 624-629.)

The *Harvey* court, specifically considering a challenge to the dot intensity method of analysis also stated:

Our previous holding that the polymarker test is scientifically reliable, *supra* part IV.B.4.d., leads us to the conclusion that the foregoing challenges to dot-intensity analysis regarding Cellmark's performance of the polymarker test, concern not the admissibility, but the weight of the evidence. See *Marcus, supra*, 294 N.J. Super. at 291 (holding that interpretation of extra bands on autorads developed from bloodstains, "like an expert's ability to perceive an abnormality on an x-ray, is a matter within the province of the jury"); *Fishback, supra*, 851 P.2d at 893 (reasoning that defendant's challenge to techniques of RFLP analysis, including interpretation of autorads, concerns weight and not admissibility of DNA typing evidence under *Frye*); *State v. Schweitzer*, 533 N.W.2d 156, 160 (S.D. 1995) (reasoning that DNA-expert's conclusions regarding results of DNA test were issue of weight for jury to consider); *State v. Kalakosky*, 121 Wash. 2d 525, 852 P.2d 1064, 1072 (Wash. 1993) (holding that defendant's assertions that specific laboratory procedures utilized to analyze DNA sample were flawed, goes to weight of evidence, not admissibility). As such, the ultimate determination of these issues was properly left to the jury.

(*Harvey, supra*, 699 A.2d at p. 625.)

Thus, any challenge to dot-intensity analysis should not challenge its admissibility but only its weight. Appellant's jury gave proper consideration to Andrus' testimony.

Finally, respondent submits that appellant overstates the significance of the DNA testing in this case and mischaracterizes the reliance the prosecution placed on this evidence. As noted above, the prosecution was prepared to proceed without any DNA testing. (RT 3317-3318.)

Respondent acknowledges the prosecutor did tell jurors that appellant was

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scientific community even when the *Frye* hearing in that case involved the testimony of only one witness, the State's expert. (*People v. Pope, supra*, 672 N.E.2d at p. 1326.) The *Harvey* court said admission of the polymarker test in other jurisdictions supported its conclusion that the trial court correctly admitted DQ Alpha evidence in the *Harvey* trial.

included in 10 percent of the male population pool for the type of genetic marker found, and that it was unlikely that Ms. Espinoza had many, if any, sex customers, earlier in the evening but the prosecutor also specifically told jurors<sup>61</sup> they could ignore any DNA evidence involving Espinoza if they wanted to, stating:

This DNA, I submit to you, it does point the finger at the defendant. If you're suspicious of what – of what it really means, *then I'd ask you to – you know, just reject it. If you think you don't know what to make of it, reject it. There is enough other evidence that implicates the defendant.*

(RT 4387-4388, emphasis added.)

Appellant cannot reasonably argue the state's case hinged on whether appellant's sperm was indeed among the 10 percent of the population containing that genetic marker found in the earlier DNA testing when the prosecutor specifically invited jurors to ignore the DNA evidence if they liked and convict appellant on the basis of other overwhelming evidence. They did so.

In his closing argument, defense counsel acknowledged that the prosecutor had told jurors “well, if you don't understand the DNA, cast it aside, *because we got other evidence we have to talk about.*” (RT 4458, emphasis added.)

Of course, the record shows the prosecution was perfectly willing to proceed to trial without any DNA evidence because its other evidence -- eyewitness identification, ballistics, other non-DNA evidence -- was so powerful. The state's overarching theory was that there was plenty of other evidence implicating appellant in Ms. Espinoza's murder -- namely that *his gun was used*

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61. Just before he told jurors they could ignore the DNA evidence if they wished to and still convict appellant, the prosecutor told jurors the defense would probably suggest to them the DNA came from another man. (RT 4387.) As stated above, the actual prosecution theory was that DNA evidence was not needed to convict based on other testimony, ballistics, and other extremely strong circumstantial evidence.

*to kill her* and that tire tracks similar to his were found at the scene (RT 4384-4385) -- and that the prosecution did not need to rely on any DNA evidence. As noted above, moments earlier in his argument, Prosecutor Cooper reminded jurors the alley where Espinoza was killed was frequented by prostitutes and their customers and that a semen-filled condom in the alley *was not linked to appellant*:

And if you'll remember the evidence and remember the diagram and remember the photographs, the condom wrapper was about 20 feet down the alley, 20 feet east of where Inez Espinoza's body was, and that there was a condom there in the alleyway. The condom was on the ground. This condom, it has seminal fluid in it, sure, but you know from the evidence that prostitutes use that alley to bring their business. They bring their johns there. *That condom could be from anybody*. It could be from any sex that had occurred there in the alley. It doesn't have to be the defendant's. He wasn't wearing it. It was not inside of Inez Espinoza. It was laying on the ground.

(RT 4386, emphasis added; see also RT 4380 [prosecutor notes Mrs. Trippel testified her alley was frequented by prostitutes and their customers].)

It is also worth noting that Ms. Espinoza was fully clothed when she was shot, like three of appellant's four surviving victims, thus creating a reasonable inference that if her killer had sex with her, he permitted her to dress again before deciding to shoot her, which is inconsistent with the behavior of the gunman in all but one of the other shootings in which the victim survived. (RT 1398.)

As the prosecutor repeatedly emphasized in closing argument, if there were other killers or shooters involved in the Espinoza and Tucker murders, and the Kachman attempted murder, those individuals would have had to sneak into appellant's house, steal his Firestar, shoot the victims, and return the gun to his house undetected because ballistics established that appellant's gun was the murder or attempted murder weapon. (RT 4382, 4391-4392, 4397-4398.)

Defense Counsel Petilla himself, in the post-trial *Marsden* motion on June

18, 1996, stated:

DNA testing, the DNA testing on the victims *was really not very relevant* in this case, although we – I thought we got good results from the prosecution presenting the DNA evidence that they had. But the whole theory here was that those people were shot because they refused to have sex with Mr. Doolin or whoever their assailant was without getting paid money first. If they had consented to free sex, they would not have been shot. So, of course, obviously the conclusion and apparently I think the jury believed is that any semen around here . . . [a]ny semen around here belonged to johns who paid because otherwise those people didn't want to have sex with this assailant until they paid, and he shot them for not having sex with them.

(RT 4938-4939, emphasis added.)

When appellant argued that further refined DNA should have been done in the Espinoza murder, Mr. Petilla responded:

Again, Your Honor, the theory of the DNA which I showed successfully those victims were shot because they did not want to have sex with this assailant, whether it was Mr. Doolin or not. I don't believe even now that Mr. Doolin was the one who did this. Whoever their assailant was, they refused to have sex with him without getting the money, 20 or \$30. [¶] I was able to show the the [sic] DNA in this case in the condom happened to exclude Mr. Doolin absolutely, but we have those fingernail scrappings [sic] that say he's not excluded. Any more tests along this line, like the ABO system, which has only four different groups, the chance of Mr. Doolin *being not excluded from a certain group if he got two more of those, this would be damning*. [¶] But precisely because of the theory, if, for example, in the case of – this is my thinking. I'm not always right.

(RT 4949-4950, emphasis added.)

In denying appellant's request for additional DNA testing pursuant to section 1405, the trial court noted the "overwhelming" non-DNA evidence against appellant, including eyewitness identification and ballistics. (Exhibit 4, p. 4 of respondent's brief in opposition to appellant's petition for writ of mandate for DNA testing before this Court, which, on December 17, 2003, in Case No. S116759, denied the section 1405 request for DNA testing.) This trial court ruling implied that even if DNA tests definitely established appellant's

exclusion from the DNA samples tested, it did not establish his innocence or raise a reasonable doubt about his guilt because there was still overwhelming evidence of his guilt based on the evidence cited by the trial court. This Court agreed in S116759.

For these same reasons, respondent submits that any error in permitting expert witness Andrus to utilize a dot-intensity method of analyzing the DNA evidence, or any error in admitting *any* DNA evidence, whatever the interpretative methodology, was harmless under a state *or* federal standard because it is beyond a reasonable doubt that the outcome would have been the same even absent the challenged evidence. This claim must fail.

## X.

### **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT A CONTINUANCE OF THE PENALTY PHASE OF THE TRIAL**

Appellant contends that the trial court abused its discretion by denying him a 48-day continuance after completion of the guilt phase of his trial but before the penalty phase. He claims the trial court's alleged error constituted a reversible per se deprivation of his right to due process. (AOB 238.)

Appellant claims that a continuance would have permitted more specific DNA testing (AOB 245) and at the "very least, a continuance would have given counsel time to interview witnesses and develop the childhood abuse<sup>62/</sup> issues that Dr. Hedberg so briefly alluded to." (AOB 247.) Appellant contends defense counsel's penalty phase evidence showing he had no mental illness and nothing in his upbringing to explain his actions was, essentially "no defense." (AOB 246.)

These claims lack merit. There was no abuse of discretion.

#### **A. The Record**

The guilt phase of appellant's trial ended on Tuesday, May 7, 1996. Jurors were told to report back nine days later on Thursday, May 16, 1996, and that the penalty phase was expected to last two or three days. (RT 4610.) The court told both the prosecutor and the defense counsel to advise each other of discovery by Friday, May 10, 1996. (RT 4611.)

On Monday, May 13, 1996, defense counsel filed two motions: (1) seeking transfer of DNA evidence for retesting, and (2) a continuance pursuant to

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62. Appellant mentions testimony by Dr. Hedberg that his two stepfathers had verbally and emotionally abused him and a school teacher had "rapped" him on the knuckles for poor performance. (AOB 246.)

section 1050. (CT 543-541.) Counsel sought a continuance until July 1, 1996, 48 days later. (CT 538.) At a hastily called hearing on that same Monday, May 13, 1996, defense counsel said he was seeking an ex parte order shortening time for filing a motion for the transfer of DNA-related evidence *and* that he also wanted to make a motion for continuance. (RT 4613.)<sup>63/</sup> He also wanted more time to question prospective prosecution witnesses in the penalty phase.

In his written motion, Petilla claimed that if DNA evidence, consisting of fingernail scrapings and vaginal swabs, taken from the body of Inez Cantu Espinoza, eliminated appellant as a source it would be exculpatory evidence because it was “reasonably arguable” she only had sex with one customer between the time she was seen in an alley and her death one half to one hour later. (CT 546; see also RT 4641-4615.) He estimated in his written motion that it might be least four weeks after the defense received the DNA evidence that the results would be available. (CT 541.)

Mr. Petilla claimed he needed the continuance because he wanted to research the Hydra-Shok bullets used in the killings and shootings, he wanted to research evidence regarding Dana Daggs and he wanted more time to investigate prosecution witnesses “and their current lifestyles” in order to develop a defense. (CT 538-539.)

The prosecutor argued that a month earlier the defense had learned:

what the results were to the [DNA] test that they wanted in the first place. They knew about the turn-around times of such tests. They had a witness here from DOJ who was talking about other facilities that could have done these things.

(RT 4618.)

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63. Mr. Petilla said he faxed notice of the motions to the prosecutor on Sunday and that the prosecutor called him Monday morning and requested a hearing before the judge that Monday rather than at the start of the penalty phase on the following Thursday. (RT 4613.)

The prosecutor said the DNA retesting request was “now moot in light of the close of the guilt phase evidence.”

(RT 4619.)

Mr. Petilla said he had not divulged any penalty phase discovery to the prosecutor because he only had a list of prospective witnesses and appellant had told him what those witnesses would say in his behalf. Mr. Petilla said he considered any communications between him and his client confidential and, thus, he did not have to reveal those communications to the prosecution. (RT 4623-4624, 4626-4627.)

The court then denied both motions for transfer of the DNA evidence and retesting and the motion for continuance. (RT 4627.)

## **B. Applicable Principles Of Law**

It is well settled that a trial court possesses broad discretion in ruling upon a request for a continuance. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; *People v. Howard* (1992) 1 Cal.4th 1132, 1171; *People v. Grant* (1988) 45 Cal.3d 829, 844-845; *People v. Courts* (1985) 37 Cal.3d 784, 790.) Absent a showing of abuse of discretion and prejudice to the defendant, the denial of a motion for continuance does not require reversal of conviction. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.) “Continuances shall be granted only upon a showing of good cause.” (*People v. Beeler* (1995) 9 Cal.4th 953, 1003; see § 1050, subd. (e).)

While a continuance in a criminal case will be granted pursuant to section 1050 when the ends of justice require it, the determination of whether a defendant has affirmatively demonstrated that justice so requires is a factual matter. (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 555; *People v. Bethea* (1971) 18 Cal.App.3d 930, 937.)

To evaluate a claim of due process denial, “the appellate court looks to the

circumstances of each case and to the reasons presented for the request.” (*People v. Frye, supra*, 18 Cal.4th at pp. 1012-1013.) “One factor to consider is whether a continuance would be useful.” (*Id.* at p. 1013, citation omitted.) The trial court must balance the anticipated benefit to the moving party (and the likelihood of such benefit) against the burden on other witnesses, jurors, and the court. (*People v. Zapien* (1993) 4 Cal.4th 929, 972.)

### C. Analysis

The trial court properly denied the continuance motion. Respondent submits the trial counsel properly balanced the marginal and speculative benefits to appellant against the burden that would be imposed on witnesses, jurors and the court if it granted a 48-day delay in the proceedings. (*People v. Zapien, supra*, 4 Cal.4th at p. 972.)

The bulk of the continuance was attributable to appellant’s claimed need to retest the DNA evidence. Appellant petitioned this Court on June 17, 2003, for a writ of mandate,<sup>64/</sup> in Case No. S116759, for DNA testing and this Court rejected that petition on the merits on December 17, 2003.

Respondent argued in his answer to the petition for writ of mandate that DNA testing was not crucial to the defense because the victims were prostitutes and the presence of other males’ sperm in or on the bodies of the murder victims did not, by any means, establish appellant’s innocence. Respondent further argued that DNA samples taken at the time that appellant’s former girlfriend, Dana Daggs, alleged she was forced to have sex with appellant would have had little, if any, influence on the jury because the district attorney’s office had refused to bring charges against appellant and because Ms. Daggs freely admitted many instances of consensual sex with appellant. (See

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64. Pursuant to section 1405.

respondent's answer at pp. 74-77.) In any event, she was a marginal witness in this case, in both the guilt and penalty phases, and appellant exaggerates the significance of her role.

The trial court, in rejecting appellant's request for section 1405 DNA testing, also wrote that other evidence at trial "overwhelmingly proved beyond a reasonable doubt" that appellant committed the two murders and the four attempted murders. (Exhibit 4 of respondent's answer to the DNA writ, at p. 4.) The trial court further found appellant had failed to show how his identity remained a significant issue in the case or to show how DNA testing would be material to identity. (*Ibid.*)

Respondent submits a 48-day delay of the trial for further DNA testing was unreasonable, was not material, and was unlikely to have any influence on the outcome of events. The court did not abuse its discretion in denying a continuance based on the need for further DNA testing.

Regarding defense counsel's inability to question prospective prosecution witnesses prior to the beginning at the penalty phase of the trial as a basis for granting a continuance, respondent notes that the prosecution only put on four witnesses at the penalty phase: (1) Dana Lynn Peterson, the nurse who examined Dana Daggs on the day that Daggs was allegedly raped (RT 4679-4702); (2) John Haman, a Department of Justice criminalist, who testified about the Hydra-Shok bullets used in the shootings (RT 4703-4724); (3) Angel Cantu, the daughter of murder victim Inez Espinoza, who defense counsel chose not to cross-examine (RT 4724-4729); and (4) Nina Mandrell, the sister of murder victim Peggy Tucker, who defense counsel also chose not to cross-examine (RT 4730-4736.)

As argued above and in the Answer to the Petition for Writ of Mandate, Ms. Daggs' role in the case or her influence on the jury's determination of (1) guilt and (2) punishment was marginal at best.

It is obvious that defense really only needed to talk to two prosecution penalty phase witnesses, Ms. Peterson and Mr. Haman. Defense counsel had a week to interview these two witnesses in advance but, in reality, their testimony was marginal in terms of a jury deciding to impose the death penalty. Ms. Peterson only testified about a marginal witness, Ms. Daggs, and Mr. Haman's expert testimony about the type of bullets used in some of the shootings was unlikely to present any surprises to the defense, even if Haman was not interviewed in advance.

It was also unlikely that advance interviews of the victim's relatives would have yielded much information of use to the defense anyway so trial counsel's failure to do so is hardly prejudicial. In fact, he did not cross-examine them at all, which is a common defense approach when dealing with victim's family members.

Regarding the defense's claim it needed more time to create a penalty phase defense it must be remembered that appellant claimed at trial, and still claims, outright innocence. Although there was testimony that he suffered some verbal abuse from his stepfathers, his childhood seems relatively uneventful compared to the childhood horror stories of many murder defendants. And of course there was defense testimony in the penalty phase from Dr. Hedberg. Dr. Hedberg described appellant as respectful and pleasant. (RT 4738.) He said appellant denied drug or alcohol abuse. (RT 4750.) Dr. Hedberg administered a number of tests and said he found that appellant did not have a "profile" indicating he was psychotic or mentally ill or psychopathic or sociopathic in nature. (RT 4740, 4753.) However, he did describe appellant as "a little guarded and a little paranoid," later describing the paranoia as "mild" (RT 4741, 4743.)

The psychologist said appellant seemed to carry "some unresolved resentment from his childhood that he has not worked out" creating feelings of sadness, mild depression and anxiety or hostility. (RT 4742.) Dr. Hedberg

noted appellant's mother had been married four times and that two of the stepfathers had been verbally and emotionally abusive to appellant, who suffered from a learning disability. (RT 4744-4746.)

The fact that defense counsel did not interview proposed defense character witnesses prior to the penalty phase seems a tactical maneuver to keep any information gained away from the prosecution pursuant to discovery rules. When questioned by the court, defense counsel claimed he was relying on his client's description of what the defense character witnesses would say and he considered those privileged lawyer-client communications and thus not subject to discovery. (RT 4623.)

In summary, denial of the motion for continuance was not an abuse of discretion. Defense counsel did not present adequate justification for a 48-day continuance. The purported reasons for the delay were highly speculative. Counsel's choice to forego questioning of marginal prospective character witnesses (i.e., junior high school classmates [RT 4923]) for the defense was a tactical decision and failure to question in advance the four prosecution witnesses did not materially harm the defense. This claim must fail.

## XI.

### SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Appellant contends California's death penalty statute, section 190.2, does not "meaningfully narrow" the pool of murderers eligible for the death penalty. (AOB 251.) Appellant acknowledges this Court has rejected previous challenges to the constitutionality of the statute but claims this Court, *People v. Stanley* (1995) 10 Cal.4th 764, 842, erroneously interpreted *Pulley v. Harris* (1984) 465 U.S. 37, 53 in doing so. (AOB 255-256.)

Similar arguments have been rejected by this Court previously. (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 465-468; *People v. Frye, supra*, 18 Cal.4th at p. 1029; *People v. Crittenden* (1994) 9 Cal.4th 83, 154.) Appellant's argument notwithstanding, the special circumstances in section 190.2 are not so broad as to create an unconstitutional statute. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1179; see also *People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Morales* (1989) 48 Cal. 3d 527, 557-558; *People v. Marshall* (1990) 50 Cal. 3d 907, 946; *People v. Anderson* (1987) 43 Cal. 3d 1104, 1147; *People v. Jones* (1997) 15 Cal.4th 119, 196; *People v. Barnett, supra*, 17 Cal.4th at p. 1179; *People v. Sakarias* (2000) 22 Cal.4th 596, 632.)

Finally, appellant states, that in *People v. Stanley, supra*, 10 Cal.4th at page 842:

This Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 [California Death Penalty] law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional.

(AOB 255-256.)

Appellant misrepresents what this Court said in *Stanley* and why it cited *Harris*. In *Stanley*, the defendant contended the 1978 death penalty law was unconstitutional "because it contains so many special circumstances that it fails

to perform the narrowing function required by the Eighth Amendment” and also that it fails to provide a ““meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not.”” (*People v. Stanley, supra*, 10 Cal.4th at p. 842.)

The *Stanley* court then stated those particular contentions had been rejected by the *Pulley v. Harris* court. (*Id.* at pp. 842-843, citing *Pulley*, 465 U.S. at p. 53.)<sup>65/</sup>

The *Stanley* court was undoubtedly referring to the following passage in *Harris*:

By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the [California Death Penalty] statute limits the death sentence to a small subclass of capital-eligible cases. . . . [¶] As we are presently informed, we cannot say that the California procedures provided Harris inadequate protection against the evil identified in *Furman*<sup>[66/]</sup>.

(*Pulley v. Harris, supra*, 465 U.S. at p. 53.)

This approving language of the United States Supreme Court in *Harris*, a case which primarily focused on proportionality issues but also briefly addressed the narrowing function of section 190.2, was undoubtedly what the California Supreme Court had in mind when denying Stanley’s claim that the California death penalty statute failed to sufficiently narrow death penalty eligibility of convicted murderers.<sup>67/</sup>

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65. Just before addressing the narrowing argument, the *Stanley* court addressed the defendant’s proportionality argument and rejected it, citing *Pulley*. (*People v. Stanley, supra*, 10 Cal.4th at p. 842.)

66. *Furman v. Georgia* (1972) 408 U.S. 238.

67. Appellant mistakenly makes reference to footnote 14 in *Harris*, at page 53, to show the United States Supreme Court had noted the 1978 California initiative had “greatly expanded” the list of special circumstances. The words “greatly expanded” are actually in footnote 13. In any event, this footnote only shows the United States Supreme Court was aware of an

Moreover, appellant in the instant matter fails to even address *People v. Wader* (1993) 5 Cal.4th 610, 669, which the *Stanley* court, just after its mention of *Harris*, also cited in support of the constitutionality of section 190.2.

This Court has repeatedly upheld the constitutionality of section 190.2 in response to challenges it fails to adequately narrow the class of death eligible murderers. Appellant has not provided adequate reason to overturn *Stanley* and its progeny.

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expanded list of special circumstances yet *still* concluded California's special circumstances statute met constitutional muster.

## XII.

### **SECTION 190.3, SUBDIVISION (A) DOES NOT ALLOW ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF A DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS**

Appellant challenges the constitutionality of section 190.3, subdivision (a), claiming that it has been applied in a “wanton and freakish manner” and violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 257.)

Appellant acknowledges California's death penalty statute survived a facial challenge in *Tuilaepa v. California* (1994) 512 U.S. 967, but claims that it has been *applied* in such an arbitrary and contradictory manner that it violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (AOB 258-259.)

The *Tuilaepa* court upheld the validity of section 190.3, subdivision (a), against a challenge that it was unconstitutionally vague. (*Id.* at p. 976.) Since then, this Court routinely has relied on *Tuilaepa* in rejecting similar challenges. (See, e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 381.)

In this case, appellant's argument loses sight of what is required for a penalty determination to pass constitutional muster. The reason *Tuilaepa* upheld factor (a) against a vagueness challenge was that a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307.) *Tuilaepa* held, expressly citing factor (a), that possible randomness in the penalty determination disappears when the aggravating factor does not require a yes or no answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at p. 975.)

In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The

circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

As to appellant's list of other capital cases, the first objection is that none of the examples shows that factor (a) in section 190.3, subdivision (a) was arbitrarily or randomly applied in the instant case. Indeed, appellant points to no factors in his own case which were *arbitrarily or capriciously applied*. Appellant cannot demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. In other words, noticeably missing from appellant's analysis is any showing that the facts of his crimes or other relevant factors were improperly relied on by the jury as facts in aggravation.

The second objection is that appellant's list proves nothing. (AOB 259-262.) In certain circumstances, depending on what the rest of the evidence shows, a particular fact such as the place at which the crime is committed may be particularly aggravating. In one case, the fact that the victim is murdered in a remote location may be aggravating; in another, the fact that the victim is murdered in his or her own home may be. Those results are not necessarily inconsistent because the surrounding circumstances in the cases may be so different that either location is, under the circumstances, aggravating. Appellant's list proves nothing, except that changed circumstances may lead to different factual evaluations. What continues to matter is that appellant receive an individualized penalty determination. The consideration of the facts of appellant's crimes produced that result. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976.)

Appellant's argument is also undermined by the consideration that a trial court retains inherent discretion to exclude evidence otherwise admissible under factor (a) because that evidence is inaccurate or cumulative. (*People v.*

*Davenport* (1995) 11 Cal.4th 1171.) This inherent discretion lessens the danger that factor (a) will be applied “without any limitation whatsoever.”

In sum, appellant’s reliance on the application of factor (a) in other cases proves nothing, does not aid his own case, and does not undermine the *Tuilaepa* result.

### XIII.

#### **CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL; AGGRAVATING FACTORS NEED NOT BE FOUND INDIVIDUALLY TRUE BEYOND A REASONABLE DOUBT; UNANIMITY IS NOT REQUIRED AMONG JURORS ON INDIVIDUAL AGGRAVATING FACTORS**

Appellant complains California's death penalty statute is unconstitutional and violates his Due Process rights because jurors, during penalty phase deliberations, did "not have to make written findings or achieve unanimity as to aggravating circumstances." (AOB 266.) Nor were jurors told that they had to find any aggravating factor true beyond a reasonable doubt or that aggravating factors had to outweigh mitigating factors beyond a reasonable doubt. (AOB 267-268.) Appellant contends the United States Supreme Courts decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and *Ring v. Arizona* (2002) 536 U.S. 584, "squarely rejected" this Court's statement in *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 that neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, or that they outweigh mitigating factors. (AOB 268.)

This Court, in *People v. Martinez* (2003) 31 Cal.4th 673, considered the applicability of *Apprendi* and *Ring* to California death penalty cases and rejected similar arguments. (*Id.* at 700.) Most recently, this Court rejected the applicability of *Ring* and *Apprendi* to a California capital case in *People v. Griffin* (2004) 33 Cal.4th 536, 594-595. (See also *People v. Prieto* (2003) 30 Cal.4th 226, 262-264; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32].) Appellant cites none of these cases.

The *Martinez* court stated:

We see nothing in *Apprendi* that would require specific findings regarding the truth of the aggravating circumstances, their relative

weight, or the appropriateness of a death penalty. (See also *Ring v. Arizona, supra*, 536 U.S. at p. 602 [requiring jury finding beyond reasonable doubt as to *facts* essential to punishment]; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14 [].

(*Id.* at 700-701, emphasis in original.)

The *Martinez* court also rejected defendant's argument that the trial court erred in failing to require the jury to submit a statement of reasons supporting its death verdict. (*Ibid.*; see also *People v. Diaz* (1992) 3 Cal.4th 495, 571-572; *People v. Frierson* (1979) 25 Cal.3d 142, 179.)

Appellant's arguments were also were rejected in *People v. Farnam* (2002) 28 Cal.4th 107, 192, wherein this Court stated:

The capital sentencing scheme is not unconstitutional insofar as it does not require the jury to render a statement of reasons or to make unanimous written findings on the aggravating factors supporting its verdict. (*People v. Welch* (1999) 20 Cal.4th 701, 772 []; *People v. Sanders* [1995] 11 Cal.4th [475] 559.) . . . .

In summary, there is no constitutional requirement that the jury, in order to return a verdict of death, must unanimously find that aggravating factors outweigh the mitigating factors beyond a reasonable doubt or that death is the appropriate remedy beyond a reasonable doubt. (*People v. Mendoza* (2000) 24 Cal.4th 130, 191; *People v. Barnett, supra*, 17 Cal.4th at p.1178; *People v. Bradford* (1997) 14 Cal.4th 1005, 1059.)

These claims must fail.

#### XIV.

### CALIFORNIA'S CAPITAL CASE SENTENCING SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION

Appellant contends this Court's decision in *People v. Allen* (1986) 42 Cal.3d 1222, 1286 through 1288, upholding California's death penalty statute against an equal protection challenge, was "necessarily flawed." (AOB 319-323.) Not so.

He contends persons facing the death penalty are provided "significantly fewer procedural protections" than persons charged with non-capital crimes and this constitutes a violation of the equal protection of the laws. (AOB 319.)

This Court recently affirmed *Allen* in *People v. Brown* (2004) 33 Cal.4th 382, noting,

Death penalty defendants are not denied equal protection because the statutory scheme does not contain disparate sentence review. [Citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1053, and *Allen, supra*, 42 Cal.3d at pp.1286-1288].

(*Id.* at p. 402.)

Respondent submits California's death penalty statutes do not violate equal protection under either the state or federal constitutions.

## XV.

### **CALIFORNIA'S DEATH PENALTY STATUTE IS NOT IN VIOLATION OF ANY INTERNATIONAL LAWS OR TREATIES; IT IS NOT CRUEL AND UNUSUAL NOR DOES IT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION**

Appellant argues California's death penalty violates international law. (AOB 336.) While appellant concedes that the United States is not bound by the laws of any other nation, he contends the Eighth and Fourteenth Amendments command that we not "lag so far behind" western European nations which have banned capital punishment. (AOB 332.)

This Court, in *People v. Ghent* (1987) 43 Cal.3d 739, 779, 781, held that capital punishment in California does not violate international law. Respondent submits *Ghent* is still good law.

Appellant's argument that customary international law is somehow applicable to the review of constitutional issues presented here is unpersuasive. It is well recognized that courts are not substitutes for international tribunals, and international law does not create the right of an individual to pursue a private human rights suit against a sovereign government. (*Hanoach Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542.)

Moreover, the United States Supreme Court has held that interpretation of the United States Constitution, and by extension, its application to state statutory law, is ultimately an issue for the High Court to decide. (*Stanford v. Kentucky* (1989) 492 U.S. 361, 370, fn. 1, 377.)

Federal courts that have considered the question of whether international law bars capital punishment in the United States have uniformly concluded that it does not. (See, e.g., *Jamison v. Collins* (2000) 100 F. Supp. 2d 647, 766 ["the Court finds no indication that the international obligations of the United States compel elimination of capital punishment"]; see also David Sloss, *The*

*Domestication of International Human Rights* (1999) 24 Yale J. Int'l L. 129; Christy A. Short, *The Abolition of the Death Penalty* (1999) 6 Ind. J. Global Legal Stud. 721; William A. Schabas, *International Law and Abolition of the Death Penalty* (1998) 55 Wash. & Lee 797.

The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. According to a March 17, 2003, report to the United Nations Commission on Human Rights, authored by Amnesty International, 84 of 195 countries in the world still have the death penalty. (<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c27907f93433769ec1256d0200491a93?Opendocument>.)

There is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons. Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as *jus cogens*, or a norm from which no derogation is permitted. Therefore, there is no basis for this Court to conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of *jus cogens*.

Finally, appellant's claim lacks merit because it has repeatedly been specifically rejected by this Court. (*People v. Ghent, supra*, 43 Cal.3d at pp. 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) In *Ghent*, this Court held that international authorities similar to those now invoked by appellant do not compel elimination of the death penalty, and do not have any effect upon domestic law unless either self-executing or implemented by Congress. (*Ibid.*) Appellant addresses neither *Ghent* or *Hillhouse*.<sup>68/</sup>

In summary, appellant has waived this claim and further has no standing to

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68. Appellant does mention *Hillhouse* in Argument XI. (AOB 254.)

invoke international law as a basis for challenging his judgment of death. Nor has he shown why *Ghent* and *Hillhouse* are not applicable.

**CONCLUSION**

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 5, 2004

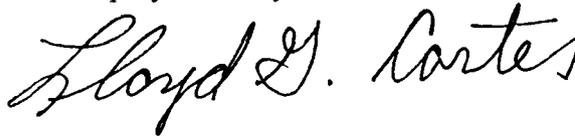
Respectfully submitted,

BILL LOCKYER  
Attorney General of the State of California

ROBERT R. ANDERSON  
Chief Assistant Attorney General

MARY JO GRAVES  
Senior Assistant Attorney General

ERIC CHRISTOFFERSEN  
Deputy Attorney General



LLOYD G. CARTER  
Deputy Attorney General

Attorneys for Plaintiff and Respondent

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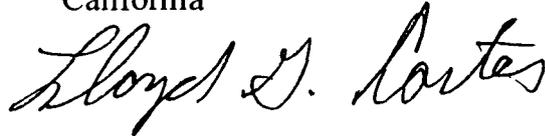
**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 53487 words.

Dated: October 5, 2004

Respectfully submitted,

**BILL LOCKYER**  
Attorney General of the State of  
California

A handwritten signature in black ink, reading "Lloyd G. Carter". The signature is written in a cursive style with a large, prominent initial "L".

**LLOYD G. CARTER**  
Deputy Attorney General

Attorneys for Plaintiff and Respondent

# **EXHIBIT A**

# COPY



Fresno County Superior Court  
Fresno Municipal Court  
Central Valley Municipal Court

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DATE: August 4, 1994

TO: ALL CRIMINAL DEFENSE ATTORNEYS

FROM: Tamara Beard, Superior Court Executive Officer *Tamara Beard*  
Sandra Silva, Fresno Municipal Court Administrator *Sandra Silva*  
Michael Weinberg, Central Valley Municipal Court Administrator *Michael Weinberg*

SUBJECT: NOTICE OF ADOPTION OF A JOINT COURT POLICY ON CAPITAL CASE APPOINTMENTS / REQUEST FOR APPLICATIONS FOR APPOINTMENT TO CAPITAL CASES

As part of the courts' on-going efforts to provide competent and cost effective legal representation for all indigent defendants, a committee of judges and administrators from all courts was formed to study the feasibility of adopting a joint court policy on capital case appointments. The committee sought to develop new policies which would enable the courts to more effectively control costs, while ensuring the continuing provision of competent legal representation. Other courts throughout the state were contacted for information regarding alternative methods for providing competent, cost-effective legal representation in such cases. It was learned that a number of courts have successfully adopted a flat fee approach, based on the degree of case difficulty and complexity. These flat fees usually include ancillary costs for investigators, experts and other expenses.

After considerable review, and solicitation of comments from criminal defense attorneys, the County Administrative Office, the County Auditor-Controller, and other interested parties, the committee determined that a similar approach would be beneficial for Fresno County. **The attached detailed policy establishing the procedures to be utilized by Fresno County courts in such cases was developed, and has been adopted by the judges of the respective courts with an implementation date of September 1, 1994.** The major provisions of the proposed policy are summarized for your information.

1. Capital Case Review Committee:

A joint court committee has been established, consisting of the Presiding Judges and Assistant Presiding Judges of each court, along with the Criminal Presiding Judges of the respective courts. The three Court Administrators will serve as non-voting members of the committee. The committee will be responsible for administering the policy, selecting qualified attorneys for inclusion on the appointment panels, approving attorney appointments and case category fees, and related tasks.



**2. Scope of Services Provided:**

Appointed counsel must provide complete legal defense services of the nature typically provided by the Public Defender within the applicable case category fee, including ancillary costs and expenses such as investigators and experts. For audit purposes, attorneys will be required to maintain complete and accurate accounting records for five years following completion of the case.

**3. Qualified Attorney Panels:**

The committee will review applications from qualified attorneys who desire appointments as lead counsel and co-counsel and agree to accept such appointments in accordance with this policy. Relevant legal education and experience, including previous capital case trial experience, will be required. Attorneys will be appointed from these panels on a rotation basis.

**4. Flat Fee Case Category Rates:**

Three basic fee categories are established. The category fees include all attorney fees, and costs for investigators, experts, and other expenses. All cases will be presumed to be in Category 1, unless the committee determines the case to be appropriate for a higher category, based on written reasons submitted by the attorney initially appointed to review the case. Attorneys will be authorized to expend up to 25 hours for initial case review at a rate of \$60 per hour. If the attorney and the committee disagree as to the appropriate case category, the attorney may decline the appointment, and the next attorney in rotation will be selected and authorized to expend up to 10 hours for initial case review. If the attorney accepts the appointment in the category authorized by the committee, the initial case review fees will become part of the total flat fee the attorney receives for that case.

**Category 1: Rate - \$40,000**

A relatively non-complex case with one defendant and one victim.

**Category 2: Rate - \$60,000**

A more difficult case involving multiple victims or defendants, or complicated special circumstances, or complex factual or legal issues.

**Category 3: Rate - \$80,000**

The most complex case involving multiple victims and defendants, or highly unusual publicity or notoriety, or very complex factual or legal issues.

The committee will have the authority to adjust the case to another category, or to authorize additional payments after the initial determination of case category, based upon a showing of good cause by appointed counsel and approval by the committee. Periodic

payments will be made throughout the duration of the case, based on an established payment schedule. If the case is resolved prior to trial, compensation will be prorated depending on the stage of the proceedings.

#### **5. Appointment of Co-Counsel**

Appointment of co-counsel will be authorized by the Committee only after the District Attorney's Office has formally declared their intention to seek the death penalty. Lead counsel must apply to the committee for approval of co-counsel appointment, setting forth the factual and legal grounds justifying such appointment and specifying the particular tasks for which the second attorney will be responsible. A separate panel of attorneys qualified for co-counsel appointments will be established, which will give attorneys the opportunity to gain experience to qualify for appointment as lead counsel in the future. Co-counsel will be compensated at a flat rate of 15% of the approved category fee, unless the committee authorizes additional compensation upon a showing of good cause. One-half of the compensation will be paid at the time of appointment, and the balance upon completion of co-counsel services.

#### **HOW TO APPLY FOR CAPITAL CASE APPOINTMENTS:**

If interested and qualified for appointment as either a lead or co-counsel, please complete and submit the documents listed below to Tamara Beard, Superior Court Executive Officer. Applications received by Friday, August 19, 1994 will be reviewed and, if approved, eligible for appointment as of September 1, 1994.

1. Fresno County Courts' Capital Case Indigent Criminal Defense Panel Application and Agreement (Appendix A-1); and
2. Attorney Qualifications (Appendix A-3, A-4) including copies of related case docket sheets (may be acquired at Clerk's Office).

You will be notified of your appointment status upon receipt and review of your application materials by the Fresno County Courts' Capital Case Panel Review Committee.

cc All Fresno County Superior and Municipal Court Judges  
Pat Mardikian

a:\capbrief.msw

**FRESNO COUNTY SUPERIOR COURT  
CONSOLIDATED FRESNO MUNICIPAL COURT  
CENTRAL VALLEY MUNICIPAL COURT**

**JOINT COURT POLICY ON CAPITAL CASE APPOINTMENTS**

The Fresno County Superior Court, the Fresno Municipal Court, and the Central Valley Municipal Court, with the concurrence of the Fresno County Board of Supervisors, hereby adopt this policy on capital case appointments for the following purposes:

To establish a panel of qualified attorneys to provide competent and quality legal representation for indigent defendants in capital cases;

To categorize attorneys for panel placement on the basis of relevant legal education and experience;

To provide fair opportunities for inclusion on the panel list, and ensure equal access to appointments for all qualified attorneys; and

To adopt cost effective plans for the appointment and compensation of attorneys, investigators and experts to provide legal representation and related services for indigent defendants.

The Courts reserve the right to adopt alternative policies and/or procedures as deemed necessary.

**I. CAPITAL CASE PANEL REVIEW COMMITTEE:**

**A. Composition of Committee:**

The Capital Case Panel Review Committee("Committee") is hereby established, consisting of the Presiding Judges and Assistant Presiding Judges of the Fresno County Superior Court, the Fresno Municipal Court, and the Central Valley Municipal Court; the Criminal Presiding Judge of the Superior Court; and the Court Administrators of the respective courts. Each judicial member shall have one vote.

**B. Duties of Committee:**

The Committee shall be responsible for administering all aspects of the capital case panel process in accordance with this policy.

**C. Quorum:**

The quorum for the Committee shall be at least one judicial member from each of the courts, and one administrative representative from any of the courts. The Presiding Judges of each court may designate an alternate judicial or administrative representative whenever necessary.

**II. APPOINTMENT OF ATTORNEYS TO PANEL:**

**A. Appointments to Panel:**

The Committee shall establish a panel of qualified criminal law attorneys who have expressed an interest in representing indigent defendants in capital cases in the Fresno County Courts in accordance with this policy by submitting a written application for appointment to the panel to the Committee. The Committee reserves the right to make the final determination of the composition of the panel. The application shall set forth the

specific qualifying legal education and experience of the attorney, and shall include a declaration under penalty of perjury that the information on the application is true and correct. The Committee will notify all applicants of the disposition of their application.

**B. Appointments from Panel:**

No attorney shall be appointed by the court to represent a defendant in a capital case to be tried in the Fresno County courts unless at the time of appointment that attorney is on the approved panel. Any attorney who is placed on the panel agrees to accept appointments in such cases in accordance with this policy.

**C. Minimum Qualifications of Lead Counsel:**

Attorneys included on the panel must meet the following minimum qualifications:

- 1) Membership in the State Bar of California for a minimum of five (5) years or practice as an attorney for a minimum of five (5) years.
- 2) Attorney of record in at least twenty (20) felony criminal cases, ten (10) of which must have been completed felony jury trials.
- 3) Attorney of record in at least three (3) cases where the charge at the Superior Court arraignment was a violation of Penal Code Section 187; and at least two (2) of these cases must have been a completed jury trial. Appointment as co-counsel in at least three (3) completed capital case trials may be substituted for one completed P.C. 187 jury trial.
- 4) Attendance at six (6) or more hours of relevant continuing legal education programs in the area of criminal defense and/or capital case or death penalty defense within twelve months, or twelve (12) hours within two

years.

- 5) Proof of current malpractice insurance covering the type of legal representation services provided by panel attorneys.

**D. Changes to Panel:**

Any attorney who meets the minimum qualifications may request to be added to the panel by submitting an application to the Committee (See Attachment A-1 through A-4). The Committee will notify the attorney whether he or she is appointed to the panel. The Committee reserves the right to remove an attorney from the panel at any time without prior notice. Upon request by an attorney removed from the panel, the Committee may elect to advise the attorney of the reason(s) for such removal.

**E. Reconsideration for Appointment to Panel:**

Any attorney not selected for inclusion on the panel may petition for reconsideration by the Committee.

**F. Order of Appointment From Panel:**

The order of attorney names on the initial panel shall be determined by random lot. Attorneys added to the initial panel shall be placed at the end of the list.

**III. APPOINTMENTS TO CAPITAL CASES:**

**A. Rotation of Appointments:**

Appointments to capital cases shall be made by rotation in the order that the attorney names appear on the list, by appointing the next available attorney from the list. After appointment to a capital case, that attorney's name shall be placed at the end of the list, and the Committee may select the next attorney on the list for the next appointment.

**B. Number of Appointments:**

The Committee will select the attorney whose name is at the top of the panel list, unless that attorney is then currently appointed or retained on two pending capital cases in any State or Federal Court, in which case the attorney shall be placed at the bottom of the panel list. A capital case shall be considered pending until completion of the case after trial, final sentencing, completion of all steps within the power of the attorney to obtain settlement of the record on appeal, and court acceptance and approval of the final accounting required by Penal Code Section 987.9 for any sums provided pursuant to that section. All attorneys on the panel list shall be responsible for advising the court of the number of pending capital cases in which they are attorney of record when being considered for appointment to a capital case.

**C. Initial Case Review:**

An attorney initially selected from the panel list for consideration for appointment to represent a capital defendant shall be authorized to expend up to twenty-five (25) hours at the rate of \$60 per hour to interview the defendant and review the files and available evidence and submit written reasons to the Committee within ten (10) court days why the case should be in a Category other than Category 1. Any materials submitted to the Committee shall be confidential, and are not subject to discovery. In the event the attorney concurs that the case is a Category 1 case, that attorney shall be appointed. In the event the attorney proposes that the case is appropriate for a higher Category, the Committee shall determine the appropriate case Category. If the Committee determines that the case is a Category other than that proposed by the attorney, the attorney may accept the

appointment in the Category determined by the Committee, or may decline the appointment. If the attorney accepts the appointment, the initial case review fee shall become part of the total flat fee for that case Category.

The attorney shall complete the initial case review within ten (10) court days of initial appointment. If the attorney desires to be appointed as counsel for that defendant, the attorney shall submit a proposed order setting compensation to the court, as provided by Section V hereinbelow. If an attorney declines to be appointed to a capital case after the initial case review, that attorney shall be placed at the end of the panel list for future appointments, unless the Committee for good cause orders otherwise. The attorney whose name is next in order on the panel list shall be offered the appointment, and shall be authorized to expend up to fifteen (15) hours at \$60.00 per hour for initial-case review, to be completed within ten (10) court days. An attorney who declines an appointment after initial case review shall make all records, reports and other documents obtained during initial case review available to a subsequently selected attorney. Any attorney accepting an appointment must be prepared to comply with the readiness requirements of Penal Code Section 987.05.

**IV. CAPITAL CASE CATEGORY DESCRIPTION AND RATES:**

**A. Compensation Based on Case Category:**

The Committee shall establish Category descriptions and rates of compensation for each Category of capital case. The Committee shall have the right to modify or revise the descriptions and rates from time to time as needed.

**B. Determination of Case Category:**

The Category description and rate to be applied to any particular case shall be determined by the Committee at the time of approval of an appointment. The Committee retains the right to revise category descriptions and rates at any time. Such revisions shall apply to all appointments made after the revisions are adopted.

**C. Case Categories and Fees:**

Case categories and applicable flat fees shall be as set forth in Appendix B. For unique capital cases which occur infrequently, that receive a great amount of publicity or notoriety over an extended period of time, or involve many victims or incidents, panel attorneys may present to the committee written justification for a fee higher than Category fees. The Committee shall determine if a higher base fee is warranted.

**V. SCOPE OF SERVICES PROVIDED:**

Appointed counsel shall provide complete legal defense services for represented defendants to include all appropriate and needed legal defense services of the nature typically provided by the Public Defender. Such services shall include, but are not limited to, interview and preparation time, all necessary court appearances, hearings, motions, court waiting time, trial at the trial court level and writ proceedings through sentencing, and the filing of any notice of appeal that may be required by Penal Code Section 1240.1. Also included are all necessary legal research, preparation of documents, secretarial, clerical, and paralegal support services, travel within the County of Fresno, and any necessary investigators, experts, interpreters, or other persons. Appointed counsel shall be responsible for providing all such services within the applicable case category fee, unless the Committee approves additional fees, as provided in section VI, paragraph E.

**VI. COMPENSATION:**

**A. Order Setting Compensation:**

At the time the attorney submits written notice of acceptance of an appointment, an order setting compensation based on the approved case category shall be submitted to the Superior Court Executive Officer, in the format set forth in Appendix C. The proposal and order shall itemize the estimated amount of time and costs which will be expended by the attorney. If the attorney also proposes the use of investigators, experts, interpreters or other persons, the proposed order shall specify the particular tasks to be accomplished, and set forth the estimated time and costs necessary to accomplish such tasks. Any materials submitted to the Committee shall be confidential, and are not subject to discovery. Appointed counsel shall be responsible for providing all such services within the applicable case category fee, unless the Committee approves additional fees, as provided in section VI, paragraph E.

**B. Entry of Order Setting Compensation:**

The Committee shall review the proposal and order setting compensation submitted by the attorney. If the Committee determines that investigative or expert services are warranted, and approves the proposal and order as submitted by the attorney, the order appointing the attorney shall be entered, specifying the particular tasks for such persons are appointed. If the Committee modifies the proposal and order submitted by the attorney, the attorney shall be notified in writing of the Committee's modifications. If the attorney then declines to accept the appointment under the terms of the Committee's modifications to the proposal and order setting compensation submitted by the attorney, that attorney shall

be relieved as attorney of record and placed at the end of the panel list for future appointments. The next eligible attorney on the panel list will be selected to represent the defendant as provided in Section III hereinabove.

**C. Penal Code 987.9 Costs:**

For each capital case a Trust Fund Account shall be established, and the amount to be placed in such account will be determined by the Committee. Trust funds shall be used only for pre-authorized investigators, experts, non-court provided interpreters, or other persons or expenditures specifically approved by the Committee, at rates that are in compliance with regulations adopted by the State Controller pursuant to Chapter 3.5 (commencing with Section 11240) of Part 1 of Division 3 of Title 2 of the California Government Code, controlling payments under Penal Code Section 987.9. Appointed counsel may apply to the Committee for additional 987.9 expenditures only upon a showing that there is a specific need for additional expenditures required by law.

**D. Compensation for Expenses:**

Expenses incurred without a written pre-authorized order signed by the Committee chair or designee approving such expenses will not be compensated. Attorneys, investigators and experts will be compensated at the hourly compensation rates established by the Committee, as set forth in Appendix D.

Pursuant to Penal Code Section 987.9, all expenditures made from Trust Funds shall be supported by a chronologically arranged journal of all receipts and disbursements of Trust Funds on a form approved by the Fresno County Auditor/Controller, including the date, check number and purpose of each disbursement, and supporting documentation to

include all cancelled checks, invoices, orders authorizing expenses or rates, and other documentation of all disbursements. Unless further amended, the forms and instructions set forth in Appendix D shall constitute the forms and procedures approved by the Auditor/Controller. Travel, mileage, and other related expenses will be governed by applicable Fresno County Management Directives. No later than sixty (60) days following the defendant's sentencing hearing, or following the dismissal of special circumstance allegations, and prior to any appeal or termination of the case in any other manner, counsel shall submit a full and final accounting to the court as required by Penal Code Section 987.9. If a final accounting is not received within 60 days, panel attorneys will not be eligible for further appointments to capital cases until such final accounting is received; and may not be compensated for outstanding invoices. The final accounting will be subject to review by the court and the Fresno County Auditor-Controller. Panel attorneys will be required to retain accounting records of appointed cases for audit purposes for five (5) years following sentencing or dismissal of the case.

**E. Increase/Decrease in Payments:**

At any time during the pendency of the case, if appointed counsel believes that additional expenditures beyond those approved by the court in the order setting compensation are necessary, or an adjustment to a higher Case Category are warranted, the attorney may apply in writing to the Committee for modifications to the order, setting forth with particularity the tasks to be performed with such additional expenditures, in the format set forth in Appendix C. If the Committee declines to approve a requested adjustment the attorney shall be advised of the reasons for the Committee's action.

If a case is resolved at any stage of the proceedings prior to completion of the jury trial and any sentencing proceedings, the attorney shall be compensated only for any actual time and costs incurred through the date of such resolution at the approved rates. In the event capital charges are reduced at any stage of the proceedings, existing court procedures governing compensation of appointed counsel for non-capital cases will be utilized in lieu of the procedures set forth in this policy. Any co-counsel appointed pursuant to Section VII shall be relieved forthwith, and any claim for payment for co-counsel services rendered through the date of termination shall be submitted to the Committee for approval.

**F. Claims for Payment:**

Payment to the attorney of record of sums earned shall be made by the Fresno County Auditor/Controller after presentation of applicable payment forms to the court setting forth the amounts due and owing to the attorney, and after the court has approved the claim and forwarded it to the Auditor/Controller. All claims for payments must comply with applicable Superior Court guidelines and policies.

**G. Payment for Change of Venue:**

If a motion for change of venue is granted by the court in any capital case, the attorney may be compensated for travel, mileage, and other related expenses incurred by the attorney as a result of the venue change. Such compensation shall be paid at the rates established by the Fresno County Board of Supervisors, or pursuant to the State Board of Control standards for travel and per diem expenses (Title 2, Calif. Admin. Code section 700, et seq.), whichever is lower. Claims for reimbursement of such expenses shall be approved by the court prior to submission to the Auditor/Controller.

**H. Payment for Mistrials:**

In the event that the court declares a mistrial which is not found by the court to be the result of misconduct of appointed counsel, and appointed counsel is required to proceed with a new trial, such counsel shall be entitled to additional compensation for actual hours expended in re-trial at then-applicable hourly rates for appointed attorneys in capital cases.

**I. Schedule of Payments:**

Payments to panel attorneys shall be made pursuant to the schedule set forth in Appendix E.

**VII. Appointment of Second Counsel:**

**A. Motion for Appointment:**

Motions for the appointment of co-counsel shall not be made unless and until the District Attorney formally indicates in writing intent to seek the death penalty. Such motions may be presented to the Committee by the attorney at any time after the death penalty intent is indicated by the District Attorney. The motion shall name the attorney that the Committee is being asked to appoint as second counsel, and shall be supported by an proposed order and affidavit of the primary counsel setting forth in detail the factual and legal grounds for appointment of co-counsel, and specifying the particular tasks for which co-counsel will be responsible. Any materials submitted to the Committee shall be confidential, and are not subject to discovery. If the Committee determines that appointment of second counsel is warranted, an order appointing such counsel shall be entered specifying the particular tasks for which co-counsel is appointed. The order shall set a reasonable fee for such services not to exceed an additional fifteen percent (15%) of

the approved Category Fee, unless primary counsel makes an affirmative showing that a greater sum is required by law, and the Committee finds that greater sums are warranted. Co-counsel compensation shall be separated from and in addition to the Category Fee paid to primary counsel, and shall be paid on a schedule of fifty percent (50%) of the approved fee upon appointment, and fifty percent (50%) upon completion of second counsel services.

**B. Appointments to Co-counsel Panel:**

The Committee shall establish a panel of qualified criminal law attorneys who have expressed an interest in appointment as co-counsel in capital cases in accordance with this policy by submitting a written application for appointment to the panel to the Committee (see Attachment A-1 through A-4). The Committee reserves the right to make the final determination of the composition of the panel. The application shall set forth the specific qualifying experience of the attorney, and shall include a declaration under penalty of perjury that the information on the application is true and correct. The Committee will notify all applicants of the disposition of their application.

**C. Appointments from Co-counsel Panel:**

No attorney shall be appointed by the court to serve as co-counsel in a capital case to be tried in the Fresno County courts unless at the time of appointment that attorney is on the approved panel. Any attorney who is placed on the panel agrees to accept appointments in such cases in accordance with this policy, and agrees to comply with the readiness requirements of Penal Code Section 987.05. Appointments as co-counsel in capital cases shall be made by rotation in the order that the attorney names appear on the list, by appointing the next available attorney from the list. After appointment as co-counsel

in a capital case, that attorney's name shall be placed at the end of the list, and the Committee may select the next attorney on the list for the next co-counsel appointment.

**D. Minimum Qualifications of Co-Counsel:**

Attorneys sought for appointment as co-counsel must meet the following minimum qualifications:

- 1) Membership in the State Bar of California for a minimum of three (3) years or practice as an attorney for a minimum of three (3) years.
- 2) Attorney of record in at least ten (10) completed felony criminal cases, including at least three (3) completed felony jury trials.
- 3) Attendance at six (6) or more hours of relevant continuing legal education programs in the area of criminal law defense and/or capital-case or death penalty defense within twelve months, or twelve (12) hours within two years.
- 4) Proof of current malpractice insurance covering the type of legal representation services provided by panel attorneys.

**C. Claims for Payment:**

The attorney of record shall be responsible for submitting all claims for payment of co-counsel, as provided hereinabove, and shall maintain the accounting records pertaining to such claims for five (5) years following completion of the case for audit purposes.

**VIII PRO BONO PUBLICO SERVICES:**

**A. Reasonable Compensation:**

Fresno County, and the Fresno County Courts, and each attorney accepting an

appointment pursuant to this policy understand and agree that the fees set forth herein constitute reasonable compensation for a competent and quality defense for a defendant in a capital case, and for the services required under this policy.

**B. Pro Bono Publico Service:**

In the event that an attorney expends time or provides services to a client which, when compared to total compensation provided under policy would suggest an hourly rate for such services below the prevailing market rates for such services, the attorney agrees that as to any difference between these fees and the attorney's usual and customary fees, such services have been provided Pro Bono Publico, and the attorney waives any further claims therefor.

~~IX~~  
**VIII. CONSTRUCTION:**

No portion of this policy shall be construed so as to preclude constitutionally mandated judicial action, as determined by the Court.

APPENDIX A-1

FRESNO COUNTY COURTS'  
CAPITAL CASE INDIGENT CRIMINAL DEFENSE PANEL

APPLICATION AND AGREEMENT

APPLICATION FOR:  
 LEAD COUNSEL  
 CO-COUNSEL

\_\_\_\_\_  
Last Name                      First                      Initial                      Firm Name

\_\_\_\_\_  
Office Address                      City                      Zip                      Phone Number

\_\_\_\_\_  
Mail Address                      City                      Zip                      Phone Number

\_\_\_\_\_  
Date of Birth

\_\_\_\_\_  
Law School                      Date Graduated                      State Bar Number

\_\_\_\_\_  
Date Admitted to Bar                      Date Began Practice in Fresno

Have you been the subject of a disciplinary proceeding by the State Bar of California or by the Bar of any other State?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please attach a detailed description of the nature, date, and result of the disciplinary proceeding.

I agree to waive confidentiality for the sole purpose of enabling the State Bar of California to notify the Fresno County Courts' Capital Case Indigent Criminal Defense Panel of the status of any disciplinary proceeding pending against me.

## APPENDIX A-2

### LEAD COUNSEL QUALIFICATIONS

1. Membership in the State Bar of California for a minimum of five (5) years or practice as an attorney for a minimum of five (5) years;
2. Attorney of record in at least twenty (20) criminal cases, ten (10) of which were completed felony trials;
3. Attorney of record in at least three (3) cases where the charge at the Superior Court arraignment was a violation of Penal Code 187, at least two (2) of these cases must have been a completed jury trial;
4. Attendance at six (6) or more hours of relevant continuing legal education programs in the area of criminal defense and/or capital case or death penalty defense within twelve months, or twelve (12) hours within two years; and
5. Proof of current malpractice insurance covering the type of legal representation services provided by panel attorneys. Attorneys must attach a copy of such proof to this *Application and Agreement*.

### CO-COUNSEL QUALIFICATIONS

1. Membership in the State Bar of California for a minimum of three (3) years or practice as an attorney for a minimum of three (3) years;
2. Attorney of record in at least ten (10) completed felony criminal cases, including at least three (3) completed felony jury trials;
3. Attendance at six (6) or more hours of relevant continuing legal education programs in the area of criminal law defense and/or capital case or death penalty defense within twelve months, or twelve (12) hours within two years;
4. Proof of current malpractice insurance covering the type of legal representation services provided by panel attorneys.



**APPENDIX A-4**

**ATTORNEY QUALIFICATIONS**

**LEAD COUNSEL:** Please list your three (3) cases where the charge at the Superior Court arraignment was a violation of Penal Code 187. Place an asterisk (\*) next to each of the two cases which had completed jury trials. **CO-COUNSEL:** Please list your

Attach a copy of the docket sheets to this application. Your application will be returned if complete information is not provided. This form must be submitted in typewritten form.

CASE NO. AND NAME                      COURT                      YEAR FILED

- 1.
- 2.
- 3.

**MINIMUM CONTINUING LEGAL EDUCATION**

Please list your attendance at six (6) or more hours of relevant continuing legal education programs in the area of criminal defense and/or capital case or death penalty defense within twelve months, or twelve (12) hours within two years.

COURSE TITLE    COURSE DESCRIPTION                      # HOURS    MO/DA/YR

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

**Attorney Name:** \_\_\_\_\_

## **APPENDIX B**

### **CASE CATEGORIES AND COMPENSATION RATES**

**CATEGORY 1:**                      **RATE:**                      **\$40,000**

A capital case involving one defendant and one victim, and the special circumstance is usually limited to Penal Code Section 190.2(a) 17 (i-viii).

**CATEGORY 2:**                      **RATE:**                      **\$60,000**

A more difficult capital case than a Category 1 case involving one defendant and one victim, and a more difficult or complicated special circumstance, or more than one victim killed in the same incident, or complex factual or legal issues in the trial or penalty phase warranting co-counsel. Capital cases with more than one defendant which would be considered a Category 1 case if there were only one defendant shall be considered in Category 2.

**CATEGORY 3:**                      **RATE:**                      **\$80,000**

A capital case involving one defendant and more than one victim killed in more than one incident or at different times; or a case that is significantly complicated by unusual publicity or notoriety over a limited period of time, or complex factual or legal issues in the trial or penalty phase which would warrant co-counsel. A capital case with more than one defendant which would be a Category 2 case if there were only one defendant shall be considered a Category 3 case.



APPENDIX C-2

[ ] SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

[ ] MUNICIPAL COURT OF CALIFORNIA, COUNTY OF FRESNO

\_\_\_\_\_ Judicial District

PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

v.

\_\_\_\_\_  
Defendant(s).

Case No. \_\_\_\_\_

PROPOSAL AND ORDER SETTING  
COMPENSATION

I, \_\_\_\_\_, do declare under penalty of perjury as follows:

1. I was appointed by the Court to represent the above-named indigent defendant.

2. In order to properly prepare the defense in this case, I require compensation in the amount allowed for a category 1, 2, or 3 case (circle one), and that the PC 987.9 trust fund amount be authorized in the amount of \$\_\_\_\_\_.

The reasons for the requested compensation level are detailed below: (please provide specific itemized descriptions of tasks and costs for each category)

Attorney Costs (Use more space if required to provide specificity)

	\$ _____
	_____
	_____
	_____

Total Attorney Costs \$ \_\_\_\_\_

APPENDIX C-2 (Continued)

987.9 Costs

Investigative Costs (Use more space if required in order to provide specificity)

_____	\$ _____
_____	_____
_____	_____
_____	_____
Sub-total	\$ _____

Expert Costs (Use more space if required in order to provide specificity)

_____	\$ _____
_____	_____
_____	_____
_____	_____
Sub-total	\$ _____

Others (Use more space if required in order to provide specificity)

_____	\$ _____
_____	_____
_____	_____
_____	_____
Sub-total	\$ _____

Total 987.9 Costs \$ \_\_\_\_\_

APPENDIX C-3

Use For Subsequent Request Only

I have previously been authorized \$ \_\_\_\_\_  
To date I spent \_\_\_\_\_  
I hereby request approval of the  
following additional amount \_\_\_\_\_  
Total Authorizations \_\_\_\_\_

PLEASE ATTACH A WRITTEN AND SPECIFIC DECLARATION AND ORDER FOR PAYMENT EXPENSES

If further expenses are required, further application will be made to the Court.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Attorney's Signature

ORDER

The Court having read and considered the Proposal and Order Setting Compensation and good cause appearing, the following sum(s) is authorized:

- [ ] Initial sum for attorney costs----- \$ \_\_\_\_\_
- [ ] Additional sum for attorney costs--- \_\_\_\_\_
- [ ] Initial sum for PC 987.9 costs----- \_\_\_\_\_

---

- [ ] Additional sum for PC 987.9 costs--- \$ \_\_\_\_\_
- [ ] Total costs authorized----- \$ \_\_\_\_\_

Said sum(s) shall not be payable until a written and specific DECLARATION AND ORDER FOR PAYMENT OF EXPENSES is submitted and an order for payment is signed by a Judicial Officer.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Capital Case Panel Review  
Committee/Judge of the  
Municipal/Superior Court

**APPENDIX D**

**COMPENSATION GUIDELINES FOR CAPITAL CASES**

**FOR P.C. 987.9 ACCOUNTING PURPOSES**

**TO BE PAID BY APPOINTED COUNSEL WITHIN THE CATEGORY RATES**

**PRESCRIBED IN APPENDIX B**

INVESTIGATORS.....up to \$25.00/hr

COMPETENCY EXAMINATIONS:

Psychologist (PhD).....up to \$250.00/per exam

Psychiatrist (M.D).....up to \$300.00/per exam

OTHER EXPERT SERVICES.....As determined by Committee

**NOTE:** All other claimed expenses, such as mileage or travel expenses (where applicable), must comply with Superior Court guidelines and policies governing such charges, and with applicable Fresno County policies and procedures.

**APPENDIX E**

**SCHEDULE OF PAYMENTS**

Initial Case Review Fee:	Up to <sup>25</sup> 10 hours @ \$60/hr.
Appointment Accepted:	15% of Category Fee (less review fee)
Preliminary Hearing Held and Completed:	25% of Category Fee
Trial Confirmation:	10% of Category Fee
Conclusion of People's case:	15% of Category Fee
Conclusion of trial:	15% of Category Fee
Completion of case after trial: (including final sentencing, settlement of record on appeal, P.C. 987.9 final accounting accepted by court)	20% of Category Fee



**Tamara Beard**  
Executive Officer - Jury Commissioner  
**Office of the Superior Court**

**DATE:** April 14, 1995

**TO:** Capital Case Review Committee  
Judges O'Neill, Kane, Gomes, Putnam, Sarkisian, Aaron, Ishii  
Administrators Sandra Silva, Michael Weinberg

**FROM:**  Tamara Beard

**SUBJECT:** ATTACHMENT TO THE JOINT COURT POLICY

Pursuant to a meeting of March 22 with Phil Cronin and Wes Merritt, I advise that the courts add the following paragraph to the "Joint Court Policy on Capital Case Appointments," section V. p. 7:

At the time the attorney submits a written application for appointment to the panel, the attorney shall be requested to sign and submit a written waiver under California Code of Civil Procedure section 360.5, wherein the attorney shall waive any defense based on statutes of limitation to any action which may be commenced against the attorney following the final accounting described in section VI, D. herein.

The form waiver should be attached as Appendix F to the Joint Court Policy. A proposed waiver form is attached hereto.

Thank you or your attention to this matter.

TB/rb  
capap.mem

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: *People v. Doolin*

No.: **S054489**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 6, 2004, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

**ROBERT DERHAM**  
Attorney at Law  
1010 B Street, Ste. 212  
San Rafael, CA 94901

**representing appellant DOOLIN**

**(Two Copies)**

**Honorable Elizabeth A. Egan**  
Fresno County District Attorney  
2220 Tulare Street, Suite 1000  
Fresno, CA 93721

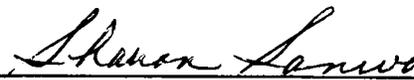
**Central California Appellate  
Program**  
2407 J Street, Suite 301  
Sacramento, CA 95816  
**(Served via courier)**

**Fresno County Superior Court**  
Attn: Clerk, Criminal Division  
1100 Van Ness Avenue #402  
Fresno, CA 93724-0002

**California Appellate Project**  
Attn: Michael Millman  
101 Second Street, Suite 600  
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 6, 2004, at Fresno, California.

\_\_\_\_\_  
Sharon Sanwo  
Declarant

\_\_\_\_\_  
  
Signature